

**U.S. Department of Labor**

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**Issue Date: 10 January 2005**

CASE NO.: 2004-SOX-58

In the Matter of:  
ALEXANDRA BARNES  
Complainant,

v.

RAYMOND JAMES & ASSOCIATES,  
Respondent.

APPEARANCES:

Tammany Kramer, Attorney  
For Complainant

Leslie Reese, Attorney  
For Respondent

BEFORE:

Stephen L. Purcell  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This case arises under the whistleblower provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (Sarbanes-Oxley) enacted on July 30, 2002. Sarbanes-Oxley prohibits companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, or which are required to file reports under § 15(d) of the same Act, and any officer, employee, or agent of such company, from discharging, harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because the employee provided the employer or Federal Government with information relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of Federal law relating to fraud against shareholders.

## **I. PROCEDURAL BACKGROUND**

Alexandra Barnes, Complainant, filed an appeal with the Office of Administrative Law Judges from a May 3, 2004 denial of her whistleblower complaint by the Occupational Safety and Health Administration of the United States Department of Labor. A formal hearing was held on September 24, 2004 in Washington, D.C. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, submit oral arguments, and file post-hearing briefs. The following exhibits were admitted into evidence at the hearing: Joint Exhibits (JX) 1-64 and ALJ Exhibits (ALJX) 1-3. Post-hearing briefs were received from both Complainant and Respondent.

## **II. ISSUES**

1. Whether Complainant engaged in activities that are protected by Sarbanes-Oxley?
2. Whether Respondent actually or constructively knew of or suspected such activity?
3. Whether Complainant suffered an unfavorable personnel action?
4. Whether Complainant's activity was a contributing factor in the unfavorable personnel action taken against her?

## **III. SUMMARY OF EVIDENCE**

Complainant, Alexandra Barnes, was hired by Raymond James in 1994. Hearing transcript ("Tr.") at 15. She earned a Securities License in 1995, and thereafter obtained both an Insurance License and a Registered Investment Adviser Representative License. Tr. 16. In 2003, Complainant was working for Respondent as a Registered Client Service Associate. Tr. 15. As a Service Associate, she performed primarily administrative functions including answering telephones, keeping and retrieving records, keeping account statements, and filling out documents. Tr. 16-17. Her employment with Respondent was terminated on November 14, 2003. JX 29.

Prior to her termination, Complainant received positive performance appraisals at Raymond James with feedback that ranged from "exceeds expectations" to "far exceeds expectations." JX-3-15; Tr. 18-21; Tr. 170. For example, Michele Willoughby, Respondent's Operations Manager in its Washington, D.C. office, wrote on November 21, 2002 that "[Complainant] is very conscientious and has accomplished a lot in a short period of time." JX-4.

Near the end of her employment, Complainant spent the majority of her time working for Charles Markson, a Financial Adviser, and Gary Settle, the Acting Branch Manager. By all accounts, Complainant and Markson had a poor working relationship. *See, e.g.*, JX-35, 37, 38, 39. Rex Wagner, a former Branch Manager at Raymond James, testified about several complaints that Complainant had raised concerning Markson. Most of the complaints, Wagner explained, were that Markson was rude or that he "messed with papers" on her desk. Tr. 167. Wagner also remembered talking to Complainant about Markson's yelling and recalled another occasion when Complainant reported Markson had "throw[n] a book at the floor or something." Tr. 168.

On November 10, 2003, Complainant emailed Willoughby and expressed displeasure about her work environment. Complainant wrote:

Dear Michele, are you aware of any other opportunities at RJ. I'm tired of seeing empty promises come to nothing and dealing with the stress of working with a jerk on a daily basis. I could really use your advice on this one. Thanks, Alyx.

JX-17.

The next day, November 11, 2003, Complainant met with Willoughby and Settle in Willoughby's office. Complainant described the meeting as occurring in two parts. Tr. 23. During the first part of the meeting, Complainant described to Willoughby and Settle what she perceived to be a hostile work environment and requested a transfer. *Id.* In the second part of the meeting, Complainant raised her concerns about Markson's business practices and alleged that he had engaged in unethical conduct. *Id.* While the parties disagree about certain aspects of the meeting, much of what occurred at that time is not in dispute. The sworn statements and testimony of Settle, Willoughby, and Complainant, JX-35, 37, 38, as well as handwritten notes prepared by Willoughby after the meeting, JX-18, provide the following outline of what transpired.

The meeting began with Complainant's recounting her strained relationship with Markson. JX-18, 35. Complainant first described a variety of inappropriate behaviors in which Markson engaged, including: door slamming, cursing, knocking things off her desk, throwing a prospectus, and unexplained absences. JX-18, 35. Complainant also complained that Markson had promised her a bonus but failed to provide it. JX-35. She therefore requested that she be transferred to another position away from Markson. Willoughby and Settle listened to these complaints but informed Complainant that there were no other opportunities available in the Washington, D.C. office. They asked Complainant if she would consider relocating to the Raymond James office in Saint Petersburg, Florida, but Complainant said she could not, citing personal reasons. JX-18, 35, 37. There is no dispute among the parties with respect to this part of the meeting.

According to Complainant, after she was told there were no other positions for her in the Washington office, Willoughby asked her, "What are your plans?" Complainant wrote that she "took this as a euphemism for telling me that I should be looking for other employment." JX-35; *see also* Tr. 25. Complainant said that she responded to this inquiry by asking hypothetically, "So what you are telling me is that if, for example, Charles Schwab were to sign on the dotted line, then I should leave immediately, after providing two weeks notice?" JX-35. Complainant wrote that Willoughby then responded to this inquiry with a further question, "So would you work for Charles Schwab?" to which Complainant replied, "Sure. Why not?" *Id.* Complainant denies, however, that she indicated she was actually offered a job by Schwab or that she ever pursued employment there.

Both Settle and Willoughby, remember this aspect of the meeting differently. They maintain that after Barnes was told there were no vacancies in Washington to which she could transfer, Complainant informed them that she was leaving Raymond James. JX-18, 37, 38.

In her sworn statement, Willoughby wrote that Complainant said “she would never consider working for Markson any longer and that she was waiting for the ink to dry at Schwab and that she would be gone within two weeks of the ink drying.” JX-37. Willoughby also wrote that, to clarify Barnes’ intentions, she asked Complainant if she was in fact leaving to work for Schwab, and Complainant answered affirmatively. Willoughby further said she even asked Complainant what she was going to do at Schwab and Complainant said that she was going to be a Financial Adviser. Willoughby’s notes of the meeting are consistent with her statement. In her notes, Willoughby wrote that Complainant is “waiting for the ink to dry @ Schawb [sic] and will be going there as an FA.” JX-18. Another portion of Willoughby’s notes reads, “Offer at Schawb [sic] for \$65,000 FA for what she really wants to do.” *Id.*

Settle’s account of Complainant’s statements is consistent with Willoughby’s. In his sworn statement, Settle wrote that Complainant said she was actively seeking employment with competitors and she specifically mentioned Charles Schwab. Settle remembered Complainant saying that “she would be gone to Charles Schwab as soon as the ink dried.” Settle understood this comment to mean that Barnes had an employment offer from Charles Schwab and she intended to accept the offer. JX-38. On December 3, 2003, Settle wrote in an email to Willoughby and Dianne Mouaikel: “Alyx said she was talking to Charles Schwab because she was unhappy with her current job as a registered SA here and could make more money with them. She said she would be going over there ‘as soon as the ink dried,’ which made it sound like it was just a matter of time before she would leave us and go over there.” JX-20.

At some point before the meeting concluded, Settle left. JX-37, 38. Willoughby and Complainant continued talking. After Settle was gone, Complainant said she was uncomfortable working with Markson because, according to Willoughby, Complainant felt his sales practices were “just a shade off.” JX-18, 37. Specifically, Complainant said that Markson did a lot of mutual fund switches. She said she gave the example of Markson’s mutual fund switches because she thought it “would illustrate that he was routinely mischaracterizing his clients risk tolerance and growth profile.”<sup>1</sup> JX-35. Complainant’s concern was that Markson was doing an inappropriate number of fund switches resulting in additional fees for his clients. Complainant did not actually mention her perception that Markson mischaracterized risk profiles because she “was distracted and forgot the topic.” JX-35. Complainant testified, however, that she was surprised that “no client [ever filed] a complaint or lawsuit against either Chuck Markson or Raymond James because of this kind of conduct and activity.” Tr. 31, 133. The meeting between Willoughby and Complainant concluded with a discussion about the benefits of working for the Federal government. JX-35, 37. According to Willoughby, she subsequently reviewed Markson’s records regarding switches and found no evidence of unethical or improper conduct. JX-37.

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<sup>1</sup> At the hearing, Complainant alleged that Markson was mischaracterizing his clients’ growth interest as aggressive because the aggressive characterization gave him greater flexibility to perform mutual fund switches. Tr. 29-30.

Although Settle was not in the meeting when Complainant raised ethical concerns about Markson, Settle has stated that he was aware of her allegations. JX-38. In his sworn statement, Settle wrote that “Barnes may have made some off the cuff comment to me in the past about her concerns with irregularities with Markson’s ethics.” *Id.* He further explained:

As I recall Barnes had raised the issue, and become confused with the terms, switches and transfers. I had to explain to her that a switch was the change of a client’s investment from one mutual fund family to another, for which fees (in the form of loads) would be earned by a broker. A transfer, on the other hand, is the change of a client’s investment within the same mutual fund family, for which no fees are earned by a broker. The action[] that Barnes was accusing Markson of was a switch, wh[ich] after discussion turned out to be a transfer. Switch forms are required to be completed to document when a switch takes place.

JX-38; *see also* Tr. 151-52.

Two days after the meeting, on November 13, 2003, Complainant was called into another meeting with Willoughby and Settle. Willoughby explained that Complainant could either resign or be terminated because she was going to work for a competitor, Charles Schwab. Tr. 33, 77. Willoughby further explained that if Complainant chose to resign she would be given two weeks severance and her unused vacation pay. JX-37. At this point, Complainant explained that, despite any misunderstandings to the contrary, she had not applied for or received any other offers of employment. JX-35, 37; Tr. 34. Willoughby and Settle, however, did not waiver in their decision to terminate her. Complainant declined to make a decision at that moment and said she first wanted to talk to an attorney.

Complainant’s employment with Raymond James was terminated on November 14. The decision to fire her was made by Willoughby, Settle, Mouaikel, and the regional manager, Bill Van Wall. Tr. 150. The only stated reason for firing Complainant was her purported communication of her intention to work for Charles Schwab. The termination was, according to Respondent, consistent with an unwritten, industry-wide policy of terminating employees who accept employment with direct competitors. Tr. 132.

Less than a week after the incident, on November 19 and 20, there was an annual internal compliance audit at the Washington, D.C. branch of Raymond James. JX-37. Willoughby testified that she was unaware the audit was to occur on those dates when she fired Complainant. The branch received a “standard” rating as a result of the audit. Tr. 176-77; JX-27.

#### **IV. DISCUSSION**

Under Sarbanes-Oxley, a complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity as defined by the Act; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §§ 1980.104(b), 1980.109(a); *Macktal v. U.S. Dep’t. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101-02

(10th Cir. 1999); *Dysert v. Sec’y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997); *Platone v. Atlantic Coast Airlines Holdings, Inc.*, Case NO. 2003-SOX-00027 (DOL Apr. 30, 2004). If the complainant proves all four elements by a preponderance of the evidence, then she is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1980.109.

Complainant has established, as explained below, that Respondent had knowledge of certain activity which she alleges is protected under Sarbanes-Oxley, and that she suffered an adverse employment action. However, Complainant has failed to show that her activity was in fact protected by the Act or that her termination from employment with Raymond James was in any way related thereto. Her complaint must therefore be denied.

### *Protected Activity*

Sarbanes Oxley protects:

[A]ny lawful act done by the employee . . . to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of . . . 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 . . . a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A.

Complainant asserts that she engaged in protected activity on November 11, 2003 when she “voiced . . . concerns to Operations Manager Michele Willoughby [concerning her belief that Markson was knowingly conducting improper switches, that he was deliberately misprofiling the degree of aggressiveness of clients, and that he was knowingly creating improper documentation.]” *Complainant’s Post-Hearing Submission* at 7. I find, however, that Complainant has failed to demonstrate that she engaged in any activity protected by the Act for at least two reasons.

First, as the above-quoted passage of the Act makes clear, the complainant must “provide information” to someone regarding an alleged violation of an enumerated rule, regulation, or law. While Complainant argues that she reported three types of improper conduct by Markson during the November 11 meeting, the record reflects only that Complainant communicated to Willoughby her belief that Markson was conducting improper switches – not that he was deliberately misprofiling clients or creating improper documentation. JX-18, 35, 27. For example, in a letter to an OSHA investigator dated December 17, 2003, Complainant wrote, with respect to her November 11 meeting with Willoughby, “I expressed my unease about working with Chuck [Markson], given what I consider his questionable conduct and mentioned that I didn’t want my good reputation damaged because of him. I gave Michele one general example of conduct I found questionable, but she didn’t ask for specifics, so I didn’t elaborate.” JX-31.

Similarly, in her own sworn statement, Complainant acknowledged that she told Willoughby only about Markson's improper switches as an example of his unethical conduct and did not complain about any other conduct during their meeting because she was distracted by a knock on the door. JX-35. Likewise, at the hearing, Complainant testified that she "started to lay out a pattern of behavior that had recently occurred to me . . . [a]nd the first example that I gave of this was to say that I thought the mutual fund switch issue was indicative of the larger pattern going on in [Markson's] practice." Tr. 28. She then testified: "I raised the mutual fund switch concern. [Willoughby] did not allow me to express all of my comments and she said, well, he does more exchanges than switches, and I said, yes, that's true because it was, he does do more exchanges than switches." Tr. 30. It is thus clear that the only *potentially* protected activity in which Complainant engaged during the November 11 meeting was her statement to Willoughby that Markson was initiating improper switches involving his clients' mutual fund accounts.

Second, while Complainant is not required to show that Markson's conduct in this regard actually constituted a violation of law, she is required to prove by a preponderance of the evidence that she reasonably believed Markson engaged in this practice. *Platone v. Atlantic Coast Airlines Holdings, Inc.*, Case NO. 2003-SOX-00027 (DOL Apr. 30, 2004); *Welch v. Cardinal Bankshares Corp.*, Case No. 2003-SOX-15 (Jan. 28, 2004). Complainant simply has not sustained her burden of proving that she reasonably held such a belief.

As noted above, Complainant told Willoughby she believed Markson was engaging in improper switches involving mutual fund accounts, thereby generating unnecessary fees for his clients. However, there is absolutely no evidence anywhere in the record of even a single transaction by Markson which might reasonably have led her to that conclusion. For example, there are no documents or witness testimony which suggest that there was an excessive amount of activity relating to Markson's mutual fund clients.<sup>2</sup> In fact, Complainant's own testimony in this regard undercuts her claim. According to Complainant, after she raised this issue during the November 11 meeting, Willoughby "said, well, he does more exchanges than switches, and I said, yes, that's true because it was, he does do more exchanges than switches." Tr. 30. Complainant similarly acknowledged during her testimony that she never raised any concerns about Markson's conduct when she completed an internal audit questionnaire form in the Spring of 2003, just a few months before her termination.<sup>3</sup> Tr. 49-52. Furthermore, immediately following Complainant's allegations on November 11, 2003, Willoughby and Settle reviewed Markson's accounts and determined that there was no evidence he had engaged in any improper

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<sup>2</sup> While the record includes some written statements prepared by Complainant in connection with this litigation which provide a somewhat more detailed description of alleged improper conduct by Markson, this information was never communicated by Complainant to Willoughby or Settle during the November 11 meeting. *See, e.g.*, JX-35 at 2 (sworn statement prepared by Complainant after this action was initiated, in which she alleges Markson engaging in trades for clients without having previously contacted them and incorrectly categorizing clients as "high risk tolerant"). Furthermore, there is no other documentation or testimony which supports these allegations, and a subsequent investigation by Willoughby and Settle into Markson's account activities, as well as an internal audit by Raymond James' compliance personnel, uncovered no evidence to support such allegations.

<sup>3</sup> The form, which expressly states that confidentiality of employee responses will be maintained, asks employees to provide information regarding, *inter alia*, whether the employee is aware of any "unusual activities by any other employees" or whether any Financial Advisor has refused to follow firm or regulatory requirements. JX-26 at 1-2.

switches.<sup>4</sup> Indeed, the annual internal audit conducted only days after Complainant made this allegation revealed no evidence of any such activity. Complainant's belief regarding Markson's alleged unethical conduct simply cannot be found reasonable when the only objective evidence of record weighs against such a belief. Since Complainant has failed to prove an element essential to her case, her claim must therefore be denied.

#### *Knowledge of Protected Activity*

If her statements during the November 11 meeting were found to constitute protected activity, it is clear from the record before me that such activity was known to Raymond James. Respondent does not dispute that Complainant told Willoughby she believed Markson engaged in improper switches. JX-35, 37. Testimony at the formal hearing also established that Dianne Mouaikel, a human resources partner, and Gary Settle, the acting branch manager, were aware of the alleged protected activity. Tr. 133, 142; JX-62. Respondent thus knew about Complainant's allegations concerning Markson. However, because Complainant's belief was not reasonable, she did not engage in any activity protected by Sarbanes-Oxley and thus cannot establish that Respondent had knowledge of such activity.

#### *Adverse Employment Action*

Sarbanes-Oxley provides that an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." 29 C.F.R. § 1980.102(a). It is undisputed in the present case, that Complainant was fired by Raymond James. Her discharge clearly constitutes an adverse employment action as defined by Sarbanes-Oxley.

#### *Protected Activity as a Contributing Factor in Adverse Employment Action*

Even if I were to find that Complainant had presented sufficient evidence to meet the first three elements of her whistleblower complaint, I find that Complainant has failed to demonstrate circumstances sufficient to raise an inference that her alleged protected activity was in any way a contributing factor in the decision to terminate her. That decision was made unanimously by Willoughby, Settle, Mouaikel, and Van Law. All four individuals have stated that Complainant's statements concerning Markson were not a factor in their decision to terminate her. Tr. 76-77, 134, 149-50. The record supports their description of the events surrounding the November 11 meeting and the reason given for Complainant's discharge.

On Monday afternoon, November 10, 2003, Complainant sent an email to Willoughby in which she stated that she was tired of "dealing with the stress of working with a jerk on a daily basis" and asked if there were any other opportunities at Raymond James. JX-17. Not long after

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<sup>4</sup> Willoughby testified that she maintained copies of all mutual fund switch letters for each of Raymond James' Financial Advisors and reviewed Markson's file immediately after the meeting. Tr. 67. Willoughby testified that she initially determined there were six switch forms but subsequently determined there were only three switch transactions since three of the forms were duplicates or related to transactions which were not classified as switches. Tr. 68. She further testified that, even if Markson had performed six switches, that number would not be excessive. *Ibid.* Similarly, Settle testified that after Willoughby told him of Complainant's allegations, he reviewed the firm's records and found no evidence of any improper transactions by Markson. Tr. 148-49.

sending this message, Complainant sent an unrelated email to Markson asking him whether it was better to mail certain information “to Laura’s office or home” to which Markson replied by email: “Are you still working with me and if so for how long?” JX-53. Complainant replied, also via email, saying she had sent “a request [to Willoughby] after our conversation, but she hasn’t responded yet.” *Ibid.* Upon receiving this message, Markson sent an email almost immediately to Willoughby stating:

I had a discussion [with Complainant] from 3 to 3:20 today about what I thought were some perceptions I was getting. My perception was that she was unhappy and was beginning to show resistance to me and the things I asked of her. Bottom line, she wants a new broker and “shouldn’t have taken the job in the first place because everyone in the office told her not to work for me”. We both said a lot and I would be happy to discuss it with you if you would like. . . .

JX-51. Willoughby responded via email a minute later saying she would talk with Markson the following morning before Complainant arrived at work. JX-54.

On Tuesday morning, November 11, 2004, Kathryn Thurber<sup>5</sup> sent an email to Dianne Mouaikel, with a copy to Willoughby. JX-63. Thurber wrote:

Michele [Willoughby] called yesterday afternoon re: Alex [sic- Alyx]. Apparently, Alex and her broker had a conversation yesterday about his need for her to be more focused and involved in her work as a Service Associate. She appears to be somewhat resistant to following through on requests made by her broker. Example: Alex is coming in later in the morning and not taking a lunch. However, when asked to do something by her broker the other day, she advised him that she was eating lunch and could not do whatever it was that he asked. Following yesterday’s conversation with her broker, Alex approached Michele and asked if there were any other positions within [Raymond James] that she could perform.

Michele would like to talk with you about how best to handle this situation. The broker is not happy, and Alex is indicating that she is unhappy with this situation as well. Michele is not sure if Alex has formerly [sic – formally] applied for FMLA Reduced Leave. . . .

JX-63. Later that day, Complainant met with Willoughby and Gary Settle in Willoughby’s office. Tr. 58. The meeting began with Willoughby explaining that there were no other vacancies in the Washington, D.C. office and inquiring whether Complainant would consider transferring to Respondent’s Florida headquarters. Tr. 58-59. They then discussed Complainant’s concerns regarding working in a “hostile work environment.” Tr. 59. In that regard, Willoughby testified that Complainant

stated that Chuck Markson, the broker that she worked for, would throw papers at her and that he would slam his door for which she could see was no

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<sup>5</sup> Thurber works in Raymond James’ Human Resources Office in Detroit, Michigan. Tr. 100.

good reason but it was so disruptive that, you know, her work area shook and that sort of thing. As far as the environment, that's really – those are the two things that she mentioned.

Tr. 59-60. She further testified that Complainant “also claimed that she was essentially running Mr. Markson’s business.” Tr. 60 According to Willoughby, when she asked complainant to describe what it was she was doing for Markson, “basically everything she mentioned to me was administrative things that any assistant who was registered would do, talk to his clients, get research for them, send them out checks, take messages for him, that sort of thing.” Tr. 61. When the conversation turned to what Complainant intended to do if she could not be reassigned within the Washington office, according to Willoughby:

Well, Alyx was very upset and she basically said she couldn't work for Chuck Markson anymore, and that when the ink was dry at Schwab, she would be gone within two weeks or immediately.

Tr. 61. Willoughby’s handwritten notes of the meeting similarly reflect that “she said she is waiting for the ink to dry @ Schwab [sic] and will be going there as an FA [Financial Advisor].” JX-18 at 1. Willoughby testified at the hearing:

That had to do with her saying that she would be going to Schwab when the ink dried, and when we questioned her about that, she said there was still an issue with our retail sales department and \$15,000 of income that was listed on reports when she was out on maternity leave, and she said she had not been paid at the rate of a salary trainee while she was out on maternity leave. I think I may have asked her when she was out on maternity leave because I have some dates there [in my notes], but I may have put those in later when I determined, but I'm pretty sure I asked her about that.

Tr. 70. Notes prepared by Willoughby dated November 11 and captioned “recap of Chuck/Alyx’s discussions” also state:

offer @ Schwab [sic] for \$65,000 FA for what she really wants to do. Says she is going when ink is dry. When asked what that meant she said there was just still an issue of \$15,000 that Retail Sales says they paid her during her maternity leave. (Diane [Mouaike] checking on this).

JX-18 at 2-3.

On Wednesday, November 12, Willoughby wrote a lengthy email to Dianne Mouaike in which she recounted what transpired during the meeting with Complainant the preceding day.<sup>6</sup> JX-62. The email closely tracks Willoughby’s handwritten notes of the November 11 meeting and states, in part:

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<sup>6</sup> The email was sent by Willoughby to Mouaike at 1:32 pm on November 12. Mouaike subsequently inserted comments within the text of the email and returned it to Willoughby, with copies to Gary Settle and Bill Van Law. Tr. 74. The comments of Mouaike appear in the text in a larger font size than the original message. *Ibid.*

6. Alyx feels she has done many things that she gets no credit for and that she does not want to work for Chuck any more. She basically cannot stand coming to work. She understands there is nothing else in the branch for her to do. She said that there have been too many promises made to her that were not fulfilled that she would never consider working for Chuck any longer and that she is waiting for the ink to dry @ Schwab and she would be gone immediately or within two weeks of the ink drying. I asked her what she meant by the ink drying and she said well there is still this issue with Retail sales and \$15,000 that they say she earned in the trainee program for the three months she was on maternity leave. Gary and I kept questioning her on this because we were not sure what it was she was trying to say or insinuate, and what I think it boils down to is on the trainee report that the branch gets it listed her as earning \$15000 during the three months she was off for maternity leave. (this could just be a reporting error on the trainee report) Alyx says she was not paid from short term disability the amount she was earning in the trainee program and that she may be owed some money. She also stated that when she returned from maternity leave she was paid at the level that kept declining during the months she was out. She said when she would ask Rex about it he never gave her good answers and sort of swept it under the table. . . .
7. Gary had to leave for St. Pete so I said to Alyx...So what you are telling us is that as soon as you have another position you will be giving us notice because you are definitely seeking outside opportunities. Alyx said, yes I have to, I cannot keep working here for what I make and have to put up with. . . .
8. Alyx said some other things after Gary left. She said she is uncomfortable working with Chuck because she feels his sales practice in [sic] just a shade off from where it should be and that she would not be surprised if he was the subject of a complaint or lawsuit. I asked her to explain. She said well he does a lot of mutual fund switches. I told her I did not have switch forms to support that so I asked if she fills out switch forms for him when needed. She said yes and then said well I guess lately he has been doing exchanges. (There is nothing wrong with this practice). Alyx said that last year Chuck was out of the office so much that Alyx says she ran his practice for him. When I asked for clarification she gave me a list of things she did to "run his practice" which were all administrative things that she would do if he was here or not. She said as far as expectations that she had none but would appreciate if Chuck would be courteous. . . .
9. I went over what Chuck's expectations were for her and she seemed OK. I told her to keep me posted on her situation with other employment.

Today Alyx arrived at 9:54 am. Chuck asked her to come into his office and he said he understood that they would not be working together very much longer but that he would make every effort to be courteous and expected that she would too. . . . Alyx replied that she was not going to continue to work for him or for RJ and that as soon as some papers were in order she was gone.

My question is do we have to keep someone like that on board till she decides to leave?????

JX-62 at 1-2. In response to Willoughby's email, Mouaikel inserted several comments within the text of the message and returned it to Willoughby with copies to Gary Settle and Van Law. Mouaikel asked Willoughby to let her know when Complainant had previously been on maternity leave so she could investigate. JX-62 at 2. Mouaikel also wrote:

Since she is leaving to go to another [Broker/Dealer] and is Registered and has access to client accounts she should probably go ahead and leave.

*Ibid.* Near the end of the message, she also inserted:

Sounds like you already addressed the courteous issue. I would think since she has already stated that she is leaving and indicated another [Broker/Dealer] that we should let her go. Bill Van Law agrees (just spoke to him)

*Ibid.*

The following day, on Thursday morning, November 13, Willoughby sent the following email message to Dianne Mouaikel:

Dianne,  
It's bonus time again and I need to know what my latitude is with Alyx. I do not want to give her a dime if she is leaving. I would like her to be out of here sooner rather than later. She did not come in until after 10 AM this morning and yesterday told Chuck she would be out of here as soon as her papers were in order. I have no idea what that means....

JX-60. Approximately one hour later, Willoughby sent another email in which she requested information concerning payments to Complainant from June 2001 to September 2001 while she was out on maternity leave. JX-19. Responses to her inquiries confirmed that she had been paid appropriately. *Ibid.* Later that day, Willoughby wrote again to Mouaikel stating:

Gary and I just talked with Alyx and now she says that she has not committed to Schwab and has some other possibilities outside of financial services. We felt that we still have a security risk so have asked for her resignation and we would pay her for two weeks plus her unused vacation. She said she wants to talk with her attorney before giving us a letter. We have asked for her key [and] asked her to leave today. She said something about the with [sic] all the medical things going on with her that she just wanted to talk with her attorney..... We also said that if she did not want to give us a letter we would terminated [sic] her effective today.

JX-61. Mouaikel replied:

Thank you for letting me know. The fact is that we have been very accommodating with her medical situations and being flexible with her hours,

etc... However, of [sic] separate issue, once she indicated she was going to a competitor we treated her as we would all other associates (actually better because we agreed to pay her as though she provided two weeks notice and included vacation time).

*Ibid.*

Based on the foregoing chronology, it is clear that Complainant's statements concerning Markson allegedly engaging in excessive mutual fund switches had absolutely nothing to do with the decision to fire her. Both Gary Settle and Michele Willoughby testified that Complainant clearly expressed her intention to leave Raymond James and accept other employment, and that she would be gone "as soon as the ink dried at Charles Schwab." This phrase is contained in the handwritten notes of Willoughby and in her detailed email message to Mouaikel the following day. I find the testimony of both Willoughby and Settle, when considered in light of the other evidence of record, credible. Even if I were to accept Complainant's version of how Charles Schwab came up during the November 11 meeting,<sup>7</sup> the simple fact is that Respondent clearly believed Complainant intended to leave Raymond James for a competitor, and it was on that basis that the decision to terminate her was made. When Complainant subsequently asserted that she did not have an offer of employment from Charles Schwab, Respondent had no reason to retract its decision to fire Complainant since Complainant had unequivocally stated she would not continue working for Markson, there were no other positions in Washington to which she could be assigned, and she refused to consider a transfer to Raymond James' home office in St. Petersburg, Florida.

In denying Complainant's claim, I recognize that a close temporal proximity between an employee's alleged protected activity and his or her termination may, in certain circumstances, be sufficient to establish retaliatory intent. *See, e.g., Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Mitchel v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985); *Getman v. Southwest Securities, Inc.*, Case No. 2003-SOX-00008 (DOL Feb. 2, 2004). This close temporal proximity, however, does not require such a finding. While Complainant was terminated from her employment just three days after alleging that Markson was engaging in improper switches, her discharge was also just three days after Raymond James came to believe that Complainant was leaving to work for a competitor. The timing of the termination is not suspicious when that timing is credibly explained by a non-retaliatory motive. Both Settle and Willoughby have consistently stated that Complainant said she was leaving to work for Schwab and that they heard her say she would be gone "as soon as the ink was dry." JX-37, 38. The email correspondence between these and other decisionmakers, coupled with their credible testimony at the hearing, all support the conclusion that Complainant was fired

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<sup>7</sup> Complainant testified that, after she was informed there were no other positions to which she could transfer in the Washington office, and declined to move to Respondent's St. Petersburg, Florida office, Willoughby asked her what her plans were. Complainant testified that she replied: "I didn't feel that I necessarily understood correctly what had just been said. Tr. 25. So I was trying to get clarification of that point, and so I said to her, so what you are telling me is that if for example Charles Schwab were to sign on the dotted line, then you suggest that I accept that and leave immediately after providing two weeks notice, and that was a question, not a statement. But she didn't answer my question, but she asked me another question, and she said, so you would work for Charles Schwab, and I said, sure, why not?" I find this description of how Charles Schwab came up during the meeting less credible than the testimony of Willoughby and Settle.

because Respondent believed that Complainant was leaving to work for a direct competitor. The timing of Complainant's discharge, given the facts of this case, does not give rise to an inference of retaliation.

Complainant has also argued that Respondent's stated rationale for firing her lacks credibility. Complainant asserts Respondent's rationale is undermined because: (1) Complainant never said she was leaving to work for a direct competitor; (2) firing employees because they are leaving to work for a direct competitor is inconsistent with Raymond James' past business practices; and (3) Raymond James persisted in firing Complainant even after they knew she was not in fact leaving to work for Charles Schwab.

The evidence of record shows, as stated above, that when the decision to fire Complainant was made, the decisionmakers – Willoughby, Settle, Mouaikel, and Van Law – believed that Complainant was leaving to work for Charles Schwab. Both Settle and Willoughby testified they heard Complainant say she was leaving for a competitor and both cited the exact same language – that Complainant said she was going to Schwab as “soon as the ink was dry.” Furthermore, both Settle and Willoughby recorded what they heard soon after the stated event. JX-18, 20, 62. There is simply no evidence to suggest that Settle and Willoughby conspired to invent Complainant's statements to establish a pretext for firing her.

With respect to Respondent's past business practices, the facts surrounding the departure of Meredith Smoke, Rex Wagner, and Diana Tomaro, identified by Complainant in her *Post-Hearing Submission*, are distinguishable from the facts presented here. Meredith Smoke did not have a broker's license. Tr. 114. She was an eighty-five-year-old woman who performed strictly clerical duties six hours a week, did not have the access to client information that Complainant had, and did not pose a risk of taking clients with her to a competitor. This risk was particularly pronounced in Complainant's case because Complainant had stated her intention to become a Financial Adviser, a position that would require a substantial personal client base. Rex Wagner left to work for Cardinal Bank, which, as Wagner testified at the hearing, is not a direct competitor of Raymond James. Tr. 173-74. Indeed, Wagner's business card still lists Raymond James as one of his employer. Tr. 160. Similarly, Diana Tomaro, who was a registered Service Adviser like Complainant, left Raymond James to work for Rex Wagner at Cardinal Bank. Tr. 118. Cardinal, as noted above, is not a competitor of Raymond James. Furthermore, according to Willoughby, Tomaro, unlike Complainant, never threatened to go to work for a competitor, and in fact left Raymond James without other employment before finding work at Cardinal. Tr. 117. *Id.*

Finally, as noted above, Raymond James was not required to alter its decision to discharge Complainant after that decision was already made. Complainant unequivocally told Willoughby and Settle that she did not have an offer from Schwab only after she was told that she was being terminated. By that time, Willoughby, Settle, Mouaikel, and Van Law had already discussed and agreed upon the decision to fire Complainant because she had accepted employment with a competitor. Tr. 76. The question before me is not whether Raymond James correctly decided to fire Complainant, but rather whether the circumstances surrounding Complainant's discharge are sufficient to give rise to the inference that her alleged protected

activity was a contributing factor in that decision. Complainant has not demonstrated by a preponderance of the evidence that it was.

### **RECOMMENDED ORDER**

Because Complainant has not demonstrated a reasonable belief that Markson was engaged in improper conduct or that the circumstances surrounding her discharge were sufficient to raise an inference that any allegedly protected activity was likely a contributing factor in that action, it is **HEREBY RECOMMENDED** that the complaint be **DENIED**.

STEPHEN L. PURCELL  
Administrative Law Judge

Washington, D.C.

### **NOTICE OF APPEAL RIGHTS**

This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c) and § 1980.110(a) unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1980. To be effective, a petition must be filed with the Board within 10 days of the date of the decision of the Administrative Law judge and specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. If a timely petition for review is filed, the decision of the administrative law judge will become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs 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 also 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.