U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 April 2007

Case No.: 2006-SOX-36

IN THE MATTER OF

GERALD R. BROOKMAN,
Complainant

vs.

LEVI STRAUSS & COMPANY,
Respondent.

APPEARANCES:

GERALD R. BROOKMAN, (Pro se)
On Behalf of the Complainant

MICHAEL W. FOSTER, ESQ.,
On Behalf of the Respondent

BEFORE: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX, or the Act),[1] and the regulations promulgated pursuant thereto,[2] brought by Gerald R. Brookman (Complainant) against Levi Strauss & Co. (Respondent). Although Complainant was initially represented by counsel, he has been effectively pro se since January 2006.

[1] 18 U.S.C. § 1514A *et seq.*
[2] 29 C.F.R. Part 1980.

Respondent filed a Motion to Dismiss on 22 Jun 06 and Complainant responded on 28 Jul 06. In a partial grant of the motion, the Court ruled that the part of Complainant's complaint relating to his placement on a performance improvement plan was dismissed and to the extent that any part of Complainant's complaint included his 19 Jul 05 letter as a protected communication under the Act, it was also dismissed. That left for litigation at formal hearing the alleged protected communications of Complainant's August 2005 SEC complaint and his 19 Sep 05 internal complaint. The remaining adverse action was Complainant's October 2005 termination.

On 25 Nov 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs. Complainant had no attorney and appeared pro-se. Employer was represented by counsel.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of

Complainant
Tracy Preston
David Gonzalez
Michael Henry Smith
William Henry Nading
Stephen Ray Douglas
Delana Nading

Exhibits

Complainant's Exhibit (CX) 1
Respondent's Exhibit (RX) 1-10

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

STIPULATIONS[4]

1. Respondent had a hotline for internal code of conduct complaints.[5]

2. Texas employment law provides that an employee can be terminated at any time.[6]

3. Complainant made an internal complaint on 19 Sep 05.[7]

4. On 29 Sep 05, Respondent's counsel, Mr. Foster went to Westlake, TX and interviewed Complainant.[8]

BACKGROUND & ISSUES

Complainant went to work for Respondent in January 2005. He was placed on a performance improvement plan (PIP) in September and terminated in October. He claims he was terminated for protected communications that he made on 19 Sep 05 and 12 Aug 05. Respondent contends that Claimant was terminated for poor performance and no one involved in the decision to terminate was aware of any protected activity. Respondent also argues that Complainant's alleged 12 Aug 05 communication did not take place until October and his 19 Sep 05 complaint was not protected activity under the Act.

LAW

The basic elements of a claim under SOX are that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[9]

It is protected activity under the Act:

> (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

[4] Tr. 11-16.
[5] Tr. 41.
[6] Tr. 46.
[7] Tr. 23
[8] Tr. 171
[9] *Reddy v. Medquist, Inc.*, 2004-SOX-35 (ARB Sept. 30, 2005).

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.[10]

To qualify as protected activity, the communication cannot be of a general nature, but must have sufficient specificity to identify a respondent's illegal conduct.[11] The complainant's communication must relate to the listed categories of fraud or securities violations.[12] Making allegations of questionable personnel actions or possible violations of other federal laws, without more, is not protected conduct under the Act.[13]

The protected activity need not play a substantial or predominant role in the employment decision and is a contributing factor if it alone, or in combination with other factors, tends to affect in any way the outcome of the decision.[14]

EVIDENCE

Complainant testified at trial in pertinent part that:[15]

He could not recall and was not aware of providing in his 19 Sep 05 ethics complaint anything more than what was contained in his ethics compliance hotline report.[16] He called the hotline and they assigned him a report number and mailing address.

The language "cooperating with the Securities and Exchange Commission (SEC) for violations regarding Sarbanes-Oxley Act" refers to his letter to the SEC and his 19 Jul 05 complaint to the audit committee. He was citing nothing else.

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[10] 18 U.S.C. § 1514A.
[11] *Fraser v. Fiduciary Trust Co.*, 417 F.Supp.2d 310 (S.D.N.Y. 2006).
[12] *Harvey v. Home Depot U.S.A., Inc.,* 2004-SOX-20 and 36 (ARB Jun 2, 2006).
[13] *Id*.
[14] *Allen v. Stewart Enterprises, Inc.*, 2004-SOX-60 to 62 (ARB July 27, 2006).
[15] Tr. 111-132.
[16] RX-6.

He sent a letter to the SEC alleging Sarbanes-Oxley violations on 12 Aug 05. The SEC sent him a letter on 7 Oct 05 and he sent one back after he was terminated.

He did not recall putting a date on the letter he sent to the SEC on 12 Aug 05. He had no reason to believe that the date was taken off the letter by anyone. He also sent other letters to various people. The only letter that was not dated was the letter that Complainant sent to the SEC on 12 Aug 05.

He originally received a letter from an administrator informing him that the subject of his complaint was not something the SEC dealt with. That was attached to his original letter from August 2005.[17]

On 21 Oct 05, Complainant wrote duplicate letters to Senators Paul Sarbanes and Michael Oxley, complaining about the SEC response. On 15 Nov 05, he got an email from the SEC.[18]

He spoke with an SEC investigator attorney, Susan Fleishman. She called him after she was assigned the case at the request of Senators Sarbanes and Oxley. She asked for copies of all the documents.

He filed a second complaint with the SEC on 5 Dec 05.

Tracy Preston testified at trial in pertinent part that:[19]

She is Respondent's Global Litigation Counsel and Chief Compliance Officer. She has worked for Respondent since January 2002.

She did not attend the 12 Jul 05 meeting with Complainant, Delana Nading, David Gonzalez, and Complainant. She learned of the meeting by speaking to Ms. Nading and Mr. Gonzalez.

The legal department has some involvement with compliance with the Act, depending on the area of expertise. Respondent has corporate counsel that is responsible for the accounting and auditing on all the financial statements; all the certifications of the CEO, CFO, and senior management; and the financial filing of the company. She gives general advice and counsels regarding potential claims that may fall under the Act.

[17] Complainant initially testified that the original letter was sent in October, but changed his testimony when asked by the ALJ about the inconsistency.
[18] RX-10.
[19] Tr. 11-30.

Her knowledge of any filings to the SEC by Complainant is through efforts of her outside counsel. She asked them to do a Freedom of Information Act request for all documents from the United States relating to any complaint brought by Complainant against Respondent. The response came on 11 Oct 06.[20] It included a letter from Complainant, received by the SEC, on 4 Oct 05 and a 4 Oct 05 response from the SEC. The response indicated the SEC would not proceed with any investigation since Complainant's complaints were not related to anything it was responsible for under the Act. That is the only time she received any documents from the SEC regarding Complainant.

David Gonzalez testified at trial in pertinent part that:[21]

He is a senior Human Resource manager for Respondent.

He is not familiar with the Sarbanes-Oxley Corporation Accountability Act of 2002. However, he is familiar with the Levi Strauss and Company Worldwide Code of Conduct and believes that it provides whistleblower protection. He did not recall if he received a 25 Aug 05 email that was sent to all worldwide employees from Charles Sandal, who at that time was the chief compliance officer of Levi Strauss. He did not recall receiving a copy of the document Complainant filed with the report line regarding whistleblower retaliation on his part.

He first became aware of Complainant during the hiring process. He interviewed Complainant by phone. He would have heard that an offer was extended to Complainant and that Complainant accepted. Complainant's official job title was application engineer or systems engineer. His duties included systems application work and data base administration. He served dual roles - providing troubleshooting assistance to the internal customers and installing system upgrades and creating certain protocols for assistance applications.

On 29 Aug 05, Delana Nading called him about performance issues she was having with Complainant. Ms. Nading said Complainant had not improved the systems application portion of his work and she intended to terminate his employment within a certain time frame. She wanted to put Complainant on a performance improvement notice that would also contain a warning regarding potential termination if he did not meet the objectives in the performance improvement notice. The notice related to Claimant's ability to perform systems applications.

[20] RX-7.
[21] Tr. 31-61.

After that call, he discussed Complainant's performance with Ms. Nading and her supervisor, Kal Majmundar. He worked with her on the performance plan for Complainant. Kal Majmundar reviewed it, but did not input anything. Complainant was given the performance improvement notice on 8 Sep 05, after he returned from vacation.

Complainant was not terminated on 29 Aug 05 because Ms. Nading wanted to see if she could work with him to correct the performance issues.

Ms. Nading and her manager made the decision to finally terminate Complainant's employment on 27 Sep 05. She called Mr. Gonzalez after receiving feedback from some co-workers about the performance improvement notice work that Complainant was supposed to complete. She expressed frustration that Complainant needed to follow her directives and stated that his work was not meeting the expectations that were in the plan and was not acceptable. She said that she received her supervisor's approval to terminate Complainant's employment.

She wanted to terminate Claimant immediately, but he suggested making Complainant's termination date 21 Oct 05, so he could be compensated for the entire 45 day period of the performance plan.

He has never seen Complainant's 19 Sep 05 Worldwide Conduct complaint. He at no time prior to 27 Sep 05 had any knowledge from any source of any alleged complaint by Complainant filed with the SEC against Respondent.

At no time prior to 13 Oct 05, did any source inform him that Complainant had filed a complaint against the company with the SEC, was cooperating in any way with the SEC in an investigation involving Respondent, had any communications of any type with anyone at the SEC regarding securities related fraud, or had any conversations internally with anyone at Levi Strauss and Company, specifically related to securities fraud. He is not normally informed when somebody files a complaint with the SEC. It is possible one could have been filed and he would not have been aware of it.

He did not recall seeing an SEC or EEOC complaint, or anything like that, come to his attention in the normal course and scope of his duties for Respondent. He has never seen any complaints that an employee filed as a violation of a Worldwide Code of Conduct of Levi Strauss, but he knows some have been filed.

Through the entire process of terminating Complainant, he did not participate in nor is he aware of any discussion about Complainant that did not relate to his technical performance. Had he been aware of a pending whistleblower complaint by Complainant he would have first gone to legal, but he still would have proceeded with the termination.

Michael Henry Smith testified at trial in pertinent part that:[22]

He has been a systems programmer for Respondent for more than ten years.

During August and September 2005, he worked with the assistance program.

In late August 2005, his manager, Mike McClean, asked him to install the DB2 log analysis tool. He completed it on or about Sunday, 28 Aug 05. He did not follow a written standardized procedure to install it. There are standard ways of installing software with a standard utility and rough directions come with the tool. There are some company specific adjustments to make, but those are not written down.

He was asked to install the tool in late August because it was a time sensitive issue. He was told Complainant was supposed to do the installation, but had not. He has no idea why Complainant did not do it. He did not ask Complainant to come over and help because he did most of it on Saturday.

William Henry Nading testified at trial in pertinent part that:[23]

He is an assistant manager for technical support for Respondent. He has worked for Respondent for 24 years. Mike McClean was his manager. He installs about 20 different products to the IBM environment. Each product has a different installation procedure that is in the instructions that come with the product. Respondent basically has a group of guys that do a lot of the installations. There are no continuity binders or folders where someone else could go look and figure out the data set names. That is left up to the individual.

If one engineer was gone and another needs to modify the software, he might call and ask how the software was set up. The engineers understand the systems well enough that it is not a big deal.

[22] Tr. 63-76.
[23] Tr. 77-84.

Stephen Ray Douglas testified at trial in pertinent part that:[24]

He is the technical leader of the database services group for Respondent. Respondent did not have any written procedures other than the manuals, which only gives basic information about how to install a product. They did not give any detailed specifications regarding Respondent's environment or naming standards. That would be a problem if the person who did the installation left the company.

In September 2005, Ms. Nading, his supervisor, asked him to review work performed by Complainant. Complainant was supposed to write a document of installation procedures for the DB2 administration tool. Complainant was supposed to show him the written procedures before actually attempting to install the product. He and Michael Smith were to review that document for accuracy and completeness and then give the go ahead for installation.

Ms. Nading received an email with the written procedures document directly from Complainant and asked Mr. Douglas to review it. When he investigated, he found out that Complainant had already installed the product, but did so improperly. The previous version no longer worked and some data sets and files had been overlayed. After Mike Smith installed the DB2 analysis tool at the end of August 2005, he validated that it worked.

The actual written procedures mimicked the information that was contained in the manual, but were not complete since they did not include all of the necessary steps. Had he been able to review them ahead of time, he could possibly have made those corrections and not have the non-functioning product at the time. Although some of the instructions dealt with SMPE and he is not an expert in that area, Mike Smith was able to validate that portion. He communicated those findings to Ms. Nading in late September.

He did not know if Ms. Frost had already written a set of procedures to install fixes in the IBM mainframe environment.

He and Complainant were co-workers. In some respects, Complainant's work performance was good and in other respects it was poor. He was poor at installing IBM products into the environment. From January 2005 through October 2005, Complainant had questions about things that he should have been able to do.

[24] Tr. 85-110

Before Complainant was hired, these kinds of installations were done by the Enterprise Group. The reason Complainant was hired was so that the Database Administration (DBA) group could do these exact installations. As that function switched to the DBA group's control, there was still going to be some need to go back to the other group and get some media and help.

Delana Nading testified at trial in pertinent part that:[25]

She was Complainant's supervisor during his entire employment with Respondent. He was a database systems engineer. He provided troubleshooting assistance to internal customers. He was also tasked with doing installations of system upgrades and creating protocols for the system. She made the decision to hire him based on his resume.[26] His resume indicated he could upgrade systems from various versions; document, plan and install DB2 performance monitor and administration tools; and install DB2 utility suites. Those are the exact things she asked him to do for Respondent. Complainant never indicated he needed some training or assistance in software installation. The DB2 performance monitor and administration tool installation referred to on his resume is the exact task she asked him to perform as part of the 8 Sep 05 termination warning.

During the first six months of his employment, Complainant was focused on troubleshooting assistance for internal customers. He began adding basic software products around June 2005. After about one month of Complainant doing installation projects, she became a little concerned. She documented situations where he asked questions that led her to believe he might not be able to perform his work.

If an installer needs company specific naming and design conventions, he could ask the DBA Group or look at the system. Complainant did not do either.

On 25 Aug 05, she asked Complainant to install the DB2 log analysis tool and upgrade the DB2 tool. The log analysis tool is a Sarbanes-Oxley tool that allows Respondent to audit its database. Respondent was doing software mediation for compliance with the Act and installation became more important. Complainant did not get it done in a timely fashion. After discussing the matter with Stephen Douglas as lead and Mike McClean as manager of the engineering team, she determined that Complainant had misrepresented his qualifications and was unable to do the job. She had Mr. Smith do the installation instead. She did not tell Complainant the deadline had moved up and get him some help or extra training, because she did not think he could do the job.

[25] Tr. 134-167.
[26] RX-8.

In early August, she had approved Complainant's request to take vacation in early September. Even though the priority of the installation increased she did not ask Complainant to give up his vacation because she thought he had significant plans.

On 29 Aug 05, she told her manager she wanted to put Complainant on a performance improvement plan (PIP) and if he could not perform that work within the scope of that plan, he would be terminated. The actual PIP was done in September.[27] Complainant's assignment was to install the DB2 tool suite. She wanted Claimant to write down the procedures he would use to do the installation work. Once those were completed, Mr. Douglas and Mr. Smith were to validate the written procedures, at which point Complainant could execute the installation. The PIP was given to Complainant when he returned from vacation on 8 Sep 05.

On 20 Sep 05, she received an e-mail from Complainant that was titled "Unable to comply" in which he stated he was not given the information to complete the procedures and asked for assistance.[28] She met with Mike McClean, Stephen Douglas, and Mike Smith. They said the information Complainant had should have been enough for him to do the job. Mr. Douglas told her that Complainant's procedures were incomplete and incorrect and that the tool had been installed incorrectly.

At that point, she decided to terminate Complainant. She met with her manager on 27 Sep 05 to let him know that Complainant had failed to fulfill the PIP and that she wished to terminate him immediately. The supervisor concurred and she went to coordinate with David Gonzales at Human Resources. He suggested that since the performance plan was for 45 days, Respondent should pay Complainant for that period. She agreed to keep Claimant on until the 45 days ran out, with the understanding that she would not be giving him work to do during that time.

At no time prior to Complainant's termination had she seen a letter from Complainant to the SEC nor did she have any knowledge that Complainant had participated in any way in the conversations with the SEC or filed a complaint of any type to the SEC. She learned that at some point that Complainant filed an internal complaint of some type related to his termination.

Complainant did have monthly coaching sessions and was also subject to a performance appraisal in mid to late June.[29]

[27] RX-2, Ex A.
[28] RX-2, Ex.B.
[29] RX-6.

During the time she discussed his PIP, she never discussed anything unrelated to his technical performance. She is not aware of any discussions relating to either internal or external complaints about any subject that Complainant might have had.

The first time she saw a copy of his 19 Sep 05 internal complaint was the day of the formal hearing.

The 19 Sep 05 Report Line record shows in pertinent part that:[30]

Complainant called Respondent's internal complaint line and complained that:

> David Gonzales, Delana Nading, and Kal Majmundar had retaliated against Complainant for filing an EEOC complaint and cooperating with the SEC for violations of the Act. They had done so by giving him an impossible software installation task and then threatening to terminate him for not completing it.

He then wrote a letter to Respondent's chief compliance officer explaining that:

> the problems with the software were beyond his control. He stated that on 25 Aug 05 he was asked by Respondent's project manager for Sarbanes Oxley remediation about the installation status of some required remediation software. Mike McLean told the project manager that the software had been sitting on a desk for three weeks, but that someone other than Complainant would install it by 29 Aug 05. However, Mr. McLean did nothing to install it. The software was ultimately installed on 1 Sep 05 by Mike Smith. Complainant left on vacation that day and returned on 8 Sep 05. On that day he was given a performance improvement plan that included impossible terms.

The 8 Sep 05 Performance Improvement Plan shows in pertinent part that Delana Nading told Complainant that:[31]

> He must be able to accomplish two critical tasks in order to successfully perform as a Database Systems Engineer. He was to install the DB2 Log Analysis Tool in support of SOX remediation by 1 Oct 05 and upgrade the DB2 Tool Suite by 1 Nov 05. However, she was concerned that he had expressed an inability to perform those tasks and that inability was inconsistent with his resume.

[30] RX-1, Ex. B.
[31] RX-2, Ex. A.

She therefore implemented a PIP that required Complainant to (1) document a step by step procedure for the installation of the DB2 tool with limited input from the Systems Engineering Team and have those procedures validated by 22 Sep 05; (2) execute the installation by 3 Oct 05; and (3) promote the DB2 installation into the development and production environments.

If he failed, he could be terminated.

Delana Nading's manager notes show in pertinent part:[32]

Complainant told a co-worker that he did not know how to install the DB2 Log Analysis tool and needed help. When the co-worker noted that Complainant had indicated he had experience installing that software, Complainant responded that it was five years ago and without additional SMPE training, he did not know what to do.

An E-mail from Complainant to OSHA shows in pertinent part:[33]

Complainant was notified of his termination from Respondent on 21 Oct 05, effective that same date.

Complainant's written complaint to OSHA shows in pertinent part:[34]

Complainant stated that the violation of Section 802(a) of the Act that he communicated to SEC was that Respondent was concealing information from the EEOC regarding its compliance with ADA provisions associated with service animals. He alleged that he was denied his right to have a service animal, filed a complaint with the EEOC, and received a right to sue letter from the EEOC. He then called the SEC. A representative told him that since such an action was a violation of federal law, it was covered under the Act. Complainant stated that on 12 Aug 05 he filed a complaint letter with the San Francisco SEC office.

Complainant argued that Respondent's failure to comply with the ADA has an adverse effect on shareholder's security values because it demonstrates a willingness to engage in fraud and violate federal law. He maintained that Respondent was engaging in falsification because even though it certifies ADA compliance, it does not actually comply.

[32] RX-2, Ex. B.
[33] RX-3, Ex. F.
[34] RX-3, Ex. G.

In response to a question from the OSHA investigator, Complainant stated that his 19 Sep 05 internal complaint was not relative to his SEC complaint.

An SEC response to Respondent's FOIA request shows in pertinent part:[35]

The SEC received an undated letter on 4 Oct 05, complaining that Respondent does not comply with the ADA. It responded on 7 Oct 05 that his complaint was not within the jurisdiction of the SEC.

ANALYSIS

There is no question that Respondent took an adverse action against Complainant by terminating him. That leaves for discussion the issues of (1) whether Complainant engaged in a protected activity, (2) whether Respondent knew about that activity, and (3) whether the activity was a contributing factor in Respondent's decision to fire Complainant.

Protected Activity by Complainant

The two alleged protected activities for adjudication are Complainant's internal complaint and his letter to the SEC.

19 Sep 05 Internal Complaint

In this internal complaint, Complainant communicated to Respondent that he was being retaliated against by Ms. Nading, Mr. Majmundar and Mr. Gonzales because (1) he had filed an EEOC complaint, (2) he had cooperated with the SEC for violations of the Act, and (3) he had experienced problems installing software associated with SOX remediation.

Clearly, a communication by an employee to an employer that he filed an EEOC complaint or is being retaliated against because he filed an EEOC complaint does not fall within the types of whistleblower activity protected by the Act. Similarly, a communication by an employee to an employer that he had problems installing software associated with SOX remediation, or was being retaliated against because he had those problems, does not fall within the types of whistleblower activity protected by the Act.[36]

That leaves only the communication between Complainant and Respondent that he was being retaliated against because he had cooperated with the SEC regarding violations of the Act by Respondent. That communication is not sufficiently specific to identify

[35] RX-7.

[36] There was no indication or allegation that Respondent was attempting to avoid or not comply with the Act in its actions concerning the software, just that it had treated Complainant unfairly.

Respondent's alleged illegal misconduct. Alternatively, if the communication is interpreted as referring to Complainant's complaint to the SEC about Respondent's failure to comply with the ADA and accommodate Complainant's service animal, it did not fall within the listed categories of fraud or securities violations. In any event, Complainant's internal complaint of 19 Sep 05 does not qualify as protected activity under the Act.

SEC Letter

Although Complainant alleges and testified that he sent his letter to the SEC on August 2005, it was the only letter prepared by Complainant that was undated. It was not received by the SEC until 4 Oct 05. In his testimony at formal hearing, he inadvertently stated that the letter was sent in October. The preponderance of the credible evidence is that he did not send that letter to the SEC until the beginning of October 2005.

Regardless of when the letter was sent, the conduct it alleged was that Respondent was failing to comply with the ADA, while fraudulently representing to the EEOC that it was in compliance. Such conduct does not fall within the Act's listed categories of fraud or securities violations. Complainant's letter to the SEC does not qualify as protected activity.

Knowledge by Respondent

Assuming arguendo that the internal complaint and SEC letters were protected activity, Complainant's complaint would succeed only if Respondent had knowledge of them before taking any adverse action. Complainant's supervisor made the decision to terminate Complainant and communicated that decision to her manager on 27 Sep 05, well before Complainant sent his letter to the SEC. While Complainant's supervisor learned, at some point, that he had filed an internal complaint related to his termination, she did not see the actual complaint until the day of the formal hearing. Respondent's global litigation counsel and chief compliance officer testified that the first time Respondent received any documents related to Complainant from the SEC was when Respondent filed a FOIA request in 2006. The evidence clearly establishes that the individuals responsible for the decision to terminate Complainant were not aware of his letter to the SEC or any internal complaint related to his termination.

Contributing Factor

Even if Respondent had knowledge of the SEC letter or internal complaint, the record clearly establishes that the communications played no role in Complainant's termination. All individuals involved were consistent in their descriptions of the reasons for Complainant's termination and that no discussions about Complainant's performance improvement plan or termination ever included non-technical matters. Even with the

consideration of any temporal nexus, the record establishes by clear and convincing evidence that Complainant was terminated because his supervisor determined he could not perform the software installation tasks required for his job, which he had indicated on his resume he could do. It also establishes that neither his internal complaint nor his letter to the SEC were a contributing factor in his termination.

In the absence of any protected activity under the Act, any knowledge of such activity by Respondent, and any contributing role played by that activity in Respondent's decision to terminate Complainant, Complainant's complaint must fail.

ORDER AND DECISION

The complaint is **DISMISSED**.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

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, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).