U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 January 2004

CASE NO.: 2003-SOX-23

IN THE MATTER OF:

ROBERT J. MCINTYRE, PRO SE
Complainant

v.

MERRILL ,LYNCH, PIERCE,
FENNER & SMITH, INC. and
MERRILL LYNCH & COMPANY
Respondents

Appearances:

Robert J.McIntyre, Pro Se

Robert E. Sheeder, Esq.
Heather Radliffe, Esq.
On Behalf of Respondents

Before:

CLEMENT J. KENNINGTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint of discrimination filed by Robert McIntyre (Complainant), pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, the Sarbanes-Oxley Act, 18 U.S.C. § 1514 A (Sarbanes Oxley or the Act) enacted on July 30, 2002. Section 806 of the Act provides protection to employees against

retaliation by companies with a class of securities registered under Sections 12 and 15 (d) of the Securities Exchange Act of 1934 (15 U.S.C. 781 and 780 (d)) because the employee: (1) provided information to the employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344 or 1348 or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders; or (2) filed, caused to be filed, testified, participated or otherwise assisted in a proceeding related to an alleged violation of 18 U.S.C. 1341, 1343, 1344 or 1348 or any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders.

I. PROCEDURAL HISTORY

On March 21, 2003, Complainant initiated these proceedings by filing a complaint with OSHA against Respondent, Merrill, Lynch, Pierce, Fenner, and Smith, Inc., (MLPFS or Respondent) alleging that MLPFS within the past 90 days had blacklisted Complainant resulting in his inability to obtain employment within the securities industry from such employers as LPL Financial, Quick & Reilly, and Tejas Securities by improper use of National Association of Securities Dealers (NASD) forms U-4 and U-5 on which MLPFS listed false reasons for his discharge, namely, unsatisfactory probation.[1] (CX-4). On August 29, 2003, Complainant amended the complaint to include Respondent's parent, Merrill Lynch & Co., Inc., (MLC). In essence, Complainant alleges that MLPFS terminated and then blacklisted him because he: (1) informed and protested to Respondents' management about unauthorized trading practices of fellow employee, John Edgecomb; (2) sent a letter on August 9, 2001 to NASD accusing MLPFS of engaging in ethical violations and fabricating reasons for his discharge; and (3) subsequently testified against MLPFS before NASD in an arbitration proceeding involving his discharge.

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[1] Respondent is a member of the National Association of Securities Dealers, Inc., a private self regulatory organization. (NASD) NASD requires member employers to register their brokers when hired by filling out a U-4 form (Uniform Application for Securities Industry Registration or Transfer) and sending it to NASD where it is stored electronically at NASD's Central Registration Depository (CRD). Member employers are required to periodically update this form when certain change occur affecting individual applicants such as civil judicial actions, customer complaints, terminations, bankruptcy and judgment liens (RX-23). Member employers are also required to fill out a U-5 form (Uniform Termination Notice for Securities Industry Registration) when they terminated brokers. (RX-3).

The exhibits and transcript of this proceeding are referred to as follows: Complainant's exhibits (CX); Respondent exhibits (RX); joint exhibits (JTX) and transcript (TR).

OSHA investigated and dismissed the complaint because the events surrounding his discharge and alleged subsequent blacklisting occurred prior to the enactment of the Act, and hence, were unprotected. Complainant appealed resulting in a trial before the undersigned in Austin, Texas on October 21, 22, and 23, 2003. Just prior to the hearing, and again at the hearing, on October 21, 2003 Complainant filed untimely motions to continue the proceeding to get an attorney, request a settlement judge, obtain "proper" discovery from Respondent or more properly from former employees Thomas Moseley, Rebecca Benavides, and NASD. (Tr. 9-31). The first day of the proceedings dealt primarily with introduction of exhibits and Complainant's testimony.[2] Of those 58 exhibits submitted by Complainant, 20 were admitted including: Complainant's March 21, 2003 complaint to OSHA (CX-4); an April 22, 2003 letter from Complainant to Respondent's Chairman, John Phelan (CX-6); Respondent's answer to the complaint (CX-14); a February 5, 1998 letter of Edgecomb to Benavides (CX-22); NASD dispute resolution process (CX-21); a January 27, 1998 letter of Complainant to Connolly Respondent's General Counsel (CX-23); memos of Doug Jones to John Failla and Richard Drew regarding Complainant's ethics hotline complaint dated August 11, and February 23, 1998 (CX-24, 25); Respondent Consultant Capital Accumulation Award Plan (CX-36); Titles VIII to XI of the Act (CX-37); compliance outline for private client financial consultants (CX-46, pp. 1-8); NASD Arbitration Decision (CX-49); Complainant's claim before NASD (CX-50); a July 8, 2003 letter from NASD to Complainant regarding allegations of blacklisting, confiscation of property, and perjury at NASD arbitration (CX-55); an October 14, 2003 letter of NASD to Complainant regarding subpoenaed documents (CX-56); Code of NASD Arbitration Procedure (CX-57); and SOX Interim Rule, 29 CFR Part 1980. (CX-58).

Respondent called Scott Gilbert (Attorney), Diane Waller (Vice-President and Manager of Respondent's long term incentive plans), John Edgecomb (Financial Advisor or Broker), Karen Beebe (Administrative Manager) and submitted 47 exhibits of which 45 were admitted including: Complainant's arbitration submission to NASD of August 9, 2001 (RX-1); Respondent's answer to arbitration submission (RX-2); Complainant's U-5 (Uniform Termination Notice for Securities Industry Registration)(RX-3); NASD Arbitration Award of December 20, 2002 (RX-4); Respondent's payment of award (EX-5, 6); Complainant's U-5 notice of termination from Stanford Group (RX-7); Complainant's employment history with Respondent and Stanford on file with

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[2] The transcript for the first day of the hearing, October 21, 2003, erroneously states on page 3 that no exhibits were identified or introduced.

NASD (RX-8); Capital Accumulation Award Plan and payment of $2,249.51 to Complainant pursuant to the plan (CX-9, 10); Financial Consultant Account Distribution and Quality Index of Complainant (RX-11); memos from Thomas Mosley to Complainant regarding probation dated February 23, March 20, April 19, May 11, 15, June 23, 2000; (RX-12, 13); June 23, 2003 memo of Mosley to Complainant (RX-16); memos of Mosley to John Graham regarding probation (RX-17); memos of Mosley to Wayne Daugherty regarding probation (RX-18); memos of Mosley to Duke Browne regarding probation (RX-19); U-5 termination of Duke (Duvegnaude) Browne (RX-20); U-5 instruction form (RX-21); U-4 form on Duke Browne (RX-22); U-4 instruction form (RX-23); U-4 form on Complainant (RX-24); Complainant's employee profile (RX-25); summary of production records for Respondent's Capital Complex office (RX-26); Complainant's production records (RX-27, 28, 29, 30); termination instruction for Complainant (RX-31); Complainant's hiring by Stanford Group on July 13, 2000 (RX-32); John Edgecomb trade and related correspondence (CX-33-40); Complainant's 2000 W-2 (RX-41); medical records of Complainant regarding sleep apnea; (RX-42); February 18, 2000 memo from Mosley to Chris Bounds (RX-43); January 27, 1998 letter of Complainant to Respondent General Counsel (RX-44); May 14, 2003 letter of Respondent's Counsel Ellen J. Casey to Complainant (RX-45); summary of Complainant's background submitted to Cyber Trade and testimony from Complainant regarding unpublished article on discharge (RX-46,46a); and U-4 of Complainant from Respondent. (RX-47).

Prior to the hearing, MLPFS filed for summary judgment contending that it was not a publicly traded company so as to escape whistleblower coverage under the Act. After the motion was denied, Respondent withdrew its motion. Also prior to the hearing, the parties submitted the issue of Complainant's discharge to a National Association of Securities Dealers, Inc., (NASD) arbitration panel in August and December, 2001,wherein, they raised some of the same issues and facts as presented at the instant hearing. (RX-1, 2, 3). Complainant contended that when he learned of unethical conduct by another broker, John Edgecomb, involving the unauthorized sale of Cypress-Fairbanks, Texas Independent School District bonds (Cypress-Fairbanks), he tried to get Edgecomb to rectify the situation by busting or canceling the trade. When Edgecomb fail to cancel the trade, Complainant reported the matter to immediate supervision who failed to act. Complainant then reported the matter to higher supervision via an ethics hotline. Thereafter, Complainant alleged he experienced discriminatory reprisals by Edgecomb who relegated Complainant to a distant office, separated from his sales assistant, denied access to call-ins, walk-ins or reassigned accounts. When Complainant returned to work after caring for an ill mother in February, 2000,

Respondent placed him on probation requiring him to meet certain goals. When he failed to meet these goals, allegedly due to inadequate time or assistance, Respondent discharged him on July 11, 2000.

Complainant sought damages for breach of contract, tortuous interference with contractual relations, wrongful termination and retaliation seeking $500,000 in damages and attorney fees. (RX-1). In response, Respondent denied Complainant's allegation stating that it encouraged employees to report ethical concerns and to investigate those complaints and administer appropriate discipline. Further, Respondent investigated Complainant's allegation and took appropriate action to client's satisfaction. In February, 2000, Respondent placed Complainant along with other brokers on probation due to substandard performance, and thereafter, on July 11, 2000 terminated Complainant for his failure to make adequate progress in meeting the production goals. Respondent denied making any defamatory statements concerning Complainant, asserted the doctrines of waiver and estoppel to bar Complainant's claims and stated that Complainant suffered no damages as a consequence of any action taken against by Respondent. (RX-2).

On December 20, 2002, NASD issued an Award finding Respondent liable for compensatory damages to Complainant of $35,000.00 with interest at 6% to accrue on November 14, 2002, plus an additional sum of $2,425.00, while denying all other requested relief. NASD failed to provide any reasons for its award. (RX-4). Respondent paid the award on January 9, 2003. (RX-5).

II. ISSUES

1. Whether Complainant's action in reporting and challenging broker, John Edgecomb's unauthorized sale of customer Robert Kanewske's Cyprus bond constituted protected activity with the meaning of the Act.

2. Whether MLPFS supervisors, Mosley and Beebe terminated Complainant on July 11, 2000 because of Complainant's whistle blowing activities in reporting and complaining about Edgecomb's unauthorized sale of Kanewske's Cyprus bond to Respondents' management.

3. Whether MLPSF blacklisted Complainant by asserting false reasons on Complainant's U-4 or U-5 concerning his July 1l, 2000 termination, and thus, depriving him from employment with other security firms.

4. Whether Respondent has the right and obligation to unilaterally amend Complainant's U-4 or U-5 so as to reflect the true reason for his termination, namely whistle blowing activities regarding Edgecomb's unauthorized sale of Client Kanewske Cyprus bond.

5. Whether Respondent unlawfully withheld information and money from Complainant that he had earned pursuant to Respondent Financial Consultant Capital Accumulation Award Plan. (FCAP).

6. Whether Respondent paid Susan Moss for favorable testimony at Complainant's NASD arbitration proceeding.

7. Whether Respondent unlawfully withheld benefits from Complainant concerning a Met Life Annuity or a $10,000 investment certificate awarded to its top producers.

8. Whether Respondent unlawfully withheld Complainant's sleep apnea report during the NASD arbitration proceeding when requested by Complainant to produce his entire personnel file.

III. CHRONOLOGY

Complainant is a 50 year old male possessing a B.A. degree with honors in Spanish and Latin American studies from Immaculate Heart College in Hollywood, California, and an MBA degree in Finance from the University of Texas in Austin, Texas. Complainant is fluent in Spanish with past work experience as an assistant instructor of Spanish at the University of Texas from September, 1979, to June, 1982; tax examiner for the Internal Revenue Service from December, 1982 to June, 1983; project researcher for the Bureau of Engineering Research, University of Texas from February, 1985 to March, 1986; assistant vice president, financial consultant or broker with Respondent from November, 1986 to July, 2000; assistant vice-president and financial consultant for

Stanford Group Co. from July, 2000 to May, 2001, followed by day trading for Summit Trading Services, Inc. (RX-46).

On November 17, 1986, Respondent hired Complainant as a trainee or sales assistant for its Medical Center office in Houston, Texas. In January, 1987, became a licensed broker for Respondent. In December, 1987, Respondent transferred Complainant to Austin, Texas where he was assigned to an international office specializing in sales with Mexico. From July, 1994 to December, 1997, Complainant worked under the supervision of manager, Rick Smith. In December, 1997, Doug Jones replaced Smith as manager and transferred operations to a satellite office known as Los Altos. In January, 1999, Respondent transferred Complainant and 3 other brokers including Edgecomb back to Respondent's domestic Austin office. There Complainant worked under the supervision of manager Thomas Mosley specializing in Mexican sales until terminated on July 11, 2000. (Tr. 185-205).

In January, 1997, customer, Robert Kanewske came into the Austin office seeking a broker to explain why a Cypress Fairbanks municipal bond which he had purchased had been sold without his authorization. Since Kanewske's broker, Edgecomb, was not in the office, Kanewske was referred to Complainant, who in turn, called Edgecomb, and confirmed the sale on December 23, 1996. Edgecomb explained that the bond had been called by the issuer. Complainant called Respondent's municipal bond desk and learned that the bond had not been called, whereupon he confronted Edgecomb who admitted a mistaken sale believing that the bond in question was part of an estate liquidation and promised to correct the sale which involved letting the client know about the mistake, and offering to cancel the sale and repurchase the bond or purchase another security. (Tr. 209-221).[3]

When Edgecomb failed to replace the bond, Complainant in March, 1997, informed Rick Smith, who told him that Edgecomb would correct the situation and inform Complainant what he had done. Edgecomb, however, never talked to Complainant whereupon Complainant informed compliance officer, Becky Benavides, about the situation. Benavides promised an investigation. Several weeks later, Smith told Complainant that they had investigated the sale, talked to

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[3] Edgecomb admitted selling the Cyprus bond without authorization under the mistaken belief that the bond was up for redemption or recall by lottery by the issuer. Edgecomb subsequently advised Kanewske of the mistake and agreed to accept in its place the A Leaf School District bond. Kanewske later expressed a desire to have the Cyprus bond reinstated into his account and Benavides complied by busting or canceling the trade. (Tr. 632-642).

Edgecomb and that the matter was to go no further because Kanewske was satisfied with replacement bonds Edgecomb had purchased which resulted in a $1,000.00 profit for Kanewske. (Tr. 224-229, 263-267).[4]

Complainant did not pursue the matter further until January 26, 1998, at which point, Smith was no longer office manager. On January 26, 1998, Complainant called Respondent's General Counsel, Charles Connolly on Respondent's ethics hotline, explained the situation, and followed up the next day with a detailed letter setting forth events. (Tr. 267-269, RX-44). Connolly agreed with Complainant that what he reported was a serious matter. In turn, Smith, Benavides, and Edgecomb were reprimanded by management. (Tr. 272-277; CX-21-26). On February 12, 1998, Benavides busted or cancelled the sale and restored the Cyprus bonds to Kanewske. (RX-38).

In either May, or June, 1998, Complainant had a compliance meeting with manager, Doug Jones and Benavides at Respondent's Capitol of Texas office during which Jones asked what Complainant's intentions were with the ethics hotline complaint. Complainant responded that he might take the issue to NASD.[5] Jones became very upset and told Complainant that he might look for another "venue" if he did so. Later in August, 1998, Jones called Complainant to Respondent's San Antonio office where he inquired about Complainant's top ten clients and told Complainant he was on a limited time line. (Tr. 335-342).

Nothing further was said about the Kanewske matter until December 15, 1998, when Complainant attended a meeting with Mosley and Karen Beebe, at which Mosley told Complainant he was aware of the ethics hotline complaint and then allegedly accused Complainant of an unauthorized trade with a coffee baron Orango, from Bogata which Complainant denied.[6] Mosley then raised the subject of Complainant's low productivity which was in the 5th quintile or bottom 20% of Respondent's brokers of similar experience as Complainant. The following day, Complainant had a meeting with Mosley and Carroll Meredith, Mosley's boss, during which Complainant produced a letter from Orango authorizing the trade. Meredith related his work experience with Respondent and asked Complainant

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Edgecomb purchased replacement bonds, Alief School District bonds on January 24, 1997. (Tr. 262).

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In May, 1998, Respondent supervisor, Joe Ochoa, called Complainant and asked what was going on with the ethic hotline complaint, what he intended to do about it, and what was his beef. (Tr. 344).

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Beebe denied that the December 15, 1998 meeting started by either herself or Mosley bringing up Complainant's ethics hot line complaint. (Tr. 707-708).

what his problem was apparently referring to the ethics hotline complaint. (Tr. 279-289). Mosley told Complainant to call him between Christmas and New Year to discuss Complainant's plan for sale improvements. Thereafter, nothing further was said about Complainant's hotline complaint. (Tr. 296).

III. COMPLAINANT'S PROBATION AND SUBSEQUENT TERMINATION

On February 23, 2000, Mosley conducted a meeting of brokers including Complainant, John Graham, Duke Browne, Chris Bounds, and Wayne Daughtery at which he informed them as of February 18, 2000 they were placed on probation due to low production in 1999. (Tr. 383-384, 688, 692-696). In 1999, Complainant scored as a financial consultant in the bottom 20% or 5th quintile based upon his length of service. (Tr. 297). Mosley told Complainant and the other brokers that this probation would [7]continue throughout the 2000 production year with all required to meet at least one of the following goals: (1) be out of the fifth quintile for production for his length of service; (2) produce a minimum of $300,000 in production during 2000; and (3) be above the national median for the 2000 Masters program. Mosley further stated, that Complainant and the other brokers must make meaningful progress toward meeting one of the above 3 minimum standards on a monthly basis with progress monitored by using their Excel and Masters reports. (RX-12, 17, 18, 19, 43; Tr. 298-300).[8]

On March 10, 2000, Mosley sent Complainant a letter reminding him of his probation and advising him of his current status in meeting those goals. Complainant's current status as of March 10, 2000 was 5th production quintile with production at $2,819.00 or $18,582 when annualized and no Masters points with a national median of 145. (RX-13, p. 1). On April 19, 2000, Mosley sent Complainant another letter setting forth Complainant's production which again failed to meet any of the three required goals. (RX-13, p 2). This was followed by

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[7] Complainant asserted that he was unfairly put on probation after returning from California to take care of a dying mother without the assistance of a client associate. Complainant neglected the fact that when he went to California he continued to work full time by means of a computer link up and with the assistance of client associate, Karen Moss. (Tr. 691)

[8] The Masters program was a contest to encourage brokers to open new accounts, sell financial plans and manage entire portfolios for a flat fee.

additional letters of May11, 25, and June 23, 2000 from Mosley to Complainant outlining additional asset, production, planning and Master points needed to get off probation. (RX-13, p. 11, 20, 23)[9] When Mosley gave Complainant his May 11, 2000 memo, he told Complainant that Carroll Meredith was upset because his district ranked 26 out of 27 and asked Mosley why Complainant had not been fired. Complainant asked for a travel stipend which Mosley denied and instead offered to give him CDs for making presentations. (Tr. 324-327).

Mosley discharged Complainant and Browne on July 11, 2000 when they failed to meet any of the initial 3 requirements. (Tr. 704). Present during Complainant's termination were Mosley, who read a prepared statement, Beebe, and Cary Gunderson, operations manager. (Tr. 328, 329). On July 26, 2000, Respondent reported their discharge on the required U-5. (Tr. 705). Chris Bounds met one of requirements by meeting the national medium master's points and was taken off probation. (Tr.700). Wayne Daughterty took a voluntary demotion and became an investment associate in Respondent's Marlboro office with senior financial advisor Rick Coleman. (Tr. 701). Graham transferred back to San Antonio and no longer reported to Mosley and in September, 2000, resigned. Even Edgecomb was placed on probation and escaped termination by bringing in a $20,000,000 pension plan. (CX-42; Tr. 646).

IV. RESPONDENT'S ALLEGED DISCRIMINATORY TREATMENT OF COMPLAINANT

Besides his termination Complainant asserted the following discriminatory actions against him by Respondent: (1) denial of stock or proper monetary compensation in Respondents Financial Consultant Capital Accumulation Award Plan (FCAP) (RX-10; CX-36, Tr. 137); (2) denial of benefits in a Met Life Annuity Plan and an Investment Certificate Program; (3) blacklisting by reporting false information on his U-4 and U-5 forms resulting in denial of employment with LPL Financial, Tejas Securities, CyberTrade, Washington Mutual and Home Depot; (4) libel by Respondent's attorney, Charles Gall in answering Complainant's allegations to OSHA. (Tr. 584-586; RX-14); bribery of Susan Moss when testifying at the arbitration proceeding before NASD (Tr. 595); (5)

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[9] Mosley sent similar letters to Graham, Browne, Bounds and Daugherty requiring them to meet certain production goals based upon their years of service.

disparate treatment by not reporting on a U-4 Edgecomb's un-authorizing trading; (6) withholding medical records from his personal file about sleep apnea during the NASD arbitration (JTX-1); and (7) refusing to unilaterally change Complainant's U-5.

Concerning the FCAP, Respondent paid Complainant the sum of $2,249.51 on December 31, 2000, for his participation in the plan. (RX-9). Diane Waller, vice president and manager of Respondent's long term incentive compensation plans, testified that the FCAP was initially established in 1984 as a means of rewarding and retaining top producing financial advisors. In 1995, Respondent made major changes to the plan whereby terminal financial advisors would receive a vested portion of minimum cash value for service rendered prior to 1995, and thereafter, no compensation. (Tr. 442-446). In December, 2000, Respondent paid Complainant for all pre-1995 vested awards. (Tr. 447-452).

Concerning the Met Life Annuity, Waller testified that Complainant qualified for it and could draw benefits as early as age 55 with an early out penalty, or could wait until age 65 and get full vesting. As far as the Investment Certificate Program, Complainant had been enrolled in the 10 year plan, but had never met the production quotas to qualify for it, and even if he had met the quotas, lost any claim to it when terminated. (Tr. 453-457). Thus, the only plan owing Complainant compensation was FCAP which paid him all that was due in December, 2000. (Tr. 471). Although Complainant testified that Waller did not respond to his inquiries about the funds, he admitted he had no basis to question Waller's testimony about such plans and the fact that Respondent had paid him what he was due. (Tr. 551-568, 572-574; 614). Further, he admitted he had no basis for accusing Gall of libel when he defended Respondent by either repeating what Respondent's official had told him, or expressing personal opinions about Complainant's charges. (Tr. 615-617). In like manner, Complainant had no basis for accusing Moss of bribery, or for accusing Respondent of withhold medical records, when in fact, he had told Beebe not to include the medical record in his file and further to white out his name on the record so as to maintain its confidentiality. (Tr. 573-584; 689-691).

Regarding the issue of blacklisting, Complainant was hired as a broker by the Stanford Group within 3 days of his termination by Respondent despite the fact that he had low production and had defaulted on a student loan. Stanford subsequently terminated Complainant on April 17, 2001 for low production. (Tr. 492-494). Subsequently, Complainant applied for work as a broker with LPL Financial, Tejas Securities, CyberTrader, Washington Mutual and Home Depot. None of these employers referred to Complainant's low production or U-5 from

Respondent. LPL did not hire Complainant because he did not have a book of business. Complainant admittedly had no knowledge why any of these companies other than LPL refused to hire him. (Tr. 502-530).

Finally, regarding Respondent's refusal to unilaterally alter or change Complainant's U-5, Scott Gilbert, Respondent's vice president and senior counsel in global regulatory matters, testified that NASD was a self regulatory organization like the New York stock exchange. NASD requires employer members to have its brokers fill out a U-4 when hired and to update it when certain events occur affecting such as criminal, disciplinary civil judicial actions, customer complaints, terminations, and judgment liens. In turn, employer members submit the U-4 to NASD Central Registration Depository where they are electronically stored and made available to the public. Further, while member employers are required to file and update the U-4, they have no right to unilaterally alter such forms or U-5s which must be filed upon termination. Rather, such changes are left to the discretion of NASD and its arbitration process. (Tr. 399-404). Since the Kanewske trade involved no complaint or settlement of $10,000 or greater, Respondent was not required to report it. (Tr. 411-412).

V. DISCUSSION

The first and primary issue to be decided is whether Complainant's whistle blowing activities of reporting Edgecomb's unauthorized trade were protected under the Act in so far they all occurred prior to the enactment of Sarbanes-Oxley. Although there is no Board cases on point several Administrative Law decisions have found no retroactive application of the Act. *Gilmore v. Parametric Technology,* 2003-SOX-1 (ALJ Feb.6, 2003); *Kunkler v. Global Futures & Forex, Ltd,* 2003-SOX-6 (ALJ Apr.24, 2003). Both *Gilmore and Kunkler* rely upon *Landgraf v/ USI Film Products,* 511 U.S. 244 (1994) for a strong presumption against retroactive application unless Congress manifested a clear intent to have the statute in question apply retroactively. Respondent agrees and argues that to apply the Act retroactively would impose an unfair and new burden upon it which Congress did not intent. In reviewing the Act I find no express provision authorizing retroactive application. Thus, I find that Complainant's reporting activity including his appeal to the NASD did not constitute protected activity in that such activity prior to the effective date of the Act, i.e., July 30, 2002. Thus

any discharge or adverse employment action for said conduct does not violate the Act.

Assuming *arguendo* that somehow Complainant engaged in timely protected activity, the question arises: Did Complainant file a charge within 90 days of any alleged discrimination as required by Section 1514 A (b)(2) (D)? Complainant alleges deception and continuing violations in Respondent's refusal to expunge or amend Complainant's U-5 as well as discovery abuse. However, the record does not support such allegation. Indeed, Respondent even if wanted to could not unilaterally amend either Complainant's U-4 or U-5. In *National Railroad Passenger Corp. v. Morgan,*536 U.S.101 (2002), the Court found the continuing violation theory applicable only to hostile work environment claims which are absent here. Rather in the present case, we have only discrete acts of alleged discrimination within 90 days of the charge filing including applications for work with Quick and Riley, Tejas Securities, Washington Mutual, and Home Depot. Complainant, however, introduced no evidence to tie any of these applications or subsequent refusals to hire with any protected activity or Complainant's U-5. Thus, Complainant has no basis for any of his charges.

What is evident from these proceedings is Complainant's attempt to have the undersigned agree that the NASD decision is binding, and further, to have me read that decision as tantamount to a finding of discrimination under the Act. Not only is that decision not binding on the undersigned, it does not indicate the basis for its ruling. Thus, I find that neither the doctrine of collateral estoppels or *res judicata* applies. Also evident from these proceedings is Complainant's substitution of unsubstantiated allegations for credible evidence of discriminatory conduct by accusing Respondent's attorneys of libel, misleading Complainant, withholding pertinent discovery materials, and engaging in improper ex-parte discussion with the undersigned, none of which occurred.

In essence, after examining the entire record, I find that: (1) Complainant did not engage in protected activity by his actions in protesting Edgecomb's unauthorized sale of customer Kanewske's Cyprus bond, all of which occurred prior to enactment of Sarbanes Oxley; (2) Respondent terminated Complainant on July 11, 2000, because of poor production, and not in retaliation for protesting Edgecomb's sale of the Cyprus bond; (3) in terminating Complainant, Respondent treated Complainant like other employee brokers; (4) Respondent did not blacklist Complainant when it indicated on NASD forms termination unsatisfactory probation; (5) Respondent did discriminate against Complainant regarding its FCAP, MET Life annuity, or investment certificate awards; (6) Respondent did not discriminate against Complainant by withholding during the NASD arbitration

proceedings Complainant's medical report of sleep apnea; (7) Respondent did not pay or bribe Susan Moss for favorable testimony at Complainant's arbitration proceeding; (8) Respondent has not blacklisted or prevented Complainant's employment with subsequent employers, nor has it improperly refused to unilaterally change Complainant's U-4 or :U-5 forms held by NASD.

VI RECOMMENDED ORDER

ACCORDINGLY, IT IS HEREBY RECOMMENDED that the case be dismissed.

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CLEMENT J. KENNINGTON

ADMINISTRATIVE LAW JUDGE

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