U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 December 2006

Case No: 2007SOX00002

In the Matter of:

MICHAEL E. MOZINGO,
Complainant,

v.

THE SOUTH FINANCIAL GROUP, INC.,
AND ITS WHOLLY-OWNED SUBSIDIARIES,
CAROLINA FIRST BANK, AND CAROLINA FIRST
SECURITIES; UVEST FINANCIAL SERVICES GROUP, INC.;
EDWARD HAUSGEN; ROCCO QUINTANA; THOMAS RYAN;
WILLIAM HANN; SCOTT PLYLER; AND JAMES TERRY,
Respondents.

INITIAL DECISION AND ORDER
GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

This matter arises out of a discrimination complaint filed under the whistleblower protection provision of Section 806 of the Sarbanes-Oxley Act (hereinafter "the Act" or "SOX"). 18 U.S.C. § 1514A. Enacted on July 30, 2002, the Act affords protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Security Exchange Act of 1934 (15 U.S.C. § 781) and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). Specifically, the law protects so-called whistleblower employees from retaliatory or discriminatory actions by the employer, when the employee provides information or otherwise assists in an investigation relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 29 C.F.R. § 1980 (2006).

PROCEDURAL BACKGROUND

On July 7, 2006, Complainant Michael E. Mozingo ("Complainant") timely filed his Complaint with the Occupational Safety and Health Administration ("OSHA") of the United

States Department of Labor.[1] On September 22, 2005, after conducting an investigation, OSHA's regional director issued a determination advising the parties that she found no reasonable cause to believe that Respondents had violated the Act. Thereafter, Complainant timely filed his objections and request for a *de novo* hearing with the Office of Administrative Law Judges, U.S. Department of Labor, via facsimile on October 24, 2006.[2]

On October 30 2006, Respondents other than UVEST Financial Services Group, Inc. ("UVEST"), filed this Motion to Dismiss or, in the Alternative, for Summary Decision ("Motion for Summary Decision").[3] By motion filed November 6, 2006, Respondent UVEST joined in this Motion for Summary Decision. On November 9, 2006, Respondents filed a supplement to their Motion for Summary Decision.

Later that same day, November 9, 2006, Complainant requested an extension of time to file his response to Respondents' Motion for Summary Decision. Thereafter, also on that same day, Respondents filed their objection to Complainant's request. By Pre-Hearing Order issued November 13, 2006, the Presiding Judge granted Complainant's request for an extension of time. On November 24, 2006, Complainant timely filed his Response in Opposition to Respondents' Motion for Summary Decision ("Response"). On that same day, Respondents filed additional evidence (the declaration of Mr. Edward Hausgen and included exhibits) with the court.

ARGUMENTS AND EVIDENCE PRESENTED BY THE PARTIES

Respondents' Motion for Summary Decision[4]

Respondents argue that Complainant's case should be dismissed because Complainant's reports do not constitute protected activity under the Act and because no adverse employment action was taken against Complainant. (Motion 5.) Specifically, with regard to Respondents' first argument, Respondents argue that the transaction about which Complainant was concerned (the transfer from another institution of an individual client's account which contained three mutual funds) had no impact on Respondent Institutions' revenues or financial reporting. (Motion 5.) Moreover, Respondents argue that Complainant could not have reasonably believed that his concerns would affect Respondent Institutions' investors, shareholders, or financial reporting. (Motion 5.)

With regard to Respondents' second argument, Respondents argue that Complaint voluntarily resigned. (Motion 5.) Respondents argue that Complainant was not constructively discharged because a mere belief that one is going to be fired is not sufficient to establish constructive discharge. (Motion 8-9.) Additionally, Respondents argue that Complainant cannot claim adverse employment action on the basis that he was threatened or harassed because the

[1] In his Complaint, Complainant alleged that the named Respondents in this case harassed, threatened, discriminated, and constructively discharged him on April 11, 2006. Compl. ¶ 44.

[2] Complainant states in his Objections to the Findings and Request for a Hearing that he received the regional director's preliminary order on September 27, 2006.

[3] In this case, because Respondents and Complainant have submitted evidence for the Presiding Judge to consider, this motion is a motion for summary decision and shall hereafter be referred to as such in this Decision.

[4] Respondents state that they reserve the right to raise other arguments and grounds for dismissal in the event that their current motion is denied. (Motion 2 n1.)

alleged activity, which Complainant claims constituted threats and harassment and which Respondents dispute, was not severe, pervasive, or frequent. (Motion 9-10.) Accordingly, Respondents also argue that these alleged threats and harassment are not sufficient to support Complainant's allegation of constructive discharge. (Motion 10.)

In support of their Motion, Respondents have submitted the affidavit of Thomas Ryan. (RX 1.) In relevant part, Mr. Ryan states that he is the President of Wealth Management for The South Financial Group, Greenville South Carolina. (RX 1 ¶ 1.) In this position, Mr. Ryan had ultimate supervisory authority over Complainant. (RX 1 ¶ 1.) Mr. Ryan states that Complainant reported, through Mr. Hausgen, to Rocco Quintana, who in turn reported to Mr. Ryan. (RX 1 ¶ 4.) With regard to Ms. Coyne's account, the account Complainant believes was fraudulently transferred, Mr. Ryan states that the transfer only involved the transfer of cash and previously purchased securities from Bank of America to Carolina First and that neither Carolina First or any of its employees earned any commission or fee of any sort on the transfer. (RX 1 ¶ 8.) Mr. Ryan states that he was informed of and believes that the following facts are true with regard to this transaction: Ms. Coyne and her daughter Ms. Anderson were clients of Mr. Quintana while he worked for another bank (RX 1 ¶ 5); after Mr. Quintana began working for Carolina First Bank, these clients requested that there accounts be transferred to Carolina First Bank (RX 1 ¶ 5); Mr. Quintana asked Complainant to complete the transaction (RX 1 ¶ 5); Complainant did not complete the transaction and Ms. Coyne died in the meantime (RX 1 ¶ 6); thereafter Mr. Quintana directed Mr. Hausgen, another Carolina First Bank employee, to complete the transaction (RX 1 ¶ 6); the transaction was completed on or about March 30, 2006 by Mr. Hausgen, on the basis of approval by Ms. Coyne's daughter, Ms. Anderson (RX 1 ¶ 6); Ms. Anderson was the personal representative of Ms. Coyne and held a power of attorney for her mother, which Ms. Anderson believed survived her mother's death (RX 1 ¶ 6); Ms. Anderson has made no complaint about the transfer (RX 1 ¶ 6). With regard to Mr. Swanson, the individual to whom Complainant first reported his concerns, Mr. Ryan states that Mr. Swanson worked on the "banking" side of the business and had no involvement or authority over the "brokerage" side of the business. (RX 1 ¶ 10.) Moreover, Mr. Ryan states that Mr. Swanson did not supervise Complainant. With regard to Complainant's allegation of constructive discharge, Mr. Ryan states that any decision to terminate Complainant would have had to have been reviewed by both himself and the Carolina First Human Resources Department. (RX 1 ¶ 12.) Mr. Ryan states that no such decision was ever made and that Complainant's story was still being investigated at the time that Complainant resigned. (RX 1 ¶ 12.) Mr. Ryan states that although he thought that Complainant exercised poor judgment and violated bank policy by ignoring the company's Whistleblower Policy and his chain of supervisory authority, he never decided or undertook to terminate Complainant for this or any other reason. (RX 1 ¶ 13.) Mr. Ryan further states that he was informed and believes that a Carolina First Human Resources Department representative urged Complainant to reconsider his resignation and that Complainant's decision to resign was entirely his own and not made under duress or pressure. (RX 1 ¶ 14.)

In further support of their Motion, Respondents also submitted the declaration of Edward Hausgen, who is Vice President and Senior Financial Advisor for Carolina First Bank, Mount Pleasant, South Carolina. (Hausgen Decl. ¶ 1.) Mr. Hausgen states that he had direct supervision over the brokerage account of Ms. Coyne (Hausgen Decl. ¶ 2), which was

transferred on or around April 4, 2006 (Hausgen Decl. ¶ 3). The transfer of this account from Bank of America to Carolina First involved only the transfer of previously purchased shares in three mutual funds. (Hausgen Decl. ¶ 3.) Mr. Hausgen states that neither Carolina First nor any of its employees earned any commission or fee based on the transfer of the account. (Hausgen Decl. ¶ 3.) On the other hand, because these funds were originally set up to reinvest dividends produced by the mutual funds in additional shares of the funds, and those instructions were not changed when the account was transferred (Hausgen Decl. ¶ 8), when the dividends were reinvested, Mr. Hausgen was credited with small commissions from the mutual fund companies (Hausgen Decl. ¶ 9). The gross commission credited to Mr. Hausgen totaled $81.72, of which Mr. Hausgen would receive 40% to 45%. (Hausgen Decl. 10.) Mr. Hausgen states that this is a miniscule amount in comparison to the total income and assets reflected in the financial statements of Carolina First Bank. (Hausgen Decl. ¶ 15.) Based on Mr. Hausgen's review of the documents related to Ms. Coyne's account (Hausgen Decl. ¶ 2) Mr. Hausgen states that no trades were executed for the account and no fees or commissions were directly charged to the account after the transfer (Hausgen Decl. ¶¶ 4, 14). On or around September 12, 2006, at the direction of Ms. Coyne's Estate, the assets in the account were transferred to an "Estate Account." (Hausgen Decl. ¶ 5.) Thereafter, the assets of the Estate Account were distributed to the beneficiaries under Ms. Coyne's will in September 2006, which left both accounts with zero balances. (Hausgen Decl. ¶ 5.) Mr. Hausgen states that the final distribution of assets from the Estate Account generated no fees or commissions. (Hausgen Decl. ¶ 5.) Attached to Mr. Hausgen's declaration are exhibits that support his declaration: account statements for Ms. Coyne's accounts at Carolina First Bank (Exhibit A) and a spreadsheet showing the commissions credited to Mr. Hausgen (Exhibit B).

Lastly, Respondents have submitted a copy of a declaration by Complainant, which was cited in Respondents' Motion. (Mozingo Decl.) Complainant's statements from this declaration, as are pertinent to the current motion, are integrated into the Factual Background section of this Decision.

Complainant's Response to Respondents' Motion[5]

In Complainant's Response, Complainant argues that he has alleged sufficient facts to make a prima facie showing that protected activity was a contributing factor in the personnel actions Respondents took against him and that there are genuine issues of material fact which make granting Respondents' Motion at this time inappropriate. (Response 5.) Specifically, Complainant states that he engaged in protected activity when he reported conduct that he reasonably believed violated "several, if not all, of the enumerated laws, rules and regulations" listed in the Act. (Response 6.) Complainant cites the following Federal statutes and rules and regulations in his Complaint and Response:

1. Securities Act of 1933 and Securities Exchange Act of 1934;
2. Section 15(b)(4) of the Securities Exchange Act of 1934;
3. SEC Rule 17a-3: Records to be made by Certain Exchange Members, Brokers and Dealers;

[5] Complainant states that because Respondents have limited their motion to two elements, Complainant is only responding to those issues and reserves the right to argue the additional elements in a later pleading. (Response 6.)

4. 17 C.F.R. § 240.10b-5: Employment of manipulative and deceptive devices;
5. NASD conduct rule 2110: Standard of Commercial Honor;
6. NASD Rule IM 2310-2: Fair Dealing with Customers;
7. NASD Conduct Rule 3010: Supervision, et. seq.;
8. NYSE Rule 405: Know Your Customer;

(Compl. ¶¶ 41-42; Response 8.)

Complainant argues that the Presiding Judge "must view the facts from [Complainant's] point of view at the time of his report that the forgery could very well have caused harm to [Ms. Coyne's] heirs, to UVEST, to the shareholders and to [Complainant's] U5." (Response 6.) Moreover, Complainant argues that his allegations of violations involve an element of intentional deceit (Response 11-12) and that his belief that such violations were occurring were reasonable (Response 12-14). Complainant argues that Respondents contention that the transaction was a "zero-dollar, zero-revenue transaction" that had no impact on shareholders is not relevant. (Response 7.)

Complainant further argues that that he suffered an adverse personnel action. (Response 14-17.) Complainant asserts that "during the 24 hours following his reports of potential violations, the Respondent discriminated against him in the terms and conditions of his employment" by threatening his job, harassing him with a series of phone calls, deliberately making his working conditions intolerable, and forcing him to quit his job. (Response 14.) Complainant also asserts that summary decision should not be granted because there are genuine disputes over (1) whether anyone on the "banking" side, to whom Complainant reported his concerns, had the authority to investigate those concerns (Response 15); (2) what Mr. Quintana's intention was in telling Complainant "I hope you realize you have screwed [yourself] forever" (Response 16); (3) whether a human resources representative asked him to reconsider his resignation and that Complainant declined to reconsider his resignation (Response 16); and (4) whether Respondents intended to terminate Complainant at the April 11, 2006 meeting (Response 17).

In support of his Response, Complainant has submitted an affidavit. (CX A.) Complainant's statements from his affidavit are set forth in the Factual Background section of this Decision. As further evidence on this matter, Complainant submitted a copy of the Brokerage Account Application and Customer Agreement form which Complainant refers to in his Complaint and affidavit. (CX B.) Additionally, Complainant has submitted a copy of Complainant's original Complaint, which Complainant incorporated into his Response. (Compl.) Allegations made in Complainant's Complaint are incorporated and cited to in the Factual Background section of this Decision if Complainant presented no evidence to support the particular allegation, i.e. the allegation was not addressed in either Complainant's affidavit or declaration.

FACTUAL BACKGROUND[6]

[6] The following abbreviations will be used in this Decision: Aff. – Affidavit; Decl. – Declaration; CX – Complainant Exhibit; RX – Respondents Exhibit.

Complainant, who has been employed as a financial advisor for approximately six years (CX A ¶ 2), was employed by Respondent Carolina First Bank as a senior financial advisor, subject to a dual employment agreement with Respondent UVEST from October 1, 2004 to April 11, 2006 (CX A ¶ 3, Mozingo Aff., Nov. 20, 2006). From October 2004 to approximately October 2005, Complainant reported directly to an individual named Bruce Snell. (CX A ¶ 4.) In October 2005, Complainant was informed that he would be under the supervision of Rocco Quintana. (CX A ¶ 5.) Mr. Quintana reported directly to Thomas Ryan, who was President of Wealth Management for The South Financial Group. (CX A ¶ 5.)

During a meeting held in November 2005, Mr. Quintana gave Complainant an Account Transfer Form that was "allegedly" signed by one of Mr. Quintana's clients, Ms. Elsie Coyne, dated October 24, 2005. (CX A ¶¶ 6-7.) Mr. Quintana also gave Complainant Ms. Coyne's brokerage statements from her Bank of America account. (CX A ¶¶ 6-7.) Complainant asserts that he was then instructed by Mr. Quintana to transfer Ms. Coyne's account to Respondent Carolina First under Complainant's broker number. (CX A ¶¶ 6-7.) Complainant informed Mr. Quintana that additional forms had to be signed by Ms. Coyne before the account could be transferred. (CX A ¶ 9.) These forms included a Brokerage Account Application and Customer Agreement, Client Profile, and a Mutual Fund Disclosure Document. (CX A ¶ 9.) Complainant asserts that Mr. Quintana assured Complainant that the additional forms would be signed as needed. (CX A. ¶ 9.)

In early December 2005, Complainant states that Mr. Quintana asked Complainant if Ms. Coyne's account had been transferred. (CX A ¶ 10.) At that time, Complainant says he reminded Mr. Quintana that additional forms had to be signed by Ms. Coyne before the funds could be transferred. (CX A ¶ 10). Complainant asserts that Mr. Quintana again indicated that the necessary forms would be forthcoming. (CX A ¶ 10.) Complainant then opened a Carolina First/UVEST account under his broker number but did not attempt to transfer the funds. (CX A ¶ 10.)

Thereafter, Complainant states that he received three or four e-mails from the UVEST Compliance Department stating that Ms. Coyne's account could not be opened until additional paperwork was received and Complainant reminded Mr. Quintana several times that additional forms were still necessary in order to actually transfer the funds to Ms. Coyne's account.[7] (CX A ¶¶ 11-12.) Later, during a meeting, Complainant asserts that Mr. Quintana informed Complainant that Ms. Coyne had died and that he did not know what would happen. (CX A ¶ 13.) Complainant asserts that Mr. Quintana also stated that "we may have to act as if nothing happened," and that, at that time, Complainant did not take Mr. Quintana's statement seriously. (CX A ¶ 13.)

In March 2006, Mr. Quintana informed Complainant that Edward Hausgen, Vice President and Senior Financial Advisor for Carolina First Bank (Hausgen Decl. ¶ 1), would be picking up the forms regarding Ms. Coyne's account that were in Complainant's possession. (CX A ¶ 14.) The only signed form in Complainant's possession was the Account Transfer Form signed on October 24, 2005, which Complainant gave to Mr. Hausgen. (CX A ¶ 14).

[7] Complainant in his declaration dated September 15, 2006 states the additional documents were required before Ms. Coyne's account could be *transferred*. (Mozingo Decl. ¶ 8.)

On or around April 1, 2006, Complainant received an email from UVEST stating that three mutual funds had been transferred to Ms. Coyne's Carolina First/UVEST account under Complainant's broker number. (CX A ¶ 15.) Complainant states that he suspected that the required documents for the transfer had not been signed by Ms. Coyne before she died and therefore requested that UVEST send Complainant copies of all documents associated with Ms. Coyne's account. (CX A ¶ 16.) Included in the documents Complainant received was a document purportedly signed by Ms. Coyne on March 23, 2006 and by Mr. Hausgen on March 27, 2006. (CX A ¶ 16; CX B, Brokerage Account Applications and Customer Agreement.) Upon further investigation, Complainant states that he noticed that the account was not set up as an estate account and there was no indication of a date of death or a death certificate on file. (CX A ¶ 17.) Additionally, Complainant states that he noticed that the "ID Type" section on the form signed by Ms. Coyne on March 23, 2006 had been filled out to indicate that Mr. Hausgen had checked Ms. Coyne's Government ID. (CX A ¶ 19.)

Complainant's Alleged Beliefs and Knowledge at the Time he Reported his Concerns

Complainant states that he knew UVEST and NASD had requirements regarding the transfer of funds, including transferring funds when an account holder had died. (CX A ¶ 19.) Additionally, Complainant, has implied that he knew about the Federal mail, wire, and bank fraud statutes at the time he reported his concerns regarding Respondents' conduct. Complainant states that he knew the documents dated as signed by Ms. Coyne after her death had been transferred to UVEST by means of mail or wire without direction from Ms. Coyne while living and therefore believed he was reporting potential mail, wire, or bank fraud. (CX A ¶ 21.)

Moreover, Complainant states that based on Ms. Coyne's Bank of America account statement, he knew that at one time, Ms. Coyne's account contained mutual funds and approximately $100,000 in cash. (CX A ¶ 22.) Complainant states that he believed that as a result of the transfer of Ms. Coyne's account, financial impropriety could result. (CX A ¶ 23.) Specifically, Complainant believed that once Ms. Coyne's mutual funds were under the control of Mr. Quintana and Mr. Hausgen, they could sell these securities. (CX A ¶ 23.) Complainant further states that he believed that the cash in Ms. Coyne's account could have been transferred and that this cash could have been traded in by Mr. Quintana and Mr. Hausgen. (CX A ¶ 23.) Complainant states that he believed that the Respondent institutions could suffer negative legal and financial consequences if the transferred funds did not go through probate or if Ms. Coyne's heirs challenged the transfer. (CX A ¶ 24.)

Complainant states that he believed, based on conversations he had with Mr. Quintana, that Mr. Quintana acted as Ms. Coyne's financial advisor regarding matters other than her mutual funds, but that he had no specific information on the number or types of investment accounts that Mr. Quintana managed for her. (CX A ¶ 8.) Complainant states that based on his suspicions regarding the form dated as signed after Ms. Coyne's death, Complainant became concerned that other fraudulent securities transactions could have occurred on Ms. Coyne's account. (CX A ¶ 25.)

Alleged Protected Activity

On April 10, 2006, Complainant met with Arthur Swanson, the Executive Vice President of Carolina First Bank in Charleston, and reported his concerns about what he believed to be potential violations of securities rules and regulations regarding the transfer of Ms. Coyne's mutual funds to her Carolina First/UVEST account from an account with another brokerage firm. (CX A ¶ 20.) Complainant states that he chose to report his concerns to Mr. Swanson because he thought his direct supervisor Mr. Quintana was involved in the transaction. (CX A ¶ 20.) During his meeting with Mr. Swanson, Complainant and Mr. Swanson contacted an attorney, whom Complainant states confirmed, based on court probate records, that Ms. Coyne had died on November 14, 2005. (CX A ¶ 26.)

Later that day, April 10, 2006, Complainant and Mr. Swanson reported the potential violations to William Hann, Senior Vice-President of Carolina First, and then to Scott Plyler, Regional Executive Vice-President for the South Coast region of Carolina First Bank. (CX A ¶ 27.) Complainant states that during his discussions with Mr. Swanson, Mr. Hann, and Mr. Plyler, he was repeatedly assured that his report would not be shared with Mr. Ryan because Mr. Ryan would immediately inform Mr. Quintana. (CX A ¶ 28.)

On April 11, 2006, Complainant states that Mr. Swanson told him to report his concerns to James Terry, President of Carolina First Bank, which Complainant did via facsimile. (CX A ¶ 29). Complainant states that, at all times, he acted exactly as he was instructed by Mr. Swanson, Mr. Hann, and Mr. Plyler in reporting his concerns. (CX A ¶ 30.)

Alleged Adverse Employment Actions

Complainant states that on April 11, 2006, during the next few hours after faxing Mr. Terry, he received several telephone messages from Mr. Quintana and Mr. Hausgen. (CX A ¶ 31.) Complainant also states that he received a telephone call from Mr. Ryan and that he spoke to Mr. Quintana. (CX A ¶ 31-32.) Complainant states that Mr. Quintana and Mr. Ryan told Complainant that he was being insubordinate and that his actions were inappropriate. (CX A ¶ 31.) Complainant states that he repeated his concerns regarding Ms. Coyne's account. (CX A ¶ 31.) Complainant further states that during his telephone conversation with Mr. Quintana, Mr. Quintana told Complainant, "you realize you have screwed [yourself] forever" and told Complainant to report to his office that afternoon. (CX A ¶ 32.) Complainant states that Mr. Quintana implied, and Complainant knew, that he was going to be fired at that meeting. (CX A ¶ 32.)

After his telephone conversation with Mr. Quintana, Complainant separately contacted Mr. Swanson and Jackie Moon, Carolina First Human Resources Director for Charleston. (CX A ¶ 33.) In both conversations, Complainant recounted his conversation with Mr. Quintana. (CX A ¶ 33.) Complainant also told both Mr. Swanson and Ms. Moon about his belief that he was going to be fired that day for insubordination for reporting potential violations and shared with them his concern that the termination would be designated on his Form U5 as involuntary, on the ground of insubordination. (CX A ¶ 33.) Complainant states that he believed such a

designation on his Form U5 would have made it difficult or impossible to obtain further employment as a broker. (CX A ¶ 34.) Complainant states that Mr. Swanson stated that it "did not take much to figure out [Mr. Quintana] was going to fire" Complainant. (CX A ¶ 35.) Complainant further states that, based on the events of that day, he believed that Mr. Quintana was planning to fire him that afternoon when he reported to his office. (CX A ¶ 38; Mozingo Decl. ¶ 11, Sep. 15, 2006.)

That afternoon, when Complainant reported to Mr. Quintana's office, as he had been instructed, he was met outside by Mr. Hausgen who informed Complainant that the meeting was postponed because the "necessary people were not available." (CX A ¶ 39.) Complainant states that he told Mr. Hausgen that he still wished to speak with Mr. Quintana, but that Mr. Hausgen told him that they would not talk to him that day. (CX A ¶ 39.) Complainant states that he walked past Mr. Hausgen and handed his resignation to Mr. Quintana. (CX A ¶ 41.) Complainant states that after Mr. Quintana read his resignation letter Mr. Quintana told Complainant that he was "brain dead." (CX A ¶ 41.) Complainant states that on April 11, 2006, he felt compelled to resign before he was involuntarily terminated by Mr. Quintana and that he had been constructively discharged. (CX A ¶¶ 41-42.)

Complainant alleges in his Complaint that after he resigned, he called Ms. Moon and informed her of his resignation. (Compl. ¶ 34.) Complainant alleges that he told Ms. Moon that he resigned because he believed he was going to be terminated for coming forward and reporting potential fraud, which he felt he had to report because the account was opened under his broker number and because he felt he had a duty to protect Carolina First and UVEST. (Compl. ¶ 34.) Complainant states that Ms. Moon never asked him to reconsider his resignation. (CX A ¶ 36.) Rather, Complainant states that Ms. Moon told Complainant that she would ask Mary Jeffries, Director of Human Resources for Carolina First, to call Complainant. (CX A ¶ 36.) Complainant states that approximately two to three days later, Ms. Jeffries called Complainant and assured him that there would be a thorough investigation of his report. (CX A ¶ 37.) She did not suggest that Complainant reconsider his resignation. (CX A ¶ 37.) Complainant states that he fully participated in the investigation of Mr. Quintana and Mr. Hausgen and that Carolina First/UVEST did not offer to reinstate him once the investigation was concluded. (CX A ¶ 43.) Complainant further states that no one from the bank gave him any legitimate explanation regarding the transfer of Ms. Coyne's account until Complainant's current action was initiated. (CX A ¶ 44.)

STANDARD OF REVIEW

In ruling on a motion for summary decision, an administrative law judge may grant the motion if the "pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact." 29 C.F.R. § 18.40(d); *see also* Rule 56 of the Federal Rules of Civil Procedure. A fact is material and precludes granting summary decision if proof of the fact "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is 'genuine' … if the evidence is such that a reasonable [finder of fact] could return a verdict for the non-moving party." *Id.*

Initially, the party moving for summary decision has the burden of showing that there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This burden may be discharged by demonstrating that the nonmovant cannot make a showing sufficient to establish an essential element of the case. *Id.* 325. Thereafter, the burden shifts to the nonmovant who must "set forth specific facts showing that there is a genuine issue of fact for the hearing." *See* 29 C.F.R. § 18.40(c). The opposing party may not rest upon mere allegations or denials. *Id.* In determining whether there is a genuine issue of fact for the hearing, the judge shall view "all the evidence and factual inferences in the light most favorable" to the nonmovant. *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-9 (1969)). If there are no genuine issues of material fact, then the moving party is entitled to judgment as a matter of law. *See Dawkins v. Shell Chemical, LP*, 2005-Sox-41, slip op at 2 (ALJ May 16, 2005).

DISCUSSION

In this matter, Respondents assert that they are entitled to summary decision because Complainant cannot establish all of the essential elements of his whistleblower claim as a matter of law. The legal burdens of proof in whistleblower actions brought under the Act are 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 (AIR 21). 18 U.S.C. §1514A(b)(2)(C). In order to prevail, a complainant must prove by a preponderance of the evidence that (1) he engaged in a protected activity or conduct; (2) the employer 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. *See* 49 U.S.C. §42121(b)(2)(B); *see also Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62, slip op. at 9-10 (ARB Jul. 27, 2006). Specifically, Respondents assert in their Motion for Summary Decision that Complainant cannot prove elements (1) that Complainant engaged in protected activity or (3) that he suffered an unfavorable personnel action.

Complainant must engage in protected activity or conduct

Respondents assert in their Motion for Summary Decision that Complainant did not engage in activity protected by the Act. The Act protects employees from retaliatory or discriminatory actions by an employer, when the employee "provides information, causes information to be provided, or otherwise assists in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by" a Federal regulatory agency, Congress, or a person with supervisory authority over the employee. *See* 18 U.S.C. §1514A(a)(1)(c). "Whether a whistleblower's belief is reasonable depends on the knowledge available to a reasonable person in the same circumstances and with the employee's training and experience." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62, slip op. at 10 (ARB Jul. 27, 2006) *and* cases cited therein. Moreover, in *Platone v. FLYi, Inc.,* the Administrative Review Board ("ARB") recently held that in SOX cases "an employee's protected communications must relate 'definitively and specifically' to the subject matter of the particular statute under which

protection is afforded" and that an allegation of "fraudulent conduct must at least be of a type that would be adverse to investors' interests" in order to be a covered violation under the Act. *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27, slip op. at 15, 17 (ARB Sep. 29, 2006) (discussing the complainant's allegations of violation of the mail and wire fraud statutes referred to in the Act, which the ARB noted were "not by their terms limited to fraudulent activity that directly or indirectly affect[ed] investors' interests").

In this case, Complainant asserts that he reasonably believed he was reporting violations of the Federal fraud statutes, rules and regulations of the Securities and Exchange Commission, and Federal laws relating to fraud when he reported the alleged improper transfer of a client's account. First, with regard to several of the Federal fraud statutes enumerated in the Act, Complainant states in his affidavit that he believed Respondents' activities constituted violations of mail, wire, or bank fraud laws because he knew that the documents dated as signed by Ms. Coyne after her death had been transferred to UVEST by means of mail or wire without direction from Ms. Coyne while living. (CX A ¶ 21.) Complainant's reports of what he believed to be mail, wire, or bank fraud are not covered violations under the Act. First, Complainant has neither alleged nor proven any *facts* which would demonstrate that the alleged fraudulent conduct was in any way directly adverse to the interests of Respondent Institutions' shareholders or investors. In this case, Complainant has alleged fraudulent conduct involving the transfer of the account of one of Respondents' clients. Accordingly, while this activity may possibly constitute fraud against Bank of America or even Ms. Coyne's heirs, it is not fraud against the Respondent Institutions' shareholders or investors.

Moreover, based on the facts alleged and proven by Complainant, Complainant cannot prove that he reasonably believed the alleged fraudulent conduct was indirectly adverse to the interests of Respondent Institutions' investors. The Presiding Judge notes that Complainant is a financial advisor with approximately six years of experience (CX A ¶ 2) and had worked for Respondents for over a year when the alleged fraudulent conduct occurred (CX A). In this particular case, the Presiding Judge also notes that the alleged fraudulent conduct consists of the forgery of a *single* client's signature which resulted in the transfer of a *single* account that happened to include shares in three mutual funds and perhaps as much as $100,000 in cash.[8] Although Complainant has stated that he believes other fraudulent conduct involving Ms. Coyne's account may have occurred, based on the improper transfer of her account, Complainant has not provided any facts or evidence in support of this allegation. Therefore, these allegations are mere speculation. *See Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35,

[8] The value of the shares in the three mutual funds was approximately $90,000. (Hausgen Decl. Ex. A.) Complainant has not alleged that he did not know the value of Ms. Coyne's mutual funds. Moreover, based on the following facts, the Presiding Judge cannot reasonably infer that Complainant did not know the value of Ms. Coyne's mutual funds: when Complainant was first instructed to transfer Ms. Coyne's account, he was given copies of her Bank of America brokerage account statements and an Account Transfer Form signed by Ms. Coyne and dated October 24, 2005 (CX A ¶¶ 6-7); Complainant knew from Ms. Coyne's Bank of America brokerage account statements that at one time Ms. Coyne's account contained as much as $100,000 in cash as well as mutual funds (CX A ¶ 22); after the account was transferred to Respondents, Complainant received an email from UVEST informing him that shares in three mutual funds had been transferred (CX A ¶ 15); and Complainant requested that UVEST send him copies of all documents related to Ms. Coyne's account and UVEST sent Complainant these documents (CX A ¶ 16). Based on the foregoing, the only reasonable interpretation of the evidence is that Complainant had, at the very least, a general idea of the value of Ms. Coyne's mutual funds.

slip op. at 8 (ARB Sep. 30, 2005). Furthermore, although Complainant alleges that the transfer of Ms. Coyne's account could result in other fraudulent conduct in the future and result in negative financial and legal consequences for Respondent Institutions and their investors, these allegations regarding potential future misconduct are also mere speculation. Accordingly, in this particular case, where (1) the alleged fraudulent conduct involved only one client and transfer of an account containing only shares in three mutual funds and perhaps as much as $100,000 in cash and (2) Complainant did not allege or prove any facts demonstrating how the *transfer* of this account had any impact on Respondent Institutions' investors, Complainant cannot prove he reasonably believed that his allegation of fraudulent conduct was indirectly adverse to the interests of Respondent Institutions' shareholders.[9]

Based on the foregoing, Complainant cannot prove he reasonably believed the fraudulent conduct he reported was adverse to the interests of Respondent Institutions' shareholders. Therefore, Complainant's reports involving the improper transfer of Ms. Coyne's account, which Complainant states he believed constituted mail, wire, or bank fraud, was not protected activity under the Act. Moreover, for the same reason, Complainant's reports do no qualify as protected activity under the Act based on the fact that Complainant believed he was reporting violations of the Federal securities fraud statute or other Federal laws relating to fraud against shareholders.[10] Additionally, with regard to the securities fraud statute and the Federal laws relating to fraud against shareholders cited by Complainant (Securities Act of 1933 and Securities Exchange Act of 1934), the Presiding Judge notes that Complainant alleged no facts and provided no explanation for how the alleged fraudulent conduct in this case violated any of these laws.

Finally, Complainant has also asserted in his Complaint and Response that the transfer of Ms. Coyne's account based on a forged document constituted violations of what Complainant asserts are rules and regulations of the Securities and Exchange Commission ("SEC"). Based on a review of the rules and regulations cited by Complainant, the Presiding Judge finds that Complainant's assertion that he was reporting what he reasonably believed to be violations of SEC rules and regulations is groundless.

First, the Presiding Judge notes that the several NASD and the NYSE rules cited by Complainant do not appear to be rules and regulations of the SEC. Rather, although promulgation of these rules is prescribed by statute and the SEC has authority to review and approve these rules, these rules are made by self-regulatory organizations. Moreover, the Presiding Judge notes that the rules cited by Complainant deal for the most part with the ethical standards and requirements for brokers when dealing with customers; these rules in general do

[9] Note, the Presiding Judge is *not* stating that there are no situations in which an employee may reasonably believe that a single fraudulent act involving a company's client or customer could be adverse to the interests of the company's investors. Moreover, the Presiding Judge is also *not* stating that an employee could never reasonably believe that fraudulent conduct involving several clients or customers of a company could be adverse to the interests of the company's investors.

[10] The Presiding Judge notes that in footnote 106 of the ARB's decision in *Platone v. FLYi, Inc.*, the ARB referred to 18 U.S.C.A. § 1348 (securities fraud) as a statute that by its terms is limited to fraudulent activity that directly or indirectly affects investors' interests. *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27, slip op. at 15 fn106 (ARB Sep. 29, 2006). Yet, this statement was not a holding of the case and the Presiding Judge believes that situations, such as the current situation where securities are involved in a case but the interests of a company's investors are not affected, may not have been contemplated by the ARB at the time the decision was written.

not deal with activity or disclosures by publicly traded companies that could affect their shareholders.

Next, the Presiding Judge notes that Complainant has asserted that he reasonably believed Respondents' alleged fraudulent conduct violated 17 C.F.R. § 240.10b-5 (Employment of manipulative and deceptive devices). Yet, this section is inapplicable in this case because, in order to violate the section, the alleged misconduct must be "in connection with the purchase [acquisition] or sale [disposition] of any security." 17 C.F.R. § 240.10b-5. In this case, no securities were in fact purchased or sold.

Additionally, Complainant has also asserted that he reasonably believed SEC Rule 17a-3 (Records to be made by certain exchange members, brokers and dealers) was violated. With regard to this rule, the Presiding Judge notes that Complainant has not definitively and specifically alleged any facts and evidence demonstrating that Complainant did in fact reasonably believe Respondents had violated SEC Rule 17a-3. The facts and evidence presented by Complainant demonstrate that Complainant was concerned with the propriety of the transfer of Ms. Coyne's account. Nothing in the record demonstrates that Complainant either was concerned with or reported that the account transfer was not properly recorded by Respondents or that Respondents were otherwise not properly keeping records.

Finally, Complainant also stated that he reasonably believed Respondents violated section 15(b)(4) of the Securities Exchange Act of 1934. After reviewing the statute, the Presiding Judge finds that Complainant's belief that Respondents violated this section of the Securities Exchange Act of 1934 is not reasonable. Section 15(b)(4) merely states circumstances under which the SEC has authority to punish brokers and dealers. The section does not itself state any rules which Respondents could have violated. Accordingly, based on the foregoing, the Presiding Judge finds that Complainant's assertion that he reasonably believed Respondents violated SEC rules and regulations is groundless and Complainant's communications are not protected activity under the Act in this instance.

In viewing the evidence in the light most favorable to Complainant, the non-moving party, the Presiding Judge finds that the alleged violations that Complainant reported are either not covered violations under the Act or are inapplicable in Complainant's case. Respondents have therefore satisfied their burden by proving that Complainant cannot make a sufficient showing to establish this element of his SOX claim. Moreover, in light of Respondents' Motion, Complainant has not set forth specific facts demonstrating that there are any genuine issues of material fact regarding this element for the hearing. Accordingly, Complainant has not satisfied his burden and the Presiding Judge finds that there are no genuine issues of material fact regarding the element of protected activity in this case.

Complainant must suffer unfavorable personnel action

As set forth above, Respondents assert in their Motion for Summary Decision that Complainant did not suffer any unfavourable personnel actions in this case. The whistleblower provision of the Sarbanes-Oxley Act prohibits a covered respondent from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in

the terms and conditions of employment. 18 U.S.C. §1514A(a). In deciding SOX cases, courts have defined an adverse action as either (1) conduct resulting in a tangible job consequence, i.e. "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits," or (2) conduct having a detrimental effect because "it is reasonably likely to deter employees from making protected disclosures." *See Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62, slip op. at 15 (ARB Jul. 27, 2006). As explained below, Complainant, under either definition, has not presented sufficient facts and evidence to demonstrate that he suffered any unfavorable personnel actions in this case.[11]

Complainant has alleged that Respondents discriminated against him by threatening his job, harassing him with a series of phone calls, deliberately making his working conditions intolerable, and forcing him to quit his job. (Response 14.) Specifically, Complainant states that on April 11, 2006, (1) he received several telephone messages from Mr. Quintana and Mr. Hausgen (CX A ¶ 31.); (2) he received a telephone call from Mr. Ryan and that he spoke to Mr. Quintana, and that during these conversations, he repeated his concerns and was told by both Mr. Quintana and Mr. Ryan that he was being insubordinate and that his actions were inappropriate (CX A ¶ 31-32.); and (3) that during his telephone conversation with Mr. Quintana, Mr. Quintana told Complainant, "you realize you have screwed [yourself] forever" and told Complainant to report to his office that afternoon (CX A ¶ 32.).

First, with regard to Complainant's allegation that Respondent threatened his job, the only fact and evidence that Complainant has offered is Mr. Quintana's statement to Complainant that "you realize you have screwed [yourself] forever." Yet, this statement, when viewed objectively and considered in light of the other facts Complainant has alleged and proven, does not overtly express a threat to Complainant's job. Mr. Quintana's statement merely expresses an opinion, albeit perhaps impolitely. It does not give any indication of what, if any, action Mr. Quintana was planning to take. Complainant has not disclosed the specific context in which this comment was made. Complainant has merely alleged that the comment was made when he attempted to explain his actions. (Response 15.) Moreover, the fact that Mr. Quintana told Complainant that he was insubordinate and acted inappropriately and told Complainant to report to his office that afternoon does not change this conclusion. These facts also do not make it reasonable to infer that Mr. Quintana intended to fire Complainant on the afternoon of April 11, 2006 or that he meant his comment to be a threat. Although Complainant states that Mr. Quintana implied that Complainant would be fired that afternoon, this statement is conclusory and unsupported by any actual facts or evidence. It is just as likely, if not more so, that Complainant was being called to Mr. Quintana's office to discuss Complainant's concerns. Moreover, Complainant has neither alleged nor proven that Mr. Quintana's comment resulted in any tangible job consequences or that the comment would likely deter other employees from report potential violations under the Act. Overall, based on all of the foregoing, Complainant cannot make a sufficient showing that Respondents took adverse action against him by threatening his employment.

[11] Neither the ARB nor the Fourth Circuit has specified which definition (test) for adverse action should be used in SOX cases. Accordingly, there is currently no precedent regarding whether alleged conduct must result in a tangible job consequence in order to constitute an adverse action under the Act.

Complainant has also failed to allege sufficient facts and present sufficient evidence to support his allegation of harassment. Complainant has alleged and presented evidence which demonstrate that on April 11, 2006, in addition to the alleged threat by Mr. Quintana, Complainant received several phone messages from Mr. Hausgen and Mr. Quintana. Complainant has also demonstrated that he spoke by telephone to Mr. Quintana and Mr. Ryan, and that both of these individuals told Complainant that he was insubordinate and that his actions were inappropriate. Moreover, Complainant has demonstrated that he was told by Mr. Quintana to report to his office later that day. Yet, these actions on the part of Respondents do not arise to the level of what reasonably could be considered harassment. From an objective standpoint, Respondents' conduct, as alleged by Complainant, does not appear to be offensive, humiliating, derogatory or to cause unreasonable interference in Complainant's ability to perform his job.[12] Moreover, this conduct consists of the types of interactions one would reasonably expect to occur in a professional setting, including discussions between supervisors and a subordinate regarding conduct that may be insubordinate or inappropriate. The Presiding Judge notes that Complainant did not attempt to describe the phone messages or phone conversations with Respondents, beyond stating that Mr. Quintana and Mr. Ryan told Complainant that he was insubordinate and acting inappropriately. In light of Respondents' Motion, these allegations and evidence in support thereof are insufficient to satisfy Complainant's burden after Respondents demonstrated that Complainant's allegations and evidence, in their current form and level of descriptiveness, could not establish that Complainant suffered adverse personnel actions in this case. Based on what Complainant has presented, it certainly cannot be said that these actions would be reasonably likely to deter employees from reporting potential violations under the Act. Nor has Complainant demonstrated that these activities resulted in any tangible job consequences. Accordingly, Complainant cannot make a sufficient showing that he suffered an unfavourable adverse personnel action in the form of harassment.

Finally, Complainant has also alleged that he was constructively discharged. In the Fourth Circuit, to prove constructive discharge, Complainant must prove that Respondents (1) intentionally made Complainant's job intolerable and that (2) Respondents conduct was motivated by Complainant's protected activity. *See Honor v. Booz-Allen Hamilton, Inc.*, 383 F.3d 180, 186-87 (4th Cir. 2004) and *Sara Lee Bakery Group, Inc. v. National Labor Relations Board*, 296 F.3d 292, 300 (4th Cir. 2002).[13] Notably, Complainant must prove that working conditions were so intolerable that a reasonable person would have felt compelled to resign.[14] *Pennsylvania State Police v. Suders*, 542 U. S. 129, 141 (2004). Based on Complainant's allegations and the evidence that he has presented, Complainant cannot prove constructive discharge. Overall, the events of April 11, 2006 were not so intolerable that a reasonable person would have felt compelled to resign. Again, as previously stated, all the adverse personnel actions alleged by Complainant occurred in the span of several hours in a single day. Moreover,

[12] The Presiding Judge notes that Complainant has made no allegations or presented any evidence demonstrating that any of these interactions were witnessed by or involved other individuals.

[13] Complainant claims that that the Supreme Court's holding in *Pennsylvania State Police v. Suders*, 542 U. S. 129 (2004), supersedes the 4th Circuit's use of a two part test in constructive discharge claims. Yet, the Fourth Circuit continues to use its two part test. See, for example, the unpublished decision *Alba v. Merrill Lynch & Co.*, No. 05-1514, 2006 WL 2161005, slip op. at *5 (4th Cir. 2006) (referring to *Suders* but not changing its analysis).

[14] In other words, Complainant must prove that he was subjected to a hostile work environment so intolerable that he was forced to quit. Accordingly, Complainant's allegation that he was subjected to a hostile work environment must rise or fall with his claim of constructive discharge.

these alleged adverse personnel actions consisted of several phone messages, phone calls, Complainant being told he was insubordinate and acted inappropriately, Complainant being told that he screwed himself forever, and Complainant being told to report to his supervisor's office that afternoon. In this case, Respondents' conduct was not frequent, severe, physically threatening, or humiliating and did not unreasonably interfere with Complainant's ability to do his job such that Complainant's working conditions could be considered intolerable from an objective standpoint. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (analyzing hostile work environment claim by considering the totality of the circumstances involved). While it may be true that Complainant believed he was going to be fired and that as a result, Complainant would have difficulty finding another job, the facts alleged and proven by Complainant do not demonstrate that his working conditions were so intolerable that he should have felt compelled to quit. As a result, Complainant cannot make a sufficient showing that he was constructively discharged.

In viewing the evidence in the light most favorable to Complainant, the nonmoving party, the Presiding Judge finds that Respondents have met their initial burden of proving that there are no genuine issues of material fact regarding this element. Specifically, Respondents have demonstrated that Complainant cannot make a showing sufficient to prove this element because the facts Complainant has alleged and proven do not amount to unfavourable personnel actions under the Act. Accordingly, in order to survive this motion, Complainant must set forth specific facts showing that there is a genuine issue of material fact for the hearing. Complainant has not satisfied this burden. Complainant has set forth no facts beyond what he originally stated in his Complaint. In light of Respondent's Motion, the factual allegations in Complainant's Complaint are insufficient to support a finding that Complainant suffered any adverse personnel actions in this case. Therefore, there are no genuine issues of material fact left to be decided with regard to this issue.

Conclusion

Respondents have proven that Complainant cannot make a showing sufficient to establish two essential elements of his claim. In this case, Complainant's activity is not protected under the Act and Complainant suffered no adverse personnel actions. Accordingly, there are no genuine issues of material fact to be decided in this case and Respondent are entitled to summary decision as a matter of law.

ORDER

For the reasons stated in the foregoing discussion, Respondents' Motion for Summary Decision is **GRANTED**.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/mam

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).