U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 June 2006

CASE NO.: 2004-SOX-00049

In the Matter of:

L. THOMAS RICHARDS,
Complainant

v.

LEXMARK INTERNATIONAL, INC.,
Respondent.

Appearances:

Christopher D. Miller, Esq.
Rambicure, Miller and Pisacano, Lexington, KY
For Complainant

Larry A. Sykes, Esq.,
Stoll, Keenon and Park, LLP, Lexington, KY
For Respondent

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING CLAIM

The instant case arises under the employee protection (whistleblower) provisions of the Sarbanes-Oxley Act of 2002, Public Law 107-204, codified at 18 U.S.C. §1514A.[1] The statute and implementing regulations (appearing at 29 C.F.R., Part 1980) generally prohibit retaliatory or discriminatory actions by publicly-traded companies (and their subsidiaries or agents) against employees who either (1) provide information to their supervisors, federal regulatory or law enforcement agencies, or Congress, relating to activities that they reasonably believe to constitute violations of federal criminal statutes relating to fraud, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in

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[1] The whistleblower provisions appear at title VII of the Act, which is designated as the Corporate and Criminal Fraud Accountability Act of 2002. As used herein, "the Act" references those provisions.

investigations or proceedings relating to such activities. For the reasons set forth below, I find that this case must be dismissed because the complainant cannot establish that he engaged in protected activity that was a contributing factor to the adverse employment action taken against him and he has therefore failed to establish a cause of action cognizable under the Act.

PROCEDURAL HISTORY

On or about April 1, 2003, L. Thomas Richards ("Complainant") filed a complaint with the Occupational Health and Safety Administration ("OSHA") under the Sarbanes-Oxley Act alleging that his former employer, Lexmark International, Inc. ("Lexmark" or "Respondent"), terminated him in retaliation for his having raised concerns about Lexmark's accounting practices. On August 18, 2003, OSHA issued a determination letter stating that it was not reasonable to believe that Respondent violated the whistleblower provisions of the Sarbanes-Oxley Act, because the Respondent showed by clear and convincing evidence that it planned to terminate Complainant two months prior to the actual dismissal for reasons unrelated to his claims regarding accounting practices.[2]

By letter of April 28, 2004, the Complainant filed objections to OSHA's determination and requested a hearing before an administrative law judge. On May 24, 2004, a Notice of Assignment, Notice of Hearing and Prehearing Order was issued, which scheduled the hearing in this matter for August 13, 2004 and set forth other filing deadlines. Thereafter, the Respondent filed two motions for summary judgment. The first, filed on July 20, 2004, alleged that the Complainant had failed to file a timely and proper objection to OSHA's determination and the second, filed on July 26, 2004, alleged that there was no genuine issue as to a material fact and it was entitled to judgment in its favor on the merits of the claim. Complainant also filed various discovery motions.

A telephonic conference was held on August 3, 2004 to discuss pending motions and the continuance of the hearing date. At that time, I advised the parties that I would be issuing an Order denying both summary decision motions and would be granting the alternative continuance request. The Order Denying Respondent's Summary Decision Motions was issued on October 1, 2004. The hearing was set for the week of December 6, 2004, and was subsequently continued until January 31, 2005.

The first portion of the hearing was conducted from January 31, 2005 until February 4, 2005 and, following a hiatus in which discovery was completed, it was concluded from May 10 through May 11, 2005.[3] At the hearing, eleven witnesses testified.

Post-hearing briefs were to be simultaneously filed in the above-captioned matter on or before July 15, 2005 with optional responsive briefs to be filed on or before July 22, 2005, later

[2] A complainant has 30 days from the receipt of OSHA'S findings to file objections and request a hearing on the record, or the findings will become final and not subject to court review. 29 C.F.R. §1980.106(a).

[3] The trial transcript is paginated consecutively despite the hiatus. All references are to the hard copy of the transcript, which will be referenced as "Tr." followed by the page number, and where appropriate, the witness's last name (e.g., Tr. 552, Complainant.) Exhibits will be referenced as "C" for Complainant's Exhibits, "R" for Respondent's Exhibits, and "ALJ" for Administrative Law Judge Exhibits, followed by the exhibit number.

amended by a requirement that any responsive briefs be supported by a motion. On July 11, 2005, Respondent filed an unopposed motion for extension of time, asking that the period for filing briefs be extended to July 22, 2005.[4] Respondent's Post-Hearing Brief was mailed overnight mail on July 22, 2005 and filed on July 25, 2005 while Complainant's Trial Brief was mailed on July 22, 2005 and filed on July 26, 2005. Complainant's Responsive Brief to Demonstrate Factual Inaccuracies Contained in the Respondent's Post-Hearing Brief was mailed on July 29, 2005 and filed on August 2, 2005 (in accordance with my initial ruling) and on August 4, 2005, Respondent filed a motion to file a supplemental response brief, along with Respondent's Supplemental Response Brief (in compliance with my amended ruling). All briefs were accepted as timely by my Order of August 16, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTUAL BACKGROUND

Initial employment.

Complainant first became employed by Lexmark on February 12, 2001, after having been recruited by a headhunter to work in a new corporate department called E-Business, which was designed to help the business adapt to new technology. (Tr. 554-55, 558-59, Complainant, C51.) He was offered the position of "Director, Internet Business Program Management," reporting to Director, Paul Wilson ("Wilson"), with a base salary, a bonus opportunity ranging from 30% to 70% of base salary depending upon level of attainment, and a signing bonus. (C51). He was offered an employment package that included relocation benefits and stock options. (Tr. 557-58, C51.) Initially, Complainant's responsibility was to work for the new department (which was also known as "E commerce") under Wilson, in the supply chain areas of reduction planning. [5] (Tr. 554-56.) Complainant performed satisfactorily in the E-Business group and received a favorable "REACH" performance evaluation based upon his performance during calendar year 2001, and he received an overall rating of 230 (which had been marked down from his self-rated score of 270). (Tr. 52-54, Heeter; Tr. 563-64, Complainant; C2.) [6] Due to absences by Wilson as a result of a back injury, Najib Bahous ("Bahous"), who was a level higher than Wilson, was essentially Complainant's immediate supervisor. (Tr. 564, Complainant.)

A decision was made to break up the E commerce department, and in April 2002, Complainant was reassigned to work for Terry Heeter ("Heeter"), Director of Supply Chain Practices, who in turn reported to Donna Covington ("Covington"), Vice President of Operations. (Tr. 23, 34-35, 37-38, Heeter; Tr. 562, Complainant.) According to Heeter, the transfer was made at the recommendation of Bahous together with Covington, who reported directly to Bahous. (Tr. 38, Heeter.) Complainant testified that Bahous had decided that the resources in E commerce could be better used inside the divisions and, because he wanted to

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[4] As I indicated in my August 16, 2005 Order, based upon a due date of July 22, 2005, the briefs would actually be due to be filed on July 27, 2005, allowing five days for mailing. *See* 29 C.F.R. § 18.4(c).

[5] Although Complainant and others used the term "E commerce" to refer to the E-Business group under Wilson, there was also a separate E-Commerce Development group in IT. (Tr. 1200-01, Cross).

[6] "REACH" performance evaluations are made annually and include an assessment of whether the employee works well within the Lexmark environment, such as by demonstrating leadership capabilities; whether the employee has achieved specific job objectives; and what further development is required. (Tr. 49-51, Heeter.)

beef up the experience and knowledge in Covington's group, he asked Complainant if he would be interested in joining that group. (Tr. 562, Complainant).

Heeter had been recruited by the same headhunter as Complainant and in August 2001, he had taken a job that Complainant had turned down while he was in E-Business. (Tr. 20-21, Heeter; Tr. 566-68, Complainant.) When she hired Heeter, Covington had advised him that there was a lot of inventory, and their focus was to drive inventory levels down. (Tr. 25, Heeter.) As Director of Supply Chain Practices, Heeter was responsible for monitoring the performance of the supply chain, identifying areas where improvement could be made, and initiating and implementing projects for such improvement. (Tr. 31, Heeter.) To achieve those objectives, his corporate group would work with the divisions and act as a catalyst for making improvements in the supply chain.[7] (*Id.*) At that time, Heeter's organization included between 45 and 50 employees. (Tr. 51.)

Transfer to Heeter's group.

Heeter agreed with Bahous that that Complainant would be a good fit within his organization due to his knowledge in supply chain. (Tr. 46, Heeter). Heeter testified that Bahous had expressed the concern that they have clear objectives for Complainant in the new section and that he be measured against clear accomplishments on those objectives. (Tr. 49-50.)

Prior to the transfer, Heeter met with Complainant and they crafted a role for him in the organization, which they revised after Heeter discussed it with Bahous. (Tr. 48-49, Heeter.) Complainant testified that his discussions with Heeter spanned a period of four weeks and he was to assume a position that had not previously existed. (Tr. 567-68). Complainant was to become a program manager, even though he was at the "director level." (Tr. 57, Heeter.) Although Heeter had other program managers working for him, none of them were at the director level. (*Id.*)

Heeter testified as to reservations he had about Complainant being transferred into his group. First, Heeter testified that he had worked with Complainant "enough to notice that there were issues with relationships with people," and he had observed Complainant having heated discussions with other people at meetings. (Tr. 35) Later, Heeter explained that Complainant was confrontational or argumentative with people, and Andy Kopp ("Kopp") in IT (Information Technology) and Dick Cross ("Cross"), the IT liaison from Heeter's group, had specifically expressed concerns about him. (Tr. 254-55). Accordingly, Heeter was concerned that Complainant would not be able to integrate well within the team or that he might create additional conflicts with the divisions and with the IT department. (Tr. 256-57). Second, Heeter testified about his concerns surrounding Complainant's ability to deliver timely results:

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[7] There were two main divisions in Lexmark – CPD, the consumer products division (i.e., ink jet printers, along with ink jet supplies) and PS and SD, printer solutions and services division (i.e., laser printers and higher value items, sold primarily to businesses); each division had a supply chain group. (Tr. 246-48, Heeter). The corporate group, which included Heeter's organization as well as information technology (IT) and supply base management, performed centralized functions, such as taking customer orders, order management, distribution and transportation. (*Id.*)

> I didn't have his specific objectives at the time, or know what he was supposed to deliver at specific time periods. However, what I did notice or I did see is that there were projects that he was working on that would go on over time, that would go longer than what I would've expected was the time frame that they were supposed to be delivered in.

(Tr. 36.) The latter concern was based upon the failure by Complainant's team to complete projects as opposed to Complainant's personal failure to do so. (Tr. 37.) One example given by Heeter concerned the team assigned to select software for supply chain visibility, which included Complainant and some IT managers from Heeter's group, and Heeter recalled that the team had "a lot of difficulty in coming to a conclusion and coming to a timely closure on that project." (Tr. 41-43.) However, Heeter admitted that there were a lot of projects going on at the time and it was difficult to differentiate between them, and he had not recalled that specific project at the time of his deposition. (*Id.*)

Andrew Kopp (Kopp) testified that he was the IT account manager (within the IT organization) in 2001 and 2002, in which capacity he served as the interface between the IT organization and Lexmark's supply chain group. (Tr. 1133-34). When Complainant was still in E commerce, between December 2001 and February 2002, Kopp worked with him on a cross functional team consisting of eight employees representing various organizations within Lexmark, working on a supply chain performance management tool selection process. (Tr. 1135-40, 1143-44, 1163). Manugistics and C-Commerce were among the vendors being considered. (Tr. 1137-38). Kopp testified that there was a perception that Complainant did not have a lot of patience in the process and already knew the answer, as he was clearly focused on a Manugistics based solution, but the team wanted to conduct the process step by step. (Tr. 1140-41). In addition, he testified that Complainant tended to cross examine other participants and prevent them from completing their presentations on schedule, thereby delaying the process. (Tr. 1141-42). Although the team selected C-Commerce, they were asked by upper management to rework the project on a more detailed basis, after which C-Commerce was again selected. (Tr. 1142-45, 1166-67). Kopp felt that Complainant was responsible because he was "a voice of dissention." (Tr. 1143-45). Kopp also testified that he participated in weekly supply chain leadership meetings at which Complainant exhibited the same lack of patience and made "sarcastic, perhaps arrogant" editorial comments. (Tr. 1146-47). He discussed these matters with Heeter. (Tr. 1145, 1151). Kopp felt that Complainant did not fit in to the consensus building process that was part of the Lexmark culture. (Tr. 1147-48). However, he acknowledged that Complainant had a wealth of experience and an aptitude for strategic thinking. (Tr. 1162).

Richard Scott Cross (Cross) worked under Heeter in the supply chain implementation and support group from the middle of 2001 through 2002. (Tr. 1188-89). He testified that members of his organization had problems working with Complainant when he was in E commerce because he would go around the team and, like Kopp, he held Complainant responsible for decisions made at a higher level that were forced upon them. (Tr. 1191-92). He also received complaints from attendees at the weekly supply chain meetings that Complainant had singled them out for blame or challenged their skills. (Tr. 1192). Cross also felt that Complainant did not operate well in a collaborative environment and preferred a more direct, hierarchical style

and he expressed his concerns about Complainant to Heeter. (Tr. 1193, 1196-97). He further testified that the situation did not improve after Complainant transferred to Heeter's section, and he again complained to Heeter, as Complainant's manager. (Tr. 1194, 1219-20). However, he admitted that Complainant was very bright and had a lot of experience and understanding in the supply chain. (Tr. 1223-24).

Performance objectives.

Before Complainant started working in his group, Heeter provided him with a specific list of objectives for his job performance, and Complainant provided comments as to those objectives, which were incorporated into the final objectives. (Tr. 58-59, 62-64, Heeter; C1; R3.) One of the objectives (listed under Personal & Role Development 2002 Objectives) was "developing improved working relationships" to be accomplished by August 1, 2002. (R3.) Other objectives related to completion of the Manugistics Rollout and the Manugistics Upgrade (software projects).[8] (*Id.*)

Complainant expressed reservations as to the completion date set for the Manugistics Rollout project, scheduled for completion in August 2002. (*Id.*) By all accounts, the Manugistics Rollout was a difficult project that met resistance in the divisions, and problems with that project predated Complainant's involvement. (Tr. 1321-1323, Brucken; Tr. 115-17, Heeter). In his response of April 22, 2002, Complainant stated the following:

> Terry- This is really the only project I am not comfortable with regarding the scheduled delivery date. To help repair/improve my "image" with Dick's team[9] etc., I decided to pursue a slower, low-key approach to integrating into the project team (They don't need another Chief coming into the tribe right now.) My plan is to use the Manu Technology and Functionality Assessment as the tool to help me peek under the covers and begin to build whatever improvement plan is going to be required to support the upgrade. My concern with the August date is that I have limited to no executional capability to help influence or deliver on the date. I intend to help the team manage the plan and deliver on it, but with the heavy dependency on EMEA [European] IT to deliver, ??? My suggestion would be to modify my role better reflecting my support of delivery by Aug 2002.

(*Id.*) Complainant testified that he had not had a real working relationship with Cross's team but that because he had directly provided input to Bahous, it had gotten back to them that he was "meddling in the Manugistics technology roll out project" and there may have been a perception problem. (Tr. 738-39). Heeter testified that he wanted Complainant to be more proactive, rather

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[8] Heeter explained that Manugistics is the software for a planning system in the supply chain. (Tr. 265-66, Heeter.) It is used to understand future demand for products ("forecasting"), to look at current inventory levels, and to determine what would need to be built in the future to satisfy customer requirements. (*Id.*) The divisions were not very receptive to using the software. (Tr. 116, Heeter). The rollout (adoption) essentially involved getting end users (in the divisions) up to speed and utilizing the system while the upgrade involved improving the software. (Tr. 115-16; 123-28, Heeter.) As of the hearing date, the Manugistics upgrade had yet to be implemented. (Tr. 128).

[9] The reference is to Dick Cross, the manager from Heeter's group whose team served as Heeter's interface with the IT group. (Tr. 255, Heeter; Tr. 1189, Cross). Both Covington's group and the IT group reported to Bahous. (Tr. 741-42, Complainant.)

than low key, and he noted that at his level of compensation, Complainant was expected to be able to work through the issues. (Tr. 118-20).

After an exchange of emails dated June 5 and June 6, Heeter agreed to move the Manugistics Upgrade plan to September 30 and include a statement on the Manugistics Rollout that it was contingent on IT delivery on schedule. (R3; Tr. 252-53, Heeter; Tr. 732-34, Complainant.) Heeter decided to leave the Rollout date unchanged. (Tr. 733; R3.)[10]

Merit increase.

On July 29, 2002, Complainant was provided with a merit pay increase based upon his work performed in 2001. (Tr. 65-66, Heeter; Tr. 338, Suggs.) He was disappointed in the amount, which was around 2.5%, but Heeter explained that he was a highly compensated employee and was near the top of his pay band. (Tr. 67-69, Heeter.) Other employees in the group received a lower percentage, and some received no increase at all. (Tr. 67). Heeter testified that he did not advise Complainant that his performance was deficient because after only two months (based upon the time the increase was approved), it was "too early to tell how he was performing." (Tr. 69.) In fact, Heeter advised Jean Marie Suggs ("Suggs"), the corporate supply chain Human Resources ("HR") adviser, that during the first 90 days of his assignment, Complainant was doing well. (Tr. 70-72, Heeter; CX 3.) Covington testified that she approved the increase and that she would not have done so if she thought he was a poor performer. (Tr. 1014-16).

Performance problems/Born Consulting.

Despite Complainant's initial successes, Heeter testified that the issues that led to Complainant's termination started to become apparent after the July/August 2002 period and his work deteriorated. (Tr. 70-71.) Heeter discussed the problems with Covington, who counseled him to make sure that HR was involved in the process. (Tr. 92, 93-94, Heeter; Tr. 935, Covington). Among the matters addressed was Complainant's mismanagement of the Born Consulting contract, discussed below. (Tr. 943-44).

Covington testified that she discussed Complainant's performance with Heeter in October 2002 in the context of discussions about the head count for his organization. (Tr. 933-35, Covington.) They went through a list of employees, discussing which ones were contributing greatly and which were not meeting objectives, and Heeter placed Complainant and another employee in the latter category. (*Id.*).

Heeter first discussed Complainant's performance problems with Suggs on October 18, 2002. (Tr. 71-73; C3). Suggs' contemporaneous notes indicate that although Complainant had started off well in Heeter's organization (even though he missed some early deliverables), in the last 90 days his work had "deteriorated to levels of teamwork and performance perceived during e-business tenure." (C3, R19). Her October 18 notes specifically stated:

[10] The final objectives appear as page 1 of R3; Complainant's response appears as the second page; and the emails appear as the third page. (R3).

> Most recently, ee [employee] has ignored requirement to work in partnership with I/T. Has gone outside processes for bringing vendor into company on Manugistics. Has incorporated use of vendor, without contract, to the point Lexmark is receiving invoices that I/T (never involved) will be expected to pay.

(*Id.*) The vendor referenced was Born Consulting.[11]

According to Heeter, Complainant had not followed appropriate procedures with the IT organization in retaining Born Consulting, an outside consultant that was working on one part of the Manugistics software project, to work on a different aspect of the project, and IT had registered a complaint.[12] (Tr. 82-85.) Although Heeter agreed with the selection of that vendor, Heeter testified that Complainant's failure to follow the proper IT procedures with respect to the retention of Born Consulting was one of the major events that influenced the decision to terminate him. (Tr. 86, 89-90). In view of Complainant's failure to follow the requisite procedures, there was no paperwork in place to allow payment of the invoices from Born Consulting. (Tr. 87-88, Heeter). Because the IT Group refused to make the payment, the $100,000 had to be paid through Heeter's departmental budget, as reflected by an email that Heeter sent on December 13. (Tr. 90, 164; C12.) Heeter acknowledged that after discussing this matter with Complainant, he never did anything like that again. (Tr. 90-91). However, as reflected in Complainant's November 7, 2002 Progress Review (discussed below), this incident had an adverse effect upon the relationship between Heeter's group (SC Practices, including Cross) and IT (including Kopp.) (C5; Tr. 101, Heeter).

When asked about the Born project, Kopp (from IT) explained that, although he had discussed the matter with Complainant and had agreed with the selection of Born Consulting to do the work, there were two problems with Complainant's engaging of Born. (Tr. 1153-54, 1160-62). First, Born's previous work had been contracted through a third party and Born had no direct relationship with Lexmark as a vendor. (*Id.*) Second, the supply chain leadership had insufficient resources to fund all of their desired projects and a decision to prioritize the Born project over other desired projects had not been made.[13] (*Id.*) When IT received invoices from a supplier for which they had no formal agreement, and when the amounts billed exceeded Complainant's budgetary estimates, the CIO for Kopp's organization refused to accept the expenditures. (Tr. 1154-56). Kopp's superiors at IT were unhappy with the actions that Complainant had taken, and Kopp expressed those concerns to Heeter. (Tr. 1156).

Around October 18, Heeter advised Complainant that they needed to sit down and discuss his objectives, but the meeting did not happen until November 8. (Tr. 578, Complainant). However, they did have discussions concerning the Born Consulting situation during this period. (Tr. 579). Complainant maintains that the Born Consulting issue was only part of an ongoing

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[11] Born Consulting has also been referenced as "Borne Consulting." (See C6).

[12] Heeter could not recall the exact date that Born Consulting started work on the contract but thought it was August because they received the invoices in September. (Tr. 312-13). According to Complainant's chronology, it was discovered in September that Lexmark did not have the paperwork in place for Born because they were billed through Manugistics. (C13; Tr. 613-14, Complainant).

[13] On cross examination, Kopp acknowledged that the project that Born worked on may have been approved even though there had been no allocation of funding. (Tr. 1183-84).

controversy between Heeter's group and the EMEA [European] IT group concerning payment for the Manugistics upgrade. (Tr. 580). Despite cost overruns, the software was still not working. (Tr. 580-81). He also maintains that Kopp and Heeter agreed that Born should be retained for the project and they knew by September that IT was not going to pay for the Born invoices. (Tr. 580, 582). Heeter testified that he had conversations with the IT group to try to resolve the issue and during November it became clear that IT would not pay the invoices. (Tr. 285).

Complainant met with Covington, Heeter and Matt Clift on October 21 to discuss the upgrade. (Tr. 583). At that time, Complainant was on leave because he was moving from Cincinnati to Lexington, where he had purchased a home, and he was in the process of getting a divorce; however, he came to work to attend the early morning meeting. (Tr. 582-83).

Covington's October 28 e-mail.

Covington sent an e-mail to Heeter on October 28, 2002 confirming one or more prior conversations with Heeter and stating the following in pertinent part:

> Terry, I wanted to make sure that we were on the same page in regards to headcount for your org for the end of the year. We have discussed the following:
> 1. Send Carlsten back to Europe before the end of the year and end his assignment.
> 2. Dismissal of [Complainant], before end of the year - let me know if you need my help with this one and please keep be [sic] abreast of what is going on.
> 3. You currently have two open tickets – let's discuss before you fill these positions. I would also like to be in the interview loop before you make any decisions to hire.
> 4. I think if we take the above actions, it will only put us 2 over headcount by the end of the year. . .

(C4, R4). She went on to express the hope that the headcount could be held at 49 instead of the 53 submitted. (*Id.*) Covington explained that this email was a follow up to her discussion with Heeter about the head count of the organization. (Tr. 935-37).

Heeter interpreted this email to reflect Covington's wish to have Complainant fired before the end of the year, but he did not reach the same conclusion himself. (Tr. 80-81, 153-54). Heeter testified that they had not reached an agreement to fire Complainant at that time. (Tr. 81). Rather, he made the decision collaboratively with Covington and Suggs at the end of November or the beginning of December. (Tr. 171-72; *see also* Tr. 155-56). Similarly, Covington testified that the decision to fire Complainant was not made at the time of her email but was reached, collaboratively, in late November or early December. (Tr. 1017-18).

Covington testified that the October 28 email was intended to follow up previous conversations, which focused on performance, and advise Heeter that he had to decide whether to keep Complainant on the job as they went in to the next year. (Tr. 975-77). However, she also testified, with respect to the organization chart, that the "two open positions" for which she

wanted to be involved in the interviewing process were those under "supply chain strategic leader" (under "Internal Consulting"), suggesting that Covington believed Complainant's position would be available.[14] (Tr. 981-82; C16).

Progress review.

A Progress Review dated November 7, 2002, prepared by Heeter and reviewed by Covington and Suggs, indicates the areas in which Heeter determined that Complainant had fallen short in achieving his objectives. (C5, R5). It did not address the work that Complainant did that was not reflected on the April objectives list. (Tr. 101). According to Heeter, a reference to exploring alternative paths that would enable Complainant to be successful was intended to include positions inside his group, in other divisions, and outside of Lexmark. (Tr. 102-03). As of the date of the Progress Review, Heeter testified that no decision had been made to fire Complainant. (Tr. 104).

Heeter first discussed the Progress Review with Complainant on Friday, November 8 and then on Tuesday, November 12, after Complainant had responded with his own self assessment (dated November 11). (Tr. 99, 257-58, 583-84, C6, C7, R7). Complainant felt that the review was slanted against him and was not a full picture of everything he had been working on, and he also felt that a number of things were incorrectly stated. (Tr. 584-85). However, Heeter testified that Complainant essentially agreed that the objectives were not met, although he said they were partially met, and they both agreed that it did not really change the total outcome of the assessment, which is that he did not meet most of his objectives, including "the critical one of relationships." (Tr. 265). Covington also reviewed the evaluation and Complainant's response and she reached the same conclusion, that he did not meet the objectives.[15] (Tr. 938-42). In his file memorandum concerning the November 12 meeting, Heeter explained, in relevant part:

> . . . . We compared his responses/assessment to my assessment point by point and concluded that they were not substantially different, his being more comprehensive, and that the same conclusion could be drawn that most objectives were not met. The point w[h]ere we had the most difference was concerning his Integration role. The objective was specific about relationships and overcoming the perception of a non-team player. I again pointed out that I felt relationships were not strong enough to allow success. . . .

(C6). Heeter also noted that Complainant advised him that he was seeking a position in a division and Heeter agreed to "meet with HR to discuss the next steps." (*Id.*) Heeter testified that he had not made the decision to terminate Complainant at that time, and he reassured Complainant during one of these meetings that his employment status was not in trouble. (Tr. 148-49, Heeter; Tr. 618, Complainant). However, Heeter believed that Complainant's only options at that time were to transfer to another division or look for a job outside of Lexmark.

[14] As discussed below, "Internal Consulting" was where Complainant would have fit into the organization chart, according to Heeter, and there were only two open positions there. (C16, Tr. 296).

[15] Covington admitted that projects would sometimes be delayed but stated that she would have expected someone at Complainant's level to come forward with a recovery plan at an earlier date. (Tr. 940-41).

(Tr. 147-48). Suggs also testified that as of November 12, 2002, the decision had not yet been made to fire Complainant. (Tr. 334, Suggs).

On the same date, prior to his meeting with Heeter, Complainant met with Leslie Sizemore-Hardin from HR to express concerns about his position and request help in obtaining another one; according to her notes, which Complainant did not dispute, he stated his belief that he and Covington did not get along and she had not given him an opportunity to succeed, and that the E-Business group was not given an opportunity to succeed either.[16] (R13; Tr. 615-17, Complainant).

Returns Project.

Later that month, on November 26, 2002, Complainant participated in a meeting with Covington and Heeter concerning a special project relating to returns. (Tr. 620-21). That project was not included in the objectives given to Complainant in April 2002. (Tr. 994, Covington.) Covington testified that she had asked Complainant to look at a project to integrate their returns process with their repair process, because returned items were repaired or refurbished, and Lexmark also performed service repair work using similar processes. (Tr. 941-43). Covington wanted Complainant to look at the processes to see whether they could get more synergy to reduce costs, but she became frustrated that Complainant stayed in the theoretical phase of the project instead of moving in to the implementation phase. (*Id.*) Complainant testified that Covington expressed concerns at the amount of progress that had been made but was pleased with the work content and complimented him as "the smartest guy around here"; no mention was made of his possible termination. (Tr. 622). Covington did not recall the date of the meeting or that specific comment, which did not sound to her like something she would say; however, she explained that it was her practice to balance criticism with positive comments. (Tr. 994-96, 1037-38).

REACH evaluation.

At the request of Suggs, Heeter put Complainant's performance evaluation into a formal "REACH" format on November 27, 2002. (C10, C11; Tr. 334, Suggs). The REACH performance evaluation, which was based on Complainant's performance as SC Program Director from May 8, 2002 to November 20, 2002, indicated that the Complainant had continuing problems with respect to interpersonal relationships and that he had only fully met two out of seven objectives, although he "mostly met" three other objectives.[17] (C11). Complainant received an overall rating of 105. (*Id.*) Heeter testified that a score of 105 was

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[16] Kopp testified that after his termination, Complainant told him that he attributed his discharge to his relationship with Covington. (Tr. 1157-58, Kopp).

[17] Specifically, the REACH provided (1) in the portion of the rating addressing Lexmark Values/Continuing Responsibilities, that he needed improvement with respect to "Employee Attitude," "Mutual Respect/Teamwork," and "Interpersonal Skills" and (2) in the portion of the form relating to Key Objectives, that he had failed to meet two objectives (relating to "Leadership, Overcome perception of non-team player and prove delivery capability" and "In-Transit inventory source/visibility solution"), that he had mostly met three objectives (relating to the "Manugistics Rollout/Weekly, Regional Planning Deployment," the CPFR Process and pilot, and the "Manugistics upgrade/AP, AD deployment"), and that he met two objectives (relating to "Portfolio Management and Strategic development" and "Orders Data Warehouse") (C11).

slightly above the unsatisfactory level and any score below 200 would be "significant" for a manager. (Tr. 301, Heeter). According to Suggs, a score of less than 150 would not qualify an applicant to use the open job postings; for a score at 79 or less, a performance plan was required for continued employment. (Tr. 383, 375-76, Suggs). Although Complainant was advised that a formal REACH evaluation was being prepared at HR's suggestion, he was not told that it had been completed and he did not see it until after he was terminated. (Tr. 623-25). Complainant asked Heeter to see it on December 12 or 13 and Heeter said he would provide it and left Complainant with the impression that it had not been completed. (Tr. 625-26). Heeter withheld the evaluation at the recommendation of HR, and specifically Suggs. (Tr. 160-61). Suggs testified that Complainant did not get the REACH from November 27 until December 10 because he had been provided the information, and from December 10 until January 6 because the decision to terminate his employment had been made. (Tr. 376).

December discussions and emails.

Heeter testified that by the first two weeks in December, there were discussions about the terms and conditions of Complainant's termination; however, someone pointed out that it would not be a good idea to fire him before the holidays and ruin his holiday, so the decision was made to wait until Complainant returned from his vacation. (Tr. 173-74). Heeter discussed the timing of the termination with Suggs and Covington separately. (Tr. 175-76). An email invitation from Covington reflected that a meeting relating to Complainant's "case" was scheduled for December 10. (R26).

Suggs verified that a decision had been made to fire the Complainant by December 2002, even though most of the matters complained of (such as his contracting with Born consulting without following appropriate procedures and the resulting ramifications) occurred before the time of the REACH evaluation. (Tr. 346-51). When asked about the precipitating factor or last straw, she explained:

> In addition [to] the information regarding the consultant and the continued deterioration of relationship between supply chain and other organizations, it came to my attention that [Complainant] had looked elsewhere within the organization for a position, and could not find one. And I did not believe by December, on or about December 10th that [Complainant] would be successful in supply chain, and I did not believe that he would be able to find another position within Lexmark where he could be successful. And that is what led me to the decision, or to agree to the decision that termination of his employment was unfortunately inevitable.

(Tr. 351, Suggs.)

On December 17, 2002, Covington sent an e-mail to Jeri Stromquist ("J. Stromquist"),[18] head of Human Resources, which also suggested that she planned to fire Complainant after the holidays:

[18] Jeri Stromquist ("J. Stromquist") was married to Gary Stromquist ("G. Stromquist" or "Mr. Stromquist"), Lexmark vice president and corporate controller. (Tr. 1059, G. Stromquist). Both testified. Mr. Stromquist was

> Jeri, I spoke with Terry last week re: [Complainant] and when we should inform him of our intentions. After discussing with Terry we decided to wait until the first of the year. So the plan would be to inform [Complainant] when we return from the holiday. I will review the total package with Terry and Jean Marie this week before the holiday.
>
> Thanks
> Donna

(C14). Although Covington did not recall specifically whether she had previously met with J. Stromquist concerning Complainant's termination, she did recall asking whether it would be possible to provide a better severance package than that which was typical (consisting of four weeks of pay.) (Tr. 1020-21). Covington testified that she wanted J. Stromquist to be aware that they were not going to terminate Complainant before the end of the year and that they were going to terminate him at the beginning of January 2003. (Tr. 1021-22). She also recalled Heeter telling her that he did not want Complainant to deal with an employment termination over the holidays but they did not agree upon a specific date. (Tr. 1022-23). However, she recalled Heeter coming in and telling her that he and Suggs would be terminating Complainant that day and they discussed the need for security. (Tr. 1023). While she does not remember the date, she believes that the termination took place on that date. (Tr. 1024).

J. Stromquist recalls discussing Complainant's termination and the terms to be offered to him with Suggs and Covington in early to mid-December, and she testified that the decision to terminate him had already been made at that time. (Tr. 1106-07). She did not participate in the decision to terminate him. (Tr. 1108).

Release and Covenant Not to Sue.

Suggs testified that she prepared a "General Release and Covenant Not to Sue" agreement on December 20, 2002. (Tr. 408, 411, 414). The agreement set forth the terms of the severance package. (C20). The final version was dated January 6, 2003 and provided: "This offer will expire if you do not accept it by February 4, 2003, unless it is earlier revoked by Lexmark." (Tr. 404; C20). This agreement is discussed further below in connection with the termination meeting.

Organization Chart.

The Supply Chain Practices Organization Chart, reflecting organizational changes for 2003, that Heeter e-mailed Covington on December 30, 2002 did not include Complainant as a member of the department, although several positions were marked "TBD" [to be determined]. (C16). Complainant's job would have been under the box on the left entitled "Internal Consulting," but that position was listed as "OPEN - TBD," reflecting the decision to terminate Complainant. (Tr. 195-96, 296, Heeter.)

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not involved in the decision to terminate Complainant and his testimony was confined to financial matters. (Tr. 1040-86). His wife testified about her role in the termination process. (Tr. 1102-32, J. Stromquist).

Inventory project assignment.

Meanwhile, on the 16th or 17th of December, at a staff meeting, Heeter assigned Complainant to work on a performance action team, which was involved in a project related to reducing inventory levels and managing inventory better. (Tr. 627-28, Complainant). One aspect of the project involved how to reduce write offs in terms of obsolete inventory. (Tr. 628). The project also involved the implementation of a common metric or language for valuing slow moving and obsolete inventory. (Tr. 188-89, Heeter.) Covington had asked for results before the end of the year, and the project was to be presented at a worldwide meeting in late January or February. (Tr. 177-78). Heeter testified that by the time of that project assignment, he already knew that he was going to fire Complainant. (Tr. 96). Nevertheless, after agonizing over the decision, he decided to make the assignment, so that it would not be obvious to Complainant and others what was happening. (Tr. 96-97). Heeter advised Complainant that this was a key assignment, because Lexmark's inflated level of inventory over the preceding two years was one of its biggest challenges. (Tr. 181). At the meeting, Heeter mentioned a class action lawsuit challenging Lexmark's inventory accounting, which Heeter later learned was dismissed by Memorandum Opinion of November 8, 2002. (Tr. 182, 184-85; C43). Complainant recalled that Lexmark had taken a series of inventory write offs for obsolete inventory in 2001, and "there was some question as to whether they did that knowingly or unknowingly in terms of the lawsuit." (Tr. 633). As part of the project, Complainant worked with Philippe Rabeau ("Rabeau") and Wayne Rowe ("Rowe"), who were also in Heeter's group. (Tr. 185, 628-29). Rowe recalled that Heeter had expressed a concern that "days of inventory," or amount of time that inventory remains in stock (discussed below) be reduced. (Tr. 502-03, Rowe). Complainant was assigned to the inventory reduction piece of the project. (Tr. 187).

Complainant testified that he met with Rabeau and Rowe to discuss the project some time during the week following the meeting. (Tr. 636-37, Complainant). Essentially, they discussed the fact that the Days of Inventory ("DOI") calculation did not provide a good picture of inventory.[19] (Tr. 637-40). As an example, Complainant mentioned the Oracle software write off taken in the third quarter of 2002, which he understood to be included in Cost of Goods Sold ("COGS") and which would have therefore reduced the DOI. (Tr. 640-43). Complainant stated that the "standard joke" was to hope that expenses would go up so that the DOI would go down, thereby bringing them closer to target. (Tr. 645). He was unable to finish his analysis because he needed raw data from Rowe or his assistant, both of whom were on vacation. (Tr. 646.)

Rabeau and Rowe testified that they met with Complainant to discuss the project, but they recalled that the meeting took place in January 2003. (Tr. 449, Rabeau; Tr. 506-07, Rowe). According to Rowe, they met on January 6th, and he recalled Complainant showing him the charts relating to the relationship between COGS and days of inventory (appearing in C37) either at the meeting or at some time before, during a brief conversation. (Tr. 507, 512-14). He testified that he told Complainant that the divisions were already managing their inventory by

[19] The accounting concept of "days of inventory" is addressed in more detail below. Days of inventory, or "DOI", is essentially the ratio of the inventory value divided by the "COGS" or cost of goods sold. (Tr. 798-800, Complainant.)

units.[20] (Tr. 529). Rabeau provided a report dated January 6, 2003 to Complainant.[21] (Tr. 453-60; C38). The draft presentation was entitled "Performance Action Teams – Inventory, Organization and approach to reducing inventory levels" and bears the names of Complainant and Rabeau and the date of January 6, 2003. (Tr. 453, C38).

Testimony concerning days of inventory.

Respondent presented the testimony of an expert witness in the area of accounting, Dr. Linda McDaniel. Dr. McDaniel is a CPA who holds undergraduate and Master's degrees in accounting and a doctorate in business administration. (Tr. 859-62, McDaniel; R31 [c.v.]) She is also president of the auditing section of the American Accounting Association and she has experience teaching accounting and financial management as well as working as a CPA for Price Waterhouse. (*Id.*). At the hearing, she was accepted as an expert in the field of accounting and financial management. (Tr. 861-62) Dr. McDaniel explained how both inventory turnover and days of inventory were standard, generally accepted metrics that are used to evaluate inventory efficiency or how well a company is managing its investments in inventory to generate sales. (Tr. 862). Specifically, she stated that the days of inventory was a complement to the inventory turnover metric, which is measured by dividing the cost of goods sold by the average inventory (valued in dollars). (Tr. 863). Thus, if a company were selling $10,000 worth of inventory [valued on a cost basis] over one year, and the average inventory on hand was worth $5,000, then the inventory turnover would be two times, meaning that $5,000 worth of inventory would be sold two times during the year. (*Id.*) The corresponding days of inventory would be the average holding time for the inventory in days, which would be 180 days for the example. (*Id.)* The corresponding formulas may be expressed as follows:

Inventory Turnover (IT) = Costs of Good Sold (COGS)/Average Inventory

Days of Inventory (DOI) = Number of days in period/IT

Days of Inventory (DOI) = Average Inventory/(COGS/Number of days in period)[22]

(R 18). Dr. McDaniel testified that the use of GAAP (Generally Accepted Accounting Principles) was the only reporting that was acceptable to the SEC. (Tr. 868). Based upon the internal documentation that she reviewed relating to days of inventory, she determined that Lexmark used GAAP for its internal reporting of DOI. (Tr. 866-67). She explained that days of inventory was always based in dollars rather than units. (Tr. 868-69). On the issue of the software writeoffs, Dr. McDaniel testified that it would have an immaterial effect on the DOI

[20] When asked to explain how that would work given the different kinds of units, Rowe explained that the divisions generally broke the units down into the categories of hardware and supplies, and they also looked at individual supply products, measured by weeks of supply. (Tr. 547-50). However, when the units were aggregated, a dollar value was used. (*Id.*)

[21] Rowe explained that the January 6 date could have been the date the document (C38) was printed, because it looked like a Power Point presentation. (Tr. 516-17).

[22] The second of the DOI equations is the first equation with the IT value plugged in.

figure.[23] (Tr. 876-77). The 21.6 million writeoff was disclosed in footnotes to the financial statements. (Tr. 882). Dr. McDaniel testified that the COGS number calculated internally was the same as that reported externally, and the auditors had determined that the external numbers were in accordance with GAAP, so the internal ones would also be consistent. (Tr. 891-92). However, she stated that she had not audited the underlying documentation relating to the use of the software writeoffs in computing the COGS and she would not be in a position to comment upon whether Complainant reasonably believed its inclusion was a violation. (Tr. 902-04).

Vice President and Corporate Controller Gary Stromquist (who is responsible for Lexmark's accounting organization) testified that the Days of Inventory calculation was a standard or textbook inventory performance measure based upon the calculation of the ratio of average inventory to cost of goods sold, and it was done on a monthly basis, using a rolling three-month average inventory and cost of goods sold. (Tr. 1041-47). He testified that the calculation was also used by Lexmark as a performance measure in the incentive compensation system. (*Id.*) The cost of goods sold (COGS) figure is determined in accordance with Generally Accepted Accounting Principles (GAAP) and is reported on publicly disclosed financial statements.[24] (Tr. 1047-49). The calculations are typically made by experienced accountants within Lexmark who are qualified CPAs and they are reviewed by an independent audit firm, Price Waterhouse Coopers. (Tr. 1047-48). Mr. Stromquist stressed that consistency was a guiding principle under GAAP. (*Id.*) Although DOI is not reported by Lexmark, the data from which it may be calculated is reported on a quarterly basis. (Tr. 1051-52, 1064).

Mr. Stromquist testified that Complainant's proposed use of units for the DOI would be problematic for two reasons. (Tr. 1049-1051). First, it would not be comparable to other financial metrics, which use dollar terms. (*Id.*) Second, it would incorporate low cost and high cost items (thereby treating a $7.00 supply item the same as a $15,000.00 item) while, as a manager, he would be more concerned about excess inventory of high cost items. (*Id.*)

With respect to the Oracle software, he testified that 21.6 million dollars had been written off as part of COGS through the third quarter of 2002, and while software had not been written off in that manner previously, the approach was consistent because similar items, such as vendor cancellation charges, had been. (Tr. 1064-71). He admitted that the decision to do so for the Oracle software (which never worked) was not a "split second decision," although it was not particularly difficult one either. (Tr. 1069-70.)

Mr. Stromquist also admitted that in 2001 there was a writeoff of approximately 90 million dollars, a portion of which included obsolete inventory, that led to a class action against Lexmark, in which investors alleged that Lexmark had not written down inventory as time went on and instead took a restructuring charge at the end of the year, thereby allegedly misleading the investing public. (Tr. 1072-74). The writeoff was multi-faceted and was the result of Lexmark's business decision to make the company more profitable by exiting an unprofitable part of the business. (Tr. 1082-84). The lawsuit did not involve DOI although it did involve an allegation

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[23] Dr. McDaniel testified that the $5.8 million writeoff in June affected the days of inventory by .6 days while the $15.8 million in September affected it by 1.8 days, which would result in a less than one percent difference for the year (2002). (Tr. 878).

[24] In contrast to COGS, DOI is not reported on financial statements. (Tr. 1055, G. Stromquist).

that some inventory was overvalued. (Tr. 1084-85). The suit was dismissed. (Tr. 1085-86; C43).

Other Lexmark employees discussed the significance of the Days of Inventory calculation: Rabeau testified that it was important to reduce the days of inventory. (Tr. 465-66). He agreed that in financial terms, it made sense to report turns in terms of currency, but that for inventory management, the metrics used were in terms of units. (Tr. 473-75, Rabeau.) Rowe (who is not a CPA or accountant) testified that he disagreed with Complainant that the days of inventory were being inappropriately reported because the method Lexmark used was within general accounting practices, and what the company executives required was consistency of measurement so that they could identify trends. (Tr. 530, 546-47). James Roland Brucken ("Brucken"), who worked in what became the Printing Systems and Solutions Division (PS & SD) of Lexmark, testified that in 2001 and 2002, his division managed inventory on a unit basis and kept track of the number of units in inventory for each type of unit. (Tr. 1284-86, 1291-93). They used days of supply for operational decisions such as how much more to make. (Tr. 1291-93). Reports to management included total inventory figures on a dollar basis and the information was sometimes broken down by unit. (Tr. 1293). Brucken testified that Inventory Turnover was a frequently used measurement, "everyone knows what days of supply refers to," and he had no concerns about the use of DOI by Lexmark presenting a false picture. [25] (Tr. 1295-97). He also testified that COGS included overhead. (Tr. 1301-02).

Subsequent to Complainant's termination, Rabeau continued with the project and first presented it at a meeting that occurred on January 14, 2003 (Tr. 451, Rabeau.) Rabeau prepared a slide presentation presenting the project results. (Tr. 459). The results were received coolly, according to Rabeau. (Tr. 467). Rowe also attended the meeting and agreed that it did not begin well or end well. (Tr. 525). Rabeau later learned in meetings with divisional personnel that they were already managing inventory on a unit basis at that level, particularly with respect to fast moving versus slow moving inventory.[26] (Tr. 476.)

January 3 meeting with Heeter.

Complainant was on vacation from Christmas until Thursday, January 2, 2003. (Tr. 390, Suggs.) He was scheduled to fly to Florida on Christmas Day and come back on the 1st of January. (Tr. 634, Complainant.) He had offered to cancel his vacation to work on the inventory project but Heeter did not take him up on the offer. (Tr. 635-36).

On Friday, January 3, 2003, the day Complainant returned to work, Heeter scheduled a meeting with him for 4:00 p.m. (Tr. 195-96). Heeter testified that he intended to terminate him at that time but that he changed his mind based upon a conversation that he had with Suggs a couple of hours before the meeting, when she advised him that it was not good practice to

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[25] Brucken acknowledged that 30% of his potential incentive bonus in 2001 was based upon an inventory turnover ratio. (Tr. 1299).

[26] Rabeau explained that the divisions were in particular using "the A, B, C classification" that was addressed in the presentation. (Tr. 476, Rabeau; C38). He was referring to the practice of distinguishing inventory based upon whether it was fast moving or slow moving. (Tr. 793, Complainant; 539, Rowe.) Complainant testified that the fast moving "A" items should be the focus of management, regardless of whether they were $1.00 items or $1,000.00 items, because those items generated 80 percent of the revenue. (Tr. 815-17).

terminate someone on a Friday afternoon and have them at home over the weekend. (Tr. 197-98). Suggs testified that she had given Heeter that advice, but denied that she did so on January 3; rather, she stated that the conversation would have taken place some time before January 3. (Tr. 361, 429-30). Her rationale for avoiding a Friday termination was that during the week, an employee would have access to resources that would be unavailable over the weekend, such as the opportunity to file for unemployment compensation or the ability to consult an attorney. (Tr. 429-30).

When Heeter met with Complainant on January 3, Complainant reported his preliminary analysis on the inventory project to Heeter. (Tr. 298, Heeter; Tr. 648, Complainant.) According to Heeter, Complainant did not indicate that he was disclosing fraud but stated that, from his perspective, it would be better to calculate "days of inventory" based on units instead of dollars. (*Id*).

Complainant testified that he expressed his concerns to Heeter and showed him charts supporting his analysis:

> A. I started to take Mr. Heeter through all of the different charts and show him how the days of inventory was getting affected by the cost of goods sold, and it was varying by month to month, and started to take him through the implications of that, so that he started to, I think understand that the way we were calculating it was misrepresenting – had the potential to definitely misrepresent and understate inventory levels on a day of I basis. And I explained to him that I was concerned about that because it's going up through to [CEO] Curlander. And I said, "It sure would explain why the company was surprised at taking write offs of absolute inventory in 2001."

(Tr. 648, Complainant.) When asked to explain, Complainant referenced the lawsuit mentioned above (which Heeter had discussed briefly at the inventory project assignment meeting), but when asked to distinguish what he knew at the time from what he subsequently learned, he stated:

> . . . . In 2001, there was a large charge of inventory write offs. That's what I knew at the time, and it was for obsolete inventory. And given the fact obsolete inventory doesn't show up in any portion of the DOI calculation, it would be understandable to me that that could happen.
> What I found out later is there was a series of write offs in 2001. So when I was talking to Terry it's like, "Well, I'm not surprised we're having trouble managing our inventory using these metrics because these metrics have more variables in them and variance in them than they do fact," and said that the days of inventory is understated.

(Tr. 649-50, Complainant). Thus, Complainant was essentially arguing that the Days of Inventory calculation resulted in an unrealistically low value because it did not take into account obsolete inventory, and that using units of inventory as opposed to value of inventory would provide a better picture of the actual number of days items remained in inventory. He also

mentioned software write offs as being inappropriately included in Days of Inventory (as a part of the Cost of Goods Sold in the denominator of the equation), thereby lowering the DOI. (Tr. 653-54). According to Complainant, they joked about how their bonuses could be messed up for the year if the year end numbers were changed by this analysis.[27] (Tr. 656-58, 663).

Complainant illustrated his point with charts showing how Cost of Good Sold and Inventory Value varied monthly. (C37).[28] He also referenced a logistics handbook, which recommended using inventory days based on units for inventory management purposes.[29] (Tr. 655, 795-96, Complainant; Tr. 214, Heeter; C44, R30). Complainant testified that Heeter was engaged in the conversation, which lasted approximately one and one half hours, and that he agreed to review the data over the weekend. (Tr. 658-59). According to Complainant, Heeter told him, "Let's keep this quiet until we can figure it out and get back on it." (Tr. 659).

Heeter did not dispute that Complainant discussed some of these matters with him during the course of over an hour and that he agreed to review the data over the weekend. (Tr. 207-09, 213). However, he testified that he just said that to end the meeting and he did not bother to review Complainant's calculations or discuss Complainant's concerns with anyone else. (Tr. 213-14). According to Heeter, from his perspective, Complainant was offering nothing new, although his numerical analysis was impressive. (Tr. 207-09). However, he acknowledged that, in addition to suggesting the use of units rather than dollars in DOI (as Rowe and Rabeau had done), Complainant was "expressing concern about what dollars, what things, what items get charged into COGS" and how the other costs and expenses (such as the writeoffs) had an effect on inventory. (Tr. 229-31).

January 6 termination.

The following Monday, January 6, 2003, Complainant was terminated by Heeter. At that time, Heeter came in to Complainant's office and asked him how he was doing, and when he replied positively, Heeter said, "I'm going to change that." (Tr. 664, Complainant; Tr. 218-19, Heeter.) He closed the door and said, "I've got to terminate you." (Tr. 664). Complainant testified that he was "absolutely floored" and upset. (*Id.*). Heeter then pulled out a document and went through his check list. (Tr. 665). When Complainant asked about his REACH evaluation, Heeter stated that it had been done but that H.R. said he should not give it to him. (Tr. 665, 668).

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[27] Covington verified that at that time, her bonus compensation probably included a cash to cash metric in which days of inventory was part of the bonus. (Tr. 997-98). 2002 Incentive Compensation Plan Objectives sheets for Covington and Heeter reflect that "Inventory turns" was an element (amounting to 10% with two other items) in Covington's plan and "Inventory Days" was a component (10%) of Heeter's plan. (C35).

[28] Complainant asserts there were other charts he showed to Heeter that were not produced. (Tr. 812-13). Heeter acknowledged that there may have been more pages but testified that he only took and retained two of them. (Tr. 213).

[29] In part, the Inventory Costs section of the handbook at the beginning of Chapter 10 stated: "Inventory turns [turnovers] should be calculated for each SKU [unit], using month-end inventory balances and annual shipment volumes based on units rather than dollars. Using dollars to calculate turns can distort these data because of changes in sales mix dollars, manufacturing and purchasing costs, and markdowns or write-offs that routinely occur during the year." (C44).

Suggs did not attend the meeting initially but her presence was requested by Complainant.[30] (Tr. 365, Suggs; Tr. 666, Complainant; Tr. 219, Heeter). A team from Lexmark security was in the office next door, according to standard practice. (Tr. 365-66, Suggs). Complainant did not mention the January 3 report he made to Heeter at any time during the meeting. (Tr. 666). However, he asked Suggs why he was being fired, and she did not answer him. (Tr. 666-68, Complainant.) It was Complainant's feeling that the severance agreement (C20, discussed above) had been "thrown together" as it did not mention stock options or relocation expenses. (Tr. 666-68). Complainant expressed concerns at these omissions and asked that he be given a separate document to sign, and he signed the severance agreement indicating that it was "received only." (Tr. 673, C20). He was told that he could not accept it for 21 days (i.e., prior to January 28, 2003) and he had 7 days to revoke it after signing it. (Tr. 673-75, Complainant; Tr. 388, Suggs; R11). Complainant received no severance package because the package was revoked by Lexmark before he was eligible to execute the agreement, on January 10 or 11, 2003. (Tr. 387-89, 422, Suggs; Tr. 677, Complainant). The letter from Suggs notifying him that the offer was revoked was dated January 10, 2003. (C27).

Relocation expenses.

During the January 6 meeting, Suggs advised Complainant that Lexmark was not going to require repayment of his relocation expenses. (Tr. 366, Suggs; Tr. 670, Complainant). She testified that prior to the January 6 meeting she had been unaware that Complainant had a $150,000 loan from the relocation company, RRI, but he mentioned the loan during the exit interview.[31] (Tr. 367-70, 436). The next day she asked Andy Cohen ("Cohen"), who oversaw the contract with the relocation company, whether he was sure that he wanted to forgive the relocation expenses; when he stated that he was, she sent a letter (dated January 7, 2003) to Complainant verifying that agreement. (Tr. 367, 431-32; C23). However, Cohen subsequently pulled her out of a meeting and told her that he had been unaware of the $150,000 loan. (Tr. 432). The relocation expense issue is being addressed in a state court (Fayette County) action, in which Heeter and Suggs have been named as defendants. (Tr. 28-29, Heeter; Tr. 320, Suggs).

Calculated damages.

Complainant calculated damages from the day he was fired until May 5, 2005 in the amount of $719,368.24. (Tr. 689-90). First, Complainant calculated his lost salary as $350,854.72 plus a calculated bonus of $52,348.00 (based upon the company portion of the bonus) (Tr. 686).[32] Second, he was unable to exercise a stock option for 1000 shares on February 12, 2003, when it would have vested, which would have amounted to $130,000 based upon market value. (Tr. 677-78, 681, 687). Third, the vested portion of his 401-K program, including the company match, would have been $17,841.19. (Tr. 688.) Fourth, health benefits

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[30] Suggs testified that she was told that Heeter requested her presence. (Tr. 365, Suggs).

[31] Heeter also testified that he was unaware of the $150,000 loan from RRI, the relocation company. (Tr. 223).

[32] While the lost wage calculation does not reflect his revenue of approximately $130,000 to $150,000 for 2004 from his business managing condominium and homeowner associations, Complainant testified that he has operated the business at a loss. (Tr. 832, 833-35). He paid himself a small salary of $10,500 in 2003 and $24,000 in 2004, together with health benefits, and he also has a small consulting contract for $5,000. (Tr. 835-38). The calculated bonus "based on business division and corporate results for 2002" of $52,348 (less applicable withholdings) was listed in the severance agreement. (R11).

payments (including COBRA through August 1, 2004) amounted to $9,693.40. (Tr. 688-89). Finally, Complainant calculated lost deferred pension plan benefits as $53,934.00. (Tr. 689).

Complaint/Attempted delivery of OSHA determination letter.

Complainant filed a timely whistleblower complaint dated April 1, 2003 with OSHA under the Sarbanes-Oxley Act seeking all available compensatory damages, including back pay with interest, special damages, and litigation costs for alleged retaliatory termination. (R21).

OSHA's determination letter was issued on August 18, 2003 and addressed to Complainant at his previous address, and the letter does not reflect that it was sent to his counsel. (R 22). The certified mail envelope for OSHA's determination letter reflects that it was mailed on August 19, 2003 and addressed to Complainant at his old address, but the old address was covered with a sticker that provided Complainant's new (forwarding) address (at his business at Prosperous Place), and the envelope indicates that it was returned to the sender (OSHA) as "UNCLAIMED." (R2).

Based upon review of the certified mail envelope, Mr. William D. Rogers, letter carrier, testified during his deposition that he was unsuccessful in delivering the letter on August 25, 2003, and the first attempted delivery notice form was left in the post box of the Prosperous Place address, an office building with four units; the notice advised that the certified letter could be picked up at the post office. (R1 at 7.) Later, two additional notices of attempted delivery were placed in the post box.[33] (*Id.* at 6-7, 13.) After providing three notices for mail pickup, the U.S. Postal Service returned the letter to the sender on or about September 11th, 2003 as unclaimed. (*Id.* at 11-12.) The letter carrier stated that the notices were left in the post box of the Prosperous Place address, but he could not comment on whether Complainant physically received the notices left at that address. (*Id.* at 17.)

Complainant testified that he did not pick up the certified letter from OSHA because he did not receive the certified mail notice from the Post Office. (Tr. 829-30). He indicated that there were previous instances when his mail had been misdelivered due to the similarity of his address with that of another business. (Tr. 830-31). At his April 19, 2004 deposition in the state court action, he stated that he first saw the OSHA determination letter when he was shown the letter by Lexmark's counsel. (R14 at 151.) Further, at the same deposition, Complainant's counsel, William Rambicure, Esq., also denied that he was provided a copy of the determination letter. (*Id.* at 151-52).

Hearing request and objections.

The hearing request and objections in the instant case were filed by counsel's letter of April 28, 2004, which was addressed to the Chief Administrative Law Judge and the Regional Administrator of OSHA. The letter indicates that a "cc" was sent to Complainant but does not list other recipients. The envelope bears a post-mark of April 28, 2004 and the letter was file-stamped received in the Office of Administrative Law Judges on May 3, 2004.

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[33] Under standard procedure, a second notice was delivered a week after the first, on or about September 1, 2003, and a third and final notice was also provided, although the date of the final notice was obscured. (R1 at 6-7, 9-10.)

LEGAL BACKGROUND

Section 806 of the Act, *Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud*, amended title 18 of the United States Code by adding a new section 1514A, *Civil action to protect against retaliation in fraud cases.*

Subsection (a) of the new section provides whistleblower protection to employees of publicly traded companies and prevents such companies or their agents from discharging or otherwise discriminating against such employees in the terms and conditions of employment because they engaged in certain lawful acts:

> . . . No company with a class of securities registered under section 12 of Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, 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 [*fraud and swindles*], 1342 [*fraud by wire, radio, or television*], 1344 [*bank fraud*], or 1348 [*securities fraud*], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, 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, 1342, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Paragraph (b) specifies how an enforcement action may be brought by such an aggrieved employee and paragraph (c) provides for remedies.

A statute of limitations provision appears in paragraph (b)(2)(D), which provides:

> (D) STATUTE OF LIMITATIONS. – An [enforcement] action . . . shall be commenced not later than 90 days after the date on which the violation occurs.

Under the Act, complaints filed with the Secretary of Labor are to be governed by the rules and procedures set forth in 49 U.S.C. §42121(b) [the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as "AIR 21."] 18 U.S.C. §1514A(b)(2)(A).[34] Congress in turn modeled the AIR 21 employee protection provisions in part on the corresponding "whistleblower" provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, as amended in 1992 (Pub. L. No. 102-486, 106 Stat. 2776). The burdens of production and persuasion in whistleblower cases are based on the framework applied under Title VII of the Civil Rights Act of 1964. *Odom v. Anchor Lithkemko*, ARB No. 96-189, ALJ No. 1996-WPC-1 (Admin. Review Board Oct. 10, 1997), slip op. at 3. *See also Bartlik v. U.S. Department of Labor*, 73 F.3d 100, 103 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding "slight variation," in that "the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination").

Implementing regulations for the Sarbanes-Oxley Act appear at 29 C.F.R Part 1980. These regulations include a provision allowing an administrative law judge, upon notice to the parties, to waive any rule or issue orders "that justice or the administration of the Act requires" based upon special circumstances or good cause shown. *See* 29 C.F.R. § 1980.115. Under section 1980.103(c) and (d), a discrimination complaint must be filed in writing with the appropriate OSHA Area Director "[w]ithin 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant.)" Section 1980.109(a), relating to decisions and orders of administrative law judges, provides that "[a] determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint"; however, relief may not be ordered if the employer establishes by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of the protected behavior or conduct.

DISCUSSION

I. Complainant's objections and hearing request were timely filed.

The discussion that follows is taken from my Order Denying Summary Decision:

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[34] The section-by-section analysis of Section 806 (Whistleblower protection for employees of publicly traded companies) provides: "This section would provide whistleblower protection to employees of publicly traded companies. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. If the employer does take illegal action in retaliation for lawful and protected conduct, subsection (b) allows the employee to file a complaint with the Department of Labor, to be governed by the same procedures and burdens of proof now applicable in the whistleblower law in the aviation industry. . ." Congressional Record of July 26, 2002 at S7418 (reported on the Office of Administrative Law Judges website, www.oalj.dol.gov.)

Under 29 C.F.R. §1980.106(a) any party who desires review, including judicial review, of the findings and preliminary order "must file any objections and a request for a hearing on the record within 30 days of **receipt** of the findings and preliminary order pursuant to §1980.105(b) [emphasis added]." The date of the postmark is deemed to be the date of filing. 20 C.F.R. §1980.106(a). Here, the OSHA determination letter was issued on August 18, 2003, and the letter was sent certified U.S. mail to Complainant's old address the following day; no copy was sent to his attorney. The certified letter was forwarded to Complainant's new (business) address, and a notice of attempted delivery was placed at that address on August 25, 2003 indicating that the letter could be picked up at the post office. However, although two additional notices were left at the new address, Complainant did not pick up the certified letter. Complainant and his counsel assert that they did not learn of the letter until April 19, 2004, when Complainant was questioned about it during his deposition, and they first received a copy at that time. The complaint was filed by mail on April 28, 2004, within nine days. The regulation under 29 C.F.R. §1980 is very clear that the thirty (30) day period for appeal begins to run upon receipt; while the Sarbanes-Oxley Act itself is silent, the AIR21 statute references "notification of findings."[35] Respondent argues that Complainant had notice and constructive receipt on August 25, 2003, when the delivery notification was left in the post box. However, the regulation requires "receipt" and not actual or constructive notice. *See* 29 C.F.R. §1980. Here, it is undisputed that Complainant did not receive the letter on August 25, 2003, and there has been no showing that he received the letter or other notification of the findings prior to April 19, 2004. Thus, the objections and hearing request filed on April 28, 2004 were filed within the thirty (30) day period, and the Complainant's objections were timely.

Presumptive Receipt/Actual or Constructive Notice

Respondent cites *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc*. 209 F.3d 552, 554 (6th Cir. 2000) as support for his position; however the facts are quite distinguishable. Moreover, *Graham-Humphreys* is a Title VII case operating under a different statutory and regulatory scheme. The pertinent provision in Title VII provides that the person aggrieved be notified if the government does not plan to pursue litigation and requires that a civil action be brought by such aggrieved person "within ninety days after the giving of such notice." 42 U.S.C. §2000e-5(f)(1). The regulations, however, require that the notice provide authorization for a civil action to be filed within ninety days of "receipt" of the authorization. 29 C.F.R. §1601.28(e)(1).

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[35] Complaints filed under the Sarbanes-Oxley Act are to be governed by the rules and procedures set forth in 49 U.S.C. §42121(b) [the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as "AIR 21"]. 18 U.S.C. §1514A(b)(2)(A). The AIR21 Act provides that the complainant may file objections and a request for a hearing "[n]ot later than 30 days after notification of findings." 49 USC §42121.

In *Graham-Humphreys*, the postal carrier unsuccessfully attempted delivery of the EEOC's May 7, 1996 right to sue ("RTS") letter at the plaintiff's address.[36] The mailman then deposited, at that residence, an attempted delivery notification, which stated that a certified letter could be claimed at the local post office. *Id*. The plaintiff received the postal notification on that day, but she made no effort to retrieve the letter. *Id.* Later, the letter was returned to the EEOC office stamped "unclaimed." An EEOC employee alerted the plaintiff by telephone on May 20, 1996 that her RTS document had been issued and posted, but it had been returned as unclaimed certified mail. *Id.* at 554-55. Later that day, the plaintiff personally appeared at the EEOC district office to accept the letter, which advised her that she could bring an action within 90 days of receipt. *Id.* at 555. She filed an action on June 21, 1996, within 90 days of receipt of the letter but more than 90 days after she received the postal notifications. *Id.* Based on these facts, the U.S. Court of Appeals for the Sixth Circuit held that the complaint was untimely because (1) the plaintiff had presumptively received actual delivery of the RTS within five days of its mailing [March 13, 1996], and (2) the plaintiff received constructive receipt of notice of the RTS when the postal notification was placed in her mailbox [March 8, 1996]. *Id* at 558. In denying equitable tolling, the Sixth Circuit noted that the plaintiff had "abundant time (74 days)" following the "actual release to her of the RTS notice" prior to expiration of the limitations period. *Id.*

With respect to presumptive receipt, the Sixth Circuit in *Graham-Humphreys* relied upon a presumption of actual delivery and receipt within five days, which may be rebutted by proof that the plaintiff did not receive notification within that period. 209 F.3d at 557. The plaintiff had conceded that she received the notice and suspected that it related to her EEOC lawsuit authorization. *Id.* at 556-57. Here, in contrast, Complainant has rebutted that presumption by asserting that he neither received the letter nor notice of the letter prior to April 19, 2004. In this regard, Complainant denies having received the notice of attempted delivery and there are no facts demonstrating that he expected to receive it. Complainant and his counsel allege no knowledge of, or physical possession of, the determination letter until Complainant was shown the letter by Lexmark's counsel during his deposition of April 19, 2004. By viewing all evidence and drawing reasonable inferences in the light most favorable to the Complainant, I find that Complainant did not receive actual delivery or notice of the determination until April 19, 2004.

In *Graham-Humphreys*, the Sixth Circuit also stated that plaintiff had constructive notice of the right to sue letter on the day that the letter carrier deposited the first official notification at plaintiff's address advising that a certified letter was awaiting her at the postal office and that, even if she had not conceded her suspicions, she had received imputed notice of her RTS because she reasonably should have expected it to arrive during that time period. The Sixth Circuit held that "the deposit of a postal attempt-to-deliver advisory at the

[36] The plaintiff had requested that the EEOC issue the letter on February 28, 1996.

claimant's last know residential address of record within the five-day mailing interval ordinarily will constitute *constructive receipt* of the RTS notice by the claimant." 209 F.3d 558. In discussing the facts of the case, the Sixth Circuit referenced specific criteria relating to Title VII cases, noting that the RTS letter was sent in response to a request from the plaintiff and she expected to receive it in the mail, and she knew or should have known that it would be likely to be sent by certified mail. In this case, in contrast, Complainant has denied knowledge of or receipt of the attempted delivery notice. Although the letter carrier did state that the first notification was left on August 25, 2003 in the post box of Complainant's forwarding address, there is no evidence that he physically received such notice. Moreover, Complainant had taken no contemporaneous action to initiate a response by OSHA and had no reason to expect that he would be receiving a determination letter during the pertinent time period. Therefore, constructive notice cannot be imputed to the Complainant.

Respondent also relies upon authority holding that a claimant who neglected to inform the EEOC of a change of address cannot overcome the presumption of delivery by mail, even if the notice is sent to the wrong address. *Respondent's First Motion for Summary Judgment* at p. 5*, citing Banks v. Rockwell Int'l N. Am Aircraft Operations,* 855 F.2d 324, 326 (6th Cir. 1988) and *Hunter v. Stephenson Roofing, Inc.,* 750 F.2d 472-475 (6th Cir. 2000). However, the issue in this case is one of receipt and not one of the incorrect address. Complainant did provide the U.S. Postal Service with a new forwarding address, which was the location where the notification was placed. Thus, the Respondents' argument that Richard had constructive notice due to his failure to provide OSHA with his new address fails.

In view of the above, I find that the Complainant's hearing request was timely.

Respondent also argues that Complainant is not entitled to invoke equitable tolling of the limitations period because of his failure to exercise due diligence and his representation by counsel. *Respondent's First Motion for Summary Judgment* at p. 6 to 8. I do not find the circumstances present here to preclude the application of equitable tolling principles on any of the bases suggested. However, inasmuch as I have found the hearing request to be timely, it is unnecessary to address the issue of equitable tolling with respect to the timeliness of the hearing request. The issue of equitable tolling as related to the defective service of the hearing request is addressed below.

Defective Service of Objections and Hearing Request

Under 20 C.F.R. §1980.106(a), "copies of the objections [filed with the Chief Administrative Law Judge] must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor. . ." Respondent asserts that the objections indicate that

neither Lexmark nor Lexmark's counsel were copied and Lexmark only received a copy weeks after they were filed. *Respondent's First Motion for Summary Judgment* at p. 3-4. Respondent argues that the claim should be dismissed on that basis. In response, Complainant concedes that Respondent and its counsel were not copied but asserts that the determination letter did not advise him of this requirement and that Respondent has not been prejudiced by the oversight. *Complainant's Response to [First] Motion for Summary Judgment* at p. 5 to 6.

Procedural requirements relating to the filing of a hearing request have generally been found to be not jurisdictional in nature and therefore subject to principles of equitable tolling. *See, e.g., Shelton v. Oak Ridge National Laboratories,* ARB No. 98-1000, ALJ No. 1995-CAA-19 (ARB March 30, 2001) (affirming the administrative law judges' acceptance, as timely, of a hearing request that was filed with the wrong office of the Department of Labor due to a clerical error).[37]

Individual administrative law judges have disagreed as to whether failure to comply with specific procedural requirements (specifically, the requirement that a hearing request be served upon the respondent) is grounds for dismissal of whistleblower complaints. *Compare Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.,* 2004-ERA-9 (ALJ Bullard, April 29, 2004) *with Hibler v. Exelon Nuclear Generating Co., LLC,* 2003-ERA-9 (ALJ Lesniak, June 5, 2004). In a Sarbanes-Oxley Act case addressing a complainant's failure to serve a hearing request on the respondent within the requisite 30-day period, Administrative Law Judge Stephen Purcell found that the period was subject to equitable tolling and that such tolling was appropriate because the complainant, who was unrepresented, had diligently pursued his appeal but was confused by the instructions given in the OSHA determination letter.[38] *Lerbs v. Buca di Beppo, Inc.,* 2004-SOX-8 (ALJ, Dec. 30, 2003) Order Denying Motion to Dismiss at 4 to 5 *citing Spearman v. Roadway Express, Inc.,* No. 1992-STA-1 (Sec'y, August 5, 1992). Judge Purcell further noted that there had been no showing of prejudice as the respondent had not been hampered in any way in its ability to develop evidence or otherwise proceed with the litigation. *Lerbs,* at 5. *See also Graham-Humphrey,* 209 F.3d at 561, *citing Truitt v. County of Wayne,* 148 F.3d 644, 648 (6th Cir. 1998) (addressing criteria for equitable tolling).

In *Jain v. Sacramento Municipal Utility District,* 1989-ERA-39 (Sec'y, Nov. 21, 1991), a whistleblower case brought under the Energy Reorganization Act, the Secretary of Labor affirmed the administrative law judge's denial of a motion to dismiss based upon the complainant's failure to serve the respondent with the hearing request. The Secretary held that failure to serve a party with a hearing request was not grounds for dismissal when any possible prejudice due to

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[37] In *Shelton*, the undersigned administrative law judge adopted the Chief Administrative Law Judge's finding that the hearing request should be accepted as timely.

[38] The same instructions are involved here. While Complainant is represented by counsel, I do not find that factor to be dispositive in view of the newness of the Sarbanes-Oxley Act and the pertinent implementing regulations.

delay was precluded by a postponement of the hearing. In *Jain*, the Secretary did not find a need to reach the issue of equitable tolling in view of the Secretary's finding that no prejudice resulted from the delay in service. Although the precedential value of *Jain* has been questioned because the service requirement in the regulations was amended in 1998 to require contemporaneous service, I find that it still represents good law. *Compare Lazur v. U.S. Steel-Gary Works,* 1999-ERA-3 (ALJ Mosser May 18, 2000), *with Webb v. Numanco,LLC,* 1998-ERA-27 (ALJ Roketenetz July 7, 1998) *vacated*, ARB No. 98-149 (ARB Jan. 29, 1999).[39]

Thus, I find that regardless of how the issue before me is framed (either as the ramifications of failure to comply with a procedural requirement or the appropriateness of equitable tolling), the pertinent inquiry is whether the Respondent has been prejudiced in any way by improper service of the hearing request. This matter, which was originally scheduled to be heard in August 2004, has been continued once and is currently set for December 6 to 10, 2004. Thus, the parties have been provided with ample time to conduct discovery and develop the evidentiary record. Respondent has asserted no prejudice nor is any apparent. Accordingly, I find that Complainant's failure to serve Respondent with its hearing request is harmless and is not grounds for dismissal.

After considering the facts based upon the evidence presented at the hearing in this matter, which were essentially the same as those presented to me on summary judgment, together with the arguments made and authority cited, I now find, based upon a preponderance of the evidence, that the objections and hearing request were timely filed. In addressing the summary judgment motion, I considered the arguments and facts in the light most favorable to the Complainant. However, I have now reached the same result based upon a preponderance of the evidence standard, taking into account Complainant's credible testimony at the hearing. Dismissal of the complaint on the basis that the objections and hearing request were untimely is therefore inappropriate.

II. Complainant has failed to establish a violation of the Sarbanes-Oxley Act.

The Sarbanes-Oxley Act provides whistleblower protection for employees of publicly traded companies[40] who provide information or participate in an investigation relating to violations of certain criminal code provisions relating to fraud (including "fraud and swindles"; "fraud by wire, radio, or television"; bank fraud; and securities fraud), rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders, when the information is provided to the employee's superior, law enforcement or regulatory personnel, or members of Congress or when the employee has participated in proceedings relating to the violation. Actions brought under the Sarbanes-Oxley Act are

[39] In *Webb*, the Administrative Review Board vacated the ALJ's decision at the parties' request for approval of a settlement agreement and did not address whether the service requirement was jurisdictional; however, the ARB implicitly acknowledged jurisdiction when it approved the settlement.
[40] The Act applies to companies (and their employees and subcontractors) that have a class of securities registered under section 12 of Securities Exchange Act of 1934 (15 U.S.C. 781) or are required to file reports under section 15(d) of the Securities Exchange Act of 1934. It is undisputed that Lexmark is a company covered by the Act.

governed by the burdens of proof set forth under 49 U.S.C. §42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21.") *Halloum v. Intel Corporation,* ARB No. 04-068, ALJ No. 2003-SOX-7 (Jan. 31, 2006) *appeal filed* No. 06-71902 (9th Cir. 2006), slip op. at 6, *citing* 18 U.S.C. §1514A(b)(2)(C).

To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct; (2) the respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Halloum*, slip op. at 6, *citing Getman v. Southwest Securities, Inc.,* ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), *recon. denied* (ARB March 7, 2006). *See also Peck v. Safe Air International, Inc.,* ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (AIR21 case); *Bauer v. U.S. Enrichment Corp.*, ARB No. 01-056, 2001-ERA-9 (ARB May 30, 2003) (ERA case).

If a complainant proves the elements of his case by a preponderance of the evidence, the respondent may still avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Halloum*, slip op. at 6.

Protected Activity or Conduct.

"Protected activity" as defined under the Act includes providing to an employer information regarding any conduct which the employee reasonably believes constitutes a violation of various criminal fraud provisions, any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. §1514A (a)(1); *see also* 29 C.F.R. §1980.102(a). Only the provision relating to a violation of rules or regulations of the SEC does not specifically mention fraud.[41] Indeed, the legislative history of the Act makes it clear that fraud was the impetus for the adoption of the whistleblower provision. *See* S. Rep. No. 107-146, 2002 WL 863249 (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company" and that the provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent."*)* In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." *Ames Department Stores Inc., Stock Litigation,* 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations.)

In its recent decision in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.,* ALJ No. 2004-SOX-11, ARB No. 04-149 (May 31, 2006), the Administrative Review Board has, however, suggested that an innocent violation of an SEC rule may give rise to jurisdiction under

[41] The legislative history of the Act supports the proposition that fraud is an integral element of a cause of action under the whistleblower provision, as I have previously stated. *See Hopkins v. ATK Tactical Systems,* Case No. 2004-SOX-00019 (ALJ Wood, May 27, 2004) *citing, e.g.* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002).. However, the Administrative Review Board has recently stated that "SOX protection applies to the provision of information regarding not just fraud, but also 'violation of . . . any rule or regulation of the Securities and Exchange Commission.'" *Klopfenstein v. PCC Flow Technologies Holdings, Inc.,* ALJ No. 2004-SOX-11, ARB No. 04-149 (May 31, 2006). No violation of an SEC rule or regulation has been alleged here.

the Act if an employee were retaliated against for reporting it. Specifically, in its remand decision, the Board stated (slip op. at 17-18) that "it certainly is possible that [the complainant] engaged in protected activity" when (in footnotes to inventory reports) he reported discrepancies between the in-transit inventory balances (which showed prepaid inventory in transit from overseas) and the shipping documents, even though he did not believe the discrepancies amounted to fraud. The Board reasoned that the communications involved, at a minimum, suggested incompetence in internal controls that could affect the accuracy of financial statements of his employer's parent company. On remand, the issue to be addressed was whether the complainant (a vice president) was reasonable in believing that "his concern about the inventory accounting related to a violation of a SOX-listed law or rule" and whether his activity sufficed to express his concern and count as the provision of information under the Act. *Id.* In *Klopfenstein*, the complainant had asserted a violation of SEC rule "13a-15a, which requires issuers . . . to maintain 'disclosure controls and procedures' and 'internal control over financial reports.'" *Id.* at n. 20.

Under the Act, it is only necessary for the complainant to establish that he "reasonably believed" there was a securities violation under the Act. *See Halloum*, slip op. at 6; *see also Collins v. Beazer Homes USA, Inc.***,** 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004). "The test does not measure the accuracy or falsity of a Complainant's allegations; rather, the plain language of the regulation only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections." *Smith v. Hewlett Packard,* 2005-SOX-88 (ALJ Pulver, Jan. 19, 2006), slip op. at 9 [citations omitted.] The "Discussion" of this provision (section 806 of the Act), following the section-by-section analysis appearing in the Congressional Record of July 26, 2002 at page S7421, provides:

> This provision would create a new provision protecting 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. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information. In addition, **a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts**. (*See generally Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478). Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief. The 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.[42] [Emphasis added].

In *Getman v. Southwest Securities., Inc.,* ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), the Administrative Review Board found that a stock analyst's refusal to change

[42] This excerpt is from the Office of Administrative Law Judges website, www.oalj.dol.gov

her rating on a stock was not protected activity. Significantly, she did not tell the review committee that "she believed she was being pressured and relating that pressure to potential fraud against shareholders." *Id.* Rather, at the review committee meeting where she claimed to have been pressured, she told the committee that they could issue the stock report without her name on it. Neither the ARB nor the administrative law judge found that the statement was an act of whistleblowing. Furthermore, the ARB reversed the ALJ's ruling that the analyst's refusal to change her rating constituted protected activity because it did not amount to "provid[ing] information" to a person with supervisory authority relating to a violation under the Act. The ARB reasoned:

> . . . In the context of a review committee meeting between an analyst and her supervisor, where disagreement over a rating may be a normal part of the process, **the analyst must communicate a concern that the employer's conduct constitutes a violation** in order to have whistleblower protection. [Emphasis added.]

Id.

Although in the instant case, the Complainant (unlike the analyst in *Getman*) provided information to a person with supervisory authority, I now find that Complainant's conduct in doing so was not protected because the Complainant did not express a concern about potential fraud against shareholders or other violations under the Act. In addition, (unlike the vice president in *Klopfenstein*, who asserted the violation of an SEC regulation) the Complainant did not reasonably believe that he was reporting even a nonfraudulent violation under the Act.

The protected activity claimed here, discussed in detail above, involves Complainant's January 3, 2003 discussion with his supervisor, Heeter, concerning his preliminary findings on an inventory project, in which he suggested that the Days of Inventory (DOI) metric, which involved dividing the average inventory (valued in dollars) by cost of goods sold (COGS), had the potential to misrepresent and understate the number of days items remained in inventory, thereby resulting in misrepresentations in management reports, because the COGS varied widely from month to month. Specifically, Complainant discussed the obsolete inventory writeoffs that had been the subject of a lawsuit and suggested that the Days of Inventory calculation resulted in an unrealistically low value because it did not take into account obsolete inventory. Further, he argued that fluctuations in the COGS value, arising from such matters as the inclusion of software writeoffs in COGS, provided misleadingly low results. He suggested that the use of units as opposed to dollar value would provide a more accurate picture of the actual number of days items remained in inventory, and he intended to pursue his work on that issue.

Construing the facts and inferences in Complainant's favor, I found on summary judgment that there was a factual issue as to whether Complainant engaged in protected activity when he provided information concerning accounting problems with inventory to Heeter and he reasonably believed that the irregularities constituted a violation of laws relating to fraud against shareholders.

In addressing this matter on the merits, I note that it is not necessary for Complainant to establish that there was a violation of the Act. Indeed, the testimony concerning the DOI metric

and its components, establishes that the DOI metric was a commonly used equation that was utilized consistent with Generally Accepted Accounting Principles (GAAP) and that the components of DOI (including Cost of Goods Sold) were calculated in accordance with GAAP.[43] Under 17 C.F.R. § 210.4-01(a)(1), financial statements to the SEC must be made in accordance with GAAP. *In re Acceptance Ins. Companies Sec. Litigation.*, 423 F.3d 899 (8th Cir. 2005). Moreover, the method suggested by Complainant for calculating DOI on a unit basis was already being used at the divisional level for planning purposes. While the software writeoff issue is less clear, the unrefuted testimony establishes that the decision to include it as part of COGS was made by CPAs within Lexmark, was consistently calculated internally and externally, was reported in footnotes to financial statements, and passed an audit by independent auditors.[44] Further, while DOI is not separately reported, it is irrefuted that the financial reports relating to the components of DOI were made in a consistent manner, in accordance with GAAP, and in a form that investors and shareholders had come to expect.[45] Thus, I do not find that any potential fraud against shareholders, or any other violation under the Act, has been established. However, Complainant does not need to establish a violation. Rather, the issue before me is whether Complainant **reasonably believed** that there was a violation, such as by providing false information to investors upon which they might rely. Complainant's burden to so establish contains both a subjective and objective element, in that he must have actually believed that there was a violation and that belief must have been reasonable, taking into consideration his training and experience. *See Lerbs v. Buca di Beppo, Inc.,* Case No. 2004-SOX-8 (ALJ Purcell June 15, 2004)*, citing Melendez v. Exxon Chemical,* ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000).

When asked whether he had a belief when he was reporting this information to Heeter that what he was reporting could impact on the public and public fraud, Complainant testified:

> A. Yeah, I used to be a vice president, senior executive to Chiquita, and I saw and attended a lot of meetings and saw – we used management information to figure out how the status of the business was and monthly reviews with senior executives. I'd actually, when I was in the E business made a couple of presentations to that senior group and saw how some things changed. So I had no doubt that when they went through these kinds of numbers and this kind of detail that, you know, they were interested and they were using this to base their view of the business on.

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[43] "Generally Accepted Accounting Principles" are "the conventions, rules, and procedures that define accepted accounting practices" that are promulgated by the accounting profession's Financial Accounting Standards Board. *United States v. Arthur Young & Co.*, 465 U.S. 805, 811 n. 7 (1984).

[44] In addressing the software writeoff issue, I reject Respondent's argument (Brief at 29-30) that the $21.6 million writeoff was immaterial because it had only a less than 1% effect on the DOI figure for the entire year of 2002. As Complainant has asserted (Brief at 43-46), there is no materiality requirement for recovery under the Act. *See generally Morefield v. Excelon Services, Inc.*, 2004-SOX-2 (ALJ Levin, Jan. 28, 2004) (the Act "places no minimum dollar value on the protected activity it covers" and "[t]he mere existence of alleged manipulation, if contrary to a regulatory standard, might not be criminal in nature, but it very well might reveal flaws in the internal controls that could implicate whistleblower coverage for seemingly paltry sums.")

[45] I attach no significance to the fact that DOI is not directly reported to the public, and I specifically reject Respondent's argument (Brief at 36) that false statements that are internal to a company and are not disseminated to the investing public cannot be a basis for liability.

> Q. Were you worried or not worried that information might be getting to the public about Lexmark that was not accurate when you made this report to Mr. Heeter?
>
> A. I was worried that this was, you know, the decisions they were making with their reporting, were saying was potentially a problem.

(Tr. 659-60). Thus, Complainant was concerned that upper management was receiving data that was misleading and would make management decisions based upon that data, which in turn could eventually affect the public. It is also clear from the testimony of others that the DOI figure, while not directly reported, may be calculated from data that are reported (such as COGS); therefore, it reached the public and had the potential of influencing decisions made by investors or shareholders. However, Complainant did not go so far as to say that the data generated involved intentional misrepresentations or fraud or that false information was disseminated to shareholders or investors. He also did not mention any Securities and Exchange Commission rules or regulations, or criminal or civil statutes relating to fraud, that were violated.

Heeter denied that Complainant had told him that he had discovered some sort of securities violation or fraud by Lexmark. (Tr. 298-99). When asked whether Complainant had characterized his findings as "some sort of accounting error," Heeter testified:

> A. No. He was characterizing it as, "This is my analysis, the work that I have done that shows that calculating days of inventory based on dollars is a different result than calculating it based on units." And the contention was that from his perspective, it would be better to calculate it on units than to be on dollars.
> He never did mention fraud or that it's wrong to do that, just said that it's his analysis and opinion that it'd be better to do it the other way.

(Tr. 298-99). I find that Complainant's and Heeter's testimony are consistent.

After considering all of the evidence on this matter, I now find that Complainant has not established that he reasonably believed that there was an actual violation under the Act. Complainant, who has a Masters of Business Administration and over thirty years of supply chain management experience, is an educated, sophisticated, experienced manager with extensive knowledge of supply chain practices. From Complainant's testimony, it was clear that he believed that a more accurate picture of the amount of time that items remained in inventory could be provided by the method that he suggested, which was still in its preliminary stages, and that inclusion of software writeoffs in COGS, and the failure to account for obsolete inventory in DOI, produced misleading results. However, he did not suggest that there was anything fraudulent about the manner in which DOI or any of the other metrics were calculated, nor did he go so far as establish that the methods used were contrary to GAAP or SEC filing requirements. Furthermore, he has not established that he believed there were intentional misrepresentations in the financial data reported either internally or externally, or that any laws or SEC regulations were violated.

At bottom, Complainant has suggested that the metrics used, while consistent with generally accepted accounting practices, failed to provide a complete picture to upper management or to shareholders and investors. While his credible testimony reveals that he had embarked on a project that he believed would result in better inventory management and supply chain practices, and while he testified that the way the figures were calculated had the potential to misrepresent inventory levels, his testimony as a whole does not establish that he actually believed any false information was reported to anyone, or that there was a violation of the Act.

As to the issue of whether a belief that there was a violation under the Act would be reasonable under the circumstances concerned here, I reach the same result. The unrefuted testimony establishes that the metrics used here, including Days of Inventory and Cost of Goods Sold, were calculated and reported in accordance with generally accepted accounting principles. Moreover, the inclusion of nonfunctioning software in COGS was reported in footnotes to financial statements, and there has been no showing that the way obsolete inventory was reported was not in accordance with GAAP or contrary to any other SEC requirements. No facts have been adduced that would cause a reasonable person with Complainant's training and experience to determine that there was any potential securities fraud or violation of any laws or SEC rules and regulations. Thus, Complainant could not have reasonably believed that there was a violation cognizable under the Act, nor did he communicate a concern about such a violation.[46]

I reach the above conclusion with some trepidation, recognizing that there may be instances where a complainant does not fully recognize that the actions he is complaining about are fraudulent, yet his reporting of them would be covered under the Act. I do not, however, find the activity concerned here to fall within the purview of the Act.

In conclusion, I find that Complainant has not established that he reasonably believed that there was a violation of any laws relating to fraud against shareholders, or of any Securities and Exchange regulations, or that he reported potential fraud against shareholders or other violations under the Act to his supervisor, based upon his own testimony in this matter and the testimony of his supervisor, considered along with the other evidence of record.

Notice of Protected Activity.

On the issue of Notice, it is clear that Lexmark was aware of Complainant's reporting of his findings on the inventory project and therefore was aware of his claimed protected activity. Under the terms of the Act, quoted above, it is sufficient for an employee to provide information regarding possible violations to a person with supervisory authority over the employee. On January 3, 2003, the Friday prior to his discharge, Complainant communicated his findings regarding the inventory accounting practices to his supervisor, Heeter. Accordingly, Respondent was aware that Complainant was engaged in protected activity (to the extent that Complainant's reporting of his findings on the inventory project constitutes protected activity) and Respondent was placed on notice of the claimed protected activity at that time.

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[46] The temporal proximity between the alleged protected activity and the termination involved here, at first blush, lends some support to the assertion that the activity was protected. However, I have discussed my rationale for discounting the temporal proximity between the two events in the section below relating to "Causation/Contributing Factor."

Unfavorable Personnel Action

Complainant clearly suffered an unfavorable personnel action within the meaning of the Act through his termination on January 6, 2003. In this regard, the Act provides that an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in terms and conditions of employment." 18 U.S.C. §1514A; *see also* 29 C.F.R. 102(a), (b)(1). Thus, his discharge is covered under the plain language of the Act.

Causation/Contributing Factor.

The final element that a complainant must establish by a preponderance of the evidence is that the protected activity was a contributing factor in the unfavorable action. *Halloum,* slip op. at 6, 7-8; 29 C.F.R. §1980.109(a). A "contributing factor" has been defined as "'any factor, which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.'" *Klopfenstein,* slip op. at 18, *citing Marano v. Dep't of Justice,* 2 F.3d 1137, 1140 (Fed. Cir. 1993) (decided under the Whistleblower Protection Act, 5 U.S.C. §1221(e)(1).) *See also Collins,* 334 F. Supp. 2d at 1379. The contributing factor standard was intended to replace case law requiring a whistleblower to prove that the conduct was a significant, motivating, substantial, or predominant factor in a personnel action. *Klopfenstein,* slip op. at 18. Complainant need not establish that the protected activity was the primary motivating factor in order to establish causation. *Halloum,* slip op. at 8, *citing Getman,* slip op. at 8.

A nexus between the protected activity and the adverse employment action may be established inferentially or directly. To establish the causal relationship between the protected activity and adverse employment action inferentially, circumstantial evidence is permissible evidence of discriminatory intent. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983). Where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, ALJ No. 1995-ERA-40 (ARB June 21, 1996). Proximity in time is sufficient to raise an inference of causation under the pertinent regulations relating to the investigation of complaints under the Act. 29 C.F.R. §1980.104(b). The same rule is applicable in whistleblower cases decided on a full record developed at a hearing. *See Halloum,* slip op. at 7-8. *See also Vieques Air Link v. United States Dept. of Labor,* 437 F.3d 102, 109 (1st Cir. 2006) *citing Bechtel Construction. Co. v. Secretary of Labor,* 50 F.3d 926, 934 (11th Cir. 1995); *Overall v. Tennessee Valley Authority,* ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53 at 12 (ARB April 30, 2001).

In denying summary decision, I found that the proximity of time between the alleged protected activity and the adverse personnel action gave rise to an inference of causation. Specifically, I found that "[t]he fact that Complainant was terminated on the next business day after allegedly reporting accounting problems is sufficient to raise an inference that the adverse action was likely motivated by his protected activity." Likewise, under the undisputed facts presented at the hearing in this matter, Complainant has established a nexus inferentially due to

the temporal proximity between his claimed protected activity (reporting the preliminary results for the inventory project on Friday, January 3, 2003) and his termination (the following Monday, January 6, 2003). [47]

When a respondent has articulated a legitimate (nondiscriminatory) basis for its action, and has produced evidence supporting that basis, the inference of discrimination disappears. *Gary v. Chautauqua Airlines,* ARB Case No. 04-112, ALJ Case No. 2003-AIR-38 (Jan. 31, 2006). At the hearing stage, the administrative law judge may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of determining whether the complainant has proven by a preponderance of the evidence that the protected activity contributed to the dismissal. *Id.* The complainant may demonstrate that the reasons proffered by the respondent were not the true basis for the adverse action, but were a pretext for discrimination, under the framework of proof for title VII cases. *Overall, supra.*[48] *See also Jenkins v. Old Dominion Recycling, Inc.,* ARB No. 05-013, ALJ No. 2004-STA-13 (ARB Jan. 27, 2006). If the employer has established legitimate reasons and the complainant also proves illegal motive, the case is a "dual motive" or "mixed motive" case, and the burden shifts to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of protected activity.[49] *Talbert v. Washington Public Power Supply Systems*, ARB No. 96-23, ALJ No. 1993-ERA-35 (ARB Sept. 27, 1996). In such "dual motive" cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. *Pogue v. U.S. Department of Labor,* 940 F.2d 1287 (9th Cir. 1991).

Here, Respondent has satisfied its burden of production by establishing an alternate grounds for dismissal – Complainant's performance problems and problems working as a team member. In this regard, Respondent has produced evidence establishing that the decision to terminate Complainant's employment was made before the January 3, 2003 meeting between Complainant and Heeter took place, based upon Complainant's performance problems and deficient interpersonal skills, and Respondent has therefore satisfied its burden of production. The reasons articulated were sufficient, non-discriminatory reasons to seek his termination as an employee. *See Halloum,* slip op. at 8 (finding that Halloum's failure to integrate himself into Intel's workforce and failure to perform up to expectations were sufficient, non-discriminatory reasons to seek his termination.) Therefore, the inference of discrimination disappears and Complainant must demonstrate by a preponderance of the evidence that the protected activity was a contributing factor in his termination, either by showing that the proffered reason was a pretext or that both illegal and legal motives played a part in the decision to terminate him. *Klopfenstein,* slip op. at 17-18. To meet this burden, a complainant need not show that his

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[47] In so finding, I note that I have found that the Complainant has failed to establish that he engaged in activity protected under the Act, for the reasons set forth above.

[48] In *Klopfenstein, supra,* slip op. at 19, *citing Rachid v. Jack in the Box, Inc.,* 376 F.3d 305, 312 (5th. Cir. 2004), the Administrative Review Board noted that most complainants will attempt to prove that the respondent's articulated reason was a pretext, because "doing so provides a highly useful piece of circumstantial evidence"; however, "a complainant is not *required* to prove pretext, because a complainant alternatively can prevail by showing 'that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic.'"

[49] For Title VII cases, the Supreme Court has suggested that direct evidence of discrimination is unnecessary to establish a mixed motive case. *See generally Desert Palace dba Caesar's Palace Hotel & Casino v. Costa,* 539 U.S. 90 (2003).

protected activity was the primary motivating factor as long as he establishes that it was a contributing factor. *Id*.

I denied summary decision because, while Respondent produced evidence that management was unsatisfied with Complainant's work performance and considering his possible termination, there were genuine issues of material fact on this point. Specifically, I found that the exact date of the decision to terminate Complainant was unclear and the evidence was contradictory on the point. Further, I found that establishing that the Complainant's termination was the natural consequence of Lexmark's documented dissatisfaction with his work performance would not be conclusive, because it would still be unclear whether his reporting of accounting problems the business day prior to his termination in any way factored into that decision. Therefore, construing the facts and inferences in the light most favorable to Complainant, I found that there was a genuine issue of material fact as to whether Complainant's protected activity was a contributing factor in his termination.

Considering all of the evidence on the issue, I now find that the Complainant has failed to satisfy his burden of persuasion on the causation issue. The circumstances leading to Complainant's termination have been set forth in some detail above and will not be repeated here. While it is still not entirely clear when the decision was made, I find that the weight of the evidence clearly establishes that the decision to terminate Complainant was made prior to the time that he was assigned to work on the inventory project (mid-December 2002) or reported the results to Heeter (January 3, 2003). Further, the weight of the evidence establishes that Complainant's claimed protected activity did not play any part whatsoever in Respondent's decision to terminate him. In this regard, Heeter, who was a credible witness, testified unequivocally that the meeting on January 3rd had no influence on his plans to terminate Complainant. (Tr. 299). Furthermore, Heeter's testimony is corroborated by both testimonial and documentary evidence establishing that the decision to terminate Complainant was made by December 2002 at the latest, and that the delay in effectuating the decision was due to the combined effects of (1) a desire not to terminate the Complainant before the holidays, and to therefore await Complainant's return from vacation on January 3, and (2) the undesirability of firing an employee on a Friday afternoon, when the employee would not have access to resources.

In his Brief and responsive brief Complainant has pointed to various discrepancies or inconsistencies in the record, to challenge Respondent's position that the decision to terminate him was made by December 10, 2002 at the latest. (See, e.g. Complainant's Brief at 47-48.)

Some of these asserted discrepancies lack substance. An example is the reference to Covington's favorable comments about Complainant at the November 26, 2002 meeting. Complainant cannot realistically assert that Covington was his ally at that point in time, as both before and after that meeting he expressed the view that Covington did not like him and did not give him the opportunity to succeed. The assignment of the inventory review project to Complainant is also not probative, as there was nothing unusual about assigning him to work on a project before his actual termination, when he was still on the payroll.

Other assertions relate to the timing of the decision to terminate Complainant, which I found to be not entirely clear on summary decision, and which I still find to be unclear based upon a full record. (Complainant's Brief at 47-48). Along the same lines are the assertions that Complainant did not do anything "wrong" after the progress review, and Heeter assured him at that time that he was not going to terminate him (primarily because Complainant might be able to obtain another position within Lexmark). (*Id.*) For the most part, however, the assertions relating to timing seem to bolster the argument that the decision to fire Complainant was, for all practical purposes, made well **before** December 2002. Indeed, an argument could be made that, while Complainant was provided with performance objectives after his transfer from E-Business to Heeter's group, his ability to succeed was limited, as more than one of the objectives depended upon his gaining the support of people with whom he already had a strained relationship (specifically, the IT group and the people within Heeter's group who interfaced with the IT group.) Complainant's chances of achieving the performance goals became even more unlikely several months after his transfer, when his relationship with these same people deteriorated after he contracted with Born Consulting without IT approval. Looking at the evidence as a whole, it appears that Complainant's likelihood of success was slim after the Born Consulting incident, despite the extended procedures Lexmark followed until the time of the termination. To the extent that the alleged inconsistencies as to timing have any significance, they tend to discount assertions that Complainant had any chance of retaining his employment after the time of the Born incident and his subsequent progress review.

Complainant has, however, pointed to some matters that do call into question Respondent's assertions.

First, Complainant notes (as I did in my denial of the summary decision motions) that there is no definitive paperwork establishing the date on which the decision to terminate Complainant was made, and the separation documents were essentially form documents, dated as of the actual termination date. (Complainant's Brief at 24-25). Along the same lines, Complainant suggested that the severance package appeared to have been thrown together, as it did not include any reference to stock options or relocation expenses. (Tr. 666-68; Complainant's Brief at 48). Specifically, Lexmark did not take action to freeze the stock options until after the termination, and HR did not research the terms of the relocation package, or it would have found out about the loan. It appears that these matters would have been resolved if the decision to terminate Complainant had been made nearly one month prior to the termination.

Second, Complainant notes that Heeter and Suggs contradicted each other when they testified about when they discussed postponing the Friday termination until Monday. (Complainant's Brief at 24, 48). Heeter stated that the conversation took place on the Friday that he planned to fire Complainant (when he was on his way to Complainant's office) while Suggs stated that it occurred at an earlier time. No explanation has been provided for this inconsistency. It appears reasonable that both Heeter and Suggs would have recalled the timing of that important conversation had it occurred.

Third, although Heeter had by all accounts been sensitive to Complainant's feelings and treated him respectfully prior to the January 3 meeting, at the time of the termination he asked Complainant whether he was having a good day and when told that he was, said that he was

"going to change that." Heeter admits to having made that statement and has offered no explanation for his apparent change of heart in his treatment of Complainant. Complainant suggests that the only explanation for Heeter's changed attitude is Complainant's reporting of the inventory results. (Complainant's Brief at 20, 48).

These inconsistencies, while troubling, are insufficient to outweigh the large amount of evidence setting forth the extensive procedures followed by Respondent in terminating Complainant. Heeter was a credible witness over all, despite the above discrepancies. Covington was also credible, although her recollection of specific dates and incidents was somewhat sketchy. Suggs appeared to be defensive, but her attitude could be explained by the fact that she has been personally sued by Complainant in state court. J. Stromquist, a credible witness, was not directly involved in the decision to terminate Complainant, but she corroborated the fact that it was made by early to mid-December. While Complainant was also credible, his testimony did not directly contradict the testimony of these witnesses (to the effect that the termination decision had already been made by mid-December), which is corroborated by contemporaneous emails and other documentation. Moreover, the testimony by Heeter and Suggs is corroborated to a certain extent by Complainant's contemporaneous statements (such as his reference to image problems with Dick Cross's group, his admission that he did not follow procedures in contracting with Born Consulting, his admission that he did not fully meet most of his performance objectives, and his statement to an HR representative that he did not feel he was being given the opportunity to succeed in Heeter's group by Covington.) Although Complainant has questioned the documentation and demonstrated how dates can be altered on email systems (or screen captures referencing dates on which emails were composed), there is no evidence of the type of conspiracy that would have been required for the multiple corroborative emails and other documents to have been so altered.

In looking at the entire record, it is clear that the decision to terminate Complainant was made before he was assigned to work on the inventory project in December. While a decision may not have been made to terminate Complainant when the E-Business section was eliminated, his potential within Lexmark was limited at that time. His assignment to work at a level below the job he had previously been offered (and declined), to work as a program manager, even though he was at the "director level," could reasonably be construed as a demotion. Furthermore, he was given objectives that included improving his working relationships, and some of the assignments that were included as objectives required that he get along with people with whom he had had difficulties in the past, including IT personnel. His potential became even more limited when he further alienated those same IT people by contracting without their approval, and his loss of Heeter's support could well be explained by the $100,000 charge to Heeter's budget as the aftermath of that incident. Complainant admitted that he did not believe that he was being given the opportunity to succeed even before he engaged in any activity that was protected under the Act and his perception may well have been valid. It is clear that his termination was inevitable and the decision to terminate him was made before mid-December. The only issue was timing, and the preponderance of the evidence shows that the timing was not influenced at all by Complainant's alleged protected activity. As the decision to terminate was made before the alleged protected activity occurred, it could not have been a contributing factor to the termination. *See generally Kendrick v. Penske Transportation Services, Inc.,* 209 F.3d 1220, 1225 (10th Cir. 2000).

Clear and Convincing Evidence

Once a complainant meets his burden of establishing the elements of his case (set forth above), the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. 1980.109(a). While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. *Remusat v. Bartlett Nuclear, Inc.*, No. 1994-ERA-36 (Sec'y Feb. 26, 1996) *citing Yule v. Burns International Security Service*, No. 1993-ERA-12 (Sec'y, May 24, 1995). *See also White v. Turfway Park Racing Association*, 909 F.2d 941, 944 (6th Cir. 1990), *citing Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Brune v. Horizon Air Industries Inc.,* ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) slip op. at 14, n. 49, *citing* BLACK'S LAW DICTIONARY at 577.

For the same reason that I found there to be factual issues on the causation issue, in addressing the summary decision motions, I found factual issues that would need to be resolved on a full evidentiary record on the issue of whether Respondent established by clear and convincing evidence that it would have taken the same personnel action in the absence of the Complainant's protected activity.

Because I have found that Complainant has failed to establish the elements of a case brought under the Act by a preponderance of the evidence, it is unnecessary for me to address the issue of whether Respondent established that it would have terminated Complainant in the absence of the alleged protected activity by clear and convincing evidence. *See, e.g., Gary v. Chautauqua Airlines, supra; Brune v. Horizon Air Industries, supra*.

CONCLUSION

For the reasons set forth above, I find that Complainant's complaint was timely filed but the claim must be dismissed because Complainant has failed to establish the requisite elements for a cause of action under the Act by a preponderance of the evidence. Specifically, he has failed to establish that he engaged in protected activity within the meaning of the Act or that there was a causal relationship between his alleged protected activity and his termination.

ORDER

IT IS HEREBY ORDERED that the Complainant's claim be, and hereby is, **DISMISSED**.

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

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).