



**Issue Date: 31 August 2020**

CASE NO.: 2019-SOX-00052

*In the matter of:*

**MICHAEL FELDMAN,**  
Complainant,

v.

**RISK PLACEMENT SERVICES, INC.,**  
Respondent.

**ORDER GRANTING MOTION FOR SUMMARY DECISION**

On March 3, 2020, I received a Motion for Summary Decision (“MSD”) from Risk Placement Services, Inc. (“RPS” or “Respondent”).<sup>1</sup> On March 13, 2020, Michael Feldman (“Mr. Feldman” or “Complainant”) filed an opposition to RPS’s motion with attached supporting documents.<sup>2</sup> I granted leave for Respondent to file a reply, in order to respond to arguments raised in Complainant’s opposition, which Respondent did on April 3, 2020. This matter is not currently set for hearing, as the prior hearing date was vacated due to the COVID-19 pandemic and has not been reset in light of this motion.

I have considered all of the parties’ filings, and for the reasons set forth below, I will grant Respondent’s motion.

**1. Background and Summary of the Parties’ Positions**

Respondent asserts that it is entitled to a decision against Complainant without the need for a trial, based on facts it claims are undisputed. Included with Respondent’s motion are exhibits, declarations, and a deposition of Complainant. Included with Complainant’s deposition were exhibits numbered 4, 5, 7, 9, 10, 13 – 22, 24, 26 – 28, 30, and 39 – 42. Respondent argues that Complainant, Mr. Feldman, was not an employee under Sarbanes-Oxley “SOX,” that he did

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<sup>1</sup> See 29 C.F.R. § 18.72; Fed. R. Civ. P. 56.

<sup>2</sup> While Complainant is a self-represented litigant, he promptly filed an extensive and documented response, including a sworn declaration, in opposition to Respondent’s MSD, and prior to that filing engaged in discovery and extensive motion practice applying the OALJ Rules of Procedure on his own behalf. During prior status conference calls in this matter with me, I discussed discovery and dispositive motions with the parties. I find that Complainant had sufficient experience as a self-represented litigant and notice of his rights and obligations in responding to an MSD to satisfy *Hooker v. Washington Savannah River Co.*, ARB No. 03-036, ALJ No. 2001-ERA-016 (Aug. 26, 2004), and will proceed with a ruling.

not suffer any adverse employment action, that he did not engage in any protected activity, that there is no causal connection between Feldman's alleged complaint and the termination, and that RPS would have terminated Michael Feldman Insurance Services ("MFIS"), and did terminate MFIS, due to Feldman's admitted illegal rebating on behalf of Brown Bacher and Walls Insurance, Inc. ("BBW"). *See* MSD p. 2.

Complainant's response in opposition included three parts, each of which attached exhibits labeled by letter (eg. A, B, C, D, E, and F where necessary). The first portion is an Opposition Motion to Summary Decision, the second portion is a Separate Statement of Undisputed Facts, and the third portion is a Declaration of Michael Feldman. As each one has its own exhibits, I will refer to them separately with corresponding labels; "CRB," "SUF," and "Feldman Decl." Relying on these exhibits and his Declaration, Mr. Feldman contends that there are disputed facts in need of determining before the above can be said to be true.

Finally, as noted above and discussed below, on April 3, 2020, I received a Supplemental Motion ("SMSD") from Respondent in support of its position.

## **2. Facts**

Respondent RPS is a Managing General Agent ("MGA") wholesale insurance broker and is a wholly-owned subsidiary of Gallagher, which is publicly traded. *See* Feldman Dep. p. 277. Mr. Feldman acknowledges that he was never directly employed by RPS nor Gallagher. *Id.* at 249. RPS provides insurance policies on behalf of insurance companies with which they are an MGA for. Each insurance company provides MGA's with underwriting requirements, each of which must comply with state approved insurance rates. *See* Woodhull Decl. ¶ 9.

RPS, working with hundreds of independent insurance agencies like MFIS, sells insurance to the insurance agencies' customers. RPS pays these agencies a commission on total premiums paid by those customers. *Id.* at ¶ 6. In the motion, Respondent explains:

Insurance coverage may be "admitted" or "non-admitted" in a particular state. The benefit of admitted coverage is that it is backed by the state in the event the insurance company fails. To become admitted, an insurance company – not its MGA – must obtain approval for its rates from the state insurance commission and comply with state insurance regulations. The insurance company's admitted rate filings are publicly available through the state insurance commission, both online, and otherwise.

MSD p. 5. (*citing* Woodhull Decl. at ¶ 12, McDevitt Decl. at ¶ 5). Mr. Feldman has provided no serious explanation for what admitted vs. non-admitted coverage is, and I take the explanation above as uncontested fact.

Complainant is the owner and operator of MFIS, in Canoga Park, California. Deposition of Michael Feldman pp. 15, 45 (“Feldman Dep.”). He began selling “E & O”<sup>3</sup> insurance to other insurance agents in 1998, and eventually added “lawyers” and “other lines of insurance.” He has never had an employee of MFIS, besides himself. *Id.* at 46. On March 10, 2011, MFIS entered into an agreement to become a Producer with The Plus Company allowing him to underwrite with them. It states explicitly that either party may cancel the agreement at any time without notice. *Id.* EX 4. RPS has taken over all interests in the Plus Company. *See* Woodhull Decl. at ¶¶ 3, 6.

Mr. Feldman acknowledges that he was never employed by RPS nor Gallagher. *Id.* at 249. In 2017, Gallagher reported revenues of \$6,100,000,000.00. *See* Woodhull Decl. ¶ 5. The amount of revenue collected by RPS from Mr. Feldman for his accounts with Greenwich, one of the two insurance companies that make the basis for his alleged protected activity, was approximately \$4,000.00. Feldman Dep. pp. 135-137; Woodhull Decl. ¶¶ 5, 27, n.2, 33-34; McDevitt Decl. at ¶17; Silvestri Decl. at ¶ 15. Besides his own customers, Mr. Feldman has not claimed personal knowledge of anyone else allegedly being discriminated against. Of the 17 policies MFIS had with RPS, 11 were with QBE while the remaining brokers were bound with Greenwich. Feldman Dep. Ex. 40.

Much of the MFIS’ business is done through connecting individual insurance agencies with MGAs such as RPS. Between 50 and 90 percent of his work consists of such transactions. Feldman Dep. pp. 50-56. He works with various MGAs by submitting applications for insurance from the agencies and selling the MGAs’ insurance plans. This results in potentially hundreds of quotes from various companies attempting to sell insurance to one of MFIS’ customers. *Id.* at 58-59.

On December 12, 2016, QBE approved RPS to write admitted coverage on its behalf, and shortly after provided RPS with their underwriting guidelines. McDevitt Decl. ¶ 5; Silvestri Decl. ¶ 9; Feldman Dep. p. 97. Prior to that, RPS only wrote admitted E & O coverage on behalf of Greenwich Insurance. *Id.*

Greenwich, like other insurance companies, sets the qualifications and requirements that customers must meet to obtain coverage – often using confidential underwriting guidelines provided to MGAs by each insurance company. Examples of guidelines include a minimum or maximum number of employees, certain internal controls, or excluding agencies that specialize in certain lines of business. *See* McDevitt Decl. ¶¶ 6, 9; Woodhull Decl. ¶ 13; Silvestri Decl. ¶ 11; Feldman Dep. pp. 92, 107, 109-10.

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<sup>3</sup> Errors and Omissions insurance covers claims against professionals for inadequate work or negligent acts made by clients. *See* Errors and Omissions Insurance, Investopedia (2019), <https://www.investopedia.com/terms/e/errors-omissions-insurance.asp> (last visited Aug. 8, 2020).

QBE, at the time RPS was contracted with MFIS, required the customer to be a larger insurance agency than Greenwich required. *Id.*; Feldman Dep. Ex. 7. QBE and Greenwich each provided RPS with a “rate calculator” showing their admitted rates. Woodhull Decl. ¶ 15. Mr. Feldman did not have access to these prior to discovery. Feldman Dep. p. 128.

On December 16, 2016, Complainant was explicitly made aware that QBE was geared towards “risks with \$5m and above in premium volume,” after he submitted a request for QBE on an account that was “too small for QBE to consider.” Feldman Dep. Ex 7. He responded by saying he would “make a note in [his] file.” *Id.* Mr. Feldman later sent another email asking “will QBE quote this one, or is the expiring premium too low?” Feldman Dep. P. 150.

Complainant admittedly brought very little business to RPS prior to QBE’s admittance in the state of California. Feldman Dep. pp 102-03. Complainant, starting in early 2017, began submitting more applications for insurance coverage. These applications contained the customers’ revenues, commissions, and premium volume, among other relevant information. *See* Feldman Dep. pp. 45, 105, Ex. 5; McDevitt Decl. ¶ 8.

An application for insurance does not ask for race or ethnicity of a customer. Feldman Dep. Ex 5. Complainant, at his deposition, was able to identify one Black customer whom he submitted an application for with RPS. Feldman Dep. pp. 181, 257. Complainant estimated that out of the “thousands” of customers he has had over the years, he was aware of approximately ten Black customers. *Id.* at 258.

Complainant went on to say that he does not meet all of his customers in person, and thus cannot say for certain what their ethnicity is. *Id.* at 257. He stated that he cultivates customers by sending out “e-mails to everybody. I don’t know any way to determine whether the brokers I’m sending to... they’re African-American, Asian, Caucasian, Hispanic. That’s not any factor. I don’t have any barometer to even know who they are.” *Id.*

### **3. Complainant’s Termination**

On May 1, 2017, Complainant received approval from Salvatore Ciuffreda, a Regional Sales Manager, to send in business on behalf of BBW, a Texas company. *See* Feldman Decl. Ex. A. *See also* Feldman Dep. pp. 208-09; Woodhull Decl. ¶ 21.

On August 2, 2017, Complainant complained to Mr. Ciuffreda regarding the time it takes for policies to be issued. Ciuffreda Decl. ¶ 8. Ms. Woodhull sent Complainant an email explaining RPS policy and stating that “if you would like to discuss anything further regarding these items or any other items you would like brought to my attention please give me a call.” Mr. Feldman did not raise any issues or complaints to Ms. Woodhull prior to the termination of his

contract, *See* Feldman Dep. at 186, 206, Exs. 13, 20, 21. In fact, he praised the RPS team and expressed a desire to continue working together.<sup>4</sup> *See also* Woodhull Decl. ¶ 20, Ex. D.

On August 20, 2017, Complainant cc'd Ms. McDevitt in an email. In this email, a customer in Texas was being offered a six percent "rebate" if it bought a QBE policy. Feldman Dep. Ex. 22. BBW had offered the customer QBE, which it could obtain through Complainant submitting business on their behalf. When asked if he was reducing his commission on "some of these deals," Complainant responded,

Yes, Mr. Walls does pay commission on some deals in both Texas and California with Brokers. They get commission from all of there [sic] carriers so what's a few points to share with our friends that look like great long term clients?

Woodhull Decl. Ex. E.

Originally, Ms. McDevitt was concerned that this "rebating" was illegal in Texas, where the customer and BBW were. She informed Ms. Woodhull, her supervisor, who took over the handling of the issue. *See* McDevitt Decl. ¶¶ 14-15; Woodhull Decl. ¶¶ 21-22, Ex. E; Silvestri Decl. ¶ 14; Ciuffreda Decl. ¶ 11. After QBE confirmed to Ms. Woodhull that "rebating" was against their policy and illegal in Texas, she decided to terminate RPS's contract with MFIS. A QBE representative memorialized a phone call and wrote that "RPS... will no longer do business with [MFIS] given the actions of Brown Bacher." *Id.*

On August 25, 2017, Ms. Woodhull called Complainant to tell him they would be terminating MFIS' producer agreement because of his admitted rebating. Woodhull Decl. ¶ 25, Feldman Dep. p. 224. Complainant soon after sent an email cc'ing multiple parties stating:

Good afternoon. I've now included QBE Insurance on my ongoing complaint against Adrienne Woodhull so that she cannot make any quick moves on me without your express written consent. RPS allows Sweet & Crawford to pay commission to brokers and broker associations like IIBA, PIA, and other brokers in California. So how can it be illegal for me and legal for all the other RPS brokers in California to share commissions to the extent that QBE has ordered and Adrienne is acting on behalf of RPS?

Feldman Dep. p. 224. Complainant explained that in the "conversation regarding illegal rebates, Adrienne said that QBE told her to terminate me." *Id.* He claims that the above was the

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<sup>4</sup> Ms. Woodhull emailed Mr. Feldman: "Please note that we get things out by effective date and this doesn't go into effect until 8/28/17. With that being said I will rush this last one for you. However I will have to keep with our procedures going forward." Mr. Feldman replied: "Thank you for making this one and last time exception... CC; RPS Team members who help keep me us in business as we grow together and maintain a good loss ratio with your Carriers at the same time." Woodhull Decl. Ex. D.

equivalent of saying “[w]hy? Because I’m complaining about their rate fixing? Why are they terminating?” *Id.*

I note here that nothing in the email references “rate fixing” nor anything related to Complainant’s current claims of race or ethnicity discrimination.

Complainant was confused as to why QBE requested his termination as he had no contract with them. *Id.* at 225. He stated that “RPS would have to make their decisions based on whatever QBE told them,” and he assumed that the reason “must have been for the rate violations.” However, Complainant then admitted that he had never mentioned rate violations to anyone at QBE before August 25. *Id.* at 226.

On Friday, August 25, at 8:00 pm, Complainant sent the following message to “RPS Accounting West,” cc’ing Ms. McDevitt, Ms. Woodhull, Mr. Ciuffreda, and Mr. Silvestri. He wrote:

Dear RPS West C/O accounting and Mariane and Adriene [sic] C/O RPS for QBE Insurance Company.

Please see attached payment in full for Jack Lee Fong Insurance Agency, Inc. going in the mail tonight.

The latest account that I moved from Liberty to QBE via RPS was Jack Lee Fong Insurance Agency, Inc. and I split commissions with them every year going back for many years as this is perfectly legal in California.

Please confirm that we have put this past us as soon as possible and we can move forward or you can check with the legal Department of either QBE or RPS as to who is right on the Laws in California and have any Counsel for either RPS, QBE or Greenwich [sic] contact me direct to discuss this matter unless there may be another reason why RPS or QBE wants to terminate my agency that has nothing to do with commission rebates in California, my excellent product and quote to bind Ratio or my Zero Loss Ratio for the History with QBE.<sup>5</sup>

Also, I have advised Salvatore Quiffreda [sic] that I sometimes pay commissions like other wholesalers some time do to Brokers in California when Writing there E & O when discussing commissions of either 12% or 15% and Sal never raised the issued [sic] that I could not pay Insurance Brokers a commission in California.

Feldman Dep. Ex. 26.

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<sup>5</sup> At this point, it would have been 8 months of history.

Ms. Woodhull responded that she would “review this week” as she had “stated earlier today.” *Id.* In another email from Sunday, August 27, Complainant wrote:

Dear Mr. Frank Figaro, President RPS Specialty, Inc. and Mike, Sal and Accounting West and all of your CEO’s Presidents and Lawyers including those of QBE.

I received an email from Adrienne this last Friday and she told me that QBE has requested that RPS terminate my agency agreement for paying or rebating commissions to Brokers in California and that Adrienne Woodhull would send out letter [sic] to all of my clients advising them that I have been terminated and they are getting non-renewed.

Please note that I provide proof that paying commissions to Brokers is Legal under Section 750.5 of the California Insurance code as well as Prop 103 and that under section 790 in the California Insurance Code that an MGA cannot terminate without Cause as defined by the code and she left me hanging with no decision if my agency is terminated or is not terminated.

Please advise the name of the person at QBE who Adrienne Woodhull received these marching orders from and confirm who is replacing Adrienne Woodhull at RPS Specialty as President for the E & O Department for taking from these [sic] actions against me and my company.

*Id.*

At his deposition, Complainant explained that he was trying to tell them that Ms. Woodhull’s statements were fraudulent, or at least misrepresentations. It was his “interpretation that she’s committing fraud, and she knows that it’s illegal and... she’s terminating me on something for grounds that have nothing to do with my termination.” Feldman Dep. p. 228.

When asked why he did not discuss fraud or misrepresentations in his email, he stated that it was “implied,” and that he was asking to find out who at QBE requested that RPS “terminate my agency for splitting commissions with other insurance brokers in California.” *Id.*

The reason he did not discuss fraud or RPS “inflating rates” in his emails following his termination was because he was “being terminated for rebating so [he] was addressing what they were saying [he] was terminated for.” *Id.* at 229.

On August 30, 2017, Complainant sent an email to the California Department of Insurance and copied a half-dozen members of RPS and QBE staff. The New Jersey Department of Insurance was not cc’d or included in the recipients of the email. He wrote:

Dear California Department New Jersey Department [sic] of Insurance and all State and Federal Agency's with standings to investigate and Adrienne Woodhull dba and for RPS, Inc.

Per my conversation with Adriene Wood [sic] as discussed on Friday RPS Specialty is Terminating my agency agreement and sending letters to my clients that I am terminated in violation of section 790 and the California [sic] and she claims that RPS written agreement has standings over any and all laws in California.

Please advise as to the person that Adrienne Woodhuff [sic] referred to working for QBE in there [sic] E & O division that is requesting that RPS Terminate my agency for splitting commissions with other Insurance Brokers in California. This practice is allow [sic] by other RPS Brokers and the threat to Terminate and go direct to my clients raises a lot of concern and legal issues

\*\* This is the 2nd time I have been Threaten [sic] by Adrienne Woodhull to terminate my agency and this lady needs to be terminated from her current Position as acting President for these actions.

Feldman Dep. Ex. 26.

Also on August 30, 2017, he submitted a complaint to the "Fraud Division" of the California Dept. of Insurance stating:

Please accept this emergency complaint under Section 790 and 750.50 under the California Insurance code violation against Adrienne Woodhull and RPS effective today 8-30-2018 for terminating my agency and contacting my clients advising them of my Termination without a valid cause as an at will Agrrement [sic] does not provide an exemption from Public Policy in California.

Please accept this email as an emergency request to contact Adrienne Woodhull of RPS to stop her from intention [sic] actions in violation of public policy.

*Id.* Ex. 27.

Later in the day, in another email in which he included a significant number of parties,<sup>6</sup> at RPS, he wrote:

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<sup>6</sup> The list includes RateReviewcomments@dobi.nj.gov, corporate@qbe.com, Licenser renewal@insurance.ca.gov, Mike Silvestri, Salvatore Ciuffreda, Adrienne Woodhull, Mariane McDevitt, i2@nw3c.org,

“Dear Rate Review and New Jersey and CA Department of Insurance Fraud Division,”

Please see the attached complaint that I have filed with the California and New Jersey Department of insurance and Include these documents in my filed complaint today against RPS Specialty ET / Adrienne Woodhull and Marianne McDevitt with the California Department of Insurance also not rate filing violations [sic] by Adrienne Woodhull in not applying all of the filed rate credits when quoting both Greenwich and QBE to my complaint.

*Id.* Ex. 28.

Joe Tixier, an attorney for RPS, responded that “[a]s is its right, RPS will no longer do business with [MFIS], effective immediately.” *Id.* Ex. 30. Complainant responded to the email from Mr. Tixier on September 18, 2017, stating that he planned on filing an EEOC complaint against them, and attached a copy. *Id.*

In the complaint, he wrote that he had been retaliated against on the basis of “Insurance Price fixing – Not offering Filed admitted rates in California for QBE and Greenwich” [sic]. He stated that the dates of the retaliation were from approximately May 1, 2017 through August 30, 2017. In his explanation for why he felt the actions were “discriminatory,” he wrote that “the filed rates for insurance broker E & O were approved by the CDOI and were not provided to the general public most of the time.” He further wrote that he was given no reason for the alleged discrimination. *Id.*

Complainant acknowledged at his deposition that he included no race or ethnicity based discrepancies in either his filings with the state of California or the EEOC. He stated that he complained by phone to Salvatore Ciuffreda, and never put his complaint in writing prior to his filing with OSHA, despite the significant number of emails that he sent RPS staff. Feldman Dep. pp. 237, 241-243.

#### **4. Complainant’s Filing with OSHA**

On November 3, 2017, Complainant submitted a formal complaint with OSHA. Feldman Dep. Ex. 39. He claimed that he complained to:

[m]anagement of RPS Inc. to include the Underwriting Manager, Mary Anne McDevitt about the illegal rate increases that are being established and inflated based of ethnic or racial reasons. Clients with ethnic names, or that are located in ethnic locations, are illegally being quoted higher rates than those that live in

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fraud@insurance.ca.gov, and once again, via cc, Maria McDevitt, Fraud@insurance.ca.gov, and Corporate@QBE.com. Feldman Dep. Ex 28.

other areas or those that have traditional names. This illegal rate inflation, if known to the public, would have an adverse effect on the shareholders of RPS Inc. and its parent company.

After making my complaints known, Mary Anne McDevitt terminated my contract to sell insurance for RPS Inc.

*Id.*<sup>7</sup>

When asked at his deposition why he filed with the DOL, he stated that “if people are working and there was a problem... you can file a complaint with the Department of Labor.” Feldman Dep. p. 136. He then stated that he was talking about the California Department of Labor as well as OSHA. *Id.* Complainant did not write any of these complaints in any e-mails he sent to Respondent during the time with which MFIS contracted with RPS. Feldman Dep. at 200, 322, 326-327, Ex. 40; Woodhull Decl. ¶¶ 31-32; McDevitt Decl. ¶ 16; Silvestri Decl. ¶ 13; Ciuffreda Decl. ¶ 5.

The RPS office with which MFIS dealt with was located in New Jersey, and neither McDevitt nor Silvestri were familiar with zip codes in California and their ethnic makeup. Feldman Dep. p. 261; McDevitt Decl. ¶ 17; Silvestri Decl. ¶ 15. Also, none of the applications that the Complainant submitted to RPS asked for race or ethnicity of the insurance customer. McDevitt Decl. ¶ 17; Silvestri Decl. ¶ 15; Woodhull Decl. ¶ 33; Feldman Dep. pp. 123-124. As noted above, Mr. Feldman himself did not know the ethnicities of his clients. Feldman Dep. p 123.

## ANALYSIS

### **1. Legal Standard for Summary Decision**

A motion for summary decision is a dispositive motion that argues that no reasonable fact finder could find for the non-moving party, and that the case may be decided without a trial. *See* 29 C.F.R. § 18.72. Generally, the purpose of summary decision is to promote efficiency in deciding claims where, based on facts that are undisputed, one party is entitled to a favorable decision as a matter of law. The regulation instructs that “[t]he judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” *Id.* A fact is material if it affects the outcome of the action. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 252, 248 (1986). A failure of proof as to an essential element of a claim “renders all other facts immaterial.” *See Celotex Corp. V. Catrett*, 477 U.S. 317, 323 (1986).

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<sup>7</sup> RPS is not a publicly traded company and has no shareholders. Also, as noted elsewhere, Ms. Woodhull terminated Mr. Feldman’s contract.

When a respondent moves for summary decision on the grounds that the complainant lacks evidence of an essential element of his claim, the complainant is then required to present evidence demonstrating the existence of each essential element, as well as show a genuine dispute of material fact for trial. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex* 477 U.S. at 324; *see also* Fed. R. Civ. P. 56; 29 C.F.R. § 18.72. A “genuine issue” exists when the nonmoving party produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties’ differing versions at a trial. *Reddy v. Medquist, Inc.*, ARB No. 04-123 (ARB Sept. 30, 2005).

The procedures for responding to a motion for summary decision are set out in 29 C.F.R. § 18.72. They provide that a party asserting that a fact is “genuinely disputed *must support that assertion*” by citing to parts of the record such as depositions and affidavits or declarations, or the party may show that the material cited to by the moving party does not establish the absence of a genuine dispute. *See* 29 C.F.R. § 18.72(c)(1)(i-ii).

An affidavit or declaration that is used to support or oppose a motion for summary decision must be “made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” 29 C.F.R. § 18.72(c)(4). If a fact is not properly supported or fails to properly address “another party’s assertion of fact, the judge may... consider the fact undisputed for purposes of the motion” and “grant summary decision if the motion and supporting materials... show that the movant is entitled to it.” *See* 29 C.F.R. § 18.72(e).

Plainly stated, a genuine issue of material fact exists when, based on the evidence, a reasonable fact finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 255. I, acting as the finder of fact, must determine if there is a genuine issue of material fact such that the moving party (here, Respondent) is not entitled to judgment as a matter of law. *See* 29 C.F.R. § 18.72(a); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party (here, Complainant). *See Anderson*, 477 U.S. at 252. I draw all reasonable inferences in favor of the non-moving party and make no credibility determinations; I do not weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56).

Thus, Respondents motion is an effort to establish the absence of a necessary element of Complainant’s claim, or alternatively that Complainant cannot provide proof supporting said necessary element. Complainant, in defending the motion, needed to cite to specific materials and facts that would be admissible at a trial, and show that his declaration was made upon personal knowledge.

Finally, the Board has established that a whistleblower complainant acting as a self-represented litigant is due a “degree of adjudicative latitude.” The Board has counseled to “construe complaints and papers filed by *pro se* complainants ‘liberally in deference to their lack

of training in the law.”” *Wimer-Gonzales v. J.C. Penney Corp., Inc.*, ARB No. 2010-0148, ALJ No. 2010-SOX-00045, slip op. at 4 (ARB Feb. 7, 2012) (quoting *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, slip op. at 4 (ARB Jan. 31, 2011)).

## **2. Respondent’s Burden**

In general, the Sarbanes-Oxley Act of 2002 protects employees of publicly traded companies 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. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, P.L. 111-203, amended the SOX whistleblower provision at 18 U.S.C. § 1514A to clarify that certain subsidiaries and affiliates of publicly traded companies are covered under the SOX whistleblower provision, among other provisions.

Moreover, SOX protections have been extended to cover employees of private companies that contract to perform services for expressly covered publicly traded companies and their subsidiaries or affiliates. *See generally Lawson v. FMR LLC*, 571 U.S. 429 (2014). For purposes of ruling on this Motion, I am assuming – without deciding – that Complainant’s status as the principal of a closely held company that contracted with what is apparently a subsidiary or affiliate of a publicly traded company would bring him into coverage under SOX.

To prevail, Complainant would be required to show at trial that he engaged in SOX-protected activity, suffered adverse employment action, and that the protected activity was a contributing factor in the adverse action. *See* 29 C.F.R. § 1980.109(a); *see also Stewart v. Lockheed Martin Aeronautics Co.*, ARB No. 14-033, ALJ No. 2013-SOX-00019, slip op. at 2 (ARB Sept. 10, 2015). To be successful in its MSD, Respondent need only show that one element has not been established. *See Bucalo v. UPS, Inc.*, ARB No. 10-107, ALJ No. 2008 SOX-00053, 2012 WL 1065844 at \*2 (ARB March 21, 2012).

While other statutes protect employee-whistleblowers more broadly, SOX protects employees from retaliation for reporting six enumerated illegal activities: 1) mail fraud, 2) wire fraud, 3) bank fraud, 4) securities/commodities fraud, 5) a rule or regulation of the SEC, or 6) any federal law relating to fraud against shareholders. *See Hoptman v. Health Net of Calif.*, ARB No. 2017-0052, ALJ No. 2017-SOX-00013, 2019 WL 5870332 at \*3 (ARB Oct. 31, 2019).

Complainant must show that he provided his information of such acts to either a Federal regulatory or law enforcement agency, a member of Congress, or a person with supervisory authority over the employee or such person working for the employer who has the authority to investigate, discover, or terminate misconduct. *See* 18 U.S.C. § 1514A. The person who is informed, if an employee of the company, must have sufficient authority to investigate or terminate misconduct. *Id.*

Furthermore, the reporting whistleblower must have both a subjective belief that he is reporting a violation, and that belief must be objectively reasonable based on the facts known to the whistleblower, or must otherwise justify the whistleblower's belief that illegal conduct was occurring. *See Beacom v. Oracle. Am., Inc.*, 825 F.3d 2376, 380-81 (8th Cir. 2016); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1000 (9th Cir. 2009); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42, slip op. at 14-15 (ARB May 25, 2011).

Thus, SOX-protected activity requires whistleblowers to have subjectively believed that they reported a violation of a law listed in 18 U.S.C. § 1514A(a); and, that belief must have been objectively reasonable. *See Sylvester*, ARB No. 07-123, slip op. at 14 (“violation of relevant law”); *see also Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008). The “inquiry into whether an employee had a reasonable belief is fact-dependent.” *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014).

### **3. Complainant Did Not Engage in Protected Activity**

I find, for the reasons below, that it is undisputed that Complainant did not engage in SOX-protected activity, which is an essential element of his claim.

To review, 29 C.F.R. § 18.72 requires that a declaration that is used to support a motion for summary decision must be based “on personal knowledge, set out facts that would be admissible evidence, and show that the... declarant is competent to testify on the matters stated.” If a fact is unsupported or a party fails to properly address the opposing party's “assertion of fact, the judge may... consider the fact undisputed for purposes of the motion,” and “grant summary decision.” 29 C.F.R. § 18.72(c)(4).

“An assertion that violations of other statutes could adversely affect the employer's financial condition is insufficient to trigger protection under” SOX. *See Gallas v. The Med. Ctr. Of Aurora*, ARB No. 16-012, ALJ No. 2015-SOX-013, 2017 WL 2222626 at \*6 (ARB April 28, 2017) (granting summary decision on complainant's failure to create issue of material fact on element of protected activity); *see also Allen v. Stewart Enters., Inc.*, ARB No. 06-081, ALJ No. 2004-SOX-00060, slip op. at 10 (ARB July 27, 2006) (“the mere possibility that an act or omission could adversely affect [the respondent's] financial condition and thus affect shareholders is not enough to bring the Complainants' concerns under the SOX's protection”). “SOX does not protect [an employee] from retaliation for reporting ‘illegal’ activities of any kind.” *See Micallef v. Harrah's Rincon Casino & Resort, et. al*, ARB No. 16-0195, ALJ No. 2015-SOX-025, slip op. at 3 (ARB July 5, 2018).

Here, Complainant asserts in his response brief that mail fraud is the basis for coverage under SOX.<sup>8</sup> *See CRB p. 3; see also Hoptman*, 2019 WL 5870332 at \*3. He states:

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<sup>8</sup> Mail fraud is a federal crime: “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell,

Mailed or electronic emailed [sic] Greenwich [sic] quote from RPS, Inc. without a QBE quote option that lead to a bind request for the 3-4-2017 is Mail Fraud under Sarbane-Oxley [sic] as RPS only emailed a quote option for Greenwich [sic] for his 3-4-2017 to obtain an inflated premium vs. the quote that was never offered to Mr. Feldman or his Client Mr. Okhovat.

*Id.* To support this factual assertion, he cites to CRB Exhibit A.<sup>9</sup> Exhibit A consists of a quote for Greenwich Insurance Company for Brokers Professional Liability sent on January 24, 2017, and expiring on March 4, 2017. *See* CRB Ex. A p. 1. It also consists of the agreement's declarations, laying out the specifics of the one year term. *Id.*<sup>10</sup> The final page of Exhibit A shows a renewal offer from QBE Insurance that is apparently for the policy period of March 3, 2019 through March 4, 2020, long after the alleged protected activity. Complainant highlights the limit of the liability of each claim, which increased by one million dollars over what was offered by Greenwich two years prior, and the premium listed was roughly \$2,000.00 less than the premium charged by Greenwich. *Id.* at 2-3.

In his brief, Mr. Feldman states that he engaged in the protected activity

of reporting Mail Fraud against and by RPS Product manager Marianne McDevitt including but not limited to Marianne McDevitt, RPS Product-Manager, Frank Figaro RPS Interim President, Salvatore Ciuffreda RPS Marketing Manager and Exclusive Marketing Representative and Mike Silvestri an underwriter working directly under Ms. McDevitt that the QBE filed rates were the same as Munich' Re's with the min premium and rate of 1,125 and was not being quoted to mid-size ethnic brokers or in locations where was [sic] a large ethnic population with \$100,00 or more commissions in California after they were approved by the CDOI on 12-12-2016, My complaints started on 12-12-2016 and stop after I was terminated on 8-30-2017.

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dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 1341.

<sup>9</sup> Exhibit B of Complainant's Reply Brief is my own Order Denying Motion to Bifurcate Discovery, issued on November 6, 2019.

<sup>10</sup> Complainant did not number the pages of his exhibits.

Focusing on Complainant's allegations, I must evaluate where there are sufficient facts in the record now from which a reasonable factfinder could conclude at trial that Complainant actually made the complaints of mail fraud he alleged he did (and did so prior to his termination); and when doing so he had the subjective belief he was complaining of mail fraud violations; and, that that belief, if he had it, was objectively reasonable. At a minimum, I would have to find a dispute of fact as to one of these points that does not arise from a so-called "sham" affidavit or declaration, discussed below.

Complainant cites to his own declaration as evidence. However, the above quotation from Mr. Feldman's brief directly contradicts his own deposition testimony, in which he claimed that he had a) only told Salvatore Ciuffreda "that if the shareholders knew about this, they'd be in big trouble"; and, b) that he had only ever complained of California Insurance code violations with the additional statement of "and various state and federal laws." *See* Feldman Dep. p. 334. In his emails, he stated that terminating his contract was "in violation of public policy." Feldman Dep. Exs. 26-27.

Complainant's original complaint to OSHA mentioned nothing of mail fraud. Feldman Dep. Ex 39. At his deposition, Complainant was pressed about what laws specifically he thought were being violated, to which he said he "didn't have to state the specific federal laws." *Id.* He also admitted that he did not tell anyone at RPS "which ones per se... I just said other state and federal laws, including the California Insurance Code." *Id.* at 334. He filed his complaint with the DOL, because of his belief that "if people are working and there was a problem... you can file a complaint with the Department of Labor." Feldman Dep. p 136.

According to Complainant at his deposition, he made the alleged protected activity statements regarding mail fraud to Mr. Salvatore Ciuffreda, the Regional Marketing Manager at RPS, "[d]uring a few of the conversations when I was complaining about the price fixing." *Id.* at 335. When asked what his response was, Complainant stated that he said "no comment." *Id.* Complainant never put his complaints in writing, as he allegedly made these statements over a series of phone calls. Complainant also stated that he never told anyone else, prior to the contract termination, about potential harm to shareholders. *Id.* Per his deposition testimony, he only mentioned to Mr. Ciuffreda that "if the shareholders knew about this..." but was not more specific. *Id.*

Mr. Ciuffreda's Declaration is attached to the MSD as an exhibit. He stated:

My first contact with Michael Feldman... was sometime in early 2017, when I was reaching out to retailers who weren't doing a large volume of business with RPS. After that first contact, Feldman called me almost daily, but the lengthy calls often had nothing to do with RPS business, instead covering his opinions about other companies or politics, or his personal matters.

As far as I could tell, Feldman was aggressive about trying to obtain new policies, and would sometimes get upset about being told that a customer did not qualify for coverage or that Feldman hadn't properly submitted the information the underwriters needed.

Feldman never complained to me that RPS was making decisions on coverage based on the race or ethnicity of a customer, or even told me about the race or ethnic background of his customers, and I never asked. To this day, I have no idea about any of MFIS's customer's race or ethnicity.

*See Ciuffreda Decl.* p. 2. Mr. Feldman has also admitted that he does not know the ethnicity of his clients. *See Feldman Dep.* p. 124, Ex. 40.

To the extent that there is a dispute here between the Complainant's declaration and Mr. Ciuffreda's, I turn to the so-called "sham affidavit" rule. Though the moniker implies bad faith, no finding of bad faith is required. The sham affidavit rule is simply a rule that holds that "a party cannot create an issue of fact [at summary judgment] by an affidavit contradicting his prior deposition testimony." *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012); *Van Asdale v. Int'l Game Technology*, 557 F.3d 989, 998-99 (9th Cir. 2009). As the Ninth Circuit explained:

The Supreme Court has explained that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Some form of the sham affidavit rule is necessary to maintain this principle. This is because, as we have explained, "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."

*Van Asdale*, 557 F.3d at 998. I agree that the sham affidavit rule "should be applied with caution" because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment. *See Yeager*, 693 F.3d at 1080. However, here, Complainant's deposition testimony is consistent with Mr. Ciuffreda's that Complainant discussed a range of issues, but not mail fraud. Applying the sham affidavit rule, I will set aside the assertions in Complainant's declaration that arguably create a disputed issue, and rely on Complainant's sworn deposition testimony to find no dispute.

Complainant's mention of filed rates, in support of his alleged reports of mail fraud, is also problematic, as the Complainant admitted that he had never seen the filed rates until after litigation began, even though they were publicly available. *See Woodhull Decl.* at ¶ 12; *McDevitt Decl.* at ¶ 5; *Feldman Dep.* pp. 115, 128, 153, 155. In fact, Mr. Feldman was asked

“what do you believe the QBE premium value requirement to be?” He replied: “between 50 and 100,000,” based off of “what the filed rates were and what I was told the filed rates were before and as of 12-12-2016.”<sup>11</sup> He then admitted that he had not seen the filed rates until they were produced in discovery. *Id.* at 115.

This is contradictory. Based on Mr. Feldman’s admission, I find it impossible for him to have had a reasonable belief that rate filing violations were occurring – even if they were – as of any complaints made prior to his termination, due to lack of knowledge of the rates.

Similar to Mr. Ciuffreda, Ms. McDevitt provided a declaration stating that:

[d]uring the course of working with MFIS, I noticed Mr. Feldman often acted (and maybe was) confused about the qualification for each insurance program, and sometimes expressed frustration when I told him that a customer would not qualify or that I needed additional information. After seeing no improvement, I sent an email to Sal Ciuffreda, a marking [sic] representative in my office, asking if we could hold a training session for Mr. Feldman, as ”he seems to not get a few things.”

McDevitt Decl. p. 4, Ex. D. McDevitt continued: “[t]o my frustration, Mr. Feldman also often sent me incorrect or incomplete information, which I addressed with him by email on several occasions.” *See* MSD McDevitt Decl. p. 4, Ex. E.<sup>12</sup>

As part of moving papers, Respondent provided the following list, with citations to the record including Mr. Feldman’s own sworn statements, as undisputed facts.

MFIS had very little business with RPS before 2017, when MFIS began seeking to secure policies for its customers from QBE, an insurance company for which RPS was a MGA that became admitted in California in December 2016. (Woodhull Decl. at ¶ 16; McDevitt Decl. at ¶¶ 4-5).

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<sup>11</sup> This is not the period of time within which Complainant was binding customers with QBE policies.

<sup>12</sup> I do not rely on the following, because I am bound to draw inferences in favor of the non-moving party at summary decision. But McDevitt also stated that the more “worrisome” behavior, to her, was that

[o]n a few occasions after [McDevitt] questioned the information Mr. Feldman submitted on an application, he quickly sent back a revised application, changing it to allow it to fit the insurer’s guidelines. For example, [McDevitt] was concerned that he was modifying his client’s applications to meet the threshold of commissions that corresponded with the minimum premium volume required by QBE at that time.

McDevitt Decl. at 5, Ex. I. If McDevitt testified at trial consistent with her declaration, and was credible, one could draw the inference that Mr. Feldman understood that his clients were being denied because of their size, based on how he swiftly altered applications in order for them to be approved. This would tend to show Mr. Feldman’s knowledge that the reason for denials were based on size and risk factors, and not due to race or ethnicity, and thus undermine the subjective belief and objective reasonability prongs of protected activity, in his case-in-chief. It would also tend to show lack of causation even if there was protected activity.

RPS learned in August 2017 that Feldman was offering a Texas insurance policy applicant a commission create on QBE policy, in violation of Texas Law. (Woodhull Decl. at ¶ 22; McDevitt Decl. ¶ 14). Therefore, RPS decided to terminate its contract with MFIS. (Woodhull Decl. at ¶22, Ex. E).

Although Feldman regularly beleaguered RPS personnel with lengthy calls and frequent emails, during the course of MFIS's contractual relationship with RPS, Feldman never complained to anyone about conduct that might violate the laws or regulations covered by Sarbanes-Oxley. (Feldman Dep. at 332-334; Woodhull Decl. at ¶ 31; McDevitt Decl. at ¶ 16; Silvestri Decl. at ¶ 13; Ciuffreda Decl. at ¶ 5).

Adrienne Woodhull, who made the decision to terminate MFIS's producer contract, did not know about any complaints from Feldman about *any* legal violations. (Woodhull Decl. at ¶ 31).

After MFIS contract termination, Feldman filed complaints with various state insurance commissions alleging violations of state insurance laws about compliance with state-filed rates. (Feldman Dep. at 229, Exs. 26-28). He also emailed various individuals in RPS or Gallagher, in which he made no allegations of violations in [SOX's] scope, or of retaliation. (Woodhull Decl. at ¶ 30; Feldman Dep. at 235-236).

Months after the termination MFIS's contract, Feldman filed a [SOX] complaint against RPS, alleging he had complained to one individual – who was not involved in the decision to terminate MFIS's contract – about purported racial or ethnic discrepancies in insurance rates, an issue governed by state insurance law. (Feldman Dep. p 135, Ex. 39; McDevitt Decl. at ¶ 15.)

In the course of their work, RPS employees do not need to know, and do not ask to learn, the ethnic or racial identification of any insurance applicant. (McDevitt Decl. ¶ at 17; Silvestri Decl. at ¶ 15; Woodhull Decl. at ¶33). They neither gather nor use such information. (McDevitt Decl. at ¶ 17; Silvestri Decl. at ¶ 15; Woodhull Decl. at ¶ 33; Feldman Dep. 123-24).

MSD pp. 3-4. The above, though presented in a light favorable to the moving party, is an accurate recording of the facts after review of the supporting evidence. Mr. Feldman's sole contentions of factual disputes are based on his declaration alone, and not any of his testimony in his deposition nor documents from the relevant time period.

To summarize, Complainant has provided no facts nor placed facts in dispute to show that he held a sincere and objectively reasonable belief that RPS was committing mail fraud, and complained of such prior to his termination. There is a lack of evidence – other than Complainant’s assertions in his declaration, discussed above – that Complainant ever made a complaint of anything other than frustration about the size requirements of QBE and the speed at which the quotes were returned to him. *See Ciuffreda Decl.* p. 2. Complainant admitted an understanding that QBE was primarily for larger brokers. *See Feldman Dep. Ex. 7.*

Complainant has never pled – neither at OSHA, nor at OALJ until his response to this MSD – that RPS was committing mail fraud, nor fraud of any sort. His briefing here is the first such allegation. I am “sensitive to the challenges that pro se plaintiffs face in pleadings and do not condemn inexperienced plaintiffs to be forever bound by their clerical errors and minor factual slip-ups.” *Newman v. Lehman Brothers Holdings, Inc.*, 901 F.3d 19, 27 (1st Cir. 2018); *see also, e.g., Boivin v. Black*, 225 F.3d 36, 43 (1st Cir. 2000) (“[C]ourts hold pro se pleadings to less demanding standards than those drafted by lawyers ... [and] endeavor, within reasonable limits, to guard against the loss of pro se claims due to technical defects.”). However, the absence of any prior complaint of mail fraud, or even a set of facts that could to a learned reader constitute mail fraud, is not a mere “technical defect.” It leaves Respondent’s asserted facts that Complainant *did not* make any such complaint of mail fraud prior to his termination, undisputed. Complainant had ample opportunity to bring charges of mail fraud or another violation of law covered by 18 U.S.C. § 1514A to the attention of the RPS employees he contacted, yet did not do so.

Instead, as previously stated and as shown by admissible evidence including his own deposition testimony, Complainant alleged other violations – and mostly did so after he was terminated. After his termination, he chose to file complaints with the California Department of Insurance, claiming that there were in violation of state insurance laws by choosing not to offer QBE quotes they deemed too small or risky. *Feldman Dep.* p 229, Exs. 26-28.

[M]anagement of RPS Inc. to include the Underwriting Manager, Mary Anne McDevitt about the illegal rate increases that are being established and inflated based of ethnic or racial reasons. Clients with ethnic names, or that are located in ethnic locations, are illegally being quoted higher rates than those that live in other areas or those that have traditional names. This illegal rate inflation, if known to the public, would have an adverse effect on the shareholders of RPS Inc and its parent company.

Feldman Dep. Ex. 39. Ms. Woodhull stated that:

within a few days of our phone conversation on August 25, 2017, Mr. Feldman began sending angry emails to numerous RPS employees and state agencies and accusing RPS of violating state insurance law by not quoting filed rates and

terminating his contract in violation of ‘public policy.’ He did not mention [SOX] or make any allegation of retaliation in any of those emails.

Woodhull Decl. at ¶ 30, Ex. K

Mr. Feldman had opportunities to bring about any complaints he may have had in the weeks before his contract was terminated. *See* Feldman Dep. Ex. 20; Woodhull Decl. ¶ 20. He did not. Having reviewed the numerous emails and calls he made to RPS personnel in the record, there is no evidence that he ever mentioned shareholder fraud, mail fraud, or even illegal action until after he was terminated.<sup>13</sup>

Complainant’s deposition testimony is probative on this issue as well. In his deposition, Complainant was asked “did you ever tell anybody at RPS during the time that your company had a contract with RPS, any specific rule or regulation that you felt was being violated?” He responded affirmatively, and when asked to cite what rule or regulation he said was being violated he stated “the California insurance code filings” and “other state and federal laws,” Feldman Dep. pp. 332-33, not mail fraud.

As far as Complainant’s beliefs, what Complainant admitted to *not* knowing at his deposition is persuasive evidence of lack of reasonableness. He did not know how quotes for premiums were calculated. *Id.* at 153. When confronted with the QBE and Greenwich filings with the state of California, he understood that they were the approved rates that “were in effect during the time [MFIS] worked under a contract with RPS.” *Id.*, Ex’s 9, 10. However, he had never reviewed those publicly available admitted rates prior to their production in discovery. *Id.* at 115, 128, 153, 155. He did not know who performed the calculations under the approved rates. *Id.* at 154. He also admitted that he had no way to perform the calculations the underwriters performed to determine the premiums, as those are restricted to underwriters’ eyes only. *Id.* at 155.

The remaining evidence of Complainant’s current claim of protected activity amounts to his own uncorroborated and self-contradicted declaration in which he asserts that he stated that underwriters were basing their calculations on race. *Id.* at 334-35. Even if he made such

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<sup>13</sup> Speaking of actions alleged to be illegal, one potentially illegal action documented by emails in this record is that of his submission on behalf of BBW, in which the email chain showed that BBW would be providing a commission split to the customer. I do not claim to know the legality of rebating in Texas. Mr. Feldman has not disputed that it is in fact illegal in Texas and has only argued that the practice is legal in California. But BBW was only able to quote QBE through Mr. Feldman, and thus his email and request were a part of an allegedly illegal act. Feldman Dep. Ex 22. This would be relevant at trial because it is the reason documented by Respondent for the termination of his contract. The email chain where the decision was made is included with Ms. Woodhull’s declaration. *See* Woodhull Decl. Ex. E. I do not rely on any of this, however, for my decision here at summary decision on the issue of protected activity; these are facts related to causation; and, at summary decision I may not resolve disputed facts in favor of the moving party.

complaints and believed them, and they were objectively reasonable, and made before Complainant was terminated, race discrimination is not SOX-protected activity.

### **ORDER**

I find that it is undisputed that the Complainant did not actually complain about mail fraud, or engage in any other SOX-protected activity, while working with Respondent prior to his termination. Nor did Complainant hold any objectively reasonable belief that Respondent committed mail fraud in order to have complained about it.

Because on the record here, no reasonable factfinder could find that Complainant engaged in SOX-protected activity prior to his termination, Respondent's Motion for Summary Decision is GRANTED and Complainant's complaint is DENIED. *See* 29 C.F.R. § 1980.109(d)(2).

SO ORDERED.

EVAN H. NORDBY  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (e-File) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

When 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. See 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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(e) and 1980.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1980.110(b).