



Issue Date: 23 April 2010

Case No.: 2010-SOX-00020

In the Matter of

BRIAN HORAN,

Complainant,

v.

WACHOVIA BANK/WELLS FARGO,

Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This proceeding arises under the Sarbanes-Oxley Act (hereinafter "the Act" or "SOX"), which was signed into law on July 30, 2002. This law includes an employee protection provision that protects employees who blow the whistle on violations of U.S. Security and Exchange Commission rules and regulations and other laws relating to preventing fraud against shareholders. Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, P.L. No. 107-204. Section 806 is codified as 18 U.S.C. § 1514A. Implementing regulations are at 29 C.F.R. Part 1980.

PROCEDURAL HISTORY

On October 20, 2009, Complainant, Brian Horan, filed his complaint with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor. On December 16, 2009, after conducting an investigation, OSHA's regional administrator issued a determination advising the parties that she found the complaint to be untimely because it had not been filed within 90 days of the alleged adverse employment action. Accordingly, she dismissed the complaint. Thereafter, on January 14, 2010, Complainant filed his objections and request for a de novo hearing with the Office of Administrative Law Judges, U.S. Department of Labor. On March 8, 2010, Respondent filed this Motion for Summary Decision. On March 31, 2010, Complainant filed an Objection to Motion for Summary Decision and Request for Investigation.

SUMMARY OF THE EVIDENCE¹

Affidavit of Max Allen (EX A)

Respondent submitted an Affidavit of Max Allen with its Motion for Summary Decision, marked as Exhibit A. In the Affidavit, Mr. Allen, a Sales Leader in the Business Relationship Banking Department, stated that during a meeting on April 22, 2009, the Complainant was orally informed that he was terminated. He further stated that the Complainant was escorted out of the building, that he mailed a letter to the Complainant dated April 28, 2009, which confirmed his termination.

Letter from Max Allen to Brian Horan dated April 28, 2009 (EX A1)

On April 28, 2009, Mr. Allen sent the Complainant a letter confirming his termination. In relevant part the letter stated, “As we discussed, your employment with Wachovia has been terminated effective April 22, 2009.”

Affidavit of Colin Cromwell (EX B)

Respondent submitted an Affidavit of Colin Cromwell with its Motion for Summary Decision, marked as Exhibit B. In the Affidavit, Mr. Cromwell, a Senior Employee Relations Consultant, first explained the internal appeals process. Specifically, he stated that the Complainant appealed his April 22nd termination on May 12, 2009. He further stated that he was responsible for handling the appeal, and that he mailed a letter dated August 21, 2009, informing the Complainant that his appeal was denied and that his prior termination would not be overturned.

Letter from Colin Cromwell to Brian Horan dated August 21, 2009 (EX B2)

On August 21, 2009, Mr. Cromwell sent the Complainant a letter confirming his termination. In relevant part, the letter stated the following:

This letter is a response to your employment appeal request. I have carefully reviewed the document, your request, and the circumstances surrounding your separation from Wachovia.

I understand that you are dissatisfied with the decision made by your management team. However, your employment relationship with Wachovia was “at-will”. The decision to end your employment was consistent with company policies and procedures and will not be overturned.

¹ The following abbreviations will be used in this Decision: EX – Respondent Exhibit; CX – Complainant Exhibit.

Termination Appeal Request Form and Complainant's 13 Page Document (CX)

The Complainant has submitted the Termination Appeal Request form that he filled out when he appealed his termination with Wachovia. In relevant part, the form stated the following:

Explanation of Termination Appeal Process: . . . For employees who are involuntarily terminated by the Company, Wachovia's Dispute Resolution policy provides an appeal process to express concerns about management's decision to terminate employment.

The goal of the Appeal Process is to ensure that the decision to terminate employment is consistent with Wachovia's Vision and Values, employment policies and fundamental fairness. All termination appeals will be investigated in a fair and impartial manner. Please note that filing and appeal does not guarantee reinstatement of employment or eligibility for re-hire. Employment at Wachovia is "at will" and may be terminated by either the employment or the manager at any time.

....

Grounds for Appeal: The goal of the Termination Appeal Process is to provide an opportunity to raise concerns about involuntary terminations. The investigation focuses on consistency, fairness and policy application. Please answer each question to the fullest extent possible. . . .

The form asks five questions regarding the disputed termination. In response to the questions the Complainant attached a thirteen page document, which discussed his concerns in detail. On the eighth and ninth pages of the document, the Complainant gives a chronological order of events leading up to his termination. In relevant part, the Complainant confirms that on April 22, 2009, he was informed at a meeting that he was being terminated. He further confirms that he received a letter dated April 28, 2009, that stated his employment was terminated.

On the bottom of the appeals form it states, "I understand that initiating this appeal does not guarantee a reversal of my termination. I also understand that this is my final opportunity to internally appeal the decision to terminate my employment with Wachovia." The Complainant signed the form and dated it May 12, 2009.

STATEMENT OF FACTS

On April 22, 2009, Complainant received oral notice that his employment at Wachovia Bank/Wells Fargo was being terminated effective April 22, 2009. The termination of Complainant's employment was confirmed in a letter dated April 28, 2009. Complainant appealed his termination through the human resources department at Wachovia Bank/Wells Fargo. Via letter dated August 21, 2009, human resources informed the Complainant that his

appeal was denied and that his termination would not be overturned. On October 20, 2009, Complainant filed his complaint with OSHA.

SUMMARY OF THE ARGUMENTS

Respondent's Motion for Summary Decision

In this matter, Respondent asserts that it is entitled to summary decision because the Complainant's whistleblower complaint was untimely filed with OSHA and because there are no genuine issues of material fact regarding the timeliness of the claim. The Respondent explains that under Section 806 of the Act, a complaint must be filed within ninety (90) days after an alleged violation of the Act occurs. The Respondent further states that it is undisputed that the Complainant was terminated from his employment in April 2009, but did not file a complaint with OSHA until October 2009; therefore, the Respondent argues that the complaint was filed with OSHA more than ninety (90) days after the alleged violation occurred and should be dismissed as untimely.

Respondent further argues that under 29 C.F.R. 1980.103(d) the ninety day statute of limitations period begins "when the discriminatory decision has been both made and communicated to the complainant," and is not tolled by the use of an internal appeal process. Respondent argues that the OSHA Whistleblower Investigations Manual specifically states that filing a grievance or arbitration action will not justify extension of the filing period. Therefore, the Respondent states that although the Complainant filed an internal appeal in Wachovia's human resources department, the deadline for filing his OSHA complaint was not extended. Accordingly, the Respondent concludes that the complaint was untimely filed on October 20, 2009.

Complainant's Objection to Motion for Summary Decision

In response, Complainant argues that the complaint was not untimely filed with OSHA because the ninety (90) day statute of limitations period did not begin to run until he received final notice from human resources that his internal appeal had been denied. Complainant explained that after the adverse action against him in April 2009, the human resource department informed him of the appeal process and told him that a final decision is made after an investigation. He stated that the human resource department told him that the investigation can result in reinstatement as if he had never been terminated. Complainant argues that he did not receive notice that his appeal had been denied until August 27, 2009. He further states that he filed his complaint with OSHA on October 20, 2009, which is less than ninety (90) days from the final notice of his appeal; therefore, Complainant argues that his complaint should not be dismissed as untimely.

DISCUSSION

Summary Decision

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). 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.* at 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. 20, 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).

In this case, the parties agree that the Complainant received oral notice of his termination on April 22, 2009, and written notice of his termination on April 28, 2009. The parties also agree that the Complainant appealed the termination through Wachovia’s human resources, and that he received notice that his appeal was denied in August 2009. Finally, the parties agree that the Complainant filed his complaint with OSHA on October 20, 2009. In viewing the evidence in the light most favorable to Complainant, the nonmoving party, I find that the Respondent has met its burden of proving that there are no genuine issues of material fact regarding the timeliness issue. Accordingly, I find that it is appropriate to issue a Decision and Order on Summary Decision.

Timeliness

In this matter, Respondent asserts that it is entitled to summary decision because the Complainant’s whistleblower complaint was untimely filed with OSHA and because there are no genuine issues of material fact regarding the timeliness of the claim.

Under the Sarbanes-Oxley Act, the regulations state the following regarding the amount of time for filing a complaint:

Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

29 C.F.R. 1980.103(d). Accordingly, the 90-day filing period begins to run when the employer makes and reasonably communicates the discriminatory adverse employment decision to the employee. In other words, the claim accrual or statute of limitation runs from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision and not from the date at which the consequences of the act become painful. *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988) (citing *College v. Ricks*, 449 U.S. 250 (1980); *Sneed v. Radio One, Inc.*, ARB No. 07-072, ALJ No. 2007-SOX-18, slip op. at 2 (ARB Aug. 28, 2008); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005); *Jenkins v. U.S. Emtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 13 (ARB Feb. 28, 2003). "Final" and "definitive" notice denotes communication that is decisive or conclusive and "unequivocal" notice means communication that is not ambiguous. *Swenk v. Exelon Generation Co. LLC*, ARB No. 04-028, ALJ No. 2003-ERA-00030, slip op. at 4 (ARB April 28, 2005) (citing *Larry v. The Detroit Edison Co.*, 86-ERA-32, slip op. at 9-10 (Sec'y June 28, 1991)).

In this case, the parties agree that the Complainant received oral notice of his termination on April 22, 2009, and written notice of his termination on April 28, 2009. The letter on April 28, 2009, stated, "As we discussed, your employment with Wachovia has been terminated effective April 22, 2009." I find this statement final, definitive and unequivocal that Complainant's employment was terminated on April 22, 2009. Accordingly, I find that the 90 day statute of limitations began to run on April 22, 2009, when the Complainant's termination was first communicated to him; therefore, when the Complainant filed his complaint with OSHA over ninety (90) days later, on October 20, 2009, the complaint was untimely.

Still, the Complainant argues that due to his internal appeal with the human resources department at Wachovia, the decision to terminate his employment was not final or unequivocal until he received final notice that his appeal was denied on August 27, 2009.² In the alternative, it can be interpreted from the Complainant's objections that he is requesting that the statute of limitations be tolled until the internal appeal was denied.³ In support of his arguments the

² The letter denying the Complainant's internal appeal is dated August 21, 2009; however, the Complainant states that the letter was not mailed until August 24, 2009, and that he received the letter no later than August 27, 2009. These dates are not a material fact and will not change the outcome of my decision; therefore, for purposes of summary decision, I will assume the Complainant's allegation is correct and that he received the letter on August 27, 2009.

³ The Complainant is acting *pro se*. *Pro se* complainants are by nature inexpert in legal matters, therefore, papers and complaints submitted by *pro se* litigants must be construed 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude. *Ubinger v. Cae Internation*, ARB No. 07-083, ALJ No. 2007-SOX-036 (August 27, 2008). Accordingly, although the Complainant does not actually state that the statute of limitations should be tolled in his Objection to Motion for Summary Decision and Request for investigation, I find that this argument can be reasonably construed when reading his objections liberally and with adjudicative latitude. Still, although *pro se* complainants may be accorded a certain degree of adjudicative latitude, a *pro se* litigant "cannot

Complainant stated that the human resources department told him about the appeal process and communicated to him that a final decision is made after an investigation. He further stated that he was informed that the investigation can result in reinstatement as if he had never been terminated. Finally, he stated that the Termination Appeal Request form references that the decision is not unequivocal or final. Therefore, he argues that the statute of limitation should not begin to run until he received final notice that his internal appeal had been denied.

This question has been answered in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In *Ricks*, the College Board of Trustees at Delaware State College formally voted to deny tenure to Ricks, a professor, on March 13, 1974. 449 U.S. at 252. Ricks immediately filed a grievance with the Board's Educational Policy Committee ("the grievance committee"). *Id.* While the grievance was still pending, on June 26, 1974, the Trustees informed him that, pursuant to College policy, he would be offered a 1-year "terminal" contract, and notified him that his employment with the college would end upon its expiration on June 30, 1975. *Id.* at 253. Ricks signed the contract without objection. *Id.* Thereafter, on September 12, 1974, the grievance committee notified him that it had denied his grievance. *Id.* at 254. On April 4, 1975, Ricks filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC), and the case was eventually appealed to the Supreme Court for determination of when the 180-day statute of limitations began. *Id.*

In its decision, the Supreme Court addressed whether the statute of limitations began to run on September 12, 1974, when the grievance committee notified Ricks that his grievance had been denied. *Id.* at 260. The Court explained that two possible lines of reasoning underlie this argument. First, the Court stated that "it could be contended that the Trustees' initial decision was only an expression of intent that did not become final until the grievance was denied."⁴ Second, the Court stated that "even if the Board's first decision expressed its official position, it could be argued that the pendency of the grievance should toll the running of the limitations periods." *Id.* at 260-61. However, the Court rejected both of these contentions with the following reasoning:

It is apparent, of course, that the Board, in the June 26 letter, indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.

generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance." *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 10 n.7 (ARB Feb. 29, 2000) (quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983)). An ALJ must remain impartial and "refrain from becoming an advocate for the *pro se* litigant." *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 6 (ARB April 25, 2003) (quoting *Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003)). Accordingly, the burden of proving the elements necessary to sustain a claim is no less for the *pro se* complainant. *Young*, slip op. at 10.

⁴ In support of this argument, a letter dated June 26 was referenced, which explicitly held out to Ricks the possibility that he would receive tenure if the Board sustained his grievance. 449 U.S. at 261.

As to the latter argument, we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. *Electrical Workers v. Robbins & Myers, Inc.*, 429 U. S. 229 (1976). The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made. *Cf. id.* at 234-235.⁵

Id. at 261. In conclusion, the Court held that the tenure decision was final at the time of the board's initial decision on June 26, 1974, because at that time the board had "formally rejected Ricks' tenure bid," had taken an "official position," and had made that position apparent to Ricks. Accordingly, the Court determined that the limitations periods commenced to run when the tenure decision was made and Ricks was notified on June 26, 1974. *Id.* at 262.

The reasoning in *Ricks* has been used and analyzed in other whistle blower cases when determining whether a complaint has been timely filed. In *Snyder v. Wyeth Pharmaceuticals*, ARB No. 09-008, ALJ No. 2008-SOX-55 (ARB April 30, 2009) the Board analyzed the decision in *Ricks* and confirmed that "[g]rievance procedures and other types of collateral procedures by definition are not invoked until the employer has made a final decision and do not in any way suggest that the employer's decision is ambivalent or equivocal." Slip op. at 8. Likewise, in *Ackison v. Detroit Edison Co.*, 90-ERA-38 (Sec'y Aug. 2, 1990), the Secretary cited *Ricks* when finding that the 30-day filing period was not tolled by the complainant's utilization of internal grievance procedures. The Secretary stated that this finding was "in accordance with the case law and the prior decisions of the Secretary on the issue of timeliness and equitable tolling." Slip op. at 2.

The facts and decision in *Ricks* are also applicable to the case at hand. Comparable to *Ricks*, in this case, the Complainant received notice of his termination on April 22, 2009, and immediately filed an internal appeal on May 12, 2009; however, also comparable to the EEOC complaint in *Ricks*, the Complainant did not file a complaint with OSHA until shortly after his internal appeal had been denied. *See* 449 U.S. at 252-54. Still, just like the argument in *Ricks*, the Complainant has argued that the statute of limitations did not begin to run until after he received final notice that his internal appeal had been denied. *See id.* at 260. Furthermore, the Complainant has based his support for his argument on the same theories that are outlined in *Ricks*: that the termination decision was not unequivocal or final until the internal appeal was denied, or that the statute of limitation had been tolled until the appeal was denied. *See id.* The Court addressed both of these arguments in *Ricks* and due to the similar facts, the analysis of the Court must be followed in this case.

First, regarding the finality of the original termination decision, the Supreme Court stated that although the letter on June 26th indicated that the termination decision may be change if the grievance was affirmed, it did not suggest that the earlier decision was tentative. 449 U.S. at 261. Rather, the Court held that "the grievance procedure was a *remedy* for a prior [final]

⁵ In *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), the Court reasoned that the federal statutes and grievance procedure provide independent remedies which can be pursued concurrently, and therefore, the filing of grievance procedures does not toll the statute of limitations of independent statutory claims. 429 U.S. at 236-38.

decision, and not an opportunity to *influence* the decision before it is made.” *Id.* Likewise, in this case, although the Complainant has submitted the Termination Appeal Request form, which implies that an investigation may result in reinstatement of employment, the form does not guarantee reinstatement, nor does it suggest that the original termination decision was not unequivocal or final. *See id.* Instead, the document requires a former employee to sign the following statement: “I understand that initiating this appeal does not guarantee a reversal of my termination. I also understand this is my final opportunity to internally appeal *the decision* to terminate my employment with Wachovia.” (Emphasis added). Contrary to the Complainant’s conclusion, this statement suggests that a final and unequivocal termination decision had previously been made and that the appeals process was only a possible remedy for that final decision. Accordingly, like the conclusion in *Ricks*, I find that the Complainant’s original termination notice on April 22, 2009, was final and definitive, and the initiation of the internal appeal process did not render the previous termination decision tentative, or equivocal. *See id.*

Second, regarding the tolling of the statute of limitations, the Supreme Court stated that grievance procedures or some other method of collateral review does not toll the running of the limitations periods. 449 U.S. at 261. Rather, an internal grievance procedure is an independent remedy that can be pursued concurrently to a federal claim. *Electrical Workers*, 429 U.S. at 236. Furthermore, the Court explained that “the existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations period normally commence when the employer’s decision is made.” 449 U.S. at 261. Likewise, in this case, the Complainant’s pursuit of an internal appeal did not toll the statute of limitations for his SOX claim with OSHA. These remedies are independent of each other, and could have been pursued concurrently; therefore, the fact that Wachovia had an internal appeals process should not obscure the fact that the statute of limitations began on when the Complainant was notified of his termination with Wachovia. The Complainant received final, definitive and unequivocal notice of his termination from Wachovia on April 22, 2009, and I find that statute of limitations for his SOX complaint was not tolled due to his pursuit of an internal appeal. Therefore, his complaint filed with OSHA on October 20, 2009, was untimely filed.

Still, although the Complainant did not timely file a SOX complaint with OSHA or the Secretary of Labor, the SOX’s limitations period is not jurisdictional and therefore is subject to equitable tolling. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 5 (ARB Dec. 30, 2005). Accordingly, I must consider whether existing circumstances would warrant equitable tolling of the deadline for filing a SOX complaint. Equitable tolling has been found to be appropriate in three situations: (1) [when] the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Moldauer*, slip op. at 5 (citing *Sch. Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18-20 (3d Cir. 1981)). The Complainant, Mr. Horan, bears the burden of justifying the application of equitable tolling principles. *Moldauer*, slip op. at 5; *see also Levi v. Anheuser Busch Co., Inc.*, ARB No. 06-102, 07-020 , 08-006, ALJ No. 2006-SOX-00037, 108, 055., slip op. at 12 (ARB April 30, 2008).

First, although the Complainant did not specifically claim that the Respondent actively misled him regarding his cause of action, in the Complainant's objections he states that the Termination Appeal Request form references that "an external action is available after internal appeal process." Accordingly, I find that this statement may be interpreted as a claim that the Respondent actively misled the Complainant respecting the timing for his cause of action. However, I also find that the Termination Appeal Request form has made no guarantees regarding external procedures, and therefore, cannot be construed to have actively misled the Complainant. The Termination Appeal Request form states that "I understand that this is my final opportunity to *internally* appeal the decision to terminate my employment with Wachovia." (Emphasis added). Although this statement implies that external procedures may be available after the internal appeal, it makes no affirmative statements regarding such procedures. Accordingly, this statement does not rise to the level of actively misleading the Complainant regarding external procedures. Furthermore, the Termination Appeal Request form makes no other statements regarding external procedures. Accordingly, the Complainant has not shown that he was actively misled regarding his cause of action.

Also, the Complainant has also not claimed or shown that he was in some extraordinary way prevented from filing his OSHA complaint. Finally, the Complainant has not claimed or shown that he mistakenly raised the precise statutory claim in the wrong forum. Accordingly, I find that the Complainant's cause of action is not subject to equitable tolling in this case; therefore, I find that the SOX claim was untimely filed on October 20, 2009, and the complaint should be dismissed.

ORDER

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

IT IS FURTHER ORDERED THAT THIS COMPLAINT IS DISMISSED.

A

DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/bdb
Newport News, Virginia

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, Suite S-5220, 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).