U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 18 February 2005

In the Matter of:

DAVID K. MANN,
Complainant

Case No. 2004-SOX-15

v.

UNITED SPACE ALLIANCE, LLC,
THE BOEING COMPANY, and
LOCKHEED MARTIN CORP.,
Respondents

DECISION AND ORDER GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT

This proceeding arises from a claim of whistleblower protection under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. section 1514A ("Sarbanes-Oxley" or "the Act"), enacted on July 30, 2002. The Act and implementing regulations at 29 CFR Part 1980[1] prohibit retaliation by publicly-traded companies against their employees who provide information to their employers, a federal agency, or Congress, alleging violation of any Federal law relating to fraud against shareholders. In this case, the Complainant, David K. Mann, alleges that his employer, United Space Alliance, LLC ("USA"), took adverse action against him because he disclosed improper procurement practices which he believed violated Federal Acquisition Regulations. The Boeing Company ("Boeing") and Lockheed Martin Corporation ("Lockheed Martin") have been named as Respondents because they jointly own USA.

All three Respondents have filed motions for summary judgment, alleging that Mr. Mann did not engage in activity protected by the Act; that Boeing and Lockheed Martin are not proper Respondents because neither was his employer; and that USA is not covered by the Act. In support of their motions, Respondents have submitted memoranda of law and the Declaration of Dennis K. Diemoz, Vice President and General Counsel for USA, along with authenticated certificates of formation and good standing of USA. The Complainant has responded by filing a Statement in Opposition to Motion for Summary Judgment by Respondent ("Complainant's Statement"), a Memorandum of Law in Support of Reversing the Department of Labor Dismissal ("Complainant's Memorandum"), along with his own declaration, annual reports from Boeing

[1] The Department of Labor's interim regulations, effective May 28, 2003, found at 29 CFR Part 1980 (2004), were replaced by final regulations effective on August 24, 2004. 69 Fed. Reg. 52104 et seq. (2004).

and Lockheed Martin, and various press articles intended to demonstrate a connection between USA's performance and prices for shares of Boeing and Lockheed Martin stock.

In reaching my decision on the motions, I have considered the entire record, including the pleadings of the parties, their objections to the findings of the Occupational Safety and Health Administration, and the materials submitted in connection with the motions. As no hearing has been held, I have accepted all of the Complainant's allegations as true. I conclude that the motions should be granted, as there is no genuine issue of material fact, and the Respondents are entitled to a decision in their favor as a matter of law.

PROCEDURAL HISTORY

On July 11, 2003, the Complainant in this case filed his Complaint for Unlawful Employment Retaliation with the Occupational Safety and Health Administration ("OSHA"). On November 17, 2003, OSHA issued its finding that there was no reasonable cause to believe that the Respondents violated 18 U.S.C. § 1514A. On or about December 15, 2003, the Complainant filed his objections with the Chief Administrative Law Judge, Office of Administrative Law Judges ("OALJ"), requesting review of OSHA's finding. He also gave notice of his intention to file a complaint in district court pursuant to 29 CFR §1980.114, which allows a complainant to bypass an administrative hearing if the Department of Labor has not issued a final decision within 180 days of the filing of the complaint.

As the 180-day limit was less than 30 days away, on December 23, 2003, I issued a Notice of Assignment and an Order to Parties to File a Status Report, notifying the parties that I would postpone setting a hearing date until they could confer and file reports advising me of the status of the case and how they wished to proceed. On January 23, 2004, the Respondents filed a Partial Objection to Findings and Preliminary Order, objecting to OSHA's finding that USA operated as an agent of Boeing and Lockheed Martin. On January 28, 2004, the Respondents filed their Status Report. On January 27, 2004, the Complainant filed his Status Report. On February 6, 2004, I conducted a telephone conference on the matter, at which time the Complainant confirmed that he had not yet filed an action in federal district court. He also stated that he wished to proceed in this forum to seek to overturn the finding by OSHA that the activity in which he engaged is not protected by the Sarbanes-Oxley Act. Counsel for the Respondents indicated that he planned to file a motion for summary judgment on their behalf. I issued an order setting a schedule for filing and responding to motions for summary judgment.

The Respondents have filed their motions with supporting memoranda and evidence, and the Complainant has filed his response, also with supporting statement, memorandum and evidence. I issued a notice to the parties that I intended to take judicial notice of material appearing on the web-site maintained by USA. No party objected to my taking judicial notice of this information. The motions are now ripe for ruling.

STANDARD FOR SUMMARY JUDGMENT

The Rules of Practice and Procedure for administrative hearings before OALJ, found at Title 29 CFR Part 18A, provide that an administrative law judge may enter summary judgment

for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact, and a party is entitled to summary decision, i.e., the moving party is entitled to judgment as a matter of law. Title 29 CFR § 18.40; Fed.R.Civ.P. 56(c), incorporated by reference into the OALJ Rules of Practice and Procedure, 29 CFR § 18.1. No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Darrah v. City of Oak Park,* 255 F.3d 301, 305 (6th Cir. 2001).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

In May 1984, Mr. Mann began working for Martin Marietta Corporation as an entry-level engineer. He remained at Martin Marietta until November, 1992. At the end of 1992, Mr. Mann accepted a position with Lockheed Space Operations Company. In 1995, Lockheed Space Operations Company merged with Martin Marietta and became the Lockheed Martin Corporation. OSHA Complaint at 3; Mann Declaration ¶¶ 1-3.

Among Lockheed Martin's various projects was a Shuttle Processing Contract with the National Aeronautics and Space Administration ("NASA"). Under this contract, Lockheed Martin provided ground operations for NASA. In 1995, however, NASA indicated a desire to consolidate its large number of Space Shuttle program contracts under a single prime contractor. At the time, the majority of the operations, processing and training work was conducted by Rockwell International Corporation ("Rockwell"), which held the Space Operations Contract for flight support, and Lockheed Martin, which held the Shuttle Processing Contract for ground operations. Realizing that the award of a single contract to one company would seriously disrupt the employees and operations in either Texas or Florida, in 1995, the two companies formed United Space Alliance, LLC, as a limited liability company established and maintained in the State of Delaware under the Delaware Limited Liability Company Act. USA was therefore created for the express purpose of providing Space Shuttle operations services to the NASA. OSHA Complaint at 2-3; Diemoz Declaration ¶¶ 5, 6. Under the Space Flight Operations Contract, USA is responsible for, among other things, the day-to-day management and operation of NASA's Shuttle fleet of orbiters, the training of NASA's astronaut corps, mission control, and operations planning for the International Space Station. USA employs approximately 10,200 people in Texas, Florida, Alabama, California, and Washington, D.C. At Kennedy Space Center, Florida, and Cape Canaveral, Florida, USA is responsible for the ground operations and logistics support of the Space Shuttle fleet, including processing, logistics, launch landing, recovery, and turnaround questions. Diemoz Declaration ¶ 3. *See also* "United Space Alliance Overview," http://www.unitedspacealliance.com/about/about.html, visited March 24, 2004.

In April 1996, USA assumed management responsibility for Rockwell's flight operations contract in Texas and Lockheed Martin's Shuttle processing contract in Florida, establishing the

company as the prime contractor for NASA's Space Shuttle program. As a result, Mr. Mann, who had been working for Lockheed Martin's ground based computer operations for NASA, was transferred to USA. When Mr. Mann was transferred from Lockheed Martin to USA, his office, position, supervisor, and NASA counterpart remained the same; only his badge and benefits changed. Mr. Mann continued to work on ground based computer operations for NASA. OSHA Complaint at 3; Complainant's Declaration at ¶¶ 4-8. Some months later, in December 1996, Boeing purchased Rockwell's aerospace and defense businesses, including its interest in USA. Therefore, Boeing and Lockheed Martin became equal owners of USA. Diemoz Declaration ¶ 5.

In 2000, Mr. Mann's job duties changed as he was selected for a position in Information Management. He assumed the role of Project Leader II, Information Management/Strategic Planning and Integration (IM/SPI) East. OSHA Complaint at 3. In early 2001, Mr. Mann was assigned to the Supply Chain Market Analysis Team ("SCAT"). At that time, USA had been experiencing problems with its existing Supply Chain information technology systems.[2] SCAT was assigned to address these problems by evaluating which vendors in the industry were available to support USA's requirements for the Supply Chain of the Shuttle system. Id. at 4. Ultimately, SCAT's role was to procure a system that would augment or replace the current system. To complete its assigned task, the SCAT team was to evaluate the available Supply Chain software vendors on the market and pare down the list to a competitive "short list" that would be used for procurement. Mr. Mann believed that the contract with NASA required USA to comply with Federal Acquisition Regulations. As a member of the SCAT team, Mr. Mann was responsible for, *inter alia*, developing the selection criteria to be used to narrow the "long list" of vendors to the "short list." Id. at 5. It was during this evaluation process that Mr. Mann engaged in alleged protected activity. Specifically, Mr. Mann asserts that, during the evaluation process, he noticed that certain vendors were being improperly removed from consideration or retained on the list without criteria-based reasons as required by the regulations, and feared that certification of compliance with the regulations would constitute a fraud on NASA. According to Mr. Mann, he alerted his supervisors to the situation, eventually asking to be reassigned when no corrective action was taken, and his supervisors subsequently took retaliatory action against him because of his whistle-blowing. *See* id. at 5-11. As noted above, for the purpose of considering the motions for summary judgment, I have taken these allegations to be true.

Discussion

In this case, Mr. Mann alleges that he was subjected to adverse actions by his employer when he notified his supervisors of possible violations of the Federal Acquisition Regulations ("FAR"), which could constitute fraud on NASA. His complaint has been brought pursuant to Section 806 of the Sarbanes-Oxley Act, which is entitled, "Civil action to protect against retaliation in fraud cases," and provides in pertinent part:

[2] The Shuttle Supply Chain consisted of "all activities required to support landing to launch operations of the shuttle fleet. These activities included but were not limited to: recovery, refurbishment, repair, manufacturing, assembly, processing, testing, engineering, configuration management, logistics, acquisition, and property management." OSHA Complaint at 4.

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES- No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information … regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud and swindle], 1343 [fraud by wire, radio, or television], 1344 [bank fraud], or 1348 [security 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 … is provided to …--

…

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

18 U.S.C § 1514A(a). The implementing regulations track this language. *See* 29 CFR § 1980.102, 69 Fed. Reg. 52113 (2004). The Respondents have moved for summary judgment because they maintain that the disclosures made by Mr. Mann are not protected by the Act; that Mr. Mann was not employed by Boeing and Lockheed Martin, neither of which made any decisions or exercised any control over his employment by USA; and that USA is not covered by the Act.

1. *Did the Complainant engage in protected activity when he notified his supervisors of possible violations of the Federal Acquisition Regulations?*

To come within the protection of the Act, the Complainant must have provided information which he reasonably believed constituted a violation by the Respondents of one of the laws enumerated in Sarbanes-Oxley. The Respondents contend that the violation alleged by the Complainant does not pertain to one of the enumerated laws. *See* Respondents' Motions at 2 and Memoranda at 4-5. Specifically, they cite to the OSHA Complaint in which the Complainant alleges that he "suffered adverse personnel actions in retaliation for protected disclosures relating to improper procurement practices which he reasonably believed violated [FAR]." The Respondents maintain that by focusing on FAR, the Complainant has alleged fraud against NASA, a federal governmental agency, but he has not alleged a violation of one of the laws enumerated by Sarbanes-Oxley. As such, the Respondents argue that the Complainant did not engage in protected activity. Id. at 5.

In asserting that he reasonably believed the Respondents had committed such a violation, the Complainant sets forth the following:

> (6) As an agent of [Boeing and Lockheed Martin], USA delivers earnings or income … claimed in their annual reports.
>
> …
>
> (9) If USA earnings were obtained through fraud against its customer (NASA) and reported in the annual reports of [Lockheed Martin and Boeing] it would be a misrepresentation to stockholders … and Securities Fraud …
>
> (10) It was reasonable in my position … to believe that if the acquisition had gone through as it was proposed, it would have resulted in considerable income reported … as legitimate and been misrepresented to stockholders or result in securities fraud.
>
> (11) Market analysts believe that connecting the performance of USA to [Lockheed Martin and Boeing] is reasonable as demonstrated by [Exhibit 4].

See Complainant's Statement at 3-4, and supporting documentation in Exhibits 2 (1998 annual report of Lockheed Martin), 3 (2001 annual report of Boeing) and 4 (press articles describing the effect of USA performance on the prices of shares of Boeing and Lockheed Martin stock).

Mr. Mann has represented from the outset of this case that his concern was violation of the FAR, and perpetration of a fraud on NASA. According to his OSHA Complaint, Mr. Mann reported that "certain vendors were being improperly dropped from evaluation without criteria-based reasons … and he believed this to be unethical and unfair …" OSHA Complaint at 5-6. He also reported his belief that the lists were being manipulated to ensure that certain vendors remained on the lists. Complaint at 6-7. *See also* Complainant's Statement at 1. These allegations are similar to those made by the plaintiff in *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 1365 (N.D. Ga. 2004). In that case, a significant component of the plaintiff's alleged protected activity was her report to her supervisors that colleagues were overpaying invoices due to a personal relationship with a vendor. Defendants argued that the plaintiff never specifically alleged securities or accounting fraud, and her complaints were too vague to constitute protected activity. In denying the defendants' motion for summary judgment, the court stated:

> … if Congress had intended to limit the protection of Sarbanes-Oxley to accountants, or to have required complainants to specifically identify the code section that they believe was being violated, it could have done so. It did not. Congress instead protected "employees" and adopted the "reasonable belief" standard for those who "blow the whistle" on fraud and protect investors. … Additionally, though Defendants contend that Plaintiff's complaints were too vague to constitute protected activity, the individuals to whom they were addressed understood the serious nature of Plaintiff's allegations. … The Court agrees with Defendants that the connection of Plaintiff's complaints to the substantive law protected in Sarbanes-Oxley is less than direct. However, Plaintiff's allegations detailed violations of the company's internal accounting controls in favor of preferential treatment based on personal relationships.

334 F. Supp. at 1377-1378 (Citations omitted). Like the allegation of improper preferential treatment of a vendor in *Collins*, the connection of Mr. Mann's complaints of improper treatment of vendors in violation of FAR to the substantive law protected in Sarbanes-Oxley is less than direct. Nonetheless, perpetration of a fraud on NASA, by improperly favoring certain vendors in violation of federal acquisition regulations, could also perpetrate a fraud on stockholders. I conclude that reporting such conduct could constitute protected activity under the Act in the appropriate case. Therefore, the case cannot be resolved on summary judgment on the issue of whether Mr. Mann engaged in protected activity.

2. *Which of the named respondents qualify as the Complainant's employer for the purposes of Sarbanes-Oxley?*

Boeing and Lockheed Martin maintain that Mr. Mann was employed by USA; all alleged retaliatory unfavorable personnel actions were taken by individuals employed by USA; no unfavorable personnel actions are attributed to Boeing or Lockheed Martin; Boeing and Lockheed Martin have no control over or say in USA's day-to-day management or direction of USA's employees; and, as a result, Mr. Mann's complaint, as it relates to Boeing and Lockheed Martin, is not covered by the Act. Boeing Motion at 2-3; Lockheed Martin Motion at 3.

The Complainant responds that he was an employee of Lockheed Martin when he "transitioned" to USA; his service date was "bridged back to 1985"; the responsibilities of Lockheed Martin and Rockwell employees transferred to USA were unchanged, and, except for executive level positions, existing management and organizational structure were also unchanged; USA management instructed him to place a request for transfer in his USA file before contacting Boeing or Lockheed Martin about job opportunities; and USA is an agent of Boeing and Lockheed Martin. Complainant's Statement at 3-4; Mann Declaration ¶¶ 1-8.

There is no question that at the time of all relevant events, USA was Mr. Mann's employer, and he was USA's employee.[3] Less straightforward is the issue of whether Boeing and/or Lockheed Martin may also be treated as Mr. Mann's employer for the purpose of coverage by the Act. The statute speaks in terms of a prohibition against discrimination against an employee by a <u>company</u>, rather than by an <u>employer</u>. While the regulations do not define the term "employer," they do define the terms "company," "company representative," and "employee" as follows:

…

> *Company* means any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

[3] The fact that he was granted a service date before USA's formation is not in itself probative of anything other than that he had prior service with a corporate predecessor to one of the owners of his current employer.

Company representative means any officer, employee, contractor, subcontractor, or agent of a company.

…

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

29 CFR § 1980.101, 68 Fed. Reg. 52113 (2004) (emphasis added). Boeing and Lockheed Martin have not contested that they are companies covered by the Act with respect to their own employees. Their argument is that at all times relative to his complaint, Mr. Mann was not their employee, but USA's. Under the regulatory definitions, if Boeing and Lockheed Martin could affect his employment with USA, or, as the Complainant argues, if USA was acting as an agent of Boeing and Lockheed Martin, then Boeing and Lockheed Martin would be covered by the Act for the purpose of Mr. Mann's complaint.

There is no evidence that Boeing and Lockheed could have, or did, affect Mr. Mann's employment with USA, or that USA was acting as their agent with respect to his employment, however. While Boeing and Lockheed Martin participate in the hiring and dismissing of USA's President and CEO, it is the responsibility of that President and CEO to hire and dismiss management and other employees of USA, and to establish the terms of their employment. *See* Diemoz Declaration ¶ 10. Moreover, Mr. Mann's statements in all of his filings support the conclusion that he was employed by USA; he complained of irregularities to his supervisors at USA; his supervisors at USA took adverse action against him; and he was required to put in a request for a transfer to USA before he could seek employment at Boeing or Lockheed Martin. Nor is there any evidence that anyone from Boeing or Lockheed Martin was aware of Mr. Mann's concerns that USA personnel were violating FAR, or took any action with respect to his employment by USA. Thus it appears that with respect to this complaint, Boeing and Lockheed are not covered by the Act by virtue of being companies which could affect Mr. Mann's employment. Nonetheless, the question remains whether they are covered by the Act on some other basis.

3. *Are USA, Boeing and Lockheed Martin covered by the Act because Boeing and Lockheed Martin own USA?*

The entities to which the whistleblower provisions of the Act apply are delineated in Section 1514(A)(a). These entities include: (1) companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781); (2) companies that are required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)); and (3) any officer, employee, contractor, subcontractor, or agent of such companies. USA maintains that it is not covered by the Act because it does not have a class of securities registered under section 12 of the Securities Exchange Act, nor is it required to file reports under Section 15(d) of the Securities Exchange Act. Diemoz Declaration ¶ 7. That notwithstanding, Mr. Mann argues that USA is an "agent" of Boeing and Lockheed Martin, which would thereby

subject USA to the whistleblower provisions of the Act together with Boeing and Lockheed Martin.

USA is operated as a joint venture by Boeing and Lockheed Martin, equally owned by both. Exhibits 2 and 3 to Complainant's submission in opposition to the motions; Diemoz Declaration ¶ 5; "United Space Alliance Overview," website, supra. It is separately incorporated as a limited liability corporation, and has over 10,000 employees. Diemoz Declaration ¶¶ 3, 5 and Exhibits A, B and C. Boeing and Lockheed Martin do not manage USA's business operations. Diemoz Declaration ¶ 8. Rather USA is managed by its own officers, none of whom are officers or employees of Boeing or Lockheed Martin, and an Advisory Board. Diemoz Declaration ¶ 9. Except for the role of Boeing and Lockheed Martin in hiring and dismissing five executive officers of USA, USA is responsible for its own employees, employee policies, and day-to-day management of the company. Diemoz Declaration ¶¶ 10, 11.

I have found no cases under Sarbanes Oxley addressing this situation. There have been several cases in which subsidiaries of companies subject to the Act have been found to be subject to the Act in conjunction with their parent companies, despite the fact that the subsidiaries themselves do not have registered securities and are not required to file reports. *See Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004) (Order Denying Motion for Summary Decision, electronic slip op. (PDF) at 2-4); *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27 (ALJ Apr. 30, 2004) (Recommended Decision and Order, electronic slip op. (PDF) at 19-21); *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (Order Denying Motion to Dismiss, ALJ Jan. 28, 2004) (electronic slip op. (HTML) at 2-4). *See also Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, 2004-SOX-11 (ALJ July 6, 2004) (Recommended Decision and Order, electronic slip op. (HTML) at 8, subsidiary could be held liable in appropriate circumstances, but not if parent not sued.) In all of these cases, shared management and control and unity of operations have been key factors in holding the parent company and its subsidiary to be covered by the Act. *See Gonzalez*, slip op. at 3; *Platone*, slip op. at 20-21; *Morefield*, slip op. at 2-3; *Klopfenstein*, slip op. at 8. Those factors are not present here. Despite the evidence that the performance of USA may affect the stock price of Lockheed Martin and Boeing, *see* Exhibit 4 to Complainant's submission in opposition to the motion, there is no evidence that USA employees are subject to internal controls of either Boeing or Lockheed Martin, *see Gonzalez*, ibid.; or that USA is an inseparable, integral part of either Boeing or Lockheed Martin, *see Morefield* at 2. Nor do I find that the failure of Complainant's business card and published articles to identify USA as a limited liability corporation have any bearing on whether it is covered by the Act, *see* Mann Declaration ¶¶ 9,10, as all the material evidence supports the conclusion that it operates as a separate and distinct entity from either of its owners.

As it cannot be said that either Lockheed Martin or Boeing exercises control over USA in the same way they would over a subsidiary, I find that coverage of the Act may not be imputed to USA simply because its corporate owners would be covered by the Act if they had engaged in the conduct alleged by the Complainant in this case. USA does not have securities registered under section 12 of the Securities Exchange Act, and is not required to file reports under section 15(d) of the Securities Exchange Act. Nor was USA acting as an agent of Boeing or Lockheed Martin within the meaning of the Act when it engaged in the conduct which is the subject of the complaint in this case. Thus I conclude that USA is not covered by the Sarbanes-Oxley Act. I

also conclude that Boeing and Lockheed Martin may not be held liable for any violation of the Act by USA.

ORDER

IT IS THEREFORE ORDERED that Respondents' motions for summary judgment are GRANTED, and this case is hereby DISMISSED.

A

ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), 69 Fed. Reg. 52116 (2004).