

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 November 2004

CASE NO: 2004-SOX-00051

In the Matter of

ED HENRICH,
Complainant

v.

ECOLAB, INC.,
Respondent

RECOMMENDED DECISION AND ORDER

Background

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (“SOX” or “the Act”), 18 U.S.C. §1514(A), enacted on July 30, 2002. The Act prohibits retaliatory actions by publicly traded companies against their employees who provide information to their employers, a federal agency, or Congress that alleges violations of 18 U.S.C. §§ 1341, 1343, 1344, 1348, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. § 1514(A).

Respondent Ecolab, Inc. (“Ecolab”) is a publicly traded company with a class of securities registered pursuant to Section 12 of the Securities and Exchange Commission Act of 1934, and is required to file reports pursuant to Section 15(d) of this act. 15 U.S.C. § 781. Complainant Ed Henrich (“Complainant”) alleges that Ecolab terminated him in retaliation for reporting accounting irregularities within one of Ecolab’s manufacturing plants in Garland, Texas. Ecolab maintains that it terminated Complainant for legitimate business purposes.

On February 11, 2004, Complainant timely filed a complaint with OSHA, claiming that he had been terminated for being a whistleblower. On April 14, 2004, OSHA issued a Findings and Preliminary Order, which found that Ecolab terminated Complainant for legitimate, non-discriminatory reasons, rather than for activities protected by the Act. OSHA dismissed the complaint based upon its findings.

On May 12, 2004, Complainant objected to OSHA's Order and requested a hearing on the merits of his whistleblower claim. The hearing, originally set for June 21, 2004, was postponed to August 31, 2004. From August 31, 2004, through September 2, 2004, the parties appeared before the undersigned for a hearing in Dallas, Texas. Administrative Law Judge Exhibits ("AX") 1-6, Respondent's Exhibits ("RX") 1-34 and 42, and Complainant's Exhibits ("CX") 35-41 and 43-45 were admitted into the record. Complainant, Mark Scott Eggebrecht, Rebecca Stenzel, Roger C. Zillmer, Robert William Peabody, Christine M. Larson, Jarun Chaiyaphan, Paul Kendrick Anderson, and Russell Warren Kellso testified at the hearing.

Issues

1. Whether Complainant engaged in activity protected within the meaning of the Act;
2. whether Ecolab had knowledge of the protected activity; and
3. whether any adverse action against Complainant was due to his engaging in protected activity.

Statement of the Case

In July of 1997, Complainant began working for Ecolab as an operations manager in the Woodbridge Plant in New Jersey. Hearing Transcript ("TR") at 30. Complainant was successful at the Woodbridge Plant, and in June of 1999, he accepted a promotion to plant manager. TR at 31. In October of 2001, Ecolab offered Complainant the plant manager position in Garland, Texas. TR at 33. Complainant accepted the offer, although he was aware at the time that the Garland Plant was the worst operating plant in the company. TR at 33.

In June of 2002, Complainant assumed the plant manager role at the Garland Plant. TR at 31. He was under the direct supervision of the Vice President of Operations, Roger Zillmer. TR at 38. Roger Zillmer's supervisor, Paul Anderson, worked out of Ecolab's headquarters in St. Paul, Minnesota, but he visited the Garland Plant occasionally. TR at 403. The Garland Plant controller, Bob Peabody, managed the accounting responsibilities of the plant. TR at 339.

One of the Ecolab products manufactured at the Garland Plant was Geo detergent, a dishwashing detergent marketed to commercial industries like restaurants and hotels. TR at 37. The Garland Plant manufactured Geo by blending raw materials and then processing them through an extruder, which would shape the blend into a block of detergent that was later shrink-wrapped, labeled, and placed in a case. TR at 36. A significant portion of Geo's customer base is in Japan. TR at 44. Ecolab's Japanese customers complained of flaws in the shape of the detergent blocks, discoloration, tears in the plastic shrink wrap and improperly positioned labels. TR at 53-54.

The Garland Plant received numerous complaints about the quality of the Geo product before Complainant became the plant manager. TR at 42; CX 37. In April of 2002, Ecolab implemented the “MIL standard” to improve Geo’s quality. TR at 295. The MIL standard was a systematic inspection process where Ecolab employees would sample 125 per 1,536 cases of Geo produced and keep track of each defect. TR at 89. If the sampling revealed a certain number of defects, then an inspection of the whole unit was required. TR at 86.

On November 7, 2002, Ecolab provided Complainant instructions by which to manage the MIL standard at the Garland Plant. RX 4. Complainant had no authority to change the MIL standard. TR at 182. By late 2003, Geo’s quality improved such that the MIL standard was no longer necessary. Evidence is inconclusive as to the exact date that Ecolab discontinued the MIL standard at the Garland Plant; Complainant contends it was “post-August” 2003, while one Ecolab employee testified that it was “early October.” TR at 124, 216.

On or about October 31, 2003, one of the Geo line supervisors at the Garland Plant, Russ Kellso, quit Ecolab. TR at 430.¹ Upon tendering his resignation, Russ Kellso informed Roger Zillmer of Complainant’s alleged involvement with falsification of the Geo product’s inspection documents. RX 5-10. Roger Zillmer investigated these allegations, which were confirmed by another Geo line supervisor, Jarun Chaiyaphan. RX 13. Jarun Chaiyaphan said that Complainant instructed him to falsify inspection information regarding the Geo detergent line and to falsify an e-mail to headquarters stating that he had inspected 125 cases – when he had inspected only 112 – in order to comply with MIL standard requirements. RX 13; TR at 251.²

Russ Kellso kept written records of Complainant’s instructions to falsify inspection documents. RX 5-10. Upon Roger Zillmer’s request, Russ Kellso sent these records to Paul Anderson, who used them to check against product records. TR 409. Paul Anderson found that Ecolab had received poor quality complaints from customers whose shipment correlated to the inspections in question. TR at 409.

During the investigation into Russ Kellso’s allegations, Roger Zillmer conferred with his supervisor Paul Anderson, and with Maurizio Nisita, one of Ecolab’s Senior Vice Presidents. TR at 255. These three executives determined that the allegations, if unrefuted by the Complainant, constituted a code of conduct violation. TR at 255. Before approaching the Complainant, Roger Zillmer involved Chris Larson, the Vice President of shared services, who consulted with Diana Lewis, the Senior Vice President of human resources. TR at 255. Chris Larson recommended that Roger Zillmer prepare a summary of findings, based on the information provided by Russ Kellso, that included seven different allegations of misconduct. RX 15.

¹ Complainant recently had reprimanded Russ Kellso for tardiness and absenteeism. TR at 331.

² Russ Kellso alleged that Complainant had instructed him to falsify that particular e-mail, but when he refused Complainant then asked Jarun Chaiyaphan to write it. RX 13; TR at 247.

On November 17, 2003, Roger Zillmer called Complainant into his office and presented seven allegations of misconduct. TR at 100; RX 15. Chris Larson participated by speaker phone. TR at 256. The Complainant maintains that he denied six of the seven allegations, and that there was “more to the story” as to seventh allegation. TR at 101. The seventh allegation concerned the e-mail, written by Jarun Chaiyaphan at the Complainant’s direction, which contained misinformation on an inspection of the Geo product. TR at 102-103. Ecolab contends that the Complainant admitted that the seventh allegation was true and that he did not give any explanation. TR at 259.

Following the conversation in Roger Zillmer’s office, Chris Larson discussed Complainant’s responses to the allegations with Maurizio Nisita, Diana Lewis, and Paul Anderson. Zillmer, TR at 262. Anderson had the ultimate authority to terminate Henrich. TR at 409. These executives determined that Complainant had violated Ecolab’s code of conduct, and that the violation was serious enough to terminate him. TR 263. Later that day, Roger Zillmer notified Complainant of his termination. TR 263.

Hours after his termination, Complainant sent an e-mail to Chris Larson and Maurizio Nisita, describing problems with Roger Zillmer and accounting irregularities in the Garland facility.³ CX 38. Upon filing this complaint, Complainant alleged that he raised the accounting issues with his supervisor, Roger Zillmer, and with the plant controller, Bob Peabody, while he was still employed with Ecolab. TR at 65, 72, 145-150; RX 22.

Ecolab alleges that as a company policy, each management employee must identify code of conduct violations in writing, on an annual basis. TR at 365. Ecolab asserts that Complainant’s allegations of accounting improprieties would have constituted code of conduct violations, but that Complainant never reported them during the annual review. TR at 366. Complainant counters that he did not identify any code of conduct violations during the formal review process because he believed that informing his supervisors satisfied that duty. TR at 77-78.

The crux of Complainant’s SOX claim is three accounting issues, two of which deal with internal accounting procedures used to track defective Geo product stock. Specifically, Complainant alleged that Ecolab: 1) misclassified Geo by-product as good bulk instead of “inventory at risk,” therefore overstating good inventory; 2) failed to account properly for material losses incurred during the Geo production process; and 3) erroneously charged labor overages to division costs rather than to plant costs.

³ The Complainant provided testimony regarding a lunch meeting that he had with his supervisor Roger Zillmer. Complainant alleges that during lunch, Roger Zillmer acknowledged the plant’s “cheating” practices and inferred that both of their jobs were on the line, but if anyone were to be fired, then Complainant would be let go first. TR at 85. During the hearing, Roger Zillmer denied these elements of the conversation at first, but later corroborated Complainant’s allegation somewhat by conceding, “I told him we both had our jobs on the line. If he heard it him before me, well . . . it may be that that’s the way it came out.” TR at 290, 315.

Inventory at risk

Ecolab accounted for the by-product resulting from the manufacture of the Geo product that did not meet inspection standards as either good bulk or inventory at risk. TR at 66-68. “Good bulk” is something that can be put back into the product without a lot of costs. TR at 66. “Inventory at risk” is salvage inventory. TR at 68. Complainant alleges that Ecolab erroneously tracked inventory at risk as good bulk. TR at 66-68. He claims that this inaccuracy inflated the value of Ecolab’s inventory, and that he “tried to push this [issue] with the controller from day one.”⁴ TR at 65.

The parties agree that the Geo-line by-product was so excessive that Ecolab had to store some of it in an off-site warehouse. TR at 65, 268. Both parties also found that there was approximately 1.2 million pounds of the by-product, which, according to Roger Zillmer, was an amount “out of the range of manageable.”⁵ TR at 271, 67. Complainant alleges, however, that of the 1.2 million pounds of by-product, only part of that amount was accounted for as physical inventory. TR at 67. This, he claims, not only skewed the value of Ecolab’s assets, but also rendered some of the costs “invisible.” TR at 69-70.

After Paul Anderson visited the Garland Plant in February of 2003, Ecolab switched part of the Geo-line by-product from good bulk to inventory at risk. TR at 145. Ecolab argues, however, that this switch was prompted neither by Complainant’s recognition of the problem nor by an effort to correct improper accounting practices. TR at 341, 404. To the contrary, Ecolab alleges that it was Paul Anderson, rather than Complainant, who first addressed the issue. TR 404. Moreover, Ecolab argues that the decision to switch the by-product from good bulk to inventory at risk did not impact assets or costs on the company’s books. TR at 276. Instead, it merely made this excessive by-product more visible, which would presumably draw more attention to it in terms of disposing it or having it reground. TR at 268.

Material Losses

Complainant also alleges that Ecolab washed defective by-product down the sewer, or threw it into garbage cans, but then improperly accounted for these losses as good bulk inventory. TR at 70. Complainant further claims that his supervisor, Roger Zillmer, asked him to write-off \$75,000 to \$100,000 worth of discolored inventory that could not be reground.⁶ TR at 73. Complainant believed that Roger Zillmer used inaccurate reasons for the write-off in an

⁴ Complainant alleges that he raised this issue with Bob Peabody, Carol Gribble, and Roger Zillmer before Paul Anderson ultimately switched the good bulk to inventory at risk. TR at 145.

⁵ The Garland Plant’s controller, Bob Peabody, elevated this figure to 1.4 million pounds of by-product or “rework.” TR at 343. Ecolab estimated that this by-product retained a value of .24 per pound, which totaled a dollar amount of approximately \$300,000 (1.4 million * .24). TR at 343. Ecolab compared this \$300,000 figure with Ecolab’s total revenue per year – \$4 to \$4.5 billion – and noted the relatively high threshold required to trigger an external audit of the company - \$20 million. TR at 343.

⁶ Ecolab disputes this figure, arguing instead that the write-off of discolored inventory would have totaled between \$45,000 and \$60,000. TR at 154.

attempt to shift plant costs to divisional costs.⁷ TR at 73. Although Complainant conceded that such a write-off would affect internal accounting only, he nonetheless found this process “unethical,” and he believed it was “cheating the company.” TR at 140, 152-153. Complainant asserts that he reported the product loss to Carol Gribble in accounting, Bob Peabody, and Roger Zillmer. TR at 72-73.

Ecolab responds that material wasted during the mixing process can be classified as good bulk inventory. TR at 350-352. Ecolab further claims that Paul Anderson switched this inventory, including the discolored Geo-line material, from good bulk to salvage – or inventory at risk. TR at 340. According to Bob Peabody, the Garland Plant controller, all materials classified as inventory at risk are reserved at 100%. TR at 340. When a reserve is recorded on the company’s books, then there is an expense recorded equal to the amount of the reserve, thereby “zeroing out” the inventory. TR at 342. Consequently, there is no impact on the company’s external accounting. TR at 342. Further, Ecolab claims that it was the controller’s responsibility to write-off costs; thus, Complainant never had the authority to do so. TR at 280.

Labor-cost charged to division

The parties concur that Ecolab plant managers had abused a company practice whereby certain labor costs were absorbed by a divisional or corporate expense account rather than by the plant itself. TR at 62, 284. Specifically, Complainant alleged that in prior years, the Garland Plant charged between \$125,000 and \$150,000 in labor costs to the divisions. TR at 62. Although he admits that this practice could be legitimate, he found it extensive and therefore “cheating” – alleging it was designed to garner bonuses and promotions at the expense of hiding costs in different areas of the company. TR at 63; RX 22. He reported this problem up the chain of command, and subsequently the practice stopped. TR at 64. As a consequence, however, the Garland Plant exceeded its budget by \$35,000 to \$40,000 a month in labor charges. TR at 64.

Although Ecolab acknowledges Complainant as “instrumental” in fixing the labor-costs that were charged to the division, it does not credit him with identifying the problem. TR at 284. Instead, Ecolab asserts that in January of 2003, Bob Peabody noticed the increase in labor-costs. TR at 347. Ecolab claims that Complainant became aware of this practice only after Bob Peabody or Carol Gribble began to investigate it. TR at 348.

Applicable Law

The Act states in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d), or any

⁷ Complainant argued that these losses should have been written off as operational costs rather than divisional costs. TR at 155.

officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - -

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against - 3 - shareholders, when the information or assistance is provided to or the investigation is conducted by - -

(A) a Federal regulatory or law enforcement agency;

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

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

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

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

1. the complainant was an employee of a covered employer;
2. the complainant engaged in protected activity as defined by the Act;
3. the respondent had actual or constructive knowledge of the protected activity
4. the respondent thereafter took some adverse action against the complainant; and
5. the protected activity of the complainant was the likely reason for the adverse action.

See Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, slip of. At 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom.*, *Carroll v. United States Department of Labor*, 78 F.3d 352, 256 (8th Cir. 1996).

Here, there is no question as to Complainant's employment status with Ecolab, a corporation governed by Sections 12 and 15(d) of the Securities Exchange Act. Further, there is no dispute over his termination. Based on the facts of this particular case, only three of the afore-mentioned elements are at issue: 1) the Complainant's protected activity; 2) Ecolab's knowledge of the protected activity; and 3) the causal nexus between the protected activity and the termination.

Findings of Fact and Conclusion of Law

Protected Activity

The Act protects employees who provide information to authorities in the executive branch, to Congress, or to the employer, that the employee reasonably believes show the employer violated federal laws against shareholder fraud. 29 C.F.R. § 1980.102(b)(1). The test does not measure the accuracy or falsity of a complainant's allegations; rather, the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections. See *Clement v. Milwaukee Transport Services, Inc.*, 2001-STA-6 (ALJ Nov. 29, 2001) (slip op. at 39).

Here, Complainant alleges that he brought improper accounting and labor issues to light. Ecolab protests, however, that Paul Anderson first identified the good bulk issue and that there was no issue to identify as to the material losses. Further, Ecolab claims that it was Bob Peabody, rather than the Complainant, who recognized and then investigated the labor-cost problem. Even assuming that it was Paul Anderson and Bob Peabody who identified the good bulk and labor-cost issues, respectively, Complainant reasonably believed that the company was "cheating" with respect to these issues.

Complainant believed that material, which was washed down the drain or placed into garbage cans, was retained on the books as good bulk. He also believed that plant managers abused the labor-cost procedure by charging overages to the division. Ecolab does not dispute either of these practices, explaining only that ultimately they were corrected. Although neither practice impacted external accounting, Complainant's understanding of these procedures as "cheating" gives rise to a reasonable belief that Ecolab's shareholders may be subjected to fraud.

Materiality Requirement

Ecolab protests that Complainant's alleged whistle-blowing activity was immaterial to the company's accounting procedures because the value of the inventory at issue – approximately \$300,000 of Geo-line by-product or "rework" – has relatively low-value in terms of the company's overall revenue and auditing standards. Ecolab generates approximately \$4 to \$4.5 billion a year in sales. The materiality standard to trigger an outside audit of the company is \$20 million. Nevertheless, the relatively low-value of the inventory in question has no bearing on whether Complainant can sustain a whistleblower action against the company.

The August 24, 2004, Federal Register addressed directly the issue of a materiality requirement. 69 FR 163 (Aug. 24, 2004) § 1980.102. The Human Resource Policy Association ("HRPA") commented that this section's description of protected activity enabled employees to bring claims based on "ordinary business and employment disputes." *Id.* As such, the HRPA suggested that the reported violation must constitute at least 3% of a company's revenue in order to be protected under SOX. OSHA countenanced this suggestion, but found it inappropriate to "specify a percentage or formula for use in defining protected activity." *Id.* Therefore, it did not adopt HRPA's suggestion.

OSHA's rejection of a specific measure by which to test the extent of a violation is the strongest authority against a materiality requirement. Precedent also provides, albeit indirectly, that complainants do not need to meet a materiality requirement as to the extent of an alleged SOX whistleblower violation. *See Collins v. Beazer Homes USA Inc.* 1:03-CV-1374-RWS (N.D. Ga, Sept. 2, 2004) (finding that a plaintiff is not required to show an actual violation of the law, but only that she reasonably believed that a law had been violated). The claimant must, however, plead specific incidents and material facts that give rise to the alleged violation. *See Lerbs v. Buca di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004) (finding that Complainant failed to establish that he had engaged in protected activity where Complainant merely made general inquires about the Respondent's conduct). *But see Harvey v. Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004) (dismissing complaint for untimeliness, but explaining in dicta that discrimination against an individual employee does not meet a "materiality threshold" in terms of a corporation's financial condition).

Here, Complainant has shown a reasonable belief that a law had been violated. Moreover, he pleaded specific incidents that gave rise to the alleged violation. In light of the statutory authority and precedent that does not require a materiality requirement, the relatively small amount of inventory in question, in comparison with Ecolab's revenue and audit standard requirements, does not defeat Complainant's whistleblower claim.

Knowledge

Constructive knowledge can be attributed to the ultimate decision-makers where the Complainant's immediate supervisor had actual knowledge of Complainant's protected activities. *Platone v. Atlantic Coast Airlines*, 2003-SOX-27 (ALJ Apr. 30, 2004), slip op. at 26 (finding that Complainant's immediate supervisor was aware of her protected activity and "planted the seeds for her dismissal"). Here, Complainant alleges that he informed Roger Zillmer, Bob Peabody, and Carol Gribble of the accounting and labor-cost improprieties. There is no documentation of Complainant's allegations, however. When Complainant had the opportunity to report code of conduct violations in writing, he failed to do so. Complainant provided no evidence, except for his own testimony at the hearing, that these three individuals had knowledge of his protected activity as to the accounting issues.⁸

Ecolab counters that it knew nothing of Complainant's involvement in any of the above issues until after he was terminated. The executives with the ultimate authority to terminate Complainant worked outside of the Garland plant and claim that accounting irregularities were never discussed when deciding whether to terminate Complainant. Ecolab insists that Paul Anderson discovered the good bulk problem, which ameliorated the material losses issue, and that Bob Peabody identified the labor-cost problem.

The undersigned finds Complainant's testimony that he informed Roger Zillmer, Bob Peabody, and Carol Gribble of the inventory problems less than credible. As such, no

⁸ The only other evidence that could have corroborated Complainant's allegation that Roger Zillmer was aware of his protected activity was the lunch conversation discussed above. *See note 3, supra*. Although Roger Zillmer conceded that he told Complainant that both of their jobs were on the line, he explained at the hearing that the conversation discussed performance difficulties, not accounting. Moreover, Roger Zillmer's subsequent e-mail memorializing the conversation belies Complainant's allegation that "cheating" practices were discussed. RX 12.

constructive knowledge can be imputed to the executives who had the ultimate authority for terminating Complainant.

Nonetheless, Roger Zillmer testified that Complainant was “instrumental” to the labor-costs issue. There was further evidence that Roger Zillmer was aware that plant managers had abused the practice by which labor overages were charged to the divisions. This was a problem that Complainant inherited. As such, it is difficult to believe that Bob Peabody – whose tenure as controller long-preceded Complainant’s assignment as plant manager – discovered the illegitimate use of this practice only after Complainant became plant manager. It is more likely that Bob Peabody knew about the abuse of this practice but chose to accept it until Complainant took issue. Therefore, Complainant provided credible evidence that his immediate supervisors knew of his protected activity as to the labor-cost issue, and this knowledge may be imputed to the outside executives. *See Platone, supra.*

Causation – Contributing Factor

To establish causation, the inquiry is whether a complainant can prove that his protected activity was a “contributing factor” in an unfavorable employment action. 29 C.F.R. § 1980.109(a). *Kester v. Carolina Light & Power Co.*, 2000-ERA-31, slip op. at 7 (ARB Sept. 30, 2003). In the context of similar whistleblower cases, “a contributing factor” means “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citations omitted) (defining “contributing factor” as applied to Whistleblower Protection Act for federal employees). A whistleblower is not required to prove that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action. *Id.*

Here, Complainant’s protected activity is not linked to his termination. Complainant narrowly established that his recognition of accounting irregularities concerning good bulk and material losses, and of labor costs charged to the division, constituted protected activity. Ecolab executives addressed and resolved each of those problems, however. Complainant failed to show that Ecolab had knowledge of his protected activity as to the good bulk and material losses. Even upon finding that Ecolab executives had constructive knowledge of Complainant’s protected activity as to the labor costs, no evidence whatsoever tended to show that Complainant’s protected activity contributed in any way to his termination. To the contrary, evidence shows that an unrelated event – Complainant’s falsification of inspection records – provided the impetus for Complainant’s termination. Therefore, Complainant has failed to prove causation.

Prima Facie Case

Upon failing to provide the causal nexus between his protected activity and his termination, Complainant could not prove his *prima facie* case. Notably, the undersigned gave Complainant the benefit of the doubt as to the protected activity itself, and as to Ecolab’s knowledge of Complainant’s protected activity. Although it appears from the evidence that the Garland Plant suffered from gross inefficiency as to the Geo-line by-product and the labor-cost overages, which tends to justify Complainant’s sense that Ecolab must have been “cheating,”

none of the conduct alleged rose to a level of illegality. As such, there is no indication that Complainant's perception of Ecolab's practices would have motivated Ecolab's executives to terminate him. On the other hand, it is clear that Ecolab's executives were outraged by Complainant's admitted violation of the company's Code of Conduct by his encouraging his own subordinates to falsify inspection documents. Complainant's termination immediately followed the discovery of such falsification of records. Accordingly, the undersigned finds that the cause of Complainant's termination was the Code of Conduct violation brought to the company's attention by Russ Kellso and that any protected whistleblowing activities on the part of Complainant played no role in his termination.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Complainant has not proven that he was terminated due to any protected activities on his part and his complaint is hereby **DISMISSED**.

SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).