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Issue Date: 14 February 2006

CASE NO.: 2006-SOX-00028

In the Matter of

DEBBIE TOWNSEND,
Complainant

v.

BIG DOG HOLDINGS, INC.,
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT

INTRODUCTION

This matter arises out of a claim filed with the Occupational Safety and Health Administration ("OSHA") alleging retaliation in violation of the Sarbanes-Oxley Act ("SOX").[1]

Respondent has moved for summary decision, arguing that Complainant cannot establish that she engaged in protected activity, and that even if she did, Respondent has articulated a legitimate, non-discriminatory reason for terminating her due to her unsatisfactory performance and insubordination, which Complainant has not rebutted. Respondent also argues that this complaint should be dismissed for failure to comply with my scheduling order.

Complainant is proceeding *pro se*, and has generally failed to prosecute her claim. Despite my repeated warnings that her failure to do so would result in dismissal, Complainant has failed to comply with each of my Orders, has failed to submit a Pre-Hearing Statement, and has failed to respond to Respondent's Motion for Summary Decision. Therefore, I dismiss her claim for failing to comply with my lawful orders and for causing undue delay.

Several other grounds independently justify granting summary decision for Respondent. Complainant has not responded to Respondent's Motion for Summary Decision with evidence showing the existence of any genuine issues of material fact. She has not shown that her conduct

[1] The complaint also alleged violations of the Safe Drinking Water Act ("SDWA"), which I addressed and dismissed as untimely filed by Order of January 4, 2006.

amounts to activity protected by SOX. She has not disputed Respondent's legitimate, non-discriminatory reasons for her termination. Therefore she has not made out a *prima facie* claim of retaliation sufficient to permit me to make the inference that she suffered discrimination. As no genuine issues of fact remain to be decided, I grant Respondent's motion for summary decision.

PROCEDURAL BACKGROUND

On August 31, 2005, OSHA sent by certified mail to Complainant's last address a determination letter dismissing her complaint for failure to establish a *prima facie* case. The determination letter informed Complainant of her right to request a hearing and appeal the dismissal, as well as the applicable timelines, addresses, and requirements for requesting a hearing under each statute. OSHA also mailed Complainant copies of the applicable regulations. The determination letter was received by Employer's counsel on September 7, 2005.

A copy of an October 20, 2005 letter from OSHA to Complainant was forwarded from OSHA to me on December 28, 2005. The October 20 letter was mailed via express mail to Complainant and I assume it was delivered and received by Complainant on October 21, 2005. The October 20 letter also states that the notice of determination was sent via certified mail to Complainant on August 31, 2005 and "three unsuccessful attempts were made to deliver this letter." The October 20 letter also contained a copy of the notice of determination with the requisite appeal rights and filing deadlines.

On November 22, 2005, OSHA received a letter from Complainant, dated November 11, 2005, in which she challenged the dismissal of her complaint. This letter did not offer any explanation why Complainant's request for hearing was untimely as to the SDWA claim or filed in the wrong forum.

On November 29, 2005, I issued an Order to Show Cause ordering the parties to show why this matter should or should not be dismissed due to Complainant's apparently untimely request for appeal and hearing. The parties were to respond by December 15, 2005.

On December 6, 2004, I issued an Amended Order to Show Cause to clarify the Order of November 29. I ordered both Respondent and Complainant, respectively, to file a memorandum of points and authorities in support of or opposing the dismissal no later than December 15, 2005.

On December 15, 2005, I received Respondent's response requesting that Complainant's appeal be dismissed as untimely. No response was received from Complainant, and I was unable to locate a phone number to call and inquire about whether she intended to respond.

On December 21, 2005, the Office of the Chief Administrative Law Judge ("OALJ") received a handwritten letter dated December 12, 2005 from Complainant explaining that OSHA representatives informed her to direct her correspondence to OALJ. The December 12 letter stated that Complainant was appealing the notice of determination, and apologized for delays explaining that she had "computer problems due to a virus from April of 2005" which had not

permitted her to complete requests properly and further explained her need to handwrite her letters.

On January 4, 2004, Complainant had still not responded to the Order to Show Cause of November 29, 2005, as amended on December 6, 2005. I issued an order dismissing a portion of Complainant's case involving alleged retaliation in violation of the SDWA due to the late and improper filing of Complainant's appeal request and SDWA's short filing period limitation of thirty days. However, given SOX's longer filing period limitation of ninety days, and based on Complainant's letter to OSHA dated November 11 challenging the dismissal, I gave Complainant the benefit of the doubt and permitted the SOX claim to go forward to hearing on equitable grounds. I ordered that the procedural deadlines be amended as follows:

- Deadline to file Motion(s) for Summary Decision: 1/24/06
- Discovery deadline (depositions with production of documents): 2/1/06
- Complainant's Prehearing Statement, exhibit exchange, exhibit list, and witness list filing deadline: 2/1/06
- Respondent's Prehearing Statement, exhibit exchange, exhibit list, and witness list filing deadline: 2/3/06
- Response(s) to motion(s) for summary decision deadline: 2/3/06
- Settlement "talk" deadline: 2/3/06

In the order, I admonished Complainant as follows:

> She is "to continue her pursuit of retaining a lawyer to represent her in her SOX claim. In addition, Complainant must comply with all pre-trial orders, applicable regulations, and statutes including, but not limited to, regulations at 29 Code of Federal Regulations §§ 18 *et seq.* **Failure to properly respond to my orders or applicable statutes and/or regulations may result in sanctions including dismissal of the complaint or answer, as applicable.**

2006-SOX-00028 Order of January 4, 2006.

In a letter dated January 4, 2006, Respondent requested a continuance of the trial set for February 9, 2006 because of Respondent's attorney's unavailability and Respondent's intention to file a motion for summary decision.

On January 13, I received Respondent's Motion for Summary Decision.

On January 20, 2006, I issued an order granting Respondent's motion for continuance of the trial from February 9, 2006 to March 15, 2006. I found that good cause existed due to counsel's unavailability and because Respondent's motion for summary decision may resolve all issues in the case, obviating the need for a trial and thereby saving judicial resources. I further

ordered that the procedural deadlines set by my January 4, 2006 order remain in effect. The Order concluded as follows:

> **NOTICE IS HEREBY GIVEN** that Complainant's further refusal to prosecute her Sarbanes-Oxley claim by missing filing deadlines or failing to cooperate with Respondent's counsel in good-faith may result in dismissal of her case.

On February 2, 2006, I received Respondent's Prehearing Statement/Trial Brief, exhibit list, and witness list.

On February 6, 2006, I issued Complainant another Order to Show Cause why her case should not be dismissed for lack of prosecution and failure to comply with prior orders and procedural deadlines. I gave Complainant until February 13, 2006 to comply by filing and serving a memorandum of points and authorities, including affidavits and other documentary evidence in support of her position, and gave Respondent until February 17, 2006 to respond.

On February 7, 2006, I received from Respondent a Motion to Dismiss for Complainant's failure to comply with my scheduling order.

As of the date of this Order, Complainant has not complied with my Orders of November 29, 2005, December 6, 2005, January 4, 2006, January 20, 2006, and February 6, 2006. Nor have I received Complainant's Prehearing Statement or accompanying documents, nor her response to Respondent's Motion for Summary Decision.

ISSUES FOR DETERMINATION

1. Should the complaint be dismissed for Complainant's failure to comply with a lawful order of the administrative law judge and undue delay?

2. Has Complainant demonstrated a *prima facie* case of retaliation under SOX that is sufficient to create the inference of discrimination and overcome summary decision?

FINDINGS OF FACT

As Complainant has failed to submit any motions or exhibits as of January 27, 2006, the following findings of fact are based solely on Respondent's Motion for Summary Decision ("RMSD"), dated January 12, 2006, and the exhibits submitted therein.

Respondent is Big Dog Holdings, Inc. ("Respondent"). RMSD 1.

Complainant is Debbie Townsend, a former store manager at a Big Dog retail store in Boise, Idaho, where she was employed by Respondent's subsidiary, Big Dog USA, Inc. *Id*. Complainant was hired at Respondent's retail store in Seaside, Oregon in August, 2000. *Id*. and Wall Decl. Complainant became the store manager of Respondent's retail store in Boise, Idaho in April, 2003, and held the position through her termination on June 14, 2005. *Id*. at 2 and Wall Decl.

Barbara Kepler was Complainant's immediate supervisor from October, 2003 until Complainant's termination. RMSD, Kepler Decl.

On April 19, 2005, Complainant's supervisor placed Complainant on a Performance Improvement Plan ("PIP") after numerous discussions about how Complainant could improve her perceived deficiencies in recruiting, hiring, and training employees at the Boise store. RMSD 6, Kepler Decl., Exhibit A. The PIP requires Complainant to meet certain objectives regarding recruiting, hiring, and training new personnel, training current employees, leadership, removing personal issues from the store, and scheduling and payroll within 30 days. RMSD Exhibit A.

On or about April 26 and April 30, Complainant's supervisor received two handwritten complaints from three of Complainant's subordinate employees, and a list of 29 grievances that allegedly came from Complainant's staff. RMSD Kepler Decl. and Exhibit C. The letters are signed but not dated, and the list of grievances is neither signed nor dated. *See* RMSD Exhibit C. The letters and list of grievances described problems with the way Complainant treated customers and employees, and mentioned possible sexism against a male employee, personal phone calls, and other problems within the store that Complainant's subordinate employees attributed to Complainant's ineffectiveness as a manager. *Id.*

Complainant drafted two letters dated May 2 and May 3, 2005, requesting copies of her paychecks, bonuses, reimbursements, and other checks paid to Complainant by Respondent. RSMD 5 and Exhibit J. Complainant indicated in the letters that she needed to provide copies of the checks to her tax auditor due to a discrepancy between the income she reported on her tax return and the income reported by Respondent. *Id*.

On May 10, 2005, Complainant's supervisor informed her about the complaints she had received from Complainant's subordinates, and expressly ordered Complainant not to speak to the employees about their complaints. RMSD Kepler Decl; *see also Id.* Exhibit F.

Between May 10 and May 18, 2005, Complainant's supervisor learned that Complainant had been speaking with the employees about their complaints. RMSD Kepler Decl. She received a note from one employee reporting that Complainant's boyfriend had made two nasty, threatening calls to her home pertaining to the employee, Complainant, and Respondent. *Id.* and Exhibit D. Complainant's supervisor documented other complaints about Complainant made by other employees. *Id.* and Exhibit E.

On May 18, 2005, Complainant's supervisor issued Complainant a formal, written warning for insubordination for violating the order not to speak with employees about their complaints and for harassing employees that complained. RMSD Kepler Decl. and Exhibit F. The written warning warned Complainant that failure to comply would result in termination. *Id*. Complainant's signed, written response on the warning itself indicated that she received the written warning, but disagreed with "a lot of the issues that led up to" the written warning and needed to investigate ongoing issues further. RMSD Exhibit F.

On May 20, 2005, Complainant sent a "notice" letter to all agents, employees, officers, and shareholders of Respondent, which purports to copy a number of state, federal, and local government agencies, including Idaho's Attorney General, Secretary of State, and State Police, Boise's City Police, the Internal Revenue Service, the Security and Exchange Commission, OSHA, and Respondent's Human Resources Department and Field Training Manager, Complainant's supervisor, and the guardians of store employee Kevin Sloane. RMSD Exhibit L. Respondent characterizes the letter as an incoherent, rambling document that purports to describe all of Complainant's work issues, but in reality contains no conduct which Complainant could reasonably believe to be covered by SOX. RMSD 6, Wall Decl., Exhibit L. The wording of the letter makes it difficult to determine what her specific complaints are and what "protected activity" Complainant believes she may have engaged in, but several relevant excerpts (grammatical errors and capitalization from original; bold emphasis added) include:

> "WHEREAS, I have, and I am, currently **in contact with the following federal agencies . . . and there protection** . . ."
>
> "Because of my thoughts, words, feelings are/or **maybe shared or communicated to any agent or Government Agency**"
>
> "FURTHERMORE, I should not have to be FEARFUL of any sort of Reprisal(s) or further have to in and of slander, threats, acts of reprisal(s) to myself or others who may be close in affections to me, **pertinent information with a government agency . .** ."
>
> ". . . on the 9th of May, '05 . . . an Orchestrated effort to dis-credit me as the current store manager was made [signed by, and in the employee's handwriting] making a direct **Personal SLANDEROUS statement** about me, and forwarded to . . . my Dist. Manger and/or N.W. Field Training Manager . . . who also has been deliberate of **verbal Abuse** . . . with a fellow store employee's Melissa Estes & Kevin Slone . . . So that my character might be Discredit, as well as my work ethics and abilities to perform my duties."
>
> "FURTHER, I Request that all Books, Minutes, Accounts, current and (Archived) Records; be it vocally recorded, transcribed, & documented in other matter; must become openly shared . . . which may have caused of created an effect of the Losses I have experienced previous to the date of this Notice. That involve my employment an/or any employment records; sales records, quotas, **tax deductions & reporting records,** employment compensation records; And/or the details of Major Merger Transaction which Funds which were acquired during this period of time, that any monies that may have been owed to me, **may have been Re-directed by officers for the sole benefit of financial Gain for their personal holdings**;"
>
> "SO THAT, Corrections may be Discovered which have been made of record(s) and that are in arrears; and be reported and Compensated, Corrected, Adjusted

with sufficient funds . . . to include any other un-substantiated and questionable payment(s) or deductions which were not beneficial to Employee(s) (such as: Insurance/ ORwca tax/ ORwcbs tax etc…..) . . . Interest, Penalties, Damages; that may have; been incurred for their **reporting these fraudulent mistakes** and being of current record(s) with, but not Limited to these Agency's: (I.R.S., S.E.C., IDAHO State Attorney General, IDAHO Tax Commission, OREGON State Tax Commission, U.S. Dept. of LABOR)"

"**DUE TO, The questionable reporting** that has contributed to these financial Losses of Wages, Options, Taxes, Benefits . . . which may have contributed to the Companies past Growth and direction must be avalayble for Any Review in this Matter . . ."

"I, Continue to have concerns of and SHOULD NOT have to Fell Fearful of any such continued Reprisals, Harasments or Assaults . . . actions to cause additional Damage(s) . . . SHOULD BE HALTED AND CEASED, this Now Being said, In my protection under the Laws of the U.S. Federal Government and Idaho State and Oregon State Government and their Law Enforcement Agency's **I may inform all agencies if I wish of this matter.**"

RMSD Exhibit L.

On May 24, 2005, Complainant's supervisor visited Complainant's store in Boise for routine inspection and to meet with Complainant to discuss her progress on the Performance Improvement Plan of April 19, 2005. RMSD Kepler Decl. That day, Complainant's supervisor observed and recorded a number of performance deficiencies related primarily to the appearance of the store. *Id.* and Exhibit G.

On May 25, 2005, Complainant's supervisor issued Complainant a final written warning addressing Complainant's failure to adequately perform her job duties. RMSD Kepler Decl. and Exhibit H. The deficiencies included failure to improve in the areas of training, scheduling, staffing, and leadership in accordance with her Performance Improvement Plan, as well as unsatisfactory performance in the areas of merchandising, displays, merchandising, maintenance, and employee relations. *Id.* The letter states that these problems are not a result of short staffing, as Complainant claims, but as a result of her failure to adequately train existing staff and her conscious disregard of management directives, which amount to insubordination and will not be tolerated. *Id*. The letter states it to be her last and final warning, and that she must immediately convince management that she is willing to and capable of making the stated improvements. *Id.* Complainant signed and acknowledged reviewing and understanding the letter. *Id*.

On June 14, 2005, Complainant was terminated after Complainant's supervisor returned to Complainant's store in Boise to evaluate Complainant's progress since the final written warning of May 25. RMSD Kepler Decl. Complainant had failed to correct the deficiencies noted in her final written warning or to make any noticeable improvements. *Id*. Complainant's supervisor decided to terminate Complainant, effective immediately, for unsatisfactory performance. *Id.* and Exhibit I. The Termination Report states that it was an involuntary

termination for unsatisfactory performance and violation of company policy, and refers to documentation from Complainant's personnel file, including written directives for violation of company policy and a final written corrective for unsatisfactory performance. *Id*.

Complainant's supervisor categorically denies that Complainant's termination had anything to do with any complaints she may have made to the company or any government agency. RMSD Kepler Decl. Rather, it was the result of ongoing, well-documented performance problems that the company unsuccessfully attempted to correct for four months, highlighted by Complainant's insubordination and harassment of employees who had complained about Complainant. *Id.*

Respondent's Executive Vice-President and General Counsel claims that Complainant never complained to anybody about any issues that are arguably covered by SOX, including tax fraud. RMSD Wall Decl.

CONCLUSIONS OF LAW

I. The Complaint Should Be Dismissed Due to Complainant's Failure to Comply With a Lawful Order and Undue Delay

Despite numerous notices and reminders, Complainant has repeatedly failed to comply with my pre-trial orders and deadlines. When a Complainant fails to respond to lawful orders and repeatedly fails to meet procedural deadlines, an administrative law judge has the authority to dismiss a complaint. Under 29 C.F.R. Section 24.6(e)(4)(i)(B), the administrative law judge may, at the request of either party or on his own motion, issue a recommended decision and order dismissing a claim upon the failure of the complainant to comply with a lawful order of the administrative law judge. When dismissal of a claim is sought, the administrative law judge must issue an order allowing parties a reasonable time to show cause why dismissal should not be granted. 29 C.F.R. § 24.6(e)(4)(ii).

Furthermore, 29 C.F.R. Section 18.6(d)(2)(v) gives an administrative law judge the authority to strike all or part of a pleading, motion, or other submission of a party who fails to comply with an order concerning that pleading or motion.

Finally, the authority to dismiss a case also comes from an administrative law judge's inherent power to manage and control his or her docket and to prevent undue delays in the orderly and expeditious disposition of pending cases. *See Link v. Wabash Railroad Co*., 370 U.S. 626 (1962).

Despite my repeated warnings that her failure to do so would result in sanctions, including the dismissal of her case, Complainant has not responded to my Orders of November 29, 2005, December 6, 2005, January 4, 2006, January 20, 2006, or February 6, 2006 as of the date of this Order. As the deadlines contained therein have all passed, I find Complainant has failed to comply with each of those orders. Therefore, her complaint shall be dismissed for lack of prosecution and failure to comply with the lawful orders of an administrative law judge, pursuant to 29 C.F.R. Section 24.6(e)(4).

Additionally, the Orders to Show Cause or November 29 and December 6, 2005 as to why Complainant's complaint should not be dismissed related to her complaint, and her failure to comply gives me the authority to dismiss her complaint under 29 C.F.R. Section 18.6(d)(2)(v). Her complaint shall be dismissed for failure to comply with an order that related to her complaint.

Moreover, I further interpret local regulations 29 C.F.R. Section 24.6(e)(4)(B) and 29 C.F.R. § 18.6(d)(2)(v) as providing me with discretion to find that Complainant's failure to comply with my Orders to Show Cause of November 29, 2005, December 6, 2005, January 4, 2006, January 20, 2006, or February 6, 2006, and her corresponding failures to submit her Prehearing Statement and to oppose Respondent's Motion for Summary Decision by the deadlines set in my orders constitutes her "consent" to granting the motion. *See U.S. v. Real Property Located in Incline Village*, 47 F.3d 1511, 1519 (9th Cir. 1995) (case dismissed pursuant to local district court rule allowing implied consent to dismissal for failing to file a pleading).

Finally, I find that Complainant's repeated failure to comply with my orders and deadlines is causing undue delay to the orderly and expeditious disposition of this case and others pending in my docket. I dismiss the claim under my inherent authority to do so in order to manage and control my docket. *See Link v. Wabash Railroad Co*., 370 U.S. 626 (1962).

II. Summary Decision Is Proper Because Complainant Has Failed to Present Sufficient Evidence to Raise the Inference That She Suffered Discrimination

Assuming *arguendo* that the complaint should not be dismissed due to Complainant's failure to comply with my orders and to prevent undue delay, summary decision for Respondent is proper because Complainant has failed to present sufficient evidence to make out a *prima facie* case of retaliation that is necessary to raise the inference that she suffered discrimination. Complainant has not responded to Respondent's Motion for Summary Decision. She has failed to prove or demonstrate the existence of a genuine issue of fact that she engaged in protected activity, a necessary element to her claim. Finally, Respondent has come forward with a legitimate, non-discriminatory reason for terminating Complainant based on her documented performance problems and insubordination, and Complainant has not come forward with any evidence to dispute that fact. As discussed below, these facts each provide independent grounds for dismissing her claim. Respondent has shown that there is no genuine issue of material fact to decide, and Complainant has not presented any evidence to the contrary. Therefore, Respondent is entitled to summary decision as a matter of law.

A. Legal Standards

1. Summary Decision

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. §18.40, *see also* Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of

fact could resolve the issue, and an issue of fact is "material" if, under the substantive law, it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U.S. 317, 323-34 (1986).

If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact. *Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). The non-moving party may not rest upon the mere allegation or denials of his or her pleading, but must go beyond the pleadings to set forth specific facts showing that there is a genuine issue of fact that could affect the outcome of the trial. *Id.*; *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); 29 C.F.R. § 18.40(c). The non-moving party must identify the specific facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler, supra* at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact and the proponent is entitled to summary decision. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986); *see Webb v. Carolina Power & Light Co.,* 1993-ERA-42, slip op. at 5-6 (Sec'y July 4, 1995).

The non-moving party benefits from any factual dispute supported by the evidence. *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

2. Retaliation Under the Sarbanes-Oxley Act

Complainant has alleged that she was retaliated against in violation of the whistleblower provisions found in section 806 of the Sarbanes-Oxley Act. *See* 18 U.S.C. § 1514A. SOX protects employees of publicly traded companies who provide information or assist in an investigation regarding any conduct with the employee reasonably believes constitutes a violation of various federal fraud provisions, including sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (securities fraud), 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; 29 C.F.R. § 1980.102(a); *Hendrix v. American Airlines, Inc.*, 2004-AIR-00010 and 2004-SOX-00023 (ALJ Dec. 9, 2004).

The information or assistance must be provided to or the investigation must be conducted by a Federal regulatory or law enforcement agency, any Member of Congress or any committee

of Congress, or 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). 18 U.S.C. § 1514A (a)(1); *see also* 29 C.F.R. § 1980.102(a), (b)(1). An employer may not 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 under the Act's protection. *Id.*

In *Brune v. Horizon Air Industries, Inc.*, the Administrative Review Board re-clarified the procedures and burdens of proof in whistleblower complaints under AIR 21, which apply equally to whistleblower complaints under SOX. ARB Case No. 04-037 (Jan. 31, 2006); *see also Bechtel v. Competitive Industries, Inc.*, 2005-SOX-00033 (ALJ Oct. 5, 2005) (claims under SOX follow same procedures governing AIR 21). The Board distinguished between a complainant's burden to secure the investigation of a complaint, which merely requires the complainant to establish a *prima facie* case that raises an inference of discrimination, and her burden to secure adjudication in her favor after she has raised an inference of discrimination, which requires her to prove intentional discrimination by a preponderance of the evidence. *See Brune* at 14.

To make out a *prima facie* case of whistleblower retaliation under SOX, the complainant must present evidence sufficient to raise the inference that the complainant's protected activity was a contributing factor in a respondent's adverse employment action taken against the complainant. *Brune* at 12. A complainant may do so using either direct or circumstantial evidence showing that: (1) the employee engaged in protected activity, (2) the employer knew or suspected, actively or constructively, that the employee engaged in protected activity, (3) the employee suffered an unfavorable personnel action, and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. *Id.* at 13; 29 C.F.R. §§ 1980.104(b), 1980.109(a). A contributing factor need not be significant, motivating, substantial, or predominant, and can be "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), *quoting Marano v. Dep't of Justice*, 2. f.3d 1137, 1140 (Fed. Cir. 1993); *see also Collins v. Beazer Homes USA, Inc*., 334 F.Supp.2d 1365 (N.D.Ga. Sept. 2, 2004. Ordinarily, temporal proximity between protected activity and unfavorable personnel action will satisfy the burden of making a *prima facie* showing of employer knowledge and that protected activity was a contributing factor. *Id.*

When an employee successfully makes out a *prima facie* claim of retaliation through the use of circumstantial evidence, as opposed to direct evidence,[2] it is appropriate to analyze the claim under the burden-shifting pretext framework developed in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *Brune* at 14. Under the Title VII framework, when a complainant has put forth sufficient evidence to support a prima facie case, the burden then shifts to the employer to produce evidence that it took the adverse action against the complainant for a legitimate, nondiscriminatory reason. *See Carroll v. United States Dep't. of*

[2] Direct evidence is "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected [activity]." *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-00056 (ALJ July 18, 2005), *citing Wright v. Southland Corp.*, 187 F.3d 1293, 1297 (11th Cir. 1999). It is "smoking gun" evidence that the respondent acted with discriminatory or retaliatory motivation. *See Gavalik v. Continental Can Co*., 812 F.2d 834, 852-53 (3d Cir.), cert. denied, 484 U.S. 979 (1987).

Labor, 78 F.3d 352,356 (8th Cir. 1996) (applying and explaining Title VII's burden-shifting framework to an ERA whistleblower case), *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-00056 (ALJ July 18, 2005), *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The employer's burden at this stage is merely one of production, not of proof.

If the employer meets the burden of producing a legitimate, non-discriminatory reason for taking adverse action against the complainant, "the inference of discrimination disappears, leaving the single issue of discrimination *vel non*." *Yarbrough v. U.S. Dep't of the Army*, 2004-SDW-00003 at p. 20 (ALJ June 9, 2005). The complainant must then prove by a preponderance of the evidence that the employer intentionally discriminated against her. *See, e.g., Brune* at 13; *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000) (Age Discrimination in Employment Act); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

To meet this burden after an employer has articulated a legitimate, non-discriminatory reason for its actions, a complainant may prove that the legitimate reasons proffered by the employer were not the true reasons for its action, but rather were a pretext for discrimination. *See St. Mary's Honor Center*, 509 U.S. at 507-508). A complainant may also prove that she suffered intentional discrimination by establishing that the employer's proffered explanation is unworthy of credence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

The trier of fact "may then examine the legitimacy of the employer's articulated reasons in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune* at 14, *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The ultimate burden of persuasion remains, as always, with the Complainant. An adjudicator's rejection of an employer's proffered legitimate explanation for the adverse action permits, but does not compel a finding of intentional discrimination. Specifically, it is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination. *Id*. at 258.

If the complainant proves discrimination by a preponderance of the evidence, and not merely established a *prima facie* case, the complainant prevails unless the employer meets its burden of proving, by clear and convincing evidence, that it would have taken the same adverse action in any event. *Brune* at 14. If the employer meets this burden, it may avoid any liability for retaliation. *Id.*, *citing* 49 U.S.C. § 42121(b)(2)(B)(i) and 29 C.F.R. 1979.109(a). If the employer does not meet this burden, appropriate relief should be awarded to the complainant.

3. Summary of Legal Standards

In summary, to withstand summary decision, Complainant must come forward with sufficient evidence to raise the inference that she was discriminated against for engaging in activity protected by SOX. *See Brune* at 14. To do so, she must make out a *prima facie* case of retaliation. *Id.* If Complainant fails to prove or to establish the existence of a factual dispute as to

any one of the *prima facie* elements of her retaliation claim, Respondent is entitled to summary decision. *See Celotex*, 477 U.S. at 322-23. Even if she does make out a prima facie claim, thereby creating an inference of discrimination, Respondent can eliminate that inference by merely articulating, as opposed to proving, the existence of a legitimate, non-discriminatory reason for taking adverse action against Complainant. *See Carroll*, 78 F.3d at 356. In that case, Respondent prevails unless Complainant can prove, by a preponderance of evidence, not only that Respondents reasons are pretextual or not credible, but also that she suffered intentional discrimination. *Id.*

B. Legal Analysis

Respondent argues that summary decision is proper here because Complainant has failed to prove that she engaged in protected activity, and because Complainant has failed to prove that Respondent's legitimate, non-discriminatory grounds for her dismissal were pretextual. For the reasons set forth below, I agree with Respondent and grant its motion for summary decision.

1. Complainant Has Not Responded to Respondent's Motion For Summary Decision With Specific Evidence That Demonstrates the Existence of a Genuine Issue of Material Fact

Respondent has moved for summary decision. Complainant's failure to respond to or otherwise present evidence opposing Respondent's Motion for Summary Decision alone justifies granting Respondent's motion. As discussed below, Respondent has presented evidence that Complainant cannot raise a genuine issue that she engaged in protected activity, and has come forward with a legitimate, non-discriminatory reason for terminating complainant, which complainant has not disputed.[3] RMSD 2, 5.

To survive the motion, the burden has shifted to the Complainant, who may not rest upon the mere allegation or denials of her pleading, but must go beyond the pleadings to set forth specific facts showing that there is a genuine issue that she engaged in protected activity and that Respondent's reasons for her termination were pretextual or incredible. *See Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); 29 C.F.R. § 18.40(c). Complainant must identify the specific facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler, supra* at 671. She cannot rest on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

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If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact. *Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). The non-moving party may not rest upon the

[3] Respondent does not dispute its knowledge of the alleged protected activities, or that its termination of Complainant was an unfavorable personnel action. For purposes of this summary decision, and drawing all inferences in favor of the Complainant as the non-moving party, I find those elements satisfied, and address only the issues raised by Respondent as the moving party.

mere allegation or denials of his or her pleading, but must go beyond the pleadings to set forth specific facts showing that there is a genuine issue of fact that could affect the outcome of the trial. *Id.*; *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); 29 C.F.R. § 18.40(c). The non-moving party must identify the specific facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler, supra* at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

Despite numerous opportunities to do so, Complainant has not responded to several Orders to Show Cause, nor has she responded in any manner to any of Respondent's motions, including its Motion for Summary Decision. *See* Part I discussion, *infra*. Respondent has demonstrated an absence of evidence showing that Complainant engaged in protected activity, an element necessary to Complainant's *prima facie* case, and Complainant has not come forward with any evidence whatsoever in response. As such, she has failed to allege any specific facts, by reference to affidavits, deposition transcripts, specific exhibits, or anything else that would create a genuine issue of material fact necessary to defeat Respondent's Motion for Summary Decision.

Further, even if Complainant did make out a *prima facie* case, thereby permitting me to make the inference of discrimination, Respondent has extinguished my ability to make that inference by coming forward with a legitimate, non-discriminatory reason for her termination. Complainant must therefore come forward with specific evidence showing that reason to be pretextual or not credible in order to re-establish the inference of discrimination. Again, Complainant has come forward with no such evidence or any evidence at all. Her failure to respond prevents me from inferring that she suffered discrimination, making summary decision appropriate.

2. Complainant Has Not Shown That a Genuine Issue of Facts Exist as to Whether She Engaged in Protected Activity

Respondent argues that summary decision is proper here because Complainant has failed to establish that she engaged in any protected activity. In support of its contention, Respondent presented as exhibits the letters of May 2 and May 3, 2005 that Complainant sent Respondent requesting information for her personal tax audit (tax letters). It also presented a letter dated May 20, 2005, which Complainant sent to Respondent and indicated it was copied to a number of state and federal agencies and other parties.

Complainant has failed to respond to Respondent's motion. The only evidence presented by Complainant at any stage of her claim is her complaint letter dated May 31, 2005, in which she alleges she was retaliated against for voicing concerns about income tax fraud to the IRS. However, in response to a motion for summary decision, Complainant is not permitted to rest on allegations in her complaint, and must come forward with specific evidence showing the existence of a genuine issue of fact that she engaged in protected activity. *See Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); 29 C.F.R. § 18.40(c). Complainant has not given any evidence for me to view

in the light most favorable to her, or from which I can draw all inferences in her favor. *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064 (Feb. 10, 2003).

Complainant has not responded to Respondent's evidence that she did not engage in protected activity. Therefore, she has not met her burden to show that a genuine issue of fact exists as to an essential element of her claim, thereby entitling Respondent to summary decision. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986) (Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact and the proponent is entitled to summary decision.); *see also Webb v. Carolina Power & Light Co.,* 1993-ERA-42, slip op. at 5-6 (Sec'y July 4, 1995). Therefore, Respondent has shown that there is no genuine issue of material fact as to an essential element of her claim, making summary decision proper.

Recognizing, however, that Complainant is proceeding *pro se*, I provide the following brief analysis of whether she engaged in protected activity, in an attempt to view the evidence before me in the light most favorable to Complainant, drawing all inferences on her behalf.

Protected activity under SOX is defined as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. *Marshall v. Norhtrup Gruman Synoptics*, 2005-SOX-00008 (ALJ June 22, 2005). The employee's belief must be scrutinized under both subjective and objective standards. *Id.*, citing *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000). The employee does not need to show that the employer's conduct *actually* caused a violation of the law, but must show that she reasonably believed the employer violated one of the laws or regulations enumerated under SOX. *Id.* These include sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (securities fraud), 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; 29 C.F.R. § 1980.102(a); *Hendrix v. American Airlines, Inc.*, 2004-AIR-00010 and 2004-SOX-00023 (ALJ Dec. 9, 2004).

Fraud is an integral element of a SOX whistleblower claim, which contains an implicit element of deceit which would impact shareholders or investors. *Marshall*, *supra*. In *Marshall*, the complainant had alleged that he engaged in protected activity by reporting his concerns about improper financial accounting methods and ethical lapses, specifically that certain managers had engaged in fraudulent accounting activity with respect to the budget and that there was willful misclassification of labor hours, depreciation, and capital expenses. *Id.* at 4-5. The ALJ disagreed, and granted the Respondent's motion for summary decision on the ground that the Complainant's raising of concerns that certain accounting practices violated the Respondent's internal and ethics policies did not qualify as protected activity under the SOX whistleblower provision. *Id.* at 4-6.

The ALJ concluded that though the *Marshall* complaint alleged financial and accounting fraud, it did not address any kind of fraud or any transactions relating to securities. *Id.* at 5-6. There was no allegation that the complained of activities resulted in a fraud against shareholders or investors, nothing in the complaint or in the complainant's response to Respondent's Motion

for Summary Decision indicated that Complainant objectively or actually believed that Respondent was committing a violation of any of the Act's enumerated securities laws or committing fraud on its shareholders. *Id.* at 6. Because complainant's complaints, even if true, did not fall under any of the employee protection provisions of the act, they did not amount to protected activity, and Respondent was entitled to summary decision as a matter of law. *Id.*

I now consider the evidence that is before me, taken from Complainant's complaint and Respondent's pleadings, and consider it in the light most favorable to Complainant. Complainant alleges that the "tax letters" of May 2 and 3, 2005, and the "notice" letter of May 20, 2005 constitutes protected activity. I address each in turn.

Complainant's "tax letters" to Big Dog related to Complainant's personal audit by the IRS. In the letters, Complainant had requested copies of her paychecks due to a discrepancy between the income she reported on her tax return and the income reported by Respondent. (RMSD Exhibit J). The letters contain no allegations of fraud or other misconduct by Respondent that might be covered under SOX. They do not specify how the tax discrepancy related to fraud enumerated under the Act, or to any violation of a securities law or regulation. Complainant has not presented any other evidence as to how the tax discrepancy relates to fraud against investors or shareholders, and I see no relation myself. Therefore, viewing the evidence in the light most favorable to Complainant, I find that the tax letters and the tax allegations of her complaint, even if true, do not amount to protected activity.

Upon review of the "notice" letter of May 20, 2005, I find that the two-and-a-half page letter is spattered with disjointed, run-on sentences, legalese, and generalizations that make it very difficult to comprehend. *See* RMSD Exhibit L. The letter attempts to notify recipients that Respondent had recently escalated the damage and victimization it has caused her over the years, that she has exercised her right to communicate with certain federal agencies (IRS, OSHA/U.S. Dep't of Labor, SEC) and that she is now protected. *See Id.* She warns all not to do anything to cause her distress, suffering, pain, or harm "[b]ecause of my thoughts, words, feelings are/or maybe shared or communicated to any agent or Government Agency." *Id.* Though she mentions fraud on more than one occasion in the letter and in her complaint, she does not describe the specific conduct that allegedly amounts to fraud, nor does she indicate any securities fraud law or regulation that may have been violated, or. Even if her allegations of general fraud are true, she does not specify how the fraud relates to investors or shareholders, and I have no evidence before me by which I can find such a relation. Therefore, I find that Complainant's notice letter and allegations of fraud in her complaint do not amount to protected activity covered by the Act.

Because Complainant has failed to present evidence showing that she engaged in protected activity, there is no genuine issue of fact for trial. I therefore grant Respondent's Motion for Summary Decision.

3. Respondent Has Produced a Legitimate, Non-Discriminatory Reason for Terminating Complainant, Which Complainant Has Not Challenged

Finally, Respondent argues that even if any of the activity Complainant alleges to be protected is actually deemed protected, summary decision for Respondent is proper because

Respondent has proven it would have terminated Complainant for documented performance problems and insubordination, regardless of whether she engaged in any protected activity, and that Complainant cannot show that reason to be pretextual. I agree.

Even if Complainant were successful in proving every element of her *prima facie* case, thereby creating an inference of discrimination, Respondent can rebut that inference simply by coming forward with a legitimate, non-discriminatory reason for her termination. *See Carroll*, 78 F.3d at 356. If Respondent articulates such a reason, the inference of discrimination necessary to support a *prima facie* case disappears, and Complainant must show Respondent's articulated reason to be pretextual or incredible. *See St. Mary's Honor Center*, 509 U.S. 502 (1993). This enables the trier of fact to examine the legitimacy of Respondent's articulated reasons in determining whether Complainant has proved, by a preponderance of the evidence, that protected activity contributed to her termination. *See Brune* at 14.

i. Unsatisfactory Performance

Here, I find that Respondent has met its burden of producing a legitimate, non-discriminatory reason for terminating Complainant. The declaration of Complainant's supervisor, and the exhibits referenced therein, lend strong support to Respondent's articulated, non-discriminatory reasons for her termination. Respondent has shown that it recognized deficiencies in Complainant's performance regarding recruiting, hiring, and training employees at her store. RMSD. Respondent sought to correct those deficiencies, both verbally and in writing through the Performance Improvement Plan of April 19, 2005 by giving Complainant specific goals and objectives to meet by certain deadlines. RMSD, Kepler Decl., Exhibit A.

Respondent evaluated Complainant's progress in meeting those goals and objectives and found it lacking on at least two occasions. The first evaluation took place on May 24, 2005, after which Complainant's supervisor issued her a final written warning which required Complainant to immediately convince management that she was willing to and capable of meeting her goals and objectives, or face discipline up to and including termination, which Complainant signed to acknowledge that she received and understood the warning. RMSD, Kepler Decl. and Exhibit H. The second evaluation took place on June 14, 2005. RMSD, Kepler Decl. Complainant's supervisor determined that Complainant still had not corrected her performance deficiencies, nor had she made any noticeable improvements. RMSD Kepler Decl. Complainant's supervisor terminated her immediately for unsatisfactory performance, which, in addition to violation of company policy, is the reason stated on Complainant's Termination Report. RMSD Kepler Decl. and Exhibit I.

I find that Respondent has met its burden of producing a legitimate, non-discriminatory reason for terminating plaintiff, namely for her failure to correct her documented unsatisfactory performance despite several opportunities to do so.

ii. Insubordination

Furthermore, the evidence also lends strong support to Respondent's argument that Complainant was terminated for insubordination. Respondent presented evidence of receiving

complaints from Complainant's subordinate staff about Complainant's poor performance and harassment of subordinate employees around April 26-30, 2005. Respondent also presented an unsigned and undated list of 29 grievances against Complainant. On May 10, Complainant's supervisor spoke with her about the complaints and expressly ordered her not to speak with the employees about the complaints.

Between May 10 and May 18, 2005, Complainant's supervisor learned that Complainant had been speaking with the employees who had complained about her. Complainant's supervisor received a hand-written report from an employee that Complainant's boyfriend had made threatening calls to her home pertaining to the employee, Complainant, and Respondent. Complainant's supervisor documented other, similar complaints from other employees. On May 18, 2005, Complainant's supervisor issued her a formal, written warning for insubordination due to Complainant's violation of the order not to speak with employees about their complaints against her. Complainant signed the warning, but noted that she disagreed with a lot of the issues that led to the warning. Though Respondent's actions occurred after the May 2 and 3, 2005 "tax" letters, they occurred before the May 20, 2005 "notice" letter. Again, Complainant has not presented evidence that Respondent's actions were influenced by any alleged protected activity.

I find that Respondent has met its burden of producing a legitimate, non-discriminatory reason for terminating plaintiff, namely for her insubordination in disobeying both a verbal and a written order not to speak with her subordinate employees about the complaints they had lodged against her.

iii. Complainant Has Not Challenged Respondent's Legitimate, Non-Discriminatory Reasons for Her Termination

Because I have found that Respondent has met its burden of producing a legitimate, non-discriminatory reason for terminating Complainant, I also find that Respondent has rebutted any inference that Complainant suffered discrimination. *See Yarbrough v. U.S. Dep't of the Army*, 2004-SDW-00003 at p. 20 (ALJ June 9, 2005). Therefore, the burden has shifted to Complainant to prove intentional discrimination by a preponderance of the evidence. *See, e.g., Brune* at 13; *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000) (Age Discrimination in Employment Act); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). To do so, Complainant must show that Respondent's articulated reason is untrue or pretextual, and even if Complainant could make such a showing, she would still have to prove by a preponderance of the evidence that she suffered intentional discrimination. *See, e.g.*, *St. Mary's Honor Center*, 509 U.S. at 507-08 and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

Here, Respondent has produced a legitimate, non-discriminatory reason for terminating Complainant, thereby extinguishing any inference of discrimination. Complainant has not met her burden to come forward with any evidence rebutting Respondent's proffered reason for her termination. Complainant has not shown the existence of a triable fact as to whether Repondent's

articulated reasons for her termination are pretextual or untrue. Therefore, summary decision appropriate.

CONCLUSION

I find that Complainant's claim should be dismissed based on her repeated failure to comply with my lawful orders, which has resulted in undue delay in the disposition of this case and other cases pending on my docket. I further find that Respondent is entitled to Summary Decision in the present claim because Complainant has failed to make a *prima facie* showing of discrimination sufficient to raise the inference that Respondent discriminated against her for engaging in protected activity for three reasons: First, Complainant has not responded to Respondent's Motion for Summary Decision with specific evidence of the existence of any genuine issue of material fact that requires a hearing to resolve. Second, Complainant has specifically failed to show the existence of a genuine issue of fact as to whether she engaged in protected activity. Third and finally, Respondent has come forward with a legitimate, non-discriminatory reason for terminating Complainant, namely for her unsatisfactory performance and insubordination, which Complainant has not disputed. Complainant has not presented sufficient evidence to support the inference of discrimination. Therefore, Respondent is entitled to summary decision as a matter of law.

DECISION AND ORDER

For the reasons stated above:

IT IS ORDERED that Respondent's Motion for Summary Decision, pursuant to 29 C.F.R. § 18.40, is **GRANTED.**

IT IS FURTHER ORDERED that Complainant Debbie Townsend's complaint is **DISMISSED With Prejudice** and without cost or attorneys' fees to either party.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL:

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).