U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 02 July 2007

CASE NO.: 2006-SOX-00099

In the Matter of

RICHARD ANDREW GROVE,
Complainant

v.

EMC CORPORATION,
Respondent

Appearances:

Richard Andrew Grove, Manchester, Connecticut, *pro se*

James R. Carroll, Christopher Lisy and Eric P. Bruskin
(Skadden, Arps, Slate, Meagher & Flom), Boston, Massachusetts,
for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises out of a complaint of discrimination filed by Richard Andrew Grove ("Grove" or "Complainant") against the EMC Corporation ("EMC") under the Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (West 2004) (hereinafter the "Sarbanes-Oxley Act" or the "Act"). Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. 780(d), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The Secretary of Labor has issued implementing regulations which are found at 29 C.F.R. Part 1980 (2005).

I. Procedural History

In his complaint filed with the U.S. Department of Labor Occupational Safety and Health Administration ("OSHA") on April 13, 2004, Grove alleges that EMC "alienated" him on November 6, 2003, terminated his employment on January 15, 2004, cut off his health benefits and denied him "COBRA" benefits coverage in retaliation for protected activity in raising concerns of impropriety in a November 4, 2003 letter to EMC officials. Administrative Law Judge Exhibit ("ALJX") 1. By letter dated May 11, 2006, the Regional Administrator for OSHA, acting as an agent for the Secretary of Labor, notified Grove of the Secretary's Findings that there was no reasonable cause to believe that EMC had violated the Sarbanes-Oxley Act. *Id.* Grove appealed the Regional Administrator's determination and requested a formal hearing in a letter dated June 12, 2006 which was received by the Office of Administrative Law Judges on June 16, 2006. ALJX 2.

On July 17, 2006, EMC filed a motion for summary decision seeking to dismiss Grove's complaint. ALJX 4(a). On August 1, 2006, Grove filed a response entitled "RICHARD ANDREW GROVE'S EVIDENCE AND DISPUTE OF EMC'S FABRICATED FACTS IN OPPOSITION TO EMC'S MOTION FOR SUMMARY DECISION." ALJX 11. Because Grove's response did not fully address EMC's factual allegations, he was ordered to file a supplemental answer which was received on August 24, 2006. ALJX 13. On September 11, 2006, I issued an order denying EMC's motion for summary decision. ALJX 27.

A hearing in this matter was held before the undersigned Administrative Law Judge on October 24 - 26, 2006. Prior to the hearing, EMC filed a Motion in Limine to exclude certain exhibits proffered by Grove, specifically audio recordings of telephone conversations which Grove surreptitiously recorded. ALJX 17. At the hearing, I took EMC's objection under advisement in order to allow parties the opportunity to analyze the recording device and submit expert testimony as to authenticity and reliability of the proffered evidence. HT at 885-87. On December 12, 2006, EMC filed a report from their expert contesting the reliability of the recording device. ALJX 48. On January 3, 2007, Complainant filed his expert report rebutting Respondent's expert. ALJX 49. On January 26, 2007, an order denying EMC's Motion in Limine was issued. ALJX 50. On February 16, 2007, Grove submitted his post-hearing brief ("Grove Br."). That same day, respondent EMC Corporation also submitted its post-hearing brief ("EMC Br."). Exhibits and evidence submitted in support of the parties' respective positions are herein referenced as follows: Complainant's Exhibits ("CX"), Respondent's Exhibits ("RX"), Joint Exhibits ("JX") and ALJ Exhibits ("ALJX"). The Hearing Transcript, totaling 930 pages, is referenced as ("HT").

After careful review of the evidentiary record and consideration of the parties' arguments, I conclude that Grove's complaint is untimely with respect to his allegations of retaliation predating his termination on January 15, 2004. I further conclude that Grove has not met his burden of proving that his termination was unlawfully motivated by any activity

protected by Sarbanes-Oxley or that EMC engaged in any unlawful post-termination retaliation. Accordingly, his complaint is dismissed.

II. Issues Presented

Grove's complaint and EMC's defenses raise multiple issues which may be broadly summarized as follows: (1) whether Grove's complaint is timely with respect to the alleged November 6, 2006 alienation; (2) whether Grove has proved that EMC discriminated against him in violation of the Sarbanes-Oxley Act by terminating his employment on January 15, 2004 and / or by taking or failing to take other actions which Grove alleges to be retaliatory; and (3) whether EMC has proffered legitimate, non-discriminatory reasons for the alleged discriminatory employment actions.

II. Findings of Fact

On May 22, 2003, Grove was offered the position of Named Account Manager at the Rockville, Maryland office of Legato Systems, Inc. CX-AA at 52; RX-1; HT at 642.[1] This offer set his base pay at $80,000 and included the opportunity to earn up to $120,000 in commissions, provided Grove could meet his sales quota. RX-1. Grove accepted the offer and began working at Legato on June 2, 2003 as a Named Account Manager for the Mid-Atlantic region sales. HT at 47.[2] His immediate manager was Charles Giametta ("Giametta"), and both Grove and Giametta ultimately reported to Bruce Gheesling ("Gheesling"), Legato's Vice President of Sales for the Eastern Region. HT at 97, 641.

Prior to being hired, Grove was interviewed by both Giametta and Gheesling. HT at 116. Grove, who was living in New York when he was hired by Legato, testified that he told Giametta during the interview that he was amenable to moving closer to the Rockville office but was not willing to pay for the relocation. HT at 116. According to Grove, Giametta responded that he could take care of the moving expenses. *Id.*[3] Grove also discussed his potential relocation with Gheesling during his phone interview. HT at 892-93. Gheesling asked Grove about his time frame for relocating, and Grove responded that he had six months left on a residential lease in New York and that he was unsure whether he could get out of the lease, or whether he might have to sublet. HT at 892. Gheesling testified it was "critical" for a sales representative to live in the assigned territory because "when you have somebody remote, they end up not wanting to cover the territory as much." HT at 642-643. Although relocation was discussed, there is no evidence that there was any clear understanding between Grove and his Legato managers on when it was expected that he would move closer to the Rockville office. Grove testified that in

[1] The parties stipulated that EMC's purchase of Legato Systems, Inc. was finalized in October of 2003. HT at 49.

[2] Grove testified that he "did not endorse" the offer letter, and, in an email faxed with his reply, he noted his concerns regarding a relocation package and changed job title. HT at 45. In this regard, Grove testified that he was offered a position as a "Channel Account Manager" during his telephone interview with Gheesling instead of the Named Account Manager position for which he was actually hired. HT at 42. However, it is undisputed that Grove began work at Legato on June 2, 2003. HT at 43, 47. It is also undisputed that the offer letter explicitly states Legato would be "bound only by the written terms" therein. *See* CX-AA at 26 and RX-1.

[3] Giametta was not called to testify at the hearing. Statements attributed to Giametta herein are as related by Grove during his testimony at the hearing. EMC's standing hearsay objection to Grove's testimony regarding statements made by Giametta is overruled. *See* 29 C.F.R. § 18.801(d)(2)(iv).

August and September of 2004 he asked Giametta about relocation expenses, and Giametta replied, "That's not going to work out." HT at 119.

During the course of his employment, Grove was responsible for selling Legato's suite of software products to new and existing Legato business clients. Grove was also required to participate in quarterly business review / opportunity forecasting meetings with Gheesling. HT at 646. In addition, he was routinely asked to forecast the potential revenue opportunities in his sales pipeline for his manager's review during Legato's weekly sales calls. HT at 51, 52.[4]

On July 2, 2003, Grove was directed by Giametta to recalculate his revenue projection forecast using a new formula. HT at 50. According to Grove, the new formula "increased the revenue potential approximately ten times without any change in the actual qualification of the opportunity." HT at 50-51. Grove further stated that it was his "professional opinion that the formula could be used … only to deceive people, because it did not give you realistic numbers." HT at 51.[5] Using the new formula, Grove's six month revenue pipeline forecast rose from $925,000.00 to approximately $10.9 million. TR at 56. On July 2 and 3, 2003, Grove raised concerns regarding the accuracy of the new formula, telling Giametta the new numbers "could only be used for illicit purposes and that nothing legal could be done with this." HT at 51, 57-58. Grove testified that Giametta responded by instructing him "not to worry about it, those numbers aren't for you; they're for the guys at the top." HT at 58.

On July 14, 2003, Giametta invited Grove to take a boat trip on July 15, 2003. HT at 59, 65-66. Grove sent an email to Giametta, informing Giametta that he had a previously-scheduled doctor's appointment for July 15, 2003, but Giametta replied, "If you're serious about your job you'll be on the boat." HT at 64. Grove also testified that Giametta told him that his job was dependent on his participation in the boat trip, so he perceived Giametta's invitation as one that could not be declined. HT at 67. In addition to Giametta and Grove, John Nitti, a Legato sales executive, and Garrett Taylor, another Legato enterprise sales team member and colleague of Grove's, went on the July 15, 2003 boat outing. HT at 60. Grove testified that while Nitti and Taylor were in the bathroom during lunch on the outing, Giametta brought up Grove's questions "about how we were providing numbers to management" and advised that "we do things differently around here…if you don't rock the boat and you go along with the flow, Bruce will take care of you." HT at 65.

[4] Grove testified that he faced challenges and frustrations as he attempted to assimilate into Legato's work environment. As of July of 2003, he had not received business cards or been provided with a laptop computer. HT at 69. In addition, Grove raised questions with Human Resources department regarding the handling of his health care coverage, draw payments and immigration (I-9) forms. *See* CX-AA at 43, 62, 92, 101-102, 110, 121. Regarding Grove's health insurance complaints, Legato Human Resources Manager Scott Sill testified that "we had (unclear whether Legato or EMC) open enrollment" at the end of 2003; Grove was "notified … and you never enrolled for the insurance." HT at 835. Sill further testified that "as Legato became EMC" Grove's Legato health insurance lapsed due to his failure to enroll in EMC's plan. *Id.*; JX-25.

[5] Grove acknowledged on cross examination that he has no specialized training in accounting or finance. HT at 349-50.

On July 31, 2003, after Grove submitted his revenue forecast using the new formula, Giametta returned it with instructions to "beef up [the] numbers." HT at 77. Grove then emailed Giametta, asking if he should use the new formula. HT at 79; CX-AA at 74. Giametta responded the next day, via telephone, telling Grove, "Yes, this is what I want you to do, I don't want you to ask any questions about it … just do it." HT at 73. Grove then submitted a new revenue forecast totaling approximately $41 million. HT at 73; CX-DD at 3. Grove testified that he was concerned that these numbers would be used to inflate Legato's potential sale price, "and possibly the value of the company right around the same time that EMC was purchasing them." HT at 168. As he later explained in a November 4, 2004 email to EMC officials, Grove stated that he was concerned by "the possibility of Legato intentionally inflating their forecasts by using non-standard formulae for the purpose of temporarily making Legato's pipeline look much more significant than it would be, even in the best of circumstances . . . to justify the purchase price paid after the initial offer by EMC." CX-AA at 230; HT at 215.

According to Gheesling, the revenue forecasting / projections used by Legato were an "exercise … for future planning, what was the potential of the marketplace." HT at 589. Gheesling stated "part of my job is to filter through and put a realistic, accurate forecast . . . [w]hat they sent back to me is filtered by myself before I would ever send up any number." *Id.* Gheesling further testified that the revenue forecasting "was just generally for planning purposes for the following year, because, as far as EMC had gone, this had already gone down … The deal was done." HT at 590.[6] As to the specific forecasts in July of 2003 that Grove questioned, Gheesling testified that he was "not shocked that a manager pushes people to say … you're only committing yourself to $200,000 … you need to stretch yourself." HT at 592. Regarding Giametta's instructions to use a new formula, Gheesling stated "that was Charlie's way of trying to figure out what his forecast was … That wasn't committed nor it was [sic] viewed as upside business." HT at 595. Gheesling continued, "I filter those forecasts, so what Charlie sends up through me … does not go and end up at the comptroller. … So, by the time the numbers were actually at any level of corporate view, these things had gone through three or four filters." HT at 595-596. Thus, Gheesling concluded, the revenue forecast was subject to three or four separate filters before being seen at the corporate level. HT at 596. Gheesling also distinguished between the exercise of sizing the potential market for Legato's product versus a "committed" forecast, stating "the forecast that goes up, that is actual revenue that we're saying we're going to produce this quarter." HT at 607-608. Gheesling went on to say the forecast resulting from the use of the new formula "was not used for revenue purpose. … [B]ecause those numbers never went to the levels that it would take to have somebody having a conversation with EMC." HT at 608. Gheesling termed the numbers "market potential, what it the potential of this market, you know, best case." HT at 609.

Grove also complained to Giametta of potential violations of the Generally Accepted Accounting Practices ("GAAP"), citing suspicious activity he discovered with respect when sales revenue from the Northrop Grumman account was booked, and potential "poaching" of his Northrop Grumman and McGraw-Hill accounts by other Legato sales representatives. HT at 127-34, 173; CX-AA at 156-162. Grove alleged that Richard Bruno, a Legato sales employee, contacted a corporation on Grove's client list "pushing Northrup Grumman to purchase a piece

[6] It is noted that the parties stipulated at the hearing that EMC's purchase of Legato was finalized in October of 2003. HT at 49.

of software, specifically not using a purchase order, as was protocol, and specifically asking the Northrup Grumman client to provide his American Express number for the transaction." HT at 128. Grove was concerned that Bruno was working in his account during "July, August and September, collecting orders which don't show up on Legato's books." HT at 130-131; CX-AA 159-160. Thereafter, Grove complained about these transactions to Bob Ligocki, a compensation specialist at Legato: "We need to have access to the reseller documentation . . . According to GAAP to my knowledge, if Legato can ship product and book revenue, then this information must be in Legato's possession and accordingly should be made available to the reps." CX-AA at 160; HT at 134. As a result of his complaints, Grove asserts that "Giametta's attitude towards me changed … he was holding me to a higher standard of accountability" than his colleagues. HT at 134.[7]

Responding to Grove's allegations of GAAP non-compliance, Gheesling testified that Legato's corporate revenue operations unit "interprets GAAP rules, interprets all the auditing rules to ensure that we are in compliance" and made the determination as to when revenue could be booked. HT at 525, 528. Gheesling further testified that customers occasionally ask to defer payment for a period of time, but deferral "doesn't invalidate the contract." HT at 526. In such circumstances, Gheesling testified, revenue is usually booked upon formation of the sales contract. HT at 523. Gheesling, however, disavowed any expertise in GAAP, stating that his primary job function revolves around making sure sales representatives get paid, while it is the responsibility of the comptroller and the corporate revenue operations unit to determine when revenue can be recognized. HT at 527-528.

During the early part of his employment, Grove came to the belief that he was not being properly credited with sales commissions on several transactions, including a deal with Bank of Tokyo that he had been assigned to close by Giametta. HT at 108-109, 111; CX AA at 106-109, 196. On September 18, 2003, he attempted to obtain clarification regarding the Bank of Tokyo sale and commission during a conference call with Gheesling and Giametta who indicated that the Bank of Tokyo was one of another sales representative's "hold-out accounts." HT at 113-114. At the hearing, Gheesling stated that Legato had no formalized policy in 2003 regarding publication of the list of hold out accounts and that he told Grove that Giametta "has a right to make certain decisions about how we manage." HT at 736, 713. Gheesling explained that he typically allowed managers a degree of latitude with regard to sales representative's compensation and that sales representatives are typically compensated on the deals where "they're doing the majority of the work, the first threshold they have to prove to me is that they did the majority of the work." HT at 533-534. As to the Bank of Tokyo sale, Gheesling testified that it was his understanding it was an "opportunity that had already been worked" prior to Grove's involvement which was limited to "provid[ing] a quote and maybe a con call or something like that … I don't think it was what I would consider significant." HT at 538.

Toward the end of the September 18, 2003 conference call, Gheesling asked Grove about his "non-compliance" with his contract that required him to relocate to the Rockville area. HT at

[7] Grove never articulated how Giametta held him to a higher standard of accountability vis-à-vis other sales representatives.

115.[8] Grove testified that he discovered during the ensuing conversation that "Gheesling had approved the moving expenses" and that "Giametta never communicated it to me, ever, on any occasion." HT at 119-20. Gheesling told Grove that he had to make a decision and that his failure to move by the first of the year could create a problem for his continued employment. HT at 122. In Grove's view, this meant that Gheesling would be satisfied so long as he moved down to his territory by the end of 2003. HT at 126. For his part, Gheesling testified the expectation that Grove would move from New York City to a location within his assigned sales territory was a "key condition" of Grove's hiring, "because it made no sense for me to hire somebody in New York City when I could have hired somebody in D.C." HT at 642, 698-700, 892.

In fact, Grove never did relocate to a place within his assigned sales territory. He did however, leave his apartment in New York City to move in with another Legato sales representative in Princeton, New Jersey "because I was not making the money I expected, [so] I was going to leave my apartment two months early … [and] sublet my apartment … to raise the money to be able to move to Virginia." HT at 117.[9] When Gheesling subsequently learned that Grove had moved to New Jersey instead of a locale within his sales territory, he "was pretty livid, because I felt like, you know, one thing that was very clear, even in my interview with Richard, was that the job was located in D.C." HT at 643.

On October 20, 2003, Grove received email notification of a Legato new employee training session scheduled for November 4-6, 2003 in California. CX-AA at 165; HT at 427. Grove was aware that the training session was mandatory. HT at 428. Grove testified that, on or about October 24, 2003, after reading story on the internet about an employee of Northrop Grumman subsidiary Logicon being "arrested" by the Securities and Exchange Commission ("SEC") in connection with Logicon's dealings with the Legato sales group, he contacted Kevin Gross ("Gross"), an attorney with the San Francisco office of the SEC. HT at 157, 160. He said that this contact was motivated by,

> My concern was mainly that it involved an account for which I was responsible, and account for which I had identified numerous events of anomalous activity … I was talking about the GAAP violations. I mentioned that there were numerous accounts, specifically Northrop Grumman, which did not have the end user data being provided for the sale … I asked about the one-off side letters and side agreements … and I wanted to know to what effect are those legal or illegal.

HT at 165-166. Grove also told Gross that he had "audio recordings of the people in question" which he was unwilling to disclose because he did not have legal counsel. HT at 166-167. Grove testified that Gross informed him that since he was not represented by counsel, his dealings with the SEC "needed to be a one-way relationship, which meant that I could voluntarily call him and give him updates." *Id.* Grove told Gross that he would rather go to EMC with his information and "see how they react." HT at 168.

[8] Grove testified that Gheesling had previously raised the subject of his relocation during a quarterly business review on August 14, 2003. HT at 126.

[9] Grove stated that he informed Giametta of his plan to move to New Jersey where he would be working out of a home office and that Giametta never told him that this arrangement was not satisfactory. HT at 117-118.

Gross reportedly instructed Grove to contact him in a couple weeks after he had gone to EMC and let him know how EMC reacted. *Id.*

On October 27, 2003, Gheesling sent Grove an email requesting he contact Oliver Landau to discuss a potential sales opportunity. HT at 139-140; CX-AA at 174. Grove spoke with Landau later that same afternoon. HT at 140. The next day, Grove received a call from Giametta who said "it had come to his attention that [Grove] was espousing a negative attitude, the most negative attitude ever espoused" and requested that Grove meet him in New York City the next following day. HT at 141, 446-451. Grove and Giametta vehemently disagreed with each other over the attitude issue during this phone conversation. HT at 446-451. Grove responded to Giametta's comments about his attitude by asking, "Why don't you work on keeping people out of my accounts, all right? Why don't you work on doing your job and stop trying to harass me while I'm trying to do my work, Charlie?" HT at 447-448.[10] Grove initially refused Giametta's request for a meeting, stating "unless you tell me specifically who said what, you're not going to see me tomorrow" and "if you want to see me tomorrow, you need to tell me who said what," but he later relented and agreed to meet with Giametta in New York City. HT at 448-449, 451.[11]

Gheesling also claimed that Grove's attitude was negative. As a result of his conversations with Giametta, Gheesling said that he became aware as early as September of 2003 that Giametta "was fundamentally having harder and harder times dealing with [Grove] . . . It was like [Grove was] preaching and . . . on a soapbox about issues . . . it seemed that [Grove] had to persist and to argue in front of everybody, that [he] couldn't take it offline." HT at 616-617. Gheesling testified that he "needed to step back in and make sure both parties [*i.e.*, Grove and Giametta] were clear . . . about the expectations of … working positively." HT at 713.

On October 28, 2003, Giametta sent Grove an email stating that Legato needed more activity in the mid-Atlantic states. CX-AA at 190. In his email reply that same day, Grove acknowledged that Giametta's message concerned how he was not doing enough, but he asserted that his lack of productivity as measured by revenue was not due a lack of effort, but rather to "an inefficient work environment" in which he claimed to be "burdened with unstructured, unrefined, and mandatory tasks which are given priority." *Id.* at 191.

On October 30, 2003, Giametta and Grove met for a little over one hour to discuss Grove's attitude and his frustrations with the company. HT at 148. Grove proceeded to outline his concerns regarding Giametta "allow[ing] other reps to poach in my accounts . . . [and] anomalous fiscal activity that should be monitored," and Grove's belief that he was not being paid properly on sales to his clients. HT at 148-151. Grove and Giametta discussed "mutual goals," and Grove testified that while there was an understanding that they would try to meet

[10] As discussed above, EMC's objection to the admission of Grove's surreptitious tape recordings was overruled.

[11] On cross examination, Grove indicated that he believed he could unilaterally refuse to meet with his manager "under terms of retaliation" and that he felt Giametta was retaliating against him at the time the call was made. HT at 468. Grove allowed his tape recorder to continue running after the telephone conversation with Giametta ended, and he is heard discussing the call with his fiancée and Mr. Taylor, his coworker and housemate. HT at 449-467. During this discussion, Grove discusses his potential next steps, including advising EMC that they were "bringing a cancer into [their] great company, you know, that could kill the whole merger." HT at 463-464.

those goals, "there was no stipulation that if you don't meet these goals you will be terminated." HT at 151-152, 170. At the conclusion of this meeting, Grove told Giametta that he had contacted the SEC: "One of the last things I said to him was, 'Hey, do you know anything about the Northrop Grumman employee being arrested on September 8th, 2003? … I read that this guy was arrested, and then I called the attorneys at the SEC to inquire.'" HT at 153-154. Grove further testified that he told Giametta, "All I did was call them and ask some questions…but from what the attorney said, it sounds like the questions and concerns…could be problematic" with regard to the EMC acquisition." HT at 158, 171. Grove described Giametta's reaction to this revelation as "noticeably distraught." HT at 172. This was the first time Grove told anyone at Legato / EMC of his contact with the SEC. HT at 159.

Grove and Giametta attended a meeting on October 31, 2003 with sales representatives from EMC. While at the meeting, Giametta pulled Grove aside and asked him what he had said to the SEC. HT at 194. Grove said that he refused to discuss the SEC conversations until after his "unresolved issues" (*i.e.*, his complaints about the Bank of Tokyo commission, concerns that that others were working on his McGraw-Hill accounts and the Northrop Grumman "anomalies") were addressed. HT at 195-196. Later that same day, Grove received an email from Giametta, with a 30-day goal plan attached. HT at 201; CX-AA at 216. Grove acknowledged that the 11 goals listed therein are an accurate representation of what he and Giametta had agreed to during their October 30, 2003 meeting, "with the exception that Mr. Giametta left out any goals that he had been responsible for, like getting to the bottom of the Northrop Grumman and the … other concerns that I had expressed with relation to my work environment." HT at 204. The 30-day goals listed in Giametta's email included the following:

1. Sponsor 1 executive breakfast in November located in the Washington DC area
2. Close NASD
3. Schedule 4 Webex or Presentations where I will attend by end of November. Marriot, Fannie Mae, Bear Sterns, McGraw Hill, AMS
4. Complete LSW training
5. Deliver 2 Quotes for Replistor, N/W, or DX by end of November.
6. Schedule two EMC mapping meetings which I will attend by end of November
7. Close a minimum of $200,000
8. Present TAS Plans for Marriott, Fannie Mae, and McGraw Hill by end of November
9. Demonstrate justified pipeline of $1,000,000 by end of November
10. Immediately stop projecting a Negative attitude
11. Present to me a comprehensive Account Matrix for your top 20 accounts identifying individuals responsible for evaluating Legato's Extended Product Set.

CX-AA at 216. Although he testified that he and Giametta agreed on these goals, in his brief Grove argues that the 30-day plan was pretextual in nature and not created in good faith, but rather to establish a foundation for his eventual dismissal. Grove Br. at 4, 7-8.

On or about November 3, 2003, Grove decided that it was time to identify someone in EMC to whom he could take his concerns. HT at 210. Grove testified he sought out:

> the highest person in human resources for the company that just purchased us and lay out my concerns and my, you know, concerns over a hostile work environment and … these other things that I had witnessed which seemed to fit in with some of these other things that people are now being arrested for. So, primarily I had concerns over a hostile work environment and people poaching in my accounts and a bunch of, you know, little things which make your job really hard to do, and, secondarily, I had serious concern that Legato was doing something illegal and that EMC and its investors and clients were going to have to pay for that at some point.

HT at 211-212. As discussed above, Grove was previously scheduled to depart on November 3, 2003 for the mandatory Legato training session in California. However, Grove decided instead "not to go away for a week … but to stay here, engage my concerns, alert EMC and continue to work on … assignments … pertaining to my 30-day goals." HT at 216-217. Grove did not inform anyone in Legato of his decision to not attend the training session. HT at 217, 435. Indeed, the record shows that Giametta, Gheesling and Sill only discovered that Grove did not travel to California when they confirmed he was not on his scheduled flight on November 6, 2003. JX-7.

On November 4, 2003, Grove sent a letter via email which set forth in detail his various concerns to Jack Mollen, EMC's Vice President of Human Resources, and Paul Dacier, EMC's General Counsel. HT at 212; CX-AA at 228-232.[12] In the letter, Grove detailed his concerns of impropriety with regard to Legato, including the possibility of "Legato intentionally inflating ... forecasts . . . raising their pricing" structure for certain products, and revenue recognition that "seem[ed] to be outside of GAAP regulations." CX-AA at 230-231. He wrote that he was presenting "primarily an HR issue…and secondarily presenting concerns … regarding LEGATO and how their actions are affecting EMC's investment in purchasing Legato" and that his "goal is to be able to have EMC address these issues in a confidential and tactful manner" and "allow EMC to act on it's own accord without any intervention by the SEC." *Id.* at 229. Grove stated that he was interested in having an "initial meeting" where he would "look for guidance on what EMC can do to … immediately address these issues" and that "following the meeting, I will assess if EMC's prescribed directives will satisfy and address my concerns as well as act in the best interests of the shareholders and protect EMC." *Id.* at 229-230. He further stated that after an initial meeting with "one person who can document my concerns and inform me as to a process to bring about a resolution, I will then be open to discussing with EMC's COO and General Counsel, if you deem my concerns mutual to them as well." *Id.* at 230. Grove also stated in this letter that "it is not my intention to remove myself from my responsibilities … in closing Q4 business," but he also stated that he had "entered protected activity" and was seeking

[12] At the hearing, Grove testified that he expected Dacier and / or Mollen "to intervene and communicate with people" regarding his absence from training. HT at 435.

"asylum, possibly in the form of a paid leave of absence…and protect[ion]…from direct retaliation." *Id.* at 230-231. Grove testified that after sending the November 4, 2003 letter, he continued to "report to work every day," worked diligently on his 30-day goals and assisted with generating sales proposals. HT at 220, 502; *see also* JX-22.

On November 6, 2003, Giametta sent Grove an email stating that he had received no communication from Grove despite repeated attempts to contact him via cell phone and warning, "If you do not get in touch with me, I will assume that this constitutes your resignation and proceed accordingly." HT at 221; CX-AA at 239; JX-5. Gheesling also sent an email informing Grove that it was "vital" for him to contact Giametta. JX-6. In response to these emails inquiring as to his whereabouts, Grove sent emails on November 6 to Giametta and Scott Sill, a Human Resources executive at Legato, advising them that he had written to EMC management seeking "asylum" and instructing them to contact either Dacier or Mollen with any further questions. HT at 223; CX-AA at 243-245.

Gheesling testified that he decided to terminate Grove's employment on November 6, 2003 after he had learned that Grove was not in attendance at the California training which he considered to be of the highest priority for any newly-hired employee, that nothing was physically wrong with Grove and that Grove had not communicated with him. HT at 554, 567-568. In Gheesling's view, Grove's actions amounted to unacceptable insubordination. HT at 568-569. At that point, Gheesling asked Legato's head of Human Resources, Kimberly Schulze, as well as Sill to immediately initiate action to terminate Grove's employment. HT at 568; JX-6. Gheesling testified on both direct and cross-examination that he had no knowledge of Grove's November 4, 2003 email or any alleged protected activity at the time he made the decision to terminate Grove. HT at 553-554, 567-568, 571, 626. Grove acknowledged on cross-examination that he "never asserted to Mr. Gheesling that I'm seeing illegal activity." HT at 417.

Grove testified that, sometime after 6:00 p.m. on the evening of Sunday, November 9, 2003, Dacier left him a voice mail message stating that he wanted to meet with Grove to discuss his "allegations." HT at 226. Grove replied by email on November 10, denying that he had made any "allegations or accusations" in his November 4, 2003 email and stating that he was concerned that he had not been contacted by EMC's human resources department since he had primarily raised a human resources concern. CX-AA at 246.

On November 10, 2003, Grove did not participate in the weekly Monday morning sales call held by Giametta. HT at 436. Also on November 10, Grove received separate emails from Sill and Dacier who both asked Grove to contact them to discuss his concerns. CX-AA at 247-249.[13] Later that evening, Sill called Grove to inform him that he was being terminated for missing the mandatory sales training. HT at 232, 810. Grove testified that he and Sill then had a candid conversation, during which he informed Sill of the "SEC problems … problems with

[13] It is noted that in his email response to Grove, Dacier tacitly acknowledged Grove's objection to his use of the word "allegations" when he referred to Grove's disclosures as "concerns." CX-AA at 247-249. Dacier also told Grove in this email that he did not need to have an attorney present at the proposed meeting to discuss his disclosures.

Northrop Grumman … inflated revenue forecasts, that I was asked to falsify those forecasts." *Id.* According to Grove, this call ended "amicably . . . I believed fully that he was going to broker . . . a meeting with Jack Mollen." HT at 236. Sill corroborated some of Grove's account of the November 10, 1003 telephone call, stating that he decided not to proceed with the termination after listening to Grove; HT at 815; but he testified that he repeatedly urged Grove to contact Dacier. HT at 831-832. Despite Sill's urgings, Grove advised Dacier in an email that presenting Dacier with the information on his concerns "would not be to my benefit at this time." CX-AA at 251. In this email, Grove attempted to explain that he was motivated not to cooperate by a fear that Dacier would be "thinking of ways to protect EMC" instead of acting on Grove's concerns, and he once again insisted that he wanted to deal with someone in HR because his "concerns are primarily issues pertaining to possible unethical or unprofessional behavior – not necessarily illegal, or at least I am not one to make that judgment." *Id.*

On or about November 11, Gheesling received a call from Sill and Schulze who informed him that Grove was "to be reinstated full time while this matter was reviewed." HT at 561. Grove testified that he then received an email from Sill informing him that EMC had "reinstated [his] email account" and that he was "still employed at LGTO/EMC." HT at 240, CX-AA at 254. That same day, he also received an email from Gheesling stating the quarterly business review meeting was being held the next day. HT at 436, JX-38. Grove did not attend the business review meeting. HT at 437. During cross-examination, he admitted he knew that he was expected to attend and was not excused from attending. HT at 436. When questioned about whether he understood the importance of attending the quarterly business review, Grove testified he "also understood that I had engaged in protected activity and . . . notified EMC, and EMC had not taken any action." *Id*.

Grove maintains that he continued to "report" to work after his reinstatement in November of 2003 by contacting and responding to clients and responding to emails, though he provided no specific examples. HT at 503; JX 22. At the same time, he admitted that he did not participate in mandatory weekly sales conference calls with Giametta or the mandatory quarterly business review following his reinstatement in November and that he did not see any customers or try to make any sales after November of 2003. HT at 436, 503.

Grove sent Sill another email on November 11, 2003, discussing the appropriate forum for disclosing his "tremendous wealth of information" and warning, "unless I am permitted an audience with a person who has the power to act and make decisions based on my documentation and provision of information, I will not grant the courtesy of providing any information past my HR issues." CX-AA at 254. Grove also stated in this email that he had already "made a great deal of [information] available on line." *Id.*[14] He continued that it would not be "acceptable at this point to involve anyone other than HR in the initial discussion." *Id.* at 255. Sill responded by email in which he assured Grove that "Dacier is the guy with the power to act and make all types of decisions, whether they be HR issues or anything else." *Id.*

Grove testified that, notwithstanding EMC's representations that his employment was not terminated on November 10, 2003, he discovered in this time frame that his accounts were

[14] This is an apparent reference to an internet website maintained by Grove. *See* HT at 367-381, RX 7, RX 8.

given away, his company email account was frozen, and his clients as well as his colleagues had been told by Giametta that he had left the company. HT at 237-239. He acknowledged that EMC notified him that his email account had been restored, but he maintained that the account never worked. HT at 246. He also admitted that he never attempted to contact EMC's IT department to correct any problem with his company email account. HT at 438-439. However, he testified that he eventually sent a copy of his November 4, 2003 email to EMC's CEO and that he tried to contact EMC's audit committee but was unable to do so "electronically." HT at 244, 249-251. He also tried to call the audit committee but said that he was informed that the committee would only accept a complaint sent in by mail or verbally related over the phone. HT at 252. He testified that he considered this advice to be "ludicrous and irresponsible . . . and very shady" and that he consequently did not pursue further dealings with the audit committee. HT at 252-253. While Gheesling testified that he had no knowledge of what Giametta said to Grove's colleagues about Grove's status with the company, he insisted that Grove's account base was left intact. HT at 562-564. Gheesling further testified that given Grove's reinstatement, he expected him to "pick up your territory … work your deals … participate in the Monday calls … participate in the quarterly business reviews … and to hopefully make the revenue goals." HT at 629. However, after Grove failed to attend the quarterly business review, Gheesling explained that there were business opportunities in Grove's accounts that needed to be pursued, and he assigned other representatives to pursue these opportunities: "[I]f you got an opportunity, you got to close it, you got to get somebody on the deal to get it closed. I can't wait to figure out if he [Grove] is going to show up to that customer, and I can't wait to figure out what's happening . . . I had to make that judgment . . . the bottom line is, to run a company, you got to continue to have somebody tend to it . . . working the opportunity." HT at 634-635. [15]

On November 13, 2003, Sill sent Grove an email message, stating that EMC wanted to promptly investigate his concerns and, directing Grove's attention to EMC's business conduct guidelines, advising that he had an obligation as an EMC employee to cooperate in any inquiries. JX-15.[16] Showing frustration at the apparent impasse, Sill further stated, "I've arranged a meeting with the top person in our company with regard to legal, compliance and HR issues and now you're reluctant to meet." *Id.*[17] He concluded by urging Grove again to contact Dacier "right away." *Id.*

Sill sent another email to Grove on November 18, 2003 in which he questioned why Grove had not responded concerning a meeting with Dacier and asking Grove to propose dates and times for a meeting. CX-AA at 266. Grove responded the next day that he was requesting an opportunity to present this information to someone from EMC's human resources department. *Id.* at 266-267. He further stated,

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[15] I found Gheesling to be a credible witness, and I specifically credit his testimony on the status of Grove's accounts during the November – December 2003 time frame, noting that he was in a better position to know than Grove who presented no evidence other than his own unsubstantiated beliefs that his accounts were actually terminated.

[16] These emails were sent to Grove's personal email address rather than his Legato email account. HT at 495; JX 15.

[17] Sill testified at the hearing that EMC's "legal group" is responsible for determining what the company should do when confronted with accusations that could involve protected activity. HT at 851.

> while I appreciate that Mr. Dacier may very well be the man who can 'make things happen'; I do not think that he is the appropriate audience in this particular case . . . It is my information, I do not have to provide it to anyone other than I see fit to hear or read it. I do not see why I would speak first to Mr. Dacier (as your email dated 11-11-04 1:14PM states) and that *if necessary* Mr. Mollen would be included in any HR issues. This is only an HR issue . . . **I will not disclose this information to anyone who is outside of EMC's Human Resources department.**"

Id. at 267 (emphasis in original). Despite his claim that he had only raised "an HR issue," Grove also stated in his email to Sill that he had come "forward with EMC Confidential information, concerns which involve fraud and unethical activities on the part of Legato executives." *Id.* Grove stated that he would he would be willing to "present the information to some other party who is willing to hear what I have heard; and who is willing to review the actions that have occurred during my tenure at Legato." *Id.* In closing, he charged that "EMC has not taken step one to address my concerns outside of Mr. Dacier's incessant attempts to force a meeting with him." *Id.*

Grove forwarded his concerns, raised in his November 4, 2003 letter, to EMC CEO Joseph Tucci in an email dated November 24, 2003, in which he complained that no one from EMC had contacted him. CX-AA at 276. On November 24, 2003, Tucci responded, that although Grove had "indicated that no one from EMC has contacted you … I'm told that Paul Dacier, EMC's compliance officer has repeatedly tried to reach you … I have asked Paul to contact you again today!" CX-AA at 277. Grove emailed back to Tucci that "my counsel will be contacting him [Dacier] to schedule a meeting." *Id.*

A week later, Sill sent Grove an email on December 2, 2003, asking Grove to contact him in order to set up a meeting "between you, Dacier and others." CX-AA at 278. Grove replied that he was "not amiable to meeting with Dacier without counsel present." HT at 257. Grove replied that he "would not discuss this information with EMC's General Counsel without my also having counsel present," reiterating that "my concerns were not Legal concerns, but rather concerns of an unethical and unprofessional work environment and of a Human Resources nature." JX-22 at 1. Grove represented that he had "confirmed this opinion with my counsel" and that "I will be meeting with Paul Dacier; but I will not be following his advice on presenting this information without counsel present on my behalf." *Id.* at 2. At the hearing, Grove conceded that he had not, in fact, retained any counsel. HT at 496-497.[18]

In emails dated December 2 and 3, 2003, Grove was informed by Sill "that I was an employee in good standing but that I had not been reporting to work." HT at 845; CX-AA at 278, 280. Sill testified that it was his understanding when he wrote the email that wasn't "making calls to customers" or "doing the job that [he was] hired to do." HT at 845. In another email sent on December 4, 2003, Sill again urged Grove to meet with Dacier stating, "it's time for you to contact Dacier and get a dialogue started to talk about your concerns." CX-AA at 280.

[18] Indeed, Grove has not been represented by counsel at any stage of this proceeding.

Grove testified that he received no further communication from EMC until January of 2004, when he received a voice mail from a Wendy Canessa in EMC's HR department indicating that his health care was going to be terminated because EMC had not received the necessary paperwork. HT at 266. Grove maintained that he had sent in his healthcare paperwork in a package which also contained Taylor's paperwork in October of 2003. *Id.* He further testified that he left two voice mail messages in response to the voicemail message from the HR department. *Id.*

On January 15, 2004, Grove returned a telephone call from Gheesling who transferred him to Sill who advised that he was being terminated "for cause." HT at 268. When Grove countered that he had engaged in protected activity, Sill responded that his termination had been "cleared through legal." HT at 268, 834. Sill testified that there were three reasons for Grove's termination: (1) his refusal to cooperate with Dacier in EMC's investigation into the issues that he had raised; (2) his failure to do his job; and (3) violations of the business conduct guidelines. HT at 841-842. Sill testified that, in his experience within Legato / EMC, there were maybe a "couple dozen" employees who were terminated for failure to follow instructions or insubordination. HT at 848.

Grove did not receive his termination letter for two weeks, and he testified that he did not receive any information regarding COBRA benefits until May 10, 2004 when he was advised that he could obtain coverage provided that he paid five month's back premiums. HT at 272-274. Grove declined COBRA benefits in May and testified that he only learned through discovery that EMC had made multiple attempts to communicate with him regarding COBRA benefits. HT at 345, 471, 835; JX 27. EMC does not dispute that Grove was not immediately sent information of COBRA benefits when he was terminated on January 15, 2004. In this regard, Sill testified that EMC uses a third party administrator for benefits, and he explained that the third party administrator did not have any record of Grove because his health insurance had lapsed as of the date of his termination. HT 834-835. Sill further testified that when the error was discovered, EMC attempted to provide Grove COBRA coverage retroactive to the date of his termination and forwarded COBRA information to him at his EMC email address which Sill had verified as functioning. HT at 835-836; JX 26. Sill also acknowledged that Grove was unhappy when he learned in May of 2004 that he would have to pay past premiums in order to have his health insurance made retroactive to January 15, 2004, but he testified that under COBRA, an individual is responsible for all costs of coverage. HT at 844.

IV. Conclusions of Law

A. Timeliness and Grove's Hostile Work Environment Claims

A complaint under the Sarbanes-Oxley Act must be filed within ninety days after the alleged violation occurred. 18 U.S.C.A. § 1514A(b)(2)(D). Aside from the January 15, 2004 termination action and the subsequent issue related to Grove's post-termination health insurance coverage, all of the conduct which Grove alleges to be retaliatory occurred more than ninety days

before his complaint was filed with OSHA on April 13, 2004.[19] Although the filing limitation period is not jurisdictional and subject to equitable modification; *see Moldauer v. Canandaigua Wine Co.*, USDOL/OALJ Reporter (PDF), ARB Case No. 04-022, ALJ Case No. 2003-SOX-026 (Dec. 30, 2005) (*Moldauer*) at 5); Grove has made no argument or showing that equitable modification is available in this case.[20] However, when questioned during a pre-trial conference about his allegations, he indicated that he is alleging that EMC / Legato's conduct prior to his termination created a "hostile work environment," and he was allowed to amend his complaint to allege that a hostile work environment existed prior to his termination and continued into the 90-day limitation period, culminating in his termination on January 15, 2004. ALJX 27 at 7.[21] Therefore, there is a threshold question as to whether conduct by EMC / Legato that occurred more than 90 days before Grove filed his Sarbanes-Oxley complaint with OSHA are actionable under a hostile work environment theory. *See Brune v. Horizon Air Industries, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) (*Brune*) at 9 (applying the hostile work environment analysis articulated in *National Passenger R.R. Corp. v. Morgan*, 536 U.S. 101 (2002) (*Morgan*) to hostile work environment claims brought under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121).[22] *See also Sasse v. Office of United States Attorney, United States Dept. of Justice*, USDOL/OALJ Reporter (PDF), ARB Nos. 02-077, 02-078, 03-044, ALJ Case No. 98-CAA-7, 2004 WL 230771 (ARB Jan. 30, 2004) (*Sasse*), *aff'd sub nom Sasse v. U.S. Dep't. of Labor*, 409 F.3d 773 (6th Cir. 2005).

The first issue in evaluating Grove's hostile work environment claims is whether the actions that occurred more than 90 days before the complaint was filed constitute "discrete acts" such as a termination, failure to promote, denial of transfer, or refusal to hire, which must have occurred within the limitation period to be actionable, or a series of related actions which may not be individually actionable but collectively or cumulatively can be said to amount to an unlawful employment practice. *Morgan*, 506 U.S. at 114-115. "[T]he essential difference between conduct that amounts to [a] discrete adverse employment action and conduct that amounts to a hostile work environment is that the former has an immediate and tangible effect on the employee's income or employment while the latter . . . affects the employee's psyche first,

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[19] April 13, 2004, was the 89th day following January 15, 2004 since there were 29 days in February of 2004. Therefore, any actions that occurred prior to January 14, 2004 are outside of Sarbanes-Oxley's 90-day filing limitation period.

[20] The ARB has recognized that there are "three principal situations in which equitable modification may apply: extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Moldauer* at 5.

[21] Grove was questioned regarding his allegations and allowed to amend his complaint at the hearing consistent with the well-recognized principle that a court has some responsibility to assist a *pro se* litigant in clarifying pleadings. *See Young v. Schlumberger Oil Field Services*, USDOL/OALJ Reporter (PDF), ARB No. 00-075, ALJ No. 2000-STA-28 (ARB Feb. 28, 2003) at 6 (Where *pro se* litigant's brief to the court "is mostly a narrative account of [the litigant's] view of the evidence," the ALJ "has some responsibility for helping."); *Griffith v. Wackenhut Corp.*, USDOL/OALJ Reporter (HTML), ARB No. 98-067, ALJ No. 1997-ERA-52 (ARB Feb. 29, 2000) at 15 n.5 (ALJ must "construe [a pro se litigant's] complaints liberally and not overly technically").

[22] The Sarbanes-Oxley Act incorporates the legal burdens of proof set forth in the Ford Aviation Act. *See* 18 U.S.C.A. § 1514A(b)(2)(C).

and his earning power or prospects only secondarily." *Sasse*, 2004 WL 230771*30. In his post-hearing brief, Grove provides the following articulation of his hostile work environment claim:

> Respondent EMC CORPORATION chose to engage in a series of actions against me, starting on July 2, 2003 and escalating through October, when I felt that my personal safety might be in jeopardy; and though I sought asylum on November 4, 2003, what EMC Human Resources delivered, in large doses was retaliation on November 6th that escalated into 'alienation' when my accounts were dissolved on November 10th, and from that alienation EMC claimed that I was 'non-responsive' and 'not showing up for work'; characterizations which could be construed as an evidence that EMC created a hostile work environment prior to November 10, 2003 (the first attempt to terminate me) all the way through until January 15, 2004 and well beyond.

Grove Br. at 13. Later in his brief, Grove alludes to the following circumstances as contributing to a hostile work environment: (1) failure to receive compensation for the Bank of Tokyo deal; (2) the dissolution of his client accounts; (3) termination of his Legato email account; (4) the human resources department's loss of tax and health insurance forms; and, (5) Giametta informing Grove's clients that he had left the company. *Id.* at 16-17. In my view, the non-payment of a commission for the Bank of Tokyo deal, the alleged retaliation on November 6, 2003, which apparently refers to the efforts by Gheesling to terminate his employment, and Grove's "alienation" from EMC when his accounts were "dissolved" or reassigned[23] all clearly constituted discrete adverse actions which had an immediate and tangible effect on Grove's income and employment. Therefore, I conclude that these events are not actionable since they occurred more than ninety days before Grove filed his Sarbanes-Oxley complaint.

With respect to the other conduct which allegedly created the hostile work environment, I find that inasmuch as none of these actions or inactions had any immediate and tangible effect on Grove's income or employment, they were not the type of discrete adverse employment actions that would have been individually actionable and, therefore, individually subject to the 90-day limitation period.[24] This finding, however, does not mean that Grove has made out a viable hostile work environment claim. Regarding the timeliness of a hostile work environment claim, the Supreme Court has held, "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Morgan* at 122. Here, the only act that occurred within the 90-day limitation period was Grove's termination on January

[23] As discussed above, I have determined that the credible evidence of record does not establish that Grove's accounts were dissolved or terminated during the November – December 2003 time frame. *See* note 15, *supra*.

[24] Reading Grove's complaint, testimony and brief liberally, I find that he has asserted the following as the "series of actions" contributing to the alleged hostile work environment: Giametta's July 2, 2003 directive that he revise his revenue forecasts; Legato's delay in providing him with a laptop computer and business cards; the handling or mishandling of his immigration, tax and health insurance forms; Giametta's failure to tell him that Gheesling had approved relocation expenses; the allegedly coercive boat trip with Giametta; Giametta's attitude toward him over the entire course of his employment; Giametta's telling clients that Grove had left the company; and the alleged deactivation of his email account.

15, 2007. As this was a separate and discrete adverse employment action, it cannot be considered part of an unlawful employment practice that is based on a series of individually non-actionable slights, discourtesies, harassments and coercions. Since the only act that occurred within the limitation period cannot be considered to be part of the same unlawful employment practice as the other acts that allegedly created a hostile work environment, I conclude that Grove's hostile work environment claim is time-barred. *See Belt v. United States Enrichment Corp.*, USDOL/OALJ Reporter (HTML) ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004) (*Belt*) at 8, *aff'd sub nom Belt v. United States Dep't of Labor*, 163 Fed.Appx. 382, 2006 WL 197385 (6th Cir. Jan. 25, 2006),

Assuming, *arguendo*, that Grove's complaint could be viewed as timely filed with respect to any conduct outside of the 90-day limitation period, I find that the evidence is insufficient to establish that EMC / Legato engaged in a series of pre-termination actions that rose to the level of creating a hostile work environment. A hostile work environment that amounts to an unlawful employment practice exists "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'. . . ." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *quoting Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986). Following the Supreme Court's rulings in *Harris* and *Vinson*, the Administrative Review Board has held that whistleblower complainant alleging a hostile work environment violation "must establish that the conduct complained of was extremely serious or serious and pervasive." *Brune* at 10. The ARB noted that "[d]iscourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable." *Id*. (*citing Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)). To make out an actionable claim of an unlawfully hostile work environment, "a complainant is required to prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and, 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant." *Id.* at 10-11 (citations omitted). In evaluating the severity and pervasiveness of the alleged harassing conduct, consideration must be given to the relevant circumstances including "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Id.* at 11 (*quoting Berkman v. U.S. Coast Guard Academy*, USDOL/OALJ Reporter (HTML) ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9 (ARB Feb. 29, 2000) at 16.

Upon consideration of the totality of evidence, I find that Grove has failed to establish that his alleged harassment was sufficiently severe or pervasive enough so as to alter conditions of employment and thus create an abusive working environment. With the exception of the discrete actions relating to his sales commissions, termination on or about November 10, 2003 and alleged dissolution of his client accounts which are time-barred, Grove presented no evidence that the conditions of his employment were altered or that he was subjected to an intimidating or abusive working environment. He also failed to produce evidence that the alleged harassment would have detrimentally affected a reasonable person and that it did

detrimentally affect him. Grove testified that he did not have any problem working with Giametta as late as September of 2003 which undercuts his claim that he was coerced and intimidated during the July 15, 2003 boat trip. TR at 551. Though he attributes the alleged premature termination and non-reactivation of his corporate email account to a campaign of retaliation for his protected activity, Grove testified that he "did not call the help desk to ask about my email" because "I was not interested in tracking down technical support to figure out something that was terminated purposely by my management." HT at 439. Grove further testified that he never contacted his managers, Gheesling or Giametta, to inquire about the problems he was having with his email and his ability to access the Virtual Private Network ("VPN"). *Id.* at 440. A reasonable person, especially one who relies as heavily as Grove did on email as a means of communication, would simply contact technical support and ask to have any problem investigated and corrected before assuming that the problem is related to a sinister conspiracy.[25] The rest of Grove's complaints relate to routine workplace irritations and inconveniences, such as delays in getting a laptop and business cards and loss or mishandling of personnel documents. Many new employees must endure inconveniences of this sort which do not alter working conditions and would not detrimentally affect any reasonable person. Therefore, I conclude that even assuming that Grove's hostile work environment claim is timely, the evidence falls well short of establishing that he was subjected to harassment that was sufficiently severe or pervasive so as to alter his conditions of employment and that such harassment would have detrimentally affected a reasonable person.

B. Termination of Grove's Employment

As there is no dispute that Grove's complaint was timely filed with respect to his January 15, 2004 termination from EMC, I can proceed directly to the merits of his complaint. Whistleblower complaints brought under Sarbanes-Oxley are governed by the legal burdens of proof identified by Congress in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 ("AIR"). 18 U.S.C.A. § 1514A(b)(2)(C). Accordingly, a Sarbanes-Oxley complainant bears the burden of proving the following elements by a preponderance of the evidence: (1) that he or she engaged in a protected activity or conduct; (2) that the respondent knew that the complainant engaged in the protected activity; (3) that the complainant suffered an unfavorable personnel action; and (4) that the protected activity was a contributing factor in the unfavorable action. *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, 2005 WL 1827748*5 (ARB July 29, 2005) (*Getman*); *Fraser v. Fiduciary Trust Co. Intern.*, 417 F.Supp.2d 310, 322 (S.D.N.Y. 2006) (*Fraser*). If the complainant meets this burden, the respondent can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity. 18 U.S.C.A. § 42121(a) - (b)(2)(B)(iv); *Getman*, 2005 WL 1827748*5.

1. Grove engaged in protected activity.

Section 806 of the Sarbanes-Oxley Act provides employees of publicly traded companies with the following protections:

[25] It is noted that Grove testified that he used email as a means of communication in order to "create a paper trail." HT at 502.

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES- No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A(a). To avail himself of this protection, Grove must "prove by a preponderance of the evidence that he provided information to [EMC] regarding a situation that he reasonably believed constituted a violation of 18 U.S.C.A., sections 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of Federal law relating to fraud against shareholders." *Welch v. Cardinal Bankshares Corp.*, USDOL/OALJ Reporter (PDF) ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB May 31, 2007) (*Welch*) at 8. Grove does not need to show an actual violation of law or even cite a particular statute that he believed was being violated. *Fraser*, 417 F.Supp.2d at 322; *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365, 1375 (N.D.Ga. 2004) (*Collins*). *See also Mahony v. KeySpan Corp.*, 2007 WL 805813*5 (E.D.N.Y. Mar. 12, 2007). However, Grove must show that his "communications 'definitively and specifically' related to any of the listed federal securities laws." *Platone v FLYi, Inc.*, USDOL/OALJ Reporter ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006) (*Platone*) at 17. *See also Fraser*, 417 F.Supp.2d at 322. The Act's "reasonable belief" language creates an objective standard that requires Grove to prove both that

he "actually believed" that any conditions reported to EMC fell within the ambit of any of the listed securities laws "and that a person with his expertise and knowledge would have reasonably believed that as well." *Welch* at 10; *Collins* at 1378. Thus, Grove's disclosures must at a minimum express his reasonable belief that his employer was "defrauding shareholders or violating security regulations." *Harvey v. Home Depot U.S.A., Inc*., USDOL/OALJ Reporter (PDF) ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36 (ARB June 2, 2006) at 13-14.

Grove asserts he engaged in six instances of activity protected by Sarbanes-Oxley: (1) raising concerns to Giametta regarding the revised revenue forecasting formula; (2) questioning the accounting procedures used during the Bank of Tokyo deal; (3) raising concerns regarding the "illicit / illegal activity with respect to … Northrop Grumman;" (4) questioning the functionality of Legato's product; (5) contacting the SEC; and, (6) sending the November 4, 2003 email letter to Dacier and Mollen.[26] Grove Br. at 2. EMC generally argues that Grove does not meet the Act's requirements for protected activity because he failed to link his concerns to any "violation of Federal securities law, SEC rule or regulation, or other provision of Federal law protecting shareholders against fraud." EMC Br. at 5-6. EMC additionally asserts that Grove did not report his concerns in a method or manner that would afford him protection under SOX. *Id.* at 6. Finally, EMC argues that Grove's beliefs were unreasonable and, therefore, unprotected. *Id.* at 6-10. Each instance of Grove's asserted protected activity is analyzed below.

a. Revenue Forecasting Formula

Grove contends that he reasonably believed the formula used to project potential future revenues "fraudulently enlarged Legato's purchase price" and thus was being used to defraud EMC shareholders. Grove Br. at 21. Grove argues this new formula "increase[d] revenue projections by a factor of 10; [and] during this same time, EMC's offer to Legato grew from six hundred million dollars to one billion, three hundred million dollars." *Id.* at 22.[27] Grove initially "protested" the use of the revised formula to Giametta, but he later mentioned the issue to the SEC attorney and in his November 4, 2003 email correspondence to Dacier and Mollen. HT at 51, 61; 167-168; CX-AA at 230. Grove testified that he knew the forecasts were being used by EMC to conduct their due diligence regarding the purchase price to offer for Legato "because of the proximity of the date and the urgency with which they were requested and the people … those numbers were being provided for." HT at 512. However, he conceded that he did not attempt to contact anyone in Legato's finance department to specifically inquire as to the intended use of the revenue projections. HT at 514.

[26] In his brief, Grove refers to his protected activity as "including but not limited to" the instances outlined above. Grove Br. at 2. Since the burden is on Grove to establish that he engaged in protected activity, I have not combed through his complex and lengthy testimony to discover additional activities that might arguably draw Sarbanes-Oxley protection where he has made no effort to do so himself as this would violate EMC's rights to basic due process. *See Ass't Sec'y & Helgren v. Minnesota Corn Processors, Inc*., USDOL/OALJ Reporter (HTML) ARB No. 01-042, ALJ No. 2000-STA-44 (ARB July 31, 2003) at 4.

[27] Neither party introduced any evidence beyond Grove's testimony regarding fluctuations in EMC's offer to Legato during the period that the revenue forecasts were requested. Thus, Grove's testimony to the effect that the purchase price was more than twice the initial offer is uncontradicted.

Unlike the complainant in *Welch* who was the respondent corporation's chief financial officer and who presumably had a relatively sophisticated understanding of corporate finance and accounting procedures; *see Welch* at 11; Grove was a salesman with no specialized training or expertise in the area of corporate acquisitions. The evidence of record does not establish that Legato recklessly or fraudulently inflated its revenue forecasts for the purpose of drawing a higher purchase offer from EMC, but Grove is not required to prove an actual violation of securities law. *Fraser*, 417 F.Supp.2d at 322. There is no evidence that Grove did not actually believe that the revised revenue forecast overstated Legato's expected income,[28] and I find that it would not be unreasonable for a person with Grove's relatively low level of expertise and knowledge to believe that use of a new formula, which dramatically increased projected income at a time when EMC's purchase offer increased substantially, presented potential investors with a materially misleading picture of Legato's financial condition. Since Grove believed, and a person with comparable expertise and knowledge would have reasonably believed, that the ten-fold inflation of revenue forecasts constituted fraud against EMC's shareholders, I find that Grove engaged in protected activity when he raised his concerns over the revenue forecasts initially to Giametta, and eventually to EMC management via the November 4, 2003 email. *See Platone* at 17 ("an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act").

b. Grove's Telephone Call to the SEC

Grove testified that he contacted attorney Kevin Gross of the SEC in October of 2003 and "identified numerous events of anomalous activity . . . GAAP violations." HT at 165. He also informed Gross "about one-off side letters and side agreements" and asked whether such arrangements were legal. HT at 166. Grove further informed Gross of his belief that "the illicit formulae, if you will, were being used at the highest level of Legato to make executive decisions." *Id.* at 168. According to Grove, Gross asked him to provide his audio recordings which purportedly corroborated his allegations against Legato officials, but he declined to provide the recordings because he did not have an attorney and because "I am not an expert in that area, I'm just an employee -- if I'm wrong, I don't want a public investigation coming out." *Id.* Instead, Grove testified that he told Gross that he "would like to go to EMC . . . and brief them with my concerns and see how they react." HT at 167-168.

As set forth above, the Sarbanes-Oxley Act protects an employee who acts lawfully "to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A(a)(2). Grove did not file or cause to be filed any proceeding before the SEC, and he did not testify, participate or otherwise assist in any proceeding before the SEC. Rather, his testimony shows that he called an SEC attorney to get information and that he specifically refused to provide any evidence, opting instead to pursue his concerns internally with EMC. On these facts, one might

[28] Regarding the "reasonable belief" standard, the legislative history of the Sarbanes-Oxley Act that "[t]he threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Legislative History of Title VIII of HR 3763: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418 - S7421 (July 26, 2002), 2002 WL 32054527.

conclude that Grove's contact with the SEC is not protected because he never initiated or participated in any proceeding before that agency. In my view, however, this would require a narrow and overly technical reading of the Act that would run counter to the legislative history which reflects that "the law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." *Carnero v. Boston Scientific Corporation*, 433 F.3d 1, 13 (1st Cir. 2005) (citing Senator Leahy's comments at 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003)). Moreover, the ARB has recognized that a whistleblower protection statute "should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation." *Fields v. Florida Power Corp*., USDOL/OALJ Reporter (HTML) ARB No. 97-070 , ALJ No. 96-ERA-22 (ARB Mar. 13, 1998) at 10 (decision under the Energy Reorganization Act, 42 U.S.C. § 5851, citing *English v. General Elec. Co*., 496 U.S. 72 (1990) and *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws")). The ARB has also suggested that an employee's contact with a government agency for the purpose of obtaining a legal opinion related to the employee's raising of protected concerns is protected under Energy Reorganization Act. *Jenkins v. United States Environmental Protection Agency*, USDOL/OALJ Reporter (HTML) ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003) at 16. Accordingly, I conclude that when an employee contacts the SEC in connection with a reasonable belief of a securities law violation within the scope of Sarbanes-Oxley, as Grove did here, that action is protected even if no formal SEC proceeding is ever initiated. To conclude otherwise would mean that an employee could be lawfully fired for contacting the SEC to obtain information about a practice that the employee reasonably believes to be in violation of a securities law, as long as the employee did not actually file, testify or participate in a proceeding before the SEC. For these reasons, I find that Grove engaged in protected activity when he contacted the SEC.

c. The Bank of Tokyo Transaction

Grove testified he "confirmed that the Bank of Tokyo order … was booked … under Q-3 for Legato, [and] the product was not shipped until August 11, and not received by the client until September 11th." HT at 174-175. Grove testified that although he had no specific financial or accounting training, he believed that Legato improperly booked Bank of Tokyo revenue contrary to Generally Accepted Accounting Procedures ("GAAP"). HT at 174-175, 349-350. However, a review of the evidentiary record reveals that the concerns that Grove raised to Legato officials (Giametta, Gheesling, Linda Hale in licensing and compensation specialist Bob Ligocki) related not to any perceived GAAP irregularities but to Grove's belief that he was owed a sales commission. HT at 350. There is probably no more fundamental principle of whistleblower law than the requirement that "[a] would-be whistleblower must actually express his concerns in order for his activity to be considered protected." *Henrich v. Ecolab, Inc*., USDOL/OALJ Reporter (PDF) ARB No. 05-030, ALJ No. 2004-SOX-51 (ARB June 29, 2006) at 11. As there is no evidence that Grove raised any GAAP irregularities or concerns of other

securities law violations in relation to the Bank of Tokyo deal with Legato officials, I find that his communications with Legato officials about this deal were not protected.[29]

d. The Northrop Grumman Account

Grove also argues he engaged in protected activity when he reported anomalies and "side-letter deals" in Legato's Northrop Grumman account. Grove Br. at 20. Grove testified he received an email asking him to provide the enabler code to authorize the permanent use of a Legato software product that he was told Northrop Grumman purchased in September of 2003. HT at 127-128. At this time, he learned that another Legato sales representative, Richard Bruno, had "specifically ask[ed] the Northrop Grumman client to provide his American Express number for the transaction." HT at 128. Grove thought this suspicious and searched for the order history, but was unable to find any reference to it in Legato's order management system. HT at 129. When he discovered the order, Grove sent several emails to Giametta, Bruno and Ligocki complaining that Bruno had trespassed on his sales territory and that he had not received commissions on sales that should have been credited to him. CX-AA at 146-153, 156-163. Although he does mention GAAP in one email to Ligocki; CX-AA at 160 ("according to GAAP to my knowledge, if Legato can ship product and book revenue, this information [product reseller documentation] must be in Legato's possession"); it is clear from context that the complaints that Grove raised with Legato officials concerned his compensation rather than GAAP or any other perceived violations of securities laws. Consequently, these communications, like those in relation to the Bank of Tokyo transaction, were not protected by Sarbanes-Oxley.

e. Legato Product Functionality

Grove testified that he and Giametta attended meetings with two Legato clients who reportedly disclosed that they had discovered a flaw in Legato's email archive product which would enable a corporate malefactor to circumvent the Sarbanes-Oxley compliance requirements for which the product had been designed and marketed. TR 84-94. There is, however, no evidence that Grove ever raised concerns with Legato or EMC management about the potential abuse of the product. That is, he never blew the whistle on this situation. Therefore, he did not engage in any protected activity in connection with this issue.

f. The November 4, 2003 Email

Grove's asserted protected whistleblowing activity culminated with the November 4, 2003 letter that he sent via email to Jack Mollen, the Senior Vice President of Human Resources for EMC, and Paul Dacier, EMC's General Counsel. In this letter, Grove outlined his concerns including "the possibility of Legato intentionally inflating their forecasts by using non-standard formulas . . . making Legato's pipeline look much more significant" and "the possibility of Legato intentionally booking orders that are not shipping to customers for the purpose of expediting revenue recognition." CX-AA at 230. Based on my earlier finding that Grove's

[29] It is noted that Grove did testify that he reported "the GAAP violations" to the SEC, conduct which I have found to be protected by Sarbanes-Oxley. HT at 165.

raising revenue forecasting concerns with Giametta were protected, I conclude that Grove's disclosures in the November 4, 2003 letter were also protected.

2. EMC had knowledge of Grove's protected activity.

While it disputes Grove's claims that he engaged in activity protected under Sarbanes-Oxley, EMC does not deny the obvious fact that it had knowledge of the activities which I have found to be protected at the time that it undertook to terminate his employment on January 15, 2004. Additionally, Grove's uncontradicted testimony establishes that he informed Giametta that he had contacted the SEC, and EMC responded to his November 4, 2003 email letter which outlined his multiple concerns. Grove thus satisfies the knowledge element of his case.

3. Grove suffered an adverse personnel action.

Grove also satisfies the adverse employment action element as it is undisputed that that the January 15, 2004 termination qualifies as a "discharge" within the meaning of section 806 of Sarbanes-Oxley. 18 U.S.C.A. § 1514A(a); *see also Allen v. Stewart Enterprises, Inc.*, USDOL/OALJ Reporter (PDF) ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006) at 15 (noting that "an employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures"),[30] *appeal filed sub nom Allen v. Administrative Review Board*, No. 06-60849 (5th Cir.). It is beyond any reasonable debate that termination of a whistleblower's employment is reasonably likely to deter employees from engaging in protected activity.

4. Grove's protected activity was not a contributing factor in his termination.

The final element of Grove's case requires him to prove by a preponderance of the evidence that his protected activity was a contributing factor in EMC's decision to terminate his employment. 49 U.S.C.A. § 42121(b)(2)(B)(iii). A contributing factor under Sarbanes-Oxley is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, USDOL/OALJ Reporter (PDF) ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006) at 17, *appeal filed sub nom Allen v. Administrative Review Board*, No. 06-60849 (5th Cir.). The contributing factor standard is a broad one that was "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.* (internal quotation marks in original), citing *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1) (West 1996)). *See also Collins*, 334 F.Supp.2d at 1378-1379. Though the contributing factor standard places only a relatively low hurdle in the path of a Sarbanes-Oxley complainant, it is one that Grove cannot surmount on this record. That is, the evidence clearly shows that rather than contributing to his termination, Grove's protected activity, if anything, insulated him from any adverse employment consequences for a time and effectively delayed the terminations decision which, I find, was based on conduct that was not protected by the Sarbanes-Oxley Act.

[30] The ARB derived this standard from the "detrimental effects" test adopted by the Ninth Circuit in *Ray v. Henderson*, 217 F.3d. 1234 (9th Cir. 2000) for determining whether a challenged employment action is adverse.

The starting point for considering whether Grove has met his burden of proving that his protected activity played a contributory role in EMC's decision to terminate his employment on January 15, 2004 is in the early days of November when Gheesling initiated steps to have Grove removed after he failed to appear at the training session in California. Grove produced no evidence to indicate that Gheesling had any knowledge of his protected activity prior to making the decision to terminate him on November 6, 2003, and he acknowledged that he "never asserted to Mr. Gheesling that I'm seeing illegal activity." HT at 417. Moreover, Gheesling credibly testified that Giametta did not inform him that Grove had contacted the SEC and that it was not until "weeks" after November 6, 2003 that he learned that Grove had written to EMC raising concerns about business practices. HT at 553-554.[31] Therefore, the evidence establishes that Grove's protected activity did not play any role in Gheesling's decision to initiate termination actions on November 6, 2003. The evidence further demonstrates that once Sill, the management official responsible for carrying out Gheesling's decision, became aware of the nature of Grove's November 4, 2003 correspondence to Dacier and Mollen, he immediately canceled the termination and instructed Gheesling that Grove was to be reinstated. Thus, Grove's protected activity, especially his November 4, 2003 email correspondence to EMC officials Dacier and Mollen, directly resulted in the initial decision not to terminate his employment.

At this point, Grove had blown the whistle, and EMC was ready to listen. However, over the next several weeks, Grove swallowed the whistle and decided not to cooperate with EMC in investigating his concerns because he objected to meeting with EMC's General Counsel. Apparently, it was Grove's belief that having "entered protected activity," he was eligible for "asylum" which, among other things, would effectively provide him with absolute insulation from any adverse employment consequences. Under this theory, he apparently believed that he was within his rights to unilaterally stop doing the job that he was hired to perform, dictate the ground rules that would govern the manner in which he cooperated in EMC's investigation of the issues he raised in his November 4, 2003 email, and to refuse to cooperate if his terms were not met. I find no support for Grove's interpretation of Sarbanes-Oxley in the language of the statute, its legislative history or legal precedent developed under the Act.

The intention of the Congress in passing Sarbanes-Oxley was to protect the investing public from corporate fraud by and "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly treaded companies." Legislative History of Title VIII of H.R. 3763: The Sarbanes-Oxley Act of 2002, Remarks by Mr. Leahy in The Senate, 2002 WL 32054527 (July 26, 2002). As Senator Leahy pointed out, section 806 of the Act was enacted to "protect . . . employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, *their supervisors (or other proper people within a corporation)*, or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. *Id.* (emphasis supplied). In my view, the legislative history expresses an implicit expectation that when an employee makes a protected disclosure of fraudulent activity to an employer, the employee would not unreasonably refuse to cooperate in the employer's lawful investigation into the disclosure.

[31] It is noted that Grove states in his brief that "directly following said engagement in protected activity, Giametta informed Gheesling." Grove Br. at 4. There is no evidence in the record to support this claim.

After sending his November 4, 2003 email to Dacier and Mollen, Grove did not report any fraudulent activity, disclose any information or otherwise assist EMC or anyone else in investigating his allegations of corporate fraud. Instead, he refused to cooperate in EMC's investigation and to do his work, conduct which EMC viewed as insubordination and grounds for terminating his employment. While the issue of alleged insubordination or misconduct related to protected activity has not heretofore been addressed under Sarbanes-Oxley, the Secretary of Labor, in considering the issue under the whistleblower protection provisions of the Energy Reorganization Act, adopted the analysis developed under the National Labor Relations Act which "requires balancing the right of the employer to maintain shop discipline and the 'heavily protected' statutory rights of employees." *Martin v. Department of the Army*, USDOL/OALJ Reporter (HTML) ALJ No. 93-SDW-1 (Sec'y July 13, 1995) at 3 (internal quotation marks in original). Under the balancing approach, "to fall outside statutory protection, an employee's conduct actually must be indefensible under the circumstances." *Id*. *See also NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, (1984) (engaging in protected activity under the NLRA "does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7"); *NLRB v. Cabal Tool Div*., 262 F.3d 184, 192 (2d Cir. 2001) (quoting *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) ("The employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect")); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1145 (5th Cir.1981) (noting that the courts in Title VII cases "have required that the employee's conduct be reasonable in light of the circumstances and that the conduct not be unjustifiably detrimental to the employer's interests"); *Rosser v. Laborers' International Union, Local 438*, 616 F.2d 221, 223 (5th Cir. 1980) (Title VII case recognizing that there "may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed"), *cert denied*, 449 U.S. 886 (1980); *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230 (1st Cir.1976) (applying balancing analysis to determine whether employee's "overall conduct was so generally inimical to her employer's interests, and so 'excessive' as to be beyond the protection of [Title VII] even though her actions were generally associated with her complaints of illegal employer conduct").

When Grove's post-November 4, 2003 conduct is balanced against EMC's legitimate interest in investigating his reports of serious corporate misconduct and fraud and in having its employees engage in productive work, the scale tips decisively in EMC's favor. Grove refused to cooperate with EMC's attempt to investigate his disclosures because he wanted to deal, at least initially, with someone from the HR department instead of the corporation's general counsel. In view of the fact that he specifically raised issues of fraud in connection with Legato's revenue forecasting and recognition practices, I find that Grove's refusal to meet with EMC's general counsel despite being instructed to do so by both Sill, an HR representative and Tucci, EMC's CEO, was patently unreasonable, especially where he has offered no evidence that he had a valid reason to be wary of Dacier based on any past dealings.[32] Also unreasonable was

[32] Grove contends that he was not insubordinate in refusing to meet with Dacier because he believed that Dacier was not the appropriate person to begin the investigation into his concerns and because he was wary of meeting Dacier without being represented by his own counsel. HT at 496-497, JX-15, 18. However, he offered no evidence which

Grove's belief that he could unilaterally declare that he had "entered protected activity" and then not perform his job without any repercussion. Considering the circumstances (*i.e.*, that he had approached EMC directly with his disclosures, representing that he wished to discuss them internally so as to avoid outside intervention, but then engaged in a course of stalling and dissembling that he was not cooperating on the advice of legal counsel), I find that Grove's conduct after November 4, 2003 is indefensible and, therefore, not entitled to protection under Sarbanes-Oxley. Indeed, his unreasonable refusal to cooperate in EMC's investigation of the issues that he raised is the antithesis of the type of employee conduct that the Congress sought to encourage and protect when it wrote section 806.[33]

The evidence in this case shows that Grove's protected activity served to save him from termination in November of 2003 and that his subsequent unprotected actions caused his termination on January 15, 2004.[34] Therefore, I conclude that Grove has not met his burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in the termination of his employment at EMC.

C. Post-Termination Retaliation Claims

Grove's final allegation is that EMC retaliated against him by refusing or neglecting to provide him with healthcare coverage under COBRA, as required by law, following his termination on January 15, 2004.[35] Grove contends that EMC denied him health coverage and, despite his numerous attempts to contact human resources following his termination, failed to provide him with COBRA benefit information. Grove Br. at 30. This allegation is not supported by the evidence. Although Grove was not initially offered post-termination health care coverage because his Legato health insurance had lapsed during the transition from Legato to EMC, it is undisputed that EMC made multiple to contact Grove in an effort to have him sign the appropriate papers in order to obtain health insurance coverage. HT at 471. Further, EMC ultimately did offer Grove COBRA retroactive to the date of his termination, and Grove has presented no evidence to show that he was treated differently from amy other similarly-situated employee in regard to the requirement that he pay all premiums due for the COBRA coverage. On these facts, I find that Grove has failed to establish that EMC's handling of his post-termination healthcare insurance constitutes an adverse personnel action or that his protected activity was a contributing factor to the manner in which his post-termination health insurance was handled by EMC.

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would support a finding that a reasonable person would have been reluctant to meet with Dacier in the circumstances of his case. Indeed, Grove's only articulated objections to dealing with Dacier were his preference for someone from HR and Dacier's initial reference to his November 4, 2003 disclosures as "allegations." As discussed above, Dacier accommodated Grove's semantic objection by subsequently using the term "concerns."

[33] Grove testified that he was aware of the requirement that he meet with Dacier, and he understood that he had an obligation to "follow lawful mandates of the CEO" and that Tucci had directed him to contact Dacier. HT at 499. He also acknowledged that ignoring orders from a superior is sufficient grounds for termination. HT at 365.

[34] Grove acknowledges in his brief that he was terminated for his "[f]ailure to meet with Dacier." Grove Br. at 6.

[35] In general, employers are required to offer continuing health insurance coverage to an insured employee who is terminated. 29 U.S.C. §§ 1161-1169.

V. Order

Since Grove's complaint is untimely with respect to his allegations of retaliation prior to his January 15, 2004 termination, and since he has failed to meet his burden of proof with respect to his allegation of unlawful termination and post-termination retaliation, his complaint under section 806 of the Sarbanes-Oxley Act is **DISMISSED** in its entirety**.**

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within 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).