U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 19 January 2006

CASE NOS: 2005-SOX-00088
2005-SOX-00089
2005-SOX-00090
2005-SOX-00091
2005-SOX-00092

In the Matter of:

JEREMY SMITH,
Complainant,

vs.

HEWLETT PACKARD,
NORA FUENTES-WEGNER,
FRANK BARSOTTI, ROBERT MULKEY, DEBRA HERCHEK,
Respondents.

APPEARANCES:

Jeremy Smith, *Pro se*
4399 Lookout Drive
Loveland, Colorado 80537

Darren Nadel, Esq.
Joshua Kirkpatrick, Esq.
Littler Mendelsohn
1200 – 17th Street
Denver, Colorado 80202
For the Respondents

BEFORE: RUSSELL D. PULVER
Administrative Law Judge

DECISION AND ORDER

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act ("SOX" or "the Act"), 18 U.S.C. § 1514A, enacted on July 30,

2002. The Act prohibits retaliatory actions by publicly traded companies against their employees who provide information to their employers, a federal agency, or Congress, that alleges violations of 18 U.S.C. §§ 1341, 1343, 1344, 1348, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. § 1514A.

Respondent Hewlett Packard ("HP") is a publicly traded company with a class of securities registered pursuant to Section 12 of the Securities and Exchange Commission Act of 1934, and is required to file reports pursuant to Section 15(d) of this Act. 15 U.S.C. § 78l. Jeremy Smith ("the Complainant") alleges that HP terminated him in retaliation for his attempts to remedy alleged race discrimination within the company. HP maintains that it terminated the Complainant for insubordination, a legitimate business purpose.

On April 25, 2005, the Complainant lodged a formal complaint with the EEOC. RX 3. On May 9, 2005, the Complainant filed a complaint with OSHA, claiming that he had been terminated for being a whistleblower. On July 6, 2005, OSHA issued a Findings and Preliminary Order that found the complaint meritless. OSHA dismissed the complaint based upon its findings.

On July 21, 2005, the Complainant objected to OSHA's Order and requested a hearing on the merits of his whistleblower claim. From September 12 through September 15, 2005, the parties appeared for a hearing in Denver, Colorado. Administrative Law Judge Exhibits ("AX") 1 and 2; Respondent's Exhibits ("RX") 1 through 41; and The Complainant's Exhibits ("CX') 1 through 4 and 6 through 23 were admitted into the record. Scott Nielsen, JoAnne Kuhn, Keith Johnson, Frank Barsotti, Nora Fuentes-Wegner, Debra Herchek, Grace Patricia Carter, and the Complainant testified at the hearing.

Issue

1. Whether the Complainant engaged in protected activity as defined by the Act.

Statement of the Case

On July 26, 1999, HP hired the Complainant as a diversity consultant in the Diversity and Inclusion Department. RX 1 and 2. At that time, he signed an agreement not to reveal confidential information before, during and after his employment at HP. RX 30. The Complainant later applied for a new position within the company. In the spring of 2001, a manager of HP's Employee Relations department, Keith Johnson, hired him as an employee relations consultant. TR at 145, 607 and CX 1.

The Employee Relations department is a specialized division within HP's Human Resources. Employee Relations serves HP's various business units. It provides coaching to managers; investigates allegations of wrongdoing; assists with specific programs such as workforce restructuring; ensures compliance assistance with employment-related laws; and consults on complex human resources issues.

In October of 2002, HP initiated a performance rating system which became the principal criterion for designating layoffs. This evaluation system consisted of four levels: S, E, M, and I.[1] Managers were told to evaluate the employee's own performance and improvement as well as his performance and improvement with relation to others in the same position.

In May of 2004, another Employee Relations manager, Ms. Fuentes-Wegner, hired the Complainant to work as a member of the Consumer Solutions Group.[2] TR at 145. Within this group, the Complainant was responsible for the public sector, small and medium business, and enterprise organizations within HP. *Id*. In late 2004, a Human Resources business manager, Wayne Redmond, asked the Complainant to assist him with a "group sensing study" at HP's Omaha, Nebraska site. TR at 154.

A group sensing study requires an Employee Relations consultant to interview employees on a volunteer basis and then record the general mood or morale at the site. TR at 903-905, 1022-1023. Generally, these communications are confidential between the consultant and the employee. TR at 473. Where negative comments turn into specific allegations of misconduct, however, the consultant meets privately with the employee and records more information, including the names of both the participant and the accused, and the details of the particular incident. TR at 477, 943.

Based on this study, the consultant creates a group sensing report. RX 31. The Complainant contends that the participant's names and the names of their accusers must remain confidential, and therefore never appear in any report. CX 4; TR at 473. HP, on the other hand, asserts that where statements by a particular individual rise to the level of a credible allegation, the consultant must thoroughly investigate and provide the names of both the accuser and the accused. TR at 608-610.

After the Complainant conducted a group sensing study at the Omaha site, he approached three managers – Wayne Redman, Scott Nielson, and Donna Ferro – to suggest that he perform a similar study at the Rockrimmon site in Colorado Springs, Colorado. TR at 867-868. They agreed. The Complainant's Rockrimmon study consisted of face-to-face, telephone, and email interviews with more than 75 employees. RX 5 at 9; CX 4. He uncovered complaints of employee dissatisfaction, threats of unionization, perceived racial inequities, and sexist and racist jokes. CX 4; TR at 916-985. During the interviews, the Complainant made several pages of notes where he thought the cases required further review. RX 40, 41; TR at 912, 944. These notes further detailed the complaints, and included the names of both the participant and the accused. *Id.* Although the Complainant recorded individual names in his notes, he purposefully excluded that information when he presented his group sensing report in February.

[1] S meant "significantly exceeds;" E meant "exceeds;" M meant "meets expectations;" and I meant "improvement needed."

[2] The Consumer Solutions Group is a division within HP and thus an internal "client" of the Employee Relations Department.

While the Complainant investigated low morale at the Rockrimmon site, HP's Vice President of Performance Management Systems, David Underwood, produced a report ("AIR") that detailed the adverse impact that the "S, E, M, I" performance rating system had on the company's various minority groups. This AIR was unrelated to Complainant's Rockrimmon study and was a much broader company-wide study. Sometime in January of 2005, HP began addressing the issues revealed in the AIR by no longer using employee-to-employee comparisons and instead focusing on the employee's own performance. TR at 214. As a result, managers elevated many employees who were rated as "I" to "M."

In February 2005, Mr. Underwood presented his findings in a teleconference attended by Ms. Fuentes-Wegner, the Complainant, and others. TR at 205, 627. The Complainant understood that the AIR indicated a significant, disproportionate number of "I" scores were given to African-American employees. TR at 858-865. Learning about the disparate treatment upset the Complainant. TR at 546. It is unclear whether remedies for the disparate ratings were discussed during this meeting. TR at 198.

The Complainant admitted that the AIR was the catalyst for his later threats to report HP to federal agencies. Index to CX 5. During the teleconference, he asked how his group, Employee Relations, would address this issue. TR at 202. The facts do not show how HP responded, but the company tasked the Diversity and Inclusion department with resolution of this matter. TR at 214-215. This dissatisfied the Complainant, and consequently, he developed his own, independent plan to address the disproportionate ratings. TR at 547.

The Complainant's plan involved internal action by HP that addressed what he found to be "systemic racism." TR at 646. The Complainant would implement the plan with "diversity sensitivity-type training" and modifying hiring practices. *Id*. This plan would be enforced by employees who the Complainant trusted to oversee and monitor its implementation. TR at 647. HP understood that this plan also required that the Complainant would oversee HP's progress, even after he was no longer an employee of the company. TR at 1002.

Also in February 2005, the Complainant submitted his Rockrimmon group sensing report, but he refused to include the names he omitted for purposes of confidentiality. The study uncovered various complaints about managers Mr. Redmond, Mr. Nielson, and Ms. Farro. Consequently, the Complainant created three versions of his Rockrimmon group sensing report – one for each – redacting accusations about the other two. TR at 104. On February 8, he gave Mr. Nielson and Ms. Ferro the reports he had prepared for them. That same day, Mr. Nielson gave a copy of his version to his manager, Ross Cockburn, Vice President of Human Resources. TR at 106. Later, Mr. Cockburn received all three redacted reports. TR at 634-635.

On February 18, 2005, the Complainant attended one of HP's Diversity and Inclusion meetings designed to inform management how to connect with their staff. TR at 775, 827. During and soon after the meeting, the Complainant discussed the group sensing report with various Diversity and Inclusion managers, including Teri Alexander and Pat Carter. TR at 778, 874. Ms. Carter received a copy of this report from Mr. Cockburn. TR at 781–783, 874–875. She noted that the report was too vague to be useful, but speculated that the Complainant had notes containing more specifics. TR at 783. She suggested to the Complainant that he supply the

notes because it was the Employee Relations unit's function to act on such specifics and because she knew the omission could "cause him serious trouble." TR at 784–785.

What appeared to be a solid, professional relationship between the Complainant and his managers quickly deteriorated during the last week of March, 2005.[3] On March 22, 2005, Mr. Cockburn requested the complete report from the Complainant. RX 5; CX 8. This event triggered escalating exchanges that eventually led to the Complainant's termination.

- March 23

The Complainant told Mr. Cockburn that he had to notify the managers named in the report before he would hand the report over to him. RX 6; CX 9. Thereafter, in a voicemail to Ms. Fuentes-Wegner, the Complainant expressed his frustration with Mr. Cockburn's request. RX 6.

- March 24 – 28

The Complainant proposed his "comprehensive plan" and requested a mutual separation agreement. HP took this request as an ultimatum because the Complainant said he would go to an external organization if his terms were not met. TR at 575, 648.

- March 29:

Ms. Fuentes-Wegner called her supervisor, Frank Barsotti, and relayed the following: Complainant's comprehensive plan, his demands that HP show good faith efforts in following it, and his offer to leave if given a satisfactory mutual separation agreement. RX 35.

- March 30:

The Complainant refused to meet with Ms. Fuentes-Wegner, but affirmed his intention to use external processes to address his concerns. He criticized HP's handling of "this serious situation." RX 9; CX 7. In response, Ms. Fuentes-Wegner requested that they meet to discuss his employment tenure. The Complainant refused to discuss this, but indicated he would meet with her. RX 10. She then requested a copy of the report, which the Complainant supplied to her. RX 12.

Also that day, Ms. Fuentes-Wegner called Mr. Barsotti to tell him that the Complainant met with disgruntled African American employees who were discussing a class action at the Pikes Peak Urban League.[4] RX 36; TR at 660.

- March 31:

In a voicemail to Ms. Fuentes-Wegner, the Complainant expressed his frustration that she and others were pressuring him to provide answers — presumably to the discrimination

[3] Up until that time, the Complainant had received favorable evaluations and awards. *See* CX 1, 2, and 3.

[4] In a later email, the Complainant explained, "I would not necessarily define some employees meeting with an Urban League representative at a business luncheon as "class action;" I would describe it, however, as employees who are dissatisfied with the lack of progress internally, and as I told you are now looking for resolution externally." CX 13.

issues portrayed in the group sensing report. He reiterated his intention to leave HP. RX 11. In a second voicemail, the Complainant requested a meeting with Kathy Young, a staff attorney, to discuss the Complainant's "protected class activity." RX 13, 38.

- April 1:

In an email to Ms. Fuentes-Wegner, the Complainant accused her of being more concerned about the class action than about discrimination. RX 14; CX 13. The Complainant emphasized that in mid-February, he told her that "several of the African Americans that I spoke with have a feeling of being unheard, and if things are not done internally to change 'this' they would [do] what is necessary externally." CX 13.

- April 4:

In an email to Ms. Fuentes-Wegner and Ms. Young, the Complainant questioned why his supervisor inquired into his activities outside the workplace, and he reported that he felt unduly scrutinized. RX 15; CX 11. In Ms. Young's reply, she directed the Complainant to Mr. Barsotti. RX 15. In response, the Complainant suggested that his managers "get legal counseling." RX 15.

- April 5:

In an email to the Complainant, Ms. Fuentes-Wegner requested the names, dates, witnesses, and other facts necessary to support the group sensing report. RX 18. Then, in a voicemail to Mr. Barsotti, the Complainant threatened that if Ms. Fuentes-Wegner continued to ask him for details regarding the group sensing report, he would "take external action" because her conduct was a violation of both HP policy and the Fair Labor Standards Act, Section 7. RX 19; CX 12.

- April 6:

In a phone call to Mr. Barsotti, the Complainant complained that Ms. Fuentes-Wegner's demands were excessive, and he requested a chance to address the issues raised by the group sensing report. Mr. Barsotti replied that he wanted the Complainant to help the Employee Relations department affect change at Rockrimmon, but that he needed him to provide specifics regarding the group sensing report. The Complainant insisted that "his job was done." RX 39.

- April 7:

In an email to the Complainant, Mr. Barsotti demanded that he comply with Ms. Fuentes-Wegner's request for details concerning the group sensing report by April 8 or be placed on administrative leave. RX 20; CX 14. In his reply, The Complainant claims he provided all the information he was required to give, and he refused to comply. RX 21.

In an email to Mr. Barsotti, copied to Ms. Alexander and Ms. Carter, the Complainant informed them that he considered his administrative leave and exclusion from an upcoming meeting to be adverse action. RX 22. In a subsequent email to Ms. Alexander, copied to Ms. Fuentes-Wegner and Mr. Barsotti, the Complainant claimed he was being made a scapegoat regarding the group sensing report and that he would continue to refuse their demands for more detail. RX 23. In a third email to various colleagues, the Complainant forwarded Mr. Barsotti's email and repeated his accusation that he was being scapegoated. RX 24.

- April 8:

In an email and a voicemail from his home to Ms. Fuentes-Wegner, the Complainant asked whether he is indeed on administrative leave and repeated his refusal to provide details of the group sensing report. RX 26 and 27. The Complainant was placed on administrative leave.

- April 12:

The Complainant completed an EEOC intake form alleging discrimination at HP. CX 16.

- April 22:

Ms. Fuentes-Wegner and Mr. Barsotti notify the Complainant by letter that his employment is terminated.[5] RX 28; CX 17.

Applicable Law

The Act states in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by --
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A (a)(1); *see also* 29 C.F.R. § 1980.102(a), (b)(1).

In order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent, it is necessary to prove that:

[5] As of June 16, 2005, HP's Employee Relations department continued to work on the group sensing report. CX 19.

1. the complainant was an employee of a covered employer;

2. the complainant engaged in protected activity as defined by the Act;

3. the respondent had actual or constructive knowledge of the protected activity;

4. the respondent thereafter took some adverse action against the complainant; and

5. the protected activity of the complainant was the likely reason for the adverse action.

See Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, slip. op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. United States Department of Labor*, 78 F.3d 352, 356 (8 Cir. 1996).

Here, there is no question that the Complainant worked for HP, a corporation governed by Sections 12 and 15(d) of the Securities Exchange Act. Further, there is no dispute over his termination. Based on the facts of this particular case, there is only one element that is at issue: the Complainant's protected activity.

Findings of Fact and Conclusions of Law

The purpose of the Act is to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." H.R. Rep. No. 107-414, 2002 WL 661627 (April 22, 2002). The legislative history of the Act explains that fraud is an essential element of a claim brought under the whistleblower provision. *See e.g*. S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section of the provision is that it "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company").

The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." *Id*. In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." *In re Ames Dept. Stores Inc. Stock Litigation*, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud as it pertains to the whistleblower protection provision is undoubtedly broader, an element of intentional deceit that impacts shareholders is implicit. *See Tuttle v. Johnson Controls*, 2004-SOX-76 (ALJ January 3, 2005).[6]

[6] In *Allen v. Stewart Enterprises, Inc*., 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), the ALJ found that the Act conveys protection to whistleblowers who report activity reasonably believed to be fraudulent in nature, and that "a fraudulent activity cannot occur without the presence of intent." Slip op. at 84.

In his pre-hearing statement, the Complainant argued that HP "purposely distorted" and "publicly lied" about its performance rating system that resulted in an adverse impact on African Americans. The Complainant did not, however, allege that he had reported any violations of securities laws, or cooperated in an internal or external securities law investigation. According to his trial testimony, the Complainant admitted that he had never reviewed any securities filings that HP made between the time of the passage of the Act in 2002 and the time of his termination. TR at 855. Moreover, he conceded that he neither knew of any disclosures that HP made in its securities filings, nor was aware of any false statements HP made in any securities filing. *Id*. Instead, he links an alleged Title VII violation to fraud against HP's shareholders.[7]

Protected Activity

Protected activity is defined under the Act as reporting an employer's conduct that the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. 29 C.F.R. § 1980.102(b)(1). The test does not measure the accuracy or falsity of a Complainant's allegations; rather, the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections. *See Clement v. Milwaukee Transport Services, Inc*., 2001-STA-6 (ALJ Nov. 29, 2001) slip op. at 39; *Tuttle v. Johnson Controls, Battery Division*, 2004-SOX-76 (ALJ Jan. 3, 2005). While the employee is not required to show the reported conduct actually caused a violation of the law, he must show that he reasonably believed the employer violated one of the laws or regulations enumerated in the Act. Thus, the employee's belief "must be scrutinized under both subjective and objective standards." *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000).

Here, the Complainant alleges that he engaged in protected activity on March 24, 2005, when he told Ms. Fuentes-Wegner that "if [he] did not see an appreciable effort by HP to address these longstanding and institutional discriminatory practices" then he would bring the issue to the attention of "the EEOC, the Department of Labor, and other appropriate agencies." RX 4. This conduct constitutes protected activity if this perceived violation by HP is covered by the Act, and if the Complainant's belief that it is covered is reasonable.

Systemic Race Discrimination

In *Harvey v. The Home Depot, Inc*., 2004-SOX-20 (ALJ May 28, 2004), the Complainant brought a claim under the whistleblower protection provision of the Act alleging systemic and individual racial discrimination. The claim centered on alleged racial and employment discrimination, rather than the company's failure to report such discrimination to the public. The ALJ analyzed the connection between a Title VII violation and the prohibition against fraudulent disclosure to shareholders under the Act. The ALJ explained that "an implicit argument may be made that a company which permits discriminatory practices despite its public policy of equal opportunity is acting contrary to the best interests of its share holders." *Id*. Nonetheless, the ALJ emphasized that a protected activity under the Act "must involve an alleged violation of a federal law directly related to fraud against share holders." *Id.*

[7] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e).

While lending credence to the connection between race discrimination and shareholder fraud, the ALJ in *Harvey* specified two key requirements for a race discrimination claim to fit under the purview of the Act. Relying on Section 302 of the Act, he explained:

> The two key components are accurate accounting and financial condition. Whether a supervisor's acts of individual discrimination comply with the company's stated equal opportunity standards has a very marginal connection with those two components. Perhaps, the failure to disclose a class action lawsuit based on systemic racial discrimination with the potential to sufficiently affect the financial condition of a corporation might become the subject of a SOX protected activity if an individual complained about the failure to disclose that situation.

Id. at 14-15.

Here, the Complainant perceived systemic racial discrimination. He admitted that the AIR was the catalyst for taking his allegations to external authorities. While the AIR concluded that the S, E, M, I evaluation system impacted minorities adversely, there is no evidence that HP intended this result. Further, HP acknowledged the adverse result, presented the problem, and took action to ameliorate it by elevating ratings of "I" to "M." In fact, HP already applied this ameliorative action when the Complainant decided to withhold information from management. He received the AIR results and he refused to supply the names for the Rockrimmon group sensing report within the same month. As such, he did not give the Diversity and Inclusion department a chance to develop any additional remedies to the rating system.

Although the evidence reveals a rumor of a class-action law suit against HP, the Complainant clarified that there was no such litigation. "I would describe it," the Complainant explained, "as employees who are dissatisfied with the lack of progress internally, and . . . are now looking for resolution externally." CX 13. Consequently, there was nothing for HP to disclose to its shareholders. Had such a suit actually been filed, and if HP had prevented that information from reaching its shareholders, and if the Complainant learned of this omission and if he had reported it, then he would have engaged in protected activity under the Act. Mere knowledge that an employee-evaluation process adversely affected minorities (without knowing whether this result was intentional), coupled with an insider's access to disgruntled employees' conversations about "external" resolutions, is not enough.

Another factor that weighs against finding that the Complainant engaged in protected activity involves his comprehensive plan. Although it appears that the Complainant designed the plan because he was tired of corporate reticence and merely wanted to serve justice by taking matters into his own hands, the Complainant's conduct also speaks of self-serving intentions. He wished to oversee HP's progress, even though he would no longer be an employee of the company. In his complaint, he threatened to go to the EEOC, the Department of Labor, and "other appropriate agencies" if *he* did not see an "appreciable effort" by HP. Requirements like these are unreasonable because the Complainant had not achieved a management position that would merit such company-wide responsibility, and because he had no basis by which he should serve as an outside auditor of the company. While the Complainant's objectives may have been noble when he first developed his comprehensive plan – he wanted to remedy what he perceived

as systemic racism – those objectives were muddled when he demanded that *his* plan rather than any other that might be developed by the Diversity and Inclusion department serve as the solution.

The Complainant's claims of protected activity are further discredited by the fact that HP had a process in place to deal with alleged discrimination at the Rockrimmon site. In order for the process to move forward, however, the Complainant needed to provide the names of the accuser and accused in his group sensing report. By failing to do so, he stymied the company's ability to remedy the problem, and he precluded his potential to be part of the solution. Consequently, he cannot prove that HP perpetrated a fraud on its shareholders by obscuring discriminatory practices when it was he who kept the details secret.

Reasonableness

The Complainant justifies his refusal to share the names he collected during his Rockrimmon group sensing study on the grounds that he contracted with participating employees to ensure their confidentiality. There is little evidence that the Complainant had the authority to make such contracts, yet it is reasonable to believe that few employees would participate in a group sensing study unless their comments were kept confidential. In his methodology for the group sensing report, however, the Complainant acknowledged that certain situations would compromise an employee's confidentiality. He wrote, "employees were given advanced notice that if they made statements that constituted a policy violation allegation, then those allegations would be investigated per HP policy." CX 4.

Upon hearing the results of the AIR, the Complainant ignored the very methodology by which he structured his own report. Yet reasons for his actions can be gleaned from his exchanges with Mr. Barsotti.[8] It appears that the Complainant was convinced that following HP's processes would only result in retaliation against those who had expressed their concerns.[9]

Nonetheless, processes like group sensing studies are useless if companies cannot follow-up on serious allegations of misconduct. Merely knowing that a potential problem might exist is usually not enough to effect change.[10] Mr. Barsotti attempted to impart on the Complainant the importance of disclosing the additional information, as well as his like-minded concern that these issues be resolved. CX 14; RX 20. In so doing, however, Mr. Barsotti notified the Complainant that he would be placed on administrative leave if he did not comply. *Id.* The Complainant perceived Mr. Barsotti's communication as harassment. RX 21. Although the Complainant's

[8] In a voicemail to Mr. Barsotti, dated April 6, the Complainant explained, "I initiated an open door with [Ms. Fuentes Wegner] based upon the information and *my lack of faith that this was going to be dutifully handled*. CX12 (emphasis added). He continued, "I know what is going on here. And I don't know if you guys are in together with this collusion, but if you are…then I will take the appropriate action." CX 12.

[9] The Complainant explained that, "identifying people from the group sensing study who had an extreme fear of being publically (sic) identified would be a breach of their confidentiality that I made with them. . . [a]nd many of them, particularly African Americans, fear reprisals like what I'm experiencing." *See* TR at 915-916, EX 22.

[10] HP's Diversity and Inclusion manager, Ms. Carter, conceded that the Complainant's Rockrimmon report was "too vague to be useful." TR at 781-783; 874-875.

conduct may be understandable within the context of what he believed was a serious problem, it was not reasonable for him to withhold information on grounds of confidentiality. Therefore, I find that the Complainant's belief that his conduct was covered under the Act is unreasonable.

Conclusion

By reaching this conclusion, I do not infer that there would never be a situation other than a class-action lawsuit where racial discrimination within a company covered by the Act detrimentally impacts shareholders. Fraudulent disclosures to shareholders about a company's diversity or opportunities for those within protected classes could very well impact a company's value on the public market. Socially responsible investors may move their money upon learning of a company's discriminatory practices.

The Complainant's allegations in this case, however, do not rise to the level of fraudulent conduct. HP made no false representation on the status of its employee demographics or treatment. When informed that the S, E, M, I rating system adversely affected minorities, and that mistreatment at the Rockrimmon site likely existed, HP took steps to correct, not obfuscate, the problems. It appears that the Complainant took matters into his own hands because he mistrusted HP's management. He disagreed with management's decision to task the Diversity and Inclusion department, rather than his Employee Relations group, with resolving the disparate treatment uncovered by the AIR. He was disheartened by what he perceived as HP's failure to act immediately and comprehensively on what he understood to be "systemic racism."

The Complainant's disenchantment with management is understandable, based on the recent interviews he had conducted at the Rockrimmon site, the knowledge that African-American employees who participated as members of the Urban League felt that their concerns were not taken seriously, and finally learning that the rating system was disproportionately affecting minorities.[11] Although his conduct was understandable, that does not mean it is actionable. His report to the EEOC based on what he felt was HP's failure to make "appreciable efforts" is not protected activity under the Act, and his refusal to supply investigatory information gained at the Rockrimmon site in order to address directly allegations of discrimination is unreasonable.

[11] In an email to Ms. Fuentes-Wegner, dated April 1, the Complainant wrote: "back in mid-February I told you that several of the African Americans that I spoke with have a feeling of being unheard, and if things are not done internally to change 'this' they would [do] what is necessary externally." CX 13.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, the Complainant has not proven protected activity under the Act and his complaint is hereby **DISMISSED**.

SO ORDERED.

A

Russell D. Pulver
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