U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 10 July 2007

CASE NO.: 2007-SOX-13

IN THE MATTER OF

ROGER FREDRICKSON

Complainant

v.

THE HOME DEPOT U.S.A., INC.

Respondent

RECOMMENDED DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION AND CANCELLING FORMAL HEARING

This proceeding arises under the Sarbanes-Oxley Act of 2002, technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. § 1514A et seq., (herein SOX or the Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1980, which are employee protective provisions.

On May 21, 2007, Respondent Home Depot filed a Motion for Summary Decision seeking dismissal of Complainant's complaint against it arguing that Complainant cannot establish a **prima facie** case because: (1) Complainant's communications did not constitute protected activity under SOX; (2) Complainant did not complain to a person with the authority to investigate, discover, or terminate misconduct; and (3) Complainant cannot establish that alleged protected activity was a contributing factor to his discharge as the persons responsible for his discharge lacked knowledge of his alleged protected activity.

Respondent's Motion further provides that Complainant cannot prevail, even if he were to establish a **prima facie** case because Respondent demonstrated a legitimate business reason for the unfavorable job action, which it would have taken absent the alleged protected activity.

On June 18, 2007, Complainant filed a response to Respondent's Motion with notarized affidavit contending that: (1) Respondent's motion mischaracterized Complainant's protected action in that Complainant contends he was fired in retaliation for properly taking store markdowns over the objection of his superiors, complaining about "return to vendor" charge back practices, and refusing to follow the fraudulent practice; (2) whether or not Ms. Heifner had authority to investigate, discover, or terminate misconduct is a question of fact to be decided at trial and may not be determined by Respondent's assertions and self-serving affidavits; (3) whether Complainant's statement to Ms. Heifner was a contributing factor in his discharge requires determination by the fact finder; (4) whether Complainant would have been discharged for the reason asserted by Respondent calls for determination by the finder of fact; and (5) Respondent has a history of presenting affidavits which prove to be inaccurate, misleading, and even false, therefore no affidavits supplied by Respondent should be relied upon for purposes of summary judgment, and cannot be substituted for live testimony.

Background

Complainant was deposed by the parties on March 26, 2007. (Complainant's deposition, p. 2). He was employed on April 19, 2006, as department supervisor at a Home Depot store. During the first week of June 2006, Complainant purposed to mark down hooks for use in his department using a computer located in the service department. He was told by Brandi Heifner, service department supervisor, that nothing was to be marked down for store use anymore, and that everything was to be entered as damaged goods. Complainant responded stating "you can't do that. It's illegal." Ms. Heifner responded "that's Tom's orders," referring to Tom Burns, the store manager. (Complainant's deposition, pp. 34-35, 242).

Complainant refused to follow Ms. Heifner's instructions, stating "If you want to write them down to damaged goods, you're welcome to, but I'm not going to do it." She took the hooks and entered the information into the computer herself. Amy Higginbotham, an employee who reported to Brandi Heifner, was present during the conversation. Complainant stated that the department heads had authority only to supervise the employees in their department. (Complainant's deposition, p. 50). Like Complainant, Ms. Heifner was a department head. Complainant was not an employee in Ms. Heifner's department, although

Complainant contends she had authority to "supervise" computer entries done in her department. (Complainant's deposition, pp. 25-26).

Complainant testified in deposition that he was not told directly that marked-down items were recorded as a loss to the store, but he had heard in meetings that damaged goods were charged back to the vendor. He stated that he believed items recorded as damaged goods were charged back to the vendor. (Complainant's deposition, pp. 40-42). He further stated he believed that recording goods used by the store as damaged goods constituted "falsifying the books of the company." (Complainant's deposition, p. 36).

The details of Complainant's conversation with Ms. Heifner are not in dispute. Complainant testified that he reported the conduct which he believed was illegal to Brandi Heifner, with Ms. Higginbotham present. (Complainant's deposition, pp. 46-47, 49). After his conversation with Ms. Heifner, Complainant mentioned the incident to Ted Parent, a non-supervisory employee, and three or four other non-supervisory employees at the service desk. (Complainant's deposition, pp. 51, 54).

Complainant did not discuss his conversation with Ms. Heifner or concerns about markdown practices with Mr. Burns, the store manager, or Joe Martinez, Complainant's direct supervisor. Complainant stated Mr. Martinez was on vacation and unavailable until his discharge date. Additionally, Complainant did not know of other lawsuits involving markdowns and the return to vendor process **until after his termination**. (Complainant's deposition, pp. 59, 258-259).

A "day or so" after Complainant's conversation with Ms. Heifner, Complainant entered other items into the computer under the "store use" category, contrary Ms. Heifner's instructions. Complainant was aware Mr. Burns watched the books closely, and reviewed "the things that went through the files every day." Complainant concluded that Mr. Burns was aware of his computer entries which contravened Mr. Burns' instructions as relayed by Ms. Heifner. (Complainant's deposition, pp. 59-60). Complainant believed Mr. Burns may have been referring to the input issue when he commented "I get the feeling I'm losing you." (Complainant's deposition, p. 62).

Complainant believes he thereafter suffered adverse job actions in that: (1) Mr. Burns instructed two persons assigned to Complainant's department to work in a different department which hindered Complainant's job performance; (2) Brian Miller, a management employee, was unreasonably belligerent with Complainant about his temporary presence in another department; and (3) Mr. Miller made unreasonable physical demands of Complainant including forcing him to work in 100+ degree weather, and work without a meal break. (Complainant's deposition, pp. 62-63, 78-79, 85, 87-88).

Complainant stated he developed a knee problem as a result of Mr. Miller's unreasonable physical demands. However, he did not report the matter to Mr. Burns or any other Home Depot manager for fear of losing his job. (Complainant's deposition, pp. 90-92).

On June 16, 2006, Complainant was in the Home Depot store to have reports signed. During an incident, the details of which are in dispute, Complainant's hand impacted the groin area of a vendor representative, Tim Quick. Complainant contends the impact was accidental and minimal. (Complainant's deposition, pp. 95-96). On June 17, 2006, Complainant was told by Mr. Miller that he was being investigated over the incident involving the vendor. (Complainant's deposition, pp. 104-105). The following Monday, Complainant stated he tried to speak with Mr. Quick, but Mr. Quick ignored him and left the store. Complainant's employment was terminated on June 20, 2006. (Complainant's deposition, pp. 109-111).

The only persons whom Complainant knew were involved in the investigation that led to his termination were Brian Miller and two people, formerly unknown to Complainant, who were present at his termination. Complainant stated he had not told Brian Miller or the others present at his termination of any activity he considered to be illegal. (Complainant's deposition, pp. 189-190).

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging SOX violations. OSHA dismissed the complaint on November 30, 2006, which finding has now been appealed to the Office of Administrative Law Judges.

DISCUSSION

A. Summary Decision

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 99-STA-21 (ARB Nov. 30, 1999)(under the Act and pursuant to 29 C.F.R. Part 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Rollins v. American Airlines, Inc., ARB Case No. 04-140, Case No. 2004-AIR-9 (ARB April 3, 2007); Webb v. Carolina Power & Light Co., Case No. 93-ERA-42 @ 4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 91-ERA-31 and 91-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present **affirmative evidence** in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. at 324. Affidavits must be made on personal knowledge, set forth such facts as would be **admissible** in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. F.R.C.P. 56 (e).

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot thereby create an issue of material fact. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993); Rockefeller v. U.S. Department of Energy, Case No. 98-CAA-10 (Sept. 28, 1998); Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 95-WPC-6 (Dec. 13, 1995). Consequently, Complainant may not oppose Respondent's Motion for Summary Decision on mere

allegations. Such responses must set forth specific facts showing that there is a genuine issue of fact for a hearing. 29 C.F.R. 18.40(c).

The determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 87-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id. at 587.

Accordingly, in order to withstand Respondents' Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett v. Niagara Mohawk Power Co., Case No. 86-ERA-2, 4 (Sec'y. July 9, 1986).

B. Elements of a prima facie case under SOX

The whistleblower provision of Sarbanes-Oxley, set forth at 18 U.S.C. §1514A, states, in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) . . . or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by . . .

> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .

18 U.S.C. § 1514A (a)(1); see also 29 C.F.R. § 1980.102 (a), (b)(1).

Complainant must make a **prima facie** showing that his protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. If Complainant is successful in establishing a **prima facie** case, Respondent may nonetheless avoid liability if it demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior. See, Platone v. FLYi, Inc., ARB No. 04-154, Case No. 2003-SOX-27 (ARB Sept. 29, 2006); 49 U.S.C. § 42121(b).

The Burden of Proof

In a Sarbanes-Oxley "whistleblower" case, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity as defined by the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Macktal v. U. S. Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Welch v. Cardinal Bankshares Corporation, ARB No. 05-064, Case No. 2003-SOX-15, @ 8 (ARB May 31, 2007).

1. Protected Activity

To constitute protected activity under SOX, a Complainant must communicate information which he reasonably believes constitutes fraudulent activity. “The ‘reasonable belief’ standard requires [Complainant] to prove both that he actually believed that the [relevant law or regulation has been violated] and that a person with his expertise and knowledge would have reasonably believed that as well. Welch, supra. Thus, complainant's belief "must be scrutinized under both subjective and objective standards." Melendez v. Exxon Chemicals Americas, Case No. 1993-ERA-6 (ARB July 14, 2000).

The Administrative Review Board (ARB) has held: "an employee's protected communications must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." Platone v. FLYi, Inc., supra, at 17 (ARB Sept. 29, 2006).

Sarbanes-Oxley was enacted for the purpose of eliminating perpetration of fraud against shareholders as evidenced by the plain language of the Act as a whole. SOX goes to great lengths to assure that information assimilated to the investing public is not fraudulent by, among other measures, establishing the Public Company Accounting Oversight Board to ensure auditors' independence, assessing responsibility to the Audit Committee of the Board of Directors of a company, requiring management to attest to the accuracy of internal controls and financial reports, and installing criminal penalties for intentional misrepresentations to the investing public. 15 U.S.C. § 7211; 15 U.S.C. § 7241; 15 U.S.C. § 78j-1; 18 U.S.C. § 1350.

In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit. See Hopkins v. ATK Tactical Systems, Case No. 2004-SOX-19 (ALJ May 27, 2004); Tuttle v. Johnson Controls, Battery Division, Case No. 2004-SOX-0076 (ALJ Jan. 3, 2005). To impact shareholders or investors, fraud as related to a third party, such as a vendor, must be of sufficient import to constitute information upon which a reasonable investor would rely.

The Supreme Court, in addressing other types of shareholder fraud, held that to "fulfill the materiality requirement there must be a substantial likelihood that the disclosure of the omitted (or misstated) fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)).

In the instant case, Complainant maintains that he had a reasonable belief of fraud relating to recordation of items as damaged rather than for "store use," whereby refunds for such merchandise were wrongfully extracted from vendors. Complainant stated he was informed of the new policy by Ms. Heifner who related the instructions originated with Mr. Burns, the store manager. Therefore, Complainant had no reasonable basis to believe that the policy extended beyond the store for which he worked. Such an alleged fraudulent policy, isolated to a single Home Depot store, even if true, is not of a magnitude sufficient to support a reasonable belief that a reasonable investor would rely upon such information, or that it altered the 'total mix' of information available to an investor. Thus, based on Complainant's deposition testimony, it is clear he had no reasonable belief that Respondent had engaged in any conduct or activity which violated any of the laws or regulations enumerated in the SOX Act or that Respondent engaged in conduct that constituted fraud against its shareholders.

Accordingly, I find that there are no disputed material facts that Complainant failed to offer any evidence to establish a **prima facie** case as he cannot establish, under the facts presented, a reasonable belief of fraud actionable under the Act.

2. Requirement to report misconduct to person in authority

As noted above, the underlying purpose of the Sarbanes-Oxley Act was to protect the investing public. In addition to the plain language of the statute, the legislative history of the Act reflects the intent to protect the investing public by exposing and correcting fraudulent behavior. See e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company"). The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." Id.

To achieve this underlying purpose, the Act anticipates and encourages employees to report fraudulent conduct, to outside agencies, Congress, and **company personnel in a supervisory capacity over the employee or "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct."** 18 U.S.C. § 1514A (a)(1)(c). Communication of an employee to their supervisor would be a natural course of reporting, following established lines of authority. Likewise, reporting wrongful conduct to another employee vested with the power to take remedial steps would be a logical course to effect change. However, communication of wrongful conduct to parties lacking supervisory authority over the whistleblower, or "authority to investigate, discover, or terminate misconduct," does not constituted protected activity, as it does not serve the underlying purpose of the Act.

Respondent contends that neither Ms. Heifner nor any of the other persons to whom Complainant complained constitute a person having supervisory authority over Complainant or "authority to investigate, discover, or terminate misconduct." Complainant asserts that this is a question of fact, and may not be determined by Respondent's assertions and self-serving affidavits, without offering any affirmative evidence to the contrary.

The proponent of a rule has the burden of proving it. Complainant, therefore, bears the initial burden of showing sufficient evidence to establish a genuine issue of fact as to whether or not Ms. Heifner was an appropriate person to receive Complainant's protected communication.

In this case, Complainant stated he complained to Ms. Heifner, a department supervisor, while Ms. Higginbotham, a non-supervisory employee was present. Complainant additionally contends he communicated his conversation with Ms. Heifner to three or four service department employees. Complainant argues that Ms. Heifner had "supervisory authority" over the computer postings done in her department. He additionally argues that the store manager, Mr. Burns, had constructive knowledge of his alleged protected activity because Complainant later posted other items to the "store use" category, and Mr. Burns regularly reviewed the computer postings.

The parties agree that Complainant and Ms. Heifner were both department supervisors, having supervisory authority only over the employees within their respective departments. Therefore, Ms. Heifner did not have supervisory authority over Complainant. Complainant testified that he gave Ms. Heifner the information for her to make the initial computer entries to "damaged goods." She relayed the instructions of the store manager, but did not forbid Complainant from making the computer entry. Complainant thereafter entered other goods to the "store use" category which he considered correct, indicating he did not consider himself bound by Ms. Heifner's instructions.

I find and conclude that Ms. Heifner's actions did not constitute her "supervision" of the postings since she neither forbad nor prevented Complainant from making entries to the "store use" category. I further find that Complainant's communications with Ms. Heifner and the non-supervisory employees cannot constitute protected activity under the Act as none of them either have supervisory authority over Complainant or have authority to investigate, discover, or terminate misconduct.

Sarbanes-Oxley includes several provisions to encourage employees to come forward with information of wrongdoing. For example, it mandates that the audit committee of a company must establish procedures for "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." 15 U.S.C.A. § 78j-1 (m)(4)(B). Thus, the Act seeks to protect employees from retaliation for their purposeful protected communications. There is nothing in the Act to indicate that it intended to protect any constructive communication, as such does not require purposeful effort by the employee and thus would not subject him to retaliation for such effort. Therefore, for a communication to be protected, it arguably must be an express, not constructive, communication.

In this case, Complainant merely entered an item into the computer system as he thought was proper. He did not take steps to report the conduct to Mr. Burns. Rather, Complainant assumed Mr. Burns would discover his computer entry based on Complainant's perception that Mr. Burns reviewed "things that went through the files every day." At best, this would constitute a constructive communication of the issue of proper input of items for store use.

Consequently, I find that Complainant did not engage in protected activity by virtue of Mr. Burns' alleged constructive discovery of Complainant's computer input, which was contrary to Mr. Burns' instructions.

Accordingly, I find and conclude that there are no disputed material facts that Complainant has failed to establish a **prima facie** case in that he did not complain to an appropriate person or agency for purposes of the Act.

3. Did Complainant establish that sufficient circumstances existed to raise an inference that his alleged protected activity was likely a contributing factor to adverse job action?

Respondent contends Complainant has failed to present evidence of a causal nexus between any adverse job action and Complainant's alleged protected activity. Complainant alleges he suffered adverse job action in that he was required to perform excessive work in the heat, work without a lunch period, and was eventually discharged. He contends he engaged in protected activities of complaining about Respondent's improper recordation of items used by the store, proper recordation of such items, and refusal to follow the procedure outlined by Ms. Heifner. He further contends that whether such activity contributed to the adverse job action requires determination by the fact finder.

As stated above, Complainant bears the burden of showing sufficient evidence of his contention to establish a genuine issue of fact. Here, he must show that circumstances existed to raise an inference that his alleged protected activity likely contributed to the adverse job action. Once that initial burden is met, it may not be overcome for purposes of summary decision by Respondent's contentions and affidavits.

Assuming, **arguendo**, Complainant engaged in the alleged protected activity, he has failed to establish a causal nexus between any adverse job action and his protected activity. No evidence has been introduced to establish that Mr. Miller, Mr. Burns, nor any of the persons involved in Complainant's discharge had knowledge of his alleged protected activity. The inference that Mr. Burns, through his examination of the computer records, may have discovered Complainant's input of an item marked for "store use," contrary to Mr. Burn's instructions, is not affirmative evidence to establish knowledge. Complainant alleges only that Respondent's stated

reason for discharge was a pretext for the job action. However, Complainant's allegations must be supported by evidence to raise the factual issue.

I find that the work demanded of Complainant was insufficient to constitute an adverse job action. While working in the heat and without a break is certainly not desirable, Complainant neither complained of the tasks at the time nor did he suffer continuing adverse consequences. There is no showing that it reflected adversely upon his performance, nor resulted in a reprimand or other job consequence. Therefore, I find it insufficient to support a finding that Complainant suffered an adverse job action because of these factors.

Consequently, I find there are no disputed material facts that Complainant has failed to establish a **prima facie** case in that he did not establish sufficient circumstances existed to infer that his alleged protected activity was a likely contributing factor in any adverse job action.

C. Did Respondent establish that Complainant would have suffered the same adverse job action absent the alleged protected activity?

Respondent argues that Complainant's conduct regarding the vendor representative was the sole reason for Complainant's discharge, and that he would have experienced the same consequence regardless of the alleged protected activity. Complainant contends, again, that this is a factual issue and calls for determination by the finder of fact.

Complainant does not deny the incident in which the vendor representative's groin was impacted, although the circumstances and gravity of the conduct are disputed. Complainant also testified that the vendor representative refused to speak with him thereafter. Respondent introduced evidence that other employees have been discharged for conduct reasons. Given Respondent's written policy, discharge under these circumstances was not unreasonable or disparate. Complainant has offered no evidence that there are disputed material facts related to Respondent's job action or disparity in its application. As stated above, Complainant has not introduced evidence to support a finding that the management employees and vendor representative involved in Complainant's discharge had knowledge of his alleged protected activity.

Accordingly, I find that Respondent has established that Complainant would have been discharged for a legitimate business reason absent the alleged protected conduct.

CONCLUSION

In light of the evidence presented and based on the foregoing, and construing all facts in the light most favorable to Complainant, I find that there are no disputed material facts that Complainant failed to offer any affirmative evidence that he engaged in activities protected under the SOX Act, and that Respondent has established Complainant would have experienced the same adverse job action of discharge absent the alleged protected conduct. Accordingly, Respondent is entitled to summary decision as a matter of law.

Accordingly,

IT IS HEREBY RECOMMENDED that Respondents' Motion for Summary Decision be, and it is, **GRANTED.**

IT IS FURTHER HEREBY ORDERED that the formal hearing scheduled for August 20, 2007, be **CANCELLED.**

ORDERED this 10th day of July, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

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