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Issue Date: 29 February 2008

CASE NO.: 2006-SOX-00074

In the Matter of

ANDRÉ RYERSON
Complainant

v.

AMERICAN EXPRESS FINANCIAL SERVICES, INC.
Respondent

André Ryerson, Amherst, Massachusetts,
Pro se

Julie Fleming-Wolfe, St. Paul, Minnesota,
For the Respondent

Before: Daniel F. Sutton, Administrative Law Judge

DECISION AND ORDER

This case arises out of a complaint of discrimination filed by André Ryerson (“Ryerson” or “Complainant”) against American Express Financial Services, Inc. (“AEFS”) under the Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (West 2004) (hereinafter “Section 806” or the “Act”). Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. 780(d), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. The Secretary of Labor has issued implementing regulations which are found at 29 C.F.R. Part 1980 (2005).

I. Procedural History

On June 6, 2006, Ryerson filed a complaint with the U.S. Department of Labor Occupational Safety and Health Administration (“OSHA”) alleging he had been subjected to retaliatory harassment by his supervisors at AEFS after internally reporting behavior by AEFS which he believed to be in violation the Act. *See* Administrative Law Judge Exhibit (“ALJX”) 1.¹ On August 24, 2004, the Regional Administrator for OSHA, acting as an agent for the Secretary of Labor, sent a letter addressed to Ryerson which dismissed his complaint based on the Secretary’s findings that there was no merit to his allegation that AEFS violated Section 806. *Id.* By letter dated April 20, 2006, which was faxed to the Office of Administrative Law Judges (“OALJ”), Ryerson appealed the Regional Administrator’s determination, stating that he had not received the August 24, 2004 letter until March 25, 2006. *See* ALJX 2. A hearing was initially scheduled to convene on June 21, 2006 but was continued on AEFS’s motion to allow for filing and ruling on a motion for summary decision. *See* ALJX 6. On July 11, 2006, this administrative law judge (“ALJ”) issued an order denying AEFS’s motion for summary decision. *See* ALJX 9.

On October 10 and 11, 2006, Ryerson filed Motions to Compel Production and Answers. *See* ALJX 17, ALJX 18. The Respondent’s objection was filed on October 16, 2006. *See* ALJX 20. On October 30, 2006, this ALJ issued an order granting in part and denying in part Ryerson’s motions. *See* ALJX 22. By order issued on December 7, 2006, a protective order submitted by the parties was approved and adopted. *See* ALJX 26. On January 5, 2007, the parties requested mediation via a settlement judge. *See* ALJX 34. This ultimately proved to be unsuccessful, and settlement proceedings were terminated on January 10, 2007. *See* ALJX 41. A hearing in this matter was conducted before the undersigned Administrative Law Judge over the course of six days: January 16 – 19, 2007 and January 31 and February 1, 2007. On April 9, 2007, Ryerson filed his post-hearing brief (“Comp. Br.”), and AEFS’s post-hearing brief (“Resp. Br.”) was filed on April 12, 2007. The record is now closed.

II. Statement of the Case and Issues Presented

Ryerson alleges that he was constructively terminated as the result of having engaged in protected activity by (1) reporting what he reasonably believed to be misleading and fraudulent statements contained in Form 118, a disclosure form which must be signed by clients who purchase mutual funds through AEFS, and (2) disclosing a policy by local AEFS management of requiring financial advisors to exclusively recommend AEFS investment products to clients. Comp. Br. at 4, 5; HT at 63-65, 284-285; RX1 at 3. Ryerson further alleges that he was subjected to retaliatory harassment by being: (1) made to rewrite valid and delivered financial plans; (2) encouraged (forced) to sell proprietary AEFS products even where other products may be better suited to the client’s goals /needs; (3) subjected to heightened supervision; (4) denied access to a computer; and (5) issued several warning letters prior to what he alleges was his constructive termination. HT at 9-10, 19, 22-26, 36-40.

¹ Exhibits in the record are referenced herein as follows: Complainant’s Exhibits (“CX”); Respondent’s Exhibits (“RX”); Joint Exhibits (“JX”) and ALJ Exhibits (“ALJX”). The Hearing Transcript, totaling 1,438 pages, is referenced as (“HT”).

Ryerson's complaint and AEFS's defense raises multiple issues which may be broadly summarized as follows: (1) whether Ryerson has proved that AEFS discriminated against him in violation of Section 806 by terminating his employment on July 6, 2004 and / or by taking other actions which Ryerson alleges to be retaliatory; and (2) whether AEFS has proffered legitimate, non-discriminatory reasons for the alleged discriminatory employment actions.

III. Findings of Fact

Ryerson, who was 68 years old at the time of the hearing, has an impressive background of academic accomplishment. After graduating from McGill in 1963 with honours, he received a Woodrow Wilson scholarship for graduate studies in French language and literature at Yale where he was awarded a Ph.D. in 1968. HT at 1005. He was on the faculty of Amherst College from 1968 to 1975 and then worked as an editor and writer under contract with the U.S. Department of Education. *Id.* He has published articles on a diverse range of subjects in several well-known publications. Along with his wife who is a technical writer, he also operated a business that provided training on effective writing to business executives and managers. *Id.*

In 1993, Ryerson made a significant career shift when he went to work for American Express, AEFS's parent, as a financial advisor. *Id.* at 1005-1006. He passed the Series 7 General Securities Representative licensure examination as well as examinations that qualified him to handle property and casualty insurance. *Id.* at 1006. He left American Express in the fall of 1995 and went to work for another investment firm, Amherst Financial Services, as a financial planner. *Id.* at 1006. He testified that the failure or discontinuation of the company's prospective client lead system was a "significant reason" behind his decision to leave American Express in 1995. *Id.* at 1256.

In February of 2001, Ryerson was appointed as a financial advisor in the Holyoke, Massachusetts office of AEFS. HT at 1008. Ryerson was brought in as a Platform One ("P1") advisor which meant that he was an AEFS employee with benefits and expenses covered by AEFS. *Id.* at 90; 440-441.² Upon his return to AEFS in 2001 many of his initial clients were assigned to him via the AEFS client assignment policy which was utilized to reassign existing clients after their initial advisor had left the company. *Id.* at 1258. Ryerson believed that his experience working in the financial services industry for several years established him as one of the "most experienced people in the office" when he was hired by AEFS in 2001. *Id.* at 1007.

At AEFS, Ryerson ultimately reported to Field Vice President ("FVP") Stephen Micelotta who described himself as the "commander in chief" of the Holyoke office. HT at 706-707. As the FVP, Micelotta was responsible for recruiting, hiring, training, coaching and assisting advisors in the Holyoke office. *Id.* at 707-708. Micelotta also served as the Registered Principle ("RP") in the Holyoke office which made him "directly responsible for compliance

² As will be discussed in greater detail below, AEFS also has Platform Two ("P2") advisors who are essentially independent franchisees who receive no benefits and are responsible for covering their own operating expenses. HT at 90.

supervision.” *Id.* at 708.³ In this capacity, Micelotta conducted “annual inspection[s] or compliance review[s]” to ensure his advisors were following appropriate practices while serving the client’s best interest. *Id.* at 734.

A. Conflicts with the FVP and Concerns over “Proprietary” Investment Products

After returning to AEFS in February of 2001, Ryerson underwent a period of training and was placed in an office with another new financial advisor, Brian Costello. HT at 1006-1007. Costello has previously worked for several years as a financial advisor with another firm, and Ryerson testified that they both had more experience than Micelotta. *Id.* Ryerson soon observed what he considered to be a potential “personality conflict” between Costello and Micelotta, and he sent an email to Patrick O’Connell, an AEFS Group Vice President (“GVP”) and Micelotta’s supervisor, suggesting that it would be in AEFS’s best interests if Costello were given more room in which to operate. *Id.* at 1008-1009.⁴ Ryerson became increasingly unhappy with Micelotta’s management style, explaining that he was “a little bothered by the fact that he [Micelotta] gave no recognition to the fact that I had a lot of experience, seven years in the industry in two different establishments . . . essentially, he was going to go through the training regime with me and Mr. Costello exactly as for brand new entrants into the office.” *Id.* at 1008. Ryerson also chafed at Micelotta’s insistence that new advisors use American Express investment products instead of non-proprietary products:

[T]he point at which this became extremely bothersome to me was this practice presumably to help new advisors get a hand, learn the ropes, so to speak, of using only American Express mutual funds for that category of investments. Most of the other categories, it should be pointed out -- and there were no choices offered us, there were no other annuities, except American Express, no other insurance, except the house brand. But in mutual funds, there was a choice.

Id. at 1008-1009. Ryerson called Costello as a witness, and he confirmed Ryerson’s testimony about his conflicts with Micelotta and irritation over Micelotta’s management style. *Id.* at 865-868. Two other witnesses called by Ryerson, Linda Adams, a certified financial planner who worked in the Holyoke office between 1993 and 2001, and John Harrington, who shared an office with Ryerson in Holyoke, echoed these observations about Micelotta. *Id.* at 811 (describing Micelotta as “emotionally abusive and derogatory” towards the new advisors); 830 (referring to Micelotta’s “tough management style”).

However, Costello viewed Micelotta’s insistence on new advisors using proprietary investment products to be reasonable and even necessary to the proper training and ultimate success of the advisor. In this regard, he testified that Micelotta’s policy on new advisors using proprietary products was a valid educational tool which did not shortchange the client, explaining,

³ A Registered Principal must pass an examination and is licensed by the National Association of Securities Dealers. HT at 786.

⁴ The e-mail is not in the record.

It's like taking a college student off the street and saying, "You're a financial advisor." Well, they're not. And therefore, the only products that we can really teach are our own. So the employee P1 system proponents the proprietary products as a teaching mechanism. I agree with that wholeheartedly because I can't see a one or two year advisor fresh out of college understanding the portfolio breakdown of stocks, bonds, preferreds, instruments, ETF's, managed accounts, managed funds. I can go on and on. The proprietary products provide top level management to a brand new advisor and it's absolutely necessary for their success.

Id. at 870-871. Costello also said that AEFS's investment products are "top notch and certainly got the clients to their goals," adding that advisors were "never forced to put a sub par product in front of our client." *Id.* at 869. Costello also disagreed with Ryerson's belief that P1 advisors were discouraged from recommending SPS investment products because they were not proprietary, but rather because SPS investments did not work well for new advisors due to the way commissions were paid. *Id.* at 861-862.

AEFS's witnesses denied that there was any policy or practice of restricting investment products to house brands. GVP O'Connell acknowledged that "a small portion of compensation was determined on proprietary versus non-proprietary sales" but added that financial advisors were directed to use the entire company portfolio to find the product that best fit the client's investment style, factoring in such variables as risk tolerance and client goals. *Id.* at 336-337, 307. Erica D'Atri, an AEFS field compliance / field risk officer, testified that she is "very strict" in informing advisors of their "duty and obligation" to sell that product which best suited the client, regardless of whether it was proprietary or not. *Id.* at 150. D'Atri asserted that "it was not the policy" of AEFS to favor the sale of proprietary funds over funds of AEFS competitors. *Id.* at 43. She further stated that "if the non-proprietary product is suitable, that's what needs to be recommended to the client." *Id.* at 68. D'Atri also testified that she didn't recall receiving any complaints of advisors being pushed to sell proprietary over non-proprietary funds. *Id.* at 70. She stated that she was aware that the Holyoke office had a higher percentage of proprietary funds being sold than other offices but added that it is not impermissible for financial advisors to push proprietary funds in circumstances where the proprietary and non-proprietary products were similar. *Id.* at 170.

I find Costello to be a particularly candid and credible witness and fully credit his testimony regarding Micelotta's policy with respect to new advisors using proprietary investment products. Therefore, I find that new financial advisors in the Holyoke office were instructed to recommend proprietary or house brand investment products, at least where the proprietary product was comparable to a non-proprietary alternative. While this apparently bothered Ryerson, there is no evidence that he ever raised concerns over this practice with AEFS managers prior to March 16, 2004 when he complained in an e-mail to O'Connell that Micelotta's "repeated efforts to stop me from using non-proprietary products placed AEFS "in a position of legal jeopardy." RX 15; Comp. Br. at 22-23. The March 16, 2004 email is discussed in greater detail below.

B. Change in the Requirements for Transfer from P1 to P2 Status

O'Connell testified that the requirements for becoming an independent P2 AEFS advisor when he was hired in February of 2001 was \$120,000.00 in GDC and 40 client plans. HT at 440. *See also* RX 28. In October of 2001, AEFS changed these requirements to cumulative totals of \$210,000.00 in GDC and 90 client plans. RX 28 at 129. However, the old requirements of \$120,000.00 in GDC and 40 client plans remained in effect for advisors appointed prior to October 3, 2001 provided that they met these requirements as of December 24, 2002. *Id.*

C. Ryerson's Performance as an Financial Advisor in 2001 and 2002

O'Connell testified that AEFS evaluates a financial advisor's productivity based on Gross Dealer Concession ("GDC") and number of financial plans that were done, not assets under management." HT at 274.⁵ Each advisor's GDC PACE⁶ and financial planning PACE is monitored on a bi-weekly basis. *Id.* at 454; RX 49. The rate of new client acquisitions was also used to evaluate AEFS advisors. HT at 245. The advisor's numbers appear on the P1 Advisor Bi-Weekly Minimum Requirements report and are compared to the scheduled / minimum requirements for all advisors at a particular level. RX-49. An advisor's GDC PACE numbers are updated every two weeks to provide a snapshot of the advisor's activity over the most recent 12-month period. HT at 454-455, 459. An advisor's recent performance, therefore, is captured on the reports for a rolling 52-week period, and is measured against minimum requirements established for and applied to P1 financial advisors company-wide. *Id.* at 456-457; RX-49. O'Connell testified that, per national AEFS policy, P1 advisors were expected to meet 100 percent of PACE at the minimum and that any advisor who failed to meet 60 percent of PACE would be subject to a performance management plan and, ultimately, termination in the event the advisor failed to increase productivity to meet the 60 percent of PACE minimum. *Id.* at 415-416. O'Connell further testified that GDC numbers are primarily driven by an advisor scheduling appointments, acquiring clients and submitting financial plans. *Id.* at 420. Because an advisor's GDC PACE is constantly updated on a rolling 52-week basis, AEFS's evaluation of a financial advisor's performance in the area of productivity essentially is a case of "what have you done for me lately?" In other words, GDC earned more than 52 weeks ago no longer counts toward an advisor's productivity. *Id.* at 457. Ryerson managed to stay above the 60 percent PACE minimum, and at times was near or above 100 percent, until 2004. RX 49; HT at 455-458. While Ryerson does question the fairness of this system, he does not challenge that it was in fact the measure that AEFS used to assess financial advisor productivity or that it was applied in his case in the same way as with any other P1 advisor.

Upon his return to AEFS, Ryerson felt that his prior experience as a financial planner put him ahead of the learning curve which new financial planners typically experience. HT at 1007.

⁵ O'Connell testified GDC was specifically used because "assets under management can be a very misleading indicator of success or failure in the business." HT at 412.

⁶ O'Connell testified that GDC PACE tracks an advisor's productivity over the preceding 12 month period, and thus measures advisor performance across AEFS. Any GDC or financial plans attributable to an advisor remain on the report for 12 months, before falling off. Reports are generated and provided to advisors on a bi-weekly basis. HT at 455-459. This is used, in part, to ensure an advisor brings in a constant, steady stream of business to maintain corporate minimum expectations.

He conceded performance weakness in the areas of setting appointments and acquiring new clients and acknowledged that Micelotta “may have” criticized his performance these areas, but he maintained that any deficiencies did not “interfere with my making the company money” and that he was allowed to operate with minimal supervision during 2001. *Id.* at 1027-1028.

After two or three instances in which a supervisor sat in with him on client sales meetings, Ryerson believed that he was no longer required to conduct sales meetings with a supervisor in attendance. HT at 1020. However, in late 2001 or early 2002, Micelotta reviewed a transaction that Ryerson had completed for a client and reproached Ryerson for not consulting with him first before selling non-proprietary funds:

He had no complaint about the quality of the product, whatever. He had no complaint about the suitability of the product, whatever. His complaint was that I was not following what I understood to be a beginning advisor's obligation to consult with Mr. Micelotta about sales. In this case, there was no reason to consult with him about it. The only company requirements for a nonproprietary sale, I believe was over a quarter of a million dollars. And that condition did not apply. At any rate, I saw this as a form of interference. And I knew, I mean it was office knowledge that, and to some degree it was part of his morning presentations as to why we should be loyal, as he put it, to the company. And I was going off the reservation, you might say.

Id. at 1020-1021. Micelotta informed Ryerson that he had included too many non-proprietary products in his plans, that he had not been complying with the “beginning advisor’s obligation to consult with Mr. Micelotta about sales” and that he had consequently been placed under “heightened compliance supervision.” *Id.* at 1021-1022.

Ryerson was again reproached by Micelotta on June 6, 2002 when he admittedly failed to notify a manager on at least one occasion that he was holding a client meeting. CX 18. This resulted in the issuance of a written confirmation of a “verbal warning” on June 19, 2002 by Ryerson’s immediate supervisor, Matt Smith, who was then the District Manager for the Holyoke office. *Id.* The warning memorandum advised Ryerson that his failure to comply with the management notification requirement in the future “will result in further disciplinary action, including written warnings or termination.” *Id.* Ryerson considered the requirement that he be accompanied by a supervisor in sales meetings with clients to be a “humiliation.” *Id.* at 1019. However, he agreed, when questioned under cross-examination, that there was nothing illegal about Micelotta’s policy that he consult before offering a non-proprietary product to a client. *Id.* at 1326.

As the Registered Principle in the Holyoke office, Micelotta is responsible for insuring regulatory compliance by the financial advisors working under his supervision. HT at 170. Pursuant to this responsibility, Micelotta is required to perform an annual compliance review of at least five, randomly-selected client files for each financial advisor. *Id.* at 735-736. Micelotta conducted Ryerson’s compliance review for the year 2002 on December 17, 2002. *Id.* at 735; RX 3. Micelotta testified that his 2002 compliance review of Ryerson’s client files revealed a “series of gaps” some of which Micelotta described as “very high on the totem pole of risk” and

“egregious.” HT at 171. D’Atri also testified that he identified seven areas which he felt were important to discuss with Ryerson during the review, especially Ryerson’s new client count which showed that he only had 12 new clients with a plan, a figure well below the “minimal requirement of 30 plans.” *Id.* at 739-740. Micelotta’s notes of his compliance interview with Ryerson on December 17, 2002 reflect that Micelotta referenced Ryerson’s acquisition of 12 new clients as an “area of opportunity” and that Ryerson agreed during the interview to a plan to acquire 30 clients in the next year. RX 3 at 15; HT at 741. In addition to the low client count, Micelotta’s 2002 review of Ryerson’s client files revealed a life insurance policy dated November 4, 2002 which was, by then six weeks old and still had not been delivered to the client. HT at 742; RX 4 at 22. Other “gaps” that Micelotta found during his 2002 review included “signed applications [that were] not filled in,” client files which were missing tax returns and other undelivered insurance policies which, Micelotta noted, was “now becoming habitual.” HT at 743-745; RX 4 at 25. Micelotta testified that due to the nature of the gaps in Ryerson’s client files, he consulted with Erika D’Atri, AEFS’s field risk manager, on how best to proceed, and the review was then completed on December 23, 2002. *Id.* at 745-746; RX 4 at 14.⁷ Following Micelotta’s review, a summary letter was sent to Ryerson identifying the gaps that were discovered and outlining corrective actions that Ryerson needed to take. RX 4. This summary memorandum stated that Ryerson was to be commended on two items (“1. All clients are Financial Planning clients. 2. Strong belief the clients should close Risk management GAPS before saving for goals.”). *Id.* at 55. The summary memorandum then outlined four specific “Opportunities for Improvement” which involved two undelivered insurance policies and incomplete or missing documentation in other plans. *Id.* at 55-56. However, the summary memorandum makes no mention of Ryerson’s low client acquisition rate. *Id.* As a result of the 2002 evaluation, Ryerson was again placed under heightened compliance review. HT at 195; 611-612.⁸

Ryerson followed-up on the actions that Micelotta directed him to take in the December 17, 2002 summary memorandum, and he reported on the steps that he had taken in a February 21, 2003 memorandum to Micelotta. RX 5. In this memorandum, Ryerson concluded, “I now realize the gravity of failing to deliver insurance policies to clients in a timely way, and I will see to it that such delivery will occur in the way it should.” *Id.* at 57.

⁷ D’Atri testified that she was responsible for providing compliance guidance and direction to AEFS Registered Principals. HT at 88. In this role, D’Atri visited AEFS offices in her geographic area roughly once a year to conduct annual assessments and occasional spot checks of the Registered Principals’ supervisory work. *Id.* at 147. D’Atri characterized Micelotta as “stringent” and “very diligent about . . . following the rules.” *Id.* at 155, 170. D’Atri also testified that Micelotta’s compliance interviews were “some of the best that I had seen in terms of notes and identifying issues and following up.” *Id.* at 170. She concurred with Micelotta’s assessment that Ryerson’s 2002 compliance review identified gaps involving “several undelivered life insurance policies.” *Id.* at 198.

⁸ Heightened compliance review is a standard AEFS measure which, according to D’Atri, meant that “in addition to a normal review of transactions . . . we were just going to look a little deeper.” HT at 172. As discussed above, Ryerson was placed under heightened compliance earlier in 2002 as a result of his failure to have a supervisor present when meeting with a client to discuss an investment plan. It is unclear from the record whether Ryerson was ever removed from heightened compliance supervision at anytime during 2002.

D. Ryerson's Concerns with Mutual Fund Investment Choices and Form F-118

Sometime after his return to AEFS in February of 2001, Ryerson came to question the manner in which AEFS "presented the choice of choosing an "A" share or a "B" share to a client considering investment in a mutual fund." HT at 1010.⁹ Specifically, he was concerned that "A shares were presented as being a better deal long-term even though clients did not like paying a front load." *Id.* at 1011. He testified that he brought this subject up during a training session in 2001 and recalled that Micelotta may have responded that he would discuss the matter later but never did. *Id.* at 1009. In any event, he did not pursue his concerns at that time. *Id.*

One year later, in the spring of 2002, Ryerson decided to raise the matter of mutual fund shares with Micelotta again, but this time privately as he had learned that it was better not to raise questions with Micelotta in a public forum. HT at 1009-1010; 629. At this time, Ryerson told Micelotta that he had researched the matter and could demonstrate that in many cases, a client "would not do better long-term buying the more expensive up front A shares . . . especially if he bought less than \$50,000.00." *Id.* at 1010-1011. It was Ryerson's view that, depending on the client's situation, B shares could constitute a better investment for certain clients, as opposed to what AEFS's Mutual Fund Disclosure Form appeared to indicate. *Id.* at 1011-1012. After this conversation, Ryerson submitted a memorandum dated May 10, 2002 to Micelotta with several pages representing his research on the "A" versus "B" shares issue. *Id.* at 1011-1016; CX 29. According to Ryerson, Micelotta was almost complimentary when presented with this information:

He was not at all unhappy about anything. And at one point in this process, my providing him this information, he said, "Well, this is interesting." He used the word "interesting." I clearly recollect that. And either then or at another point when we were meeting over this, he said -- and it might've followed the remark, "This is interesting," I think I might have you teach a class about this."

Id. at 1017. Ryerson was not interested in teaching a class, and he decided not to pursue the matter further at that time:

And I made no response. Essentially in the back of my mind I was thinking I really am not especially interested in your letting me teach a class on this. I'm interested in your passing this material up the ladder where somebody will pay attention to it and see that there is a problem with the advertising literature of American Express.

JUDGE SUTTON: Did you say that to him? Or, was that your thought?

⁹ Investors purchasing mutual funds can elect to purchase A, B, or C shares. In order to purchase A shares, investors pay a percentage (usually 5% - 6%) of their investment as a "front load" payment, thus diminishing the actual investment by that percentage. Investors who purchase B shares pay no front end load, but are penalized should they elect to withdraw / liquidate their investment within the first five years. After five years, there is no penalty for withdrawal from B share mutual funds. *See* RX 6.

THE WITNESS: No, that was my thought. I did not pursue the matter. I was already at that time on tentative grounds with Mr. Micelotta, as the [June 19, 2002 verbal warning] letter from Matt Smith, which is I believe accepted into evidence, shows. Mr. Micelotta, that was in 2002, he was then bearing down on me and making me present all of my sales and having a manager. I had to go get a manager to be present when sales or discussions with a client were conducted in the office.

Id. at 1017-1018. As mentioned above, Ryerson by this time had been placed under heightened compliance supervision and was directed to have a supervisor present when he met with clients to discuss investment plans.

In the fall of 2003, Erica D'Atri, the field compliance / risk official, gave a presentation, which Ryerson attended along with all AEFS advisors in the area, where she emphasized the necessity of advisors using a standard AEFS Mutual Fund Disclosure Form F-118. *Id.* at 1030-1031. The F-118 form is a standard disclosure form designed to provide clients with knowledge of an advisor's duties and obligations which is shown to prospective clients "as part of the compliance" requirements. HT at 159-160, 728. In 2003, the relevant portion of the F-118 describing sales charges on "A" shares, read as follows:

Front-End Load – These share classes typically apply a front end sales charge. When you buy shares with a front end sale charge, a portion of the dollars you contribute is not invested. Generally, you will receive a reduction in the front end sales charge if you make a large purchase, already hold other mutual funds offered by the same fund family or commit to regularly purchase the mutual fund's shares.

RX 1 at 4I. Ryerson did not raise any questions regarding the F-118 at the meeting with D'Atri, but he formed the opinion after reading the form closely that the form's language was "misleading" and "enormously objectionable" in its comparison of "A" versus "B" shares. HT at 1033, 1312-1313.

The F-118 form was developed in response to concerns expressed by the National Association of Securities Dealers ("NASD") that advisors were recommending investment in "B" shares, even though such investments were not suitable for clients, because the advisors typically received greater compensation on sales of "B" shares versus "A" shares. HT at 158-159. Ryerson acknowledged under cross-examination that the above-quoted language in the F-118 regarding "front end loads" which he found objectionable is identical to language contained in a NASD "Investor Alert" entitled "Understanding Mutual Fund Classes" which was updated on January 14, 2003 and introduced in evidence as RX 6. HT at 1311-1312.¹⁰

¹⁰ AEFS argues that Ryerson's conduct in complaining about the F-118 is not protected by Section 806 because he lacked a reasonable belief that the form's language was false or fraudulent. AEFS Br. at 8. In making this argument, AEFS somewhat mischaracterizes Ryerson's testimony as establishing that he "knew that the NASD had issued investor alerts regarding this issue, and that the language in the Form 118 was identical to that in the NASD alerts." AEFS Br. at 8 (citing pages 1310-1312 of the transcript). Ryerson actually testified that he did not recall

E. Ryerson's Performance as a Financial Advisor in 2003

Micelotta completed an annual evaluation of Ryerson's 2003 performance on November 19, 2003 and met with Ryerson that day to discuss the evaluation. RX 9. Regarding Ryerson's productivity during 2003, Micelotta noted that his total earnings (\$23,940.00) were up 20 percent from 2002 but still showed room for improvement, and he pointed out that Ryerson's plan sales were "very low." *Id.* at 71. Micelotta stated that Ryerson acknowledged that his plan sales were very low and that he was open to feedback, coaching and mentoring to achieve his goal of bringing in 25 new planning clients for 2004. *Id.* at 71-72. The evaluation also contained Micelotta's review of six client files. *Id.* at 81-84. Micelotta identified deficiencies or "gaps" requiring corrective action in three files but no problems in the other three files. *Id.* at 81-82, 89; RX 10 at 94. Ryerson advised Micelotta by memorandum dated November 28, 2003 that he had taken the requested corrective actions, and Micelotta approved the corrections on December 31, 2003. RX 11. *See also* RX 9 at 89. In addition to the corrective actions necessary to close gaps identified in his review of the client files, Micelotta confirmed in a November 24, 2003 memorandum which summarized his November 19, 2003 compliance interview with Ryerson, that Ryerson had agreed to work with him on "developing a program that will provide you with the necessary mentorship along with market group training programs that will allow you to increase client acquisition." RX 10 at 94; HT at 757. Ryerson advised Micelotta that he had completed the requested corrective actions in a memorandum dated November 28, 2003, and Micelotta acknowledged the corrections in notations that he added to the annual evaluation on December 31, 2003. RX 11; RX 9 at 89.

seeing the January 14, 2003 Investor Alert prior to the document being identified as an exhibit, though he did readily agree that the language that he objected to in the F-118 form tracked language in the Investor Alert:

Q. Okay. Can you take a look at [RX] 6, just so I can ask you something about it?

A. Okay.

Q. Do you remember seeing this particular alert on or about January of 2003?

A. I do not recollect. This is clear in my mind above all because it was entered into evidence. It was then that I started reading this with great care.

Q. So you don't remember whether you saw it or not back when it was issued in January of '03?

A. That's correct.

Q. In fact, if you look under the paragraph at the bottom of the page, if you buy Class A shares, you see exactly the same language as is in the mutual fund disclosure form, don't you?

A. Yes.

Q. And in fact, on the next page, RX 59, the language describing B shares, RX 59 --

A. Yes.

Q. -- this is essentially, those three paragraphs are essentially the same language that you objected to in your 12/18 memorandum to Mr. Micelotta. Isn't that right?

A. That certainly is true.

HT at 1311-1312. Ryerson's acknowledgement on the witness stand in 2007 that the F-118 used language taken from the NASD alert does not establish that he was aware that NASD was the source of the Front-End load language in the F-118 when he complained about the language in December of 2003 and March of 2004.

Ryerson's chronic low sales and client acquisition placed him substantially behind his peer group. As of the year ending on December 31, 2003, Ryerson had acquired only five new clients, in comparison to a peer group average of 21 new clients, placing him 76 percent behind his peers' average. HT at 521. His sales during this same period were at 82 percent of GDC PACE, compared to a peer group average of 113 percent, and his financial plan PACE was 88 percent behind the average for his peers. *Id.* at 520.

F. Ryerson's December 19, 2003 Meeting with Micelotta

Following the meeting where D'Atri stressed the necessity of using the F-118 form with clients, Ryerson drafted a handwritten memorandum on December 18, 2003 which he left in Micelotta's mail box early on the morning of December 19, 2003. HT at 1034, 513; CX 40-A.¹¹ In this memorandum, Ryerson outlined his concerns with the F-118 and asserted the disclosure language contained "FALSE statements" and was "generally misleading, by looking for all the advantages of A shares only." CX 40-A. He also marked-up the F-118 form by highlighting language that he considered false or misleading. RX 1 at 4I-4J.¹² Ryerson also stated that he was not comfortable requiring his clients to sign the form which he believed was "misleading, and worse, contains outright falsehoods." *Id.*

Shortly after dropping of his memorandum, Ryerson was called down to Micelotta's office. *Id.* at 1034. Only the two men were present, and the door to Micelotta's office was closed during the ensuing meeting. *Id.* at 1034-1035. Micelotta began by saying that he had read Ryerson's memorandum, and he attempted to explain why he thought that Ryerson was wrong in his interpretation that certain statements were false and misleading. *Id.* Ryerson was unconvinced: "[A]ll I can recollect, and this I recollect very clearly, his explanation made absolutely no sense, whatever." *Id.* at 1035. Ryerson told Micelotta, "What you're saying, Steve, does not make sense." *Id.* Micelotta then responded,

If you leave this in my hands, I'm obligated to send this up the line to Erika D'Atri. If I do that, I am going to make you rewrite all your plans. I'm going to

¹¹ While CX-40A is dated December 18, 2003, RX-12 appears to be dated December 10, 2003. Ryerson testified that the memo was written on December 18, and the date on CX-40A was partially cut off due to the way it was photocopied. HT at 1034. Thus, there is no dispute that the memorandum is dated December 18, 2003.

¹² Ryerson provided the following critique of the F-118 on the bottom of the form's second page:

The most serious problem with this form we are compelled to have our clients sign is that some of its assertions are FALSE. As a whole it is also misleading – where small investors are concerned, because with A shares, if they have to withdraw early due to emergency needs, their risk of loss in years 2 though 4 is decidedly greater than with B shares. The Thomson illustration software in head-to-head comparisons of A and B shares in a given fund (as I showed you about a year-and-a-half ago) often shows that in a \$40,000 investment, the B shares often OUTPERFORM A shares even long-term. None of this is revealed here, nor is it revealed in the official prospectus, which I could show you to be similarly misleading. The official American Express training for advisors holds that A shares are always less costly than B shares. Not true.

RX 1 at 4J (underlining and emphasis capitalization in original).

have you attend -- have me or another manager attend your every appointment. You're going to have to get preapproved every sale, every proposal for a sale." He may have said that I would have to go down with the new advisors to Hartford. Or, he may have said that later. But at some point, he did say that, whether it was in that meeting or not. And so, and then that did not go on much longer. But he did emphatically say, "I'm going to make you rewrite all your plans and you're going to have to come to me for every sale and every proposed sale." And there may have been more. And then he asked me what I wanted to do.

Id. at 1036-1038.¹³ Ryerson responded that he felt that Micelotta had given him no choice, so he took the December 18, 2003 memorandum back. *Id.* at 1037, 1048. He explained his decision to not pursue the F-118 matter further as follows:

I knew in the aftermath of the events of December 19th that I was in a very awkward situation, and I fully believed that the form was illegal and violated state laws against consumer fraud and it violated the Investment Acts of '33 and '34. But I did not know what I could do about it since essentially my livelihood, supporting my family was on the table. And so I could not in conscience ask people to sign this form. And yet, it would be the only way I could sell a mutual fund, if that were the business on the table. At any rate, the short of it is this is an inhibiting factor in the back of my mind in addition to the situation that I had a supervisor over me who was threatening in one form or another, in one way, the 19th of December, in a somewhat different way in late January, threatening to put me out of work and have me lose the investment I'd put into the business in the course of, by then, ten years.

Id. at 1047. Ryerson testified that prior to the December 19, 2003 meeting, he had never been directed to rewrite any of his financial plans. *Id.* at 1039.

¹³ I have relied on Ryerson's account of this meeting over the conflicting version related by Micelotta who denied making any threat to have Ryerson rewrite plans or attend training if he did not take back his December 18, 2003 memorandum. Indeed, Micelotta portrayed Ryerson as agitated at the meeting, "walking around the table and mumbling and screaming" with his hands in the air, while Micelotta tried to get him to relax. HT at 633. He also testified that he told Ryerson that he would be "happy to forward this to Erika D'Atri, if you feel that this is what you want to do." *Id.* at 633-634. Although Ryerson admittedly could not recall every detail of conversations and at times became somewhat confused as to dates, I found him to be a generally forthright and credible witness. On the other hand, Micelotta's demeanor when he was questioned about the December 19, 2003 meeting was telling. He was noticeably uncomfortable and appeared anxious and under great stress when relating his version of what was said. Perhaps Micelotta genuinely felt that he had not threatened Ryerson for disclosing concerns about the F-118 containing fraudulent or misleading statements and that he was only concerned with Ryerson remaining focused on improving his performance and productivity, but this is no more than speculation since Micelotta denied the statements attributed to him. In any event, I am persuaded that Ryerson's account is substantially closer to the truth, and I have credited it.

G. Micelotta's Review of Additional Plans from 2003

Micelotta testified that he reviewed seven of Ryerson's client plans over the course of 2003 per AEFS policy – two in May, two in August and three in December. HT at 668.¹⁴ He further testified that his reviews identified gaps requiring corrective actions by Ryerson. *Id.* at 890-891. While he considered some of these gaps to be minor and only necessitating inclusion of supporting documentation, others were “substantial” and “serious enough to warrant rewriting those sections.” *Id.* at 892-893. Micelotta stated that, in his estimation, such rewrites would typically take less than three hours to complete. *Id.* at 893-894, 904. The seven plans and Micelotta's review notes were admitted as CX 65-71 under a mutually-agreed confidentiality agreement and protective order. *Id.* at 1111. Comparison of these plans with the November 19, 2003 compliance evaluation (RX 9) reflects that they are not the same plans identified in the evaluation as containing gaps requiring corrective action. Micelotta completed a “Follow-Up/Action Plan” for six of the seven plans. The first such action plan is dated 5/15/03 and states that the plan had “missing pages.” CX 65, Vol. II. The second action plan is dated 5/18/03 and is blank. CX 69. The third action plan is dated 6/15/03 and is also blank. CX 66. The fourth of the seven plans indicates that it was reviewed by Micelotta on 8/19/03 and contains a note dated 8/19/03 that “This plan should be redone.” CX 68. The last three action plans are all dated 12/29/03, and all contain the same notation: “Plan is weak. Must redo.” CX 67, Vol. I; CX 70, Vol. II; CX 71. Micelotta testified that he did not discuss his review of these plans with Ryerson until after the first of the year. HT at 905.

H. Increasing Complaints about Ryerson's Performance

Ryerson testified that he was first notified that Micelotta found deficiencies with these additional plans in January or February of 2004 when Micelotta provided him with a list of plans requiring corrective action. HT at 1048, 1050.¹⁵ He further testified that he received the list at one of a series of meetings with Micelotta during which the latter became increasingly critical of his performance. *Id.* at 1051. In these meetings, which Ryerson said started in late January, Micelotta complained that financial advisors such as Ryerson with four years of experience (“LOS 4s”)¹⁶ were not performing up to expectation and that he was spending time on supervising Ryerson that he felt would be better spent on new advisors. *Id.* at 1042-1044. At one of these meetings, Micelotta told Ryerson, “With the time you're costing me, I'd be better off with you gone.” *Id.* at 1044. Ryerson testified that Micelotta's criticism concerned the “key requirement” of GDC, as well as the “expectation” that he would acquire 30 new clients and write 30 new investment plans for the upcoming year, and he said that he acknowledged to Micelotta that “getting new clients and selling lots of plans does not happen to be my strong point” but that he was “prepared to work on this to make those figures go up.” *Id.* at 1045. Micelotta pointed out during these meetings that his GDC was weakening and that his principal

¹⁴ The client plans are formally called “Financial Advisory Proposals.” *See e.g.*, CX 65.

¹⁵ This list was not introduced in evidence. Ryerson testified that he no longer had the list and that it actually named eight plans. HT at 1048.

¹⁶ “LOS” stands for length of service.

concern was with Ryerson's new client acquisition. *Id.* at 1046. However, there was no discussion of the F-118 or Ryerson's concerns with "A" versus "B" shares and proprietary versus non-proprietary investment products. 1046-1047.

Ryerson testified that when he received the list of deficient 2003 plans from Micelotta, he was surprised "because now he was fulfilling a threat that supposedly I had gotten rid of by retracting my memorandum and my comments on Form 118." HT at 1050. He said that he initially "ignored" Micelotta's list:

Initially, I ignored it. I considered the whole thing totally improper, ridiculous, harassment. I just -- I planned other things to occupy me.

Id. at 1051. However, he also described fairly extensive discussions with Micelotta regarding the corrective actions that Micelotta wanted him to undertake on the plans. *Id.* at 1048-1050, 1052-1053. Ryerson testified that he spent roughly an hour and one half per day rewriting the plans in the February to March 2004 time frame but then stopped for a period of time and did not resume any work until sometime after April of 2004 when Micelotta reminded him that the plans had not been completed. *Id.* at 1054, 1075-1076. He further testified that he did not immediately comply with Micelotta's renewed request that he rewrite the plans until Micelotta responded to his complaints about computer access, at which point he resumed spending about one hour per day on revising the plans. *Id.* at 1076-1078. He said that he continued to work on the plans at this pace until sometime in June when he realized that he was facing termination due to his declining GDC PACE. *Id.* at 1079.¹⁷ Ryerson made it clear at the hearing that he viewed Micelotta's request that he do additional work on the plans as part of a campaign of harassment and that Micelotta would never be satisfied with his work. *Id.* at 1075-1076, 1079.

Ryerson's complaints about computer access derived from a policy that O'Connell implemented in 2002 of requiring P1 advisors to share a computer unless they were at or above a specified level of GDC PACE. HT at 435, 437; 833-836, 849. The policy was based on O'Connell's belief that an advisor's need for computer access was minimal and that their time was more productively spent generating leads, setting appointments, acquiring new clients and dealing with their existing clients. *Id.* at 435-436. From 2001 to 2003, Ryerson has access to his own computer, but in 2004 he began sharing an office with John Harrington, another P1 advisor who, like Ryerson, was below the specified GDC PACE for entitlement to a single-user computer. *Id.* at 833-835. Harrington testified that advisors were frustrated by this policy, even to the point that at least one quit, and he added that some advisors were allowed exclusive access to a computer because they were not sharing an office with another advisor due to high turnover in the Holyoke office. *Id.* at 835, 850; 554. In the spring of 2004, frustrated with having to share a computer with Ryerson, Harrington approached Micelotta with a request for increased computer access as he felt that the sharing arrangement negatively impacted his ability to do his job. *Id.* at 838-841. Micelotta acceded to Harrington's request and awarded him exclusive use of the computer during the late afternoon and early evening hours when he made most of his client calls. *Id.* at 839-840. Harrington explained that Micelotta approved this arrangement because he used the computer to log all of his client calls while Ryerson did not regularly use the

¹⁷ The matter of computer access and Ryerson's declining GDC PACE in 2004 are discussed *infra*.

computer to log his calls. *Id.* at 842, 850-851. When Ryerson complained that this arrangement impeded his ability to rewrite plans, Micelotta provided him with access to a computer in an empty office located down the corridor from the office that he shared with Harrington. *Id.* at 842-843, 844-846, 852-853; 555-556; 1077-1078. Comp. Br. at 24. This modified arrangement apparently was less than ideal as Harrington had to answer Ryerson's phone when the latter was on the computer in the vacant office and then yell out Ryerson that he had a call, at which point Ryerson would "jump up and run full speed ... to catch the incoming call." *Id.* at 843.

In early March, two new issues surfaced between Ryerson and Micelotta concerning Ryerson's performance. The first issue concerned a check which Ryerson received from a client ("MT") on March 1, 2004 but did not forward to the corporate office until March 3, 2004 contrary to AEFS policy which required that all checks be forwarded by not later than 12:00 p.m. on the next business day after receipt. HT at 644-645; RX 29 at 137. *See also* RX 13.¹⁸ Micelotta pointed this discrepancy out to Ryerson who acknowledged his error in a memorandum dated March 12, 2004. RX 14. The second issue concerned the same client and was more serious as Micelotta accused Ryerson of inappropriately and prematurely recommending an investment product, known as a "SPS" transaction,¹⁹ using a generic "Ibbotson" chart to support his recommendation and mischaracterizing the client's risk tolerance as "moderately aggressive" to avoid drawing internal scrutiny as to whether the investment exceeded the client's risk parameters. HT at 644-648; 1055-1057; RX 29. Ryerson emphatically denied using a generic chart and explained that Micelotta either misunderstood or deliberately misconstrued his reference to charts, and he denied any impropriety in attempting to "align" a client's risk parameters with what he perceived to be the risk assessment that overseeing AEFS officials assigned to particular investments. HT at 1056-1057; RX 44 at 187.²⁰

I. The March 16, 2004 E-mail

Ryerson testified that he interpreted Micelotta's criticisms of his handling of the MT case as an ominous turn of events which caused him to reconsider his December 19, 2003 decision to withdraw the December 18, 2003 memorandum detailing his concerns with the F-118 language:

And that was what in a sense roused me out of my semi-passive state, not knowing quite how to conduct business any more, what was going on, but clearly under a very dark cloud, to in a sense rebel or to send a second very clear whistle note up the ladder into the organization in as much as now, I believe for the first

¹⁸ It is noted that Costello testified that he too was rebuked by Micelotta for not dealing with checks and contracts within the time frames established by AEFS. HT at 879-882.

¹⁹ SPS, or "Strategic Portfolio Service," constitutes, generally, a "mutual fund / securities platform where hundred of different mutual funds are offered." HT at 279-280. This product provides the client "a broad array of mutual fund choices, access to individual securities, stocks and bonds inside one platform." *Id.* at 280. Clients are charged a flat fee on a monthly basis for this product. *Id.* at 279.

²⁰ Ryerson's denial of using an "Ibbotson" chart to support his investment recommendations to MT is corroborated by a March 6, 2004 "Financial Planning Considerations" package that he prepared for the client. CX 23.

time ever Mr. Micelotta was charging me with offenses, violations of compliance standards that were very meaningful and absolutely hadn't occurred. So I was incensed. I was -- this called for a change of behavior on my part.

HT at 1056. On March 16, 2004, he sent an e-mail to Micelotta, D'Atri and O'Connell containing an undated, three-page "Dear Steve" letter in which he revisited his concerns with the F-118 form's allegedly "*false and misleading*" language and advised that he was serving a very useful function to AEFS as an "*internal whistleblower*." RX 15 at 106 (italics in original). He then accused Micelotta of "trying to drive me out of American Express" by making "my life sufficiently miserable that I'll resign." *Id.* First, Ryerson asserts that he is legally protected as "*the oldest person in the office*" and that Micelotta has "made me a particular target of your dismissive and patronizing manner." *Id.* at 106-107 (italics in original).²¹ Second, Ryerson claimed that Micelotta was harassing him and attempting to "guarantee" his failure by insisting that he "rewrite" seven delivered and accepted plans, set six to nine appointments, make 500 dials and attend meetings designed for first year advisors within a four-day period. *Id.* at 107. Third, Ryerson complained that contrary to Micelotta's suggestion in 2001 that the "rigors of the first year" on the job as a new advisor might be limited to six months, he continued to be "hound[ed] four years later, and he expressed bitterness that AEFS had induced him to come back with "free" client leads that soon dried up and that the requirements for an advisor moving from P1 to were made "*225 percent more difficult*." for an advisor to effectively earn a promotion. *Id.* (italics in original). Ryerson also alleged that Micelotta's "repeated efforts to stop me from using non-proprietary products" has put AEFS "in a position of legal jeopardy." *Id.* The letter concluded with Ryerson stating that he is seeking three things: (1) that he be allowed to report to someone other than Micelotta; (2) that the requirements for P2 when he was hired (\$120,000.00 in GDC and 40 client plans) be honored; and (3) that he be allowed to retain his own computer even though he did not meet company requirements for doing so. *Id.* at 108.

J. AEFS's Response to Ryerson's March 16, 2004 E-mail

O'Connell testified that while he did not believe that Ryerson's March 16, 2004 e-mail contained any complaints of fraudulent or illegal activity, he referred the issues regarding form F-118 to D'Atri, the field risk manager, "to see if in fact, we should clarify the verbiage in the form." HT at 427. O'Connell expected that D'Atri would work with corporate headquarters in addressing the F-118 issues raised by Ryerson. *Id.* at 427-428. O'Connell further testified that he considered Ryerson's complaints about Micelotta to be human resources issues, so he asked Laura McHugh, an AEFS manager of market group operations, to work with the human resources department to address these issues and report her findings to the corporate office. *Id.* at 428-429, 431; 513; RX 26.

On March 18, 2004, Ryerson was asked to participate in a conference call with D'Atri, Micelotta and D'Atri's supervisor, Gloria Spencer, regarding the March 16, 2004 e-mail. HT at

²¹ Ryerson testified that he had no direct evidence that he had been discriminated against on the basis of age, and he explained that he included the age discrimination allegation, in effect, as a bargaining chip that he was prepared to concede in the hope of arriving at some type of settlement with AEFS. HT at 1067-1068. *See also* Comp. Br. at 26-27.

1060. Ryerson testified that he was told D'Atri and Spencer recognized his concerns about the F-118 form, and he was assured that his concerns would be addressed promptly and passed "up the line." *Id.* at 1062-1063. D'Atri confirmed that although she had not considered the language of the F-118 form to be problematic or misleading, her discussion with Ryerson led her to the conclusion that the form's language was "unclear," and she testified that Larson too understood Ryerson's concerns. *Id.* at 139, 163. Ryerson was instructed by either D'Atri or Larson to add his own notes to the F-118 to correct any objectionable language, but he testified that this instruction contradicted AEFS policy which prohibited advisors from altering company forms. *Id.* at 1064.²² The March 18, 2004 conference call was limited to the F-118 form and did not cover Ryerson's allegations that Micelotta had threatened him with retaliation. *Id.* at 1065.

McHugh testified that she conducted an investigation at O'Connell's request into the "human resources issues" raised in Ryerson's March 16, 2004 e-mail. HT at 527, 563. She concluded, through discussions with D'Atri, that Ryerson's complaints regarding the F-118 form had been referred to the appropriate individual with AEFS, Cara Gresson, who was the original author of the form. *Id.* at 565-566. On March 30, 2004, McHugh met with Ryerson and Micelotta. *Id.* at 537; 1066-1067.²³ Based on her inquiries, McHugh concluded that the major issue raised by Ryerson's e-mail was the language of F-118 form. *Id.* at 541. McHugh confirmed the substance of the March 30, 2004 meeting in an e-mail to Ryerson dated April 30, 2004. RX 26; HT at 1069.

After two weeks had passed since March 16, 2004, Ryerson became concerned that his complaint about F-118 disclosure form was not being taken seriously, so he sent two e-mails dated March 29, 2004 and March 31, 2004 to James Cracchiolo, the President of AEFS. HT at 1070; RX 19 and 20. In the first e-mail, Ryerson stated that he was putting Cracchiolo "on notice" that the language of F-118 "opens American Express to charges of consumer fraud ... [and] civil action ... by the Securities and Exchange Commission." RX 19 at 112. Ryerson also asked Cracchiolo for guidance on how to proceed should a situation arise in which he needed to use the existing version of the F-118. *Id.* Ryerson closed this e-mail with quotations from an unidentified article which discusses a case where the SEC reportedly filed a civil securities fraud complaint against corporate officers, and he cautioned that the issues cited in his March 16, 2004 e-mail "would appear to be subject to the above provisions of the SEC's new policy." *Id.* at 112-113. In his second e-mail to Cracchiolo, Ryerson complained that he was in a difficult position because he felt that he could not use the F-118 as currently written which would affect his performance, and he suggested specific corrective language which he noted had previously been provided to McHugh at their March 30, 2004 meeting. RX 20. He also suggested that AEFS retain his services on an hourly basis to review its legal and compliance documents. *Id.* at 115. Ryerson never received any response to either of these e-mails to Cracchiolo. HT at 1070-1071.

²² Larson rescinded the instruction that Ryerson add his own notes to the F-118 on or about March 30, 2004. RX 20 at 114.

²³ McHugh initially scheduled this meeting for March 23, 2004, but this date was canceled because Ryerson first wanted to consult with an attorney. RX 17; HT at 1067.

Within a few days of sending the two e-mails to Cracchiolo, Ryerson was contacted by Carla Gresson, AEFS's manager of compliance policies, who had created the F-118 disclosure form. HT at 1071. Gresson then sent an e-mail on April 15, 2004 to D'Atri, Micelotta, McHugh and Ryerson in which she indicated that, after discussing the F-118 form with Ryerson, she "agreed that it did not make sense" and had amended the form by adopting Ryerson's suggested replacement language so that it "is much more clear and conveys the true meaning." RX 22 at 119. Gresson's e-mail outlined the changes as follows:

The new language reads: Generally, you will receive a reduction in the front-end sales charge if you make a large purchase or if the accumulated investments, or their value, within a single fund family reach a certain level.

The old language read as follows: Generally, you will receive a reduction in the front-end sales charge if you make a large purchase, already hold other mutual funds offered by the same fund family or commit to regularly purchase the mutual fund's shares.

Id. at 119. Ryerson agreed that the form was corrected soon after he discussed the matter with Gresson, but he maintains that Gresson never acknowledged his point that the problem was not with clarity of the language but whether it was truthful. HT 1072-1073.

In her April 30, 2004, e-mail McHugh summarized her March 30, 2004 meeting with Ryerson and Micelotta and set forth her findings. RX 26. She began by stating that it was her understanding that Ryerson's main concern with "A" versus "B" shares surrounded the F-118 form which had been modified per his recommendations. *Id.* at 123. She next addressed Ryerson's concern that he had been labeled as an "analytic" and a "troublemaker" by Micelotta, and she stated that she had addressed this with Micelotta who had agreed to use an appropriate leadership style and accept Ryerson's feedback. *Id.* She then addressed Ryerson's concern that he was considered expendable based on references to his low plan count and the effect that LOS 4 advisors have on a supervisor's pay by advising that AEFS has set a performance requirement of 60 percent GDC PACE and that it was Micelotta's responsibility to help him succeed as an advisor. *Id.* McHugh also discussed Ryerson's allegation of age discrimination, and she defended Micelotta against Ryerson's charge that he operated under a presumption that everything had to be regulated by pointing out that it is Micelotta's responsibility as the Registered Principal to ensure compliance and that his direction that Ryerson rewrite plans was done not to drive him out but to ensure that clients received the best products. *Id.* She added that Ryerson was being "held to the same requirements as the other P1 advisors." *Id.* McHugh also stated that Micelotta's instruction that Ryerson "rewrite 7 plans, attend Tuesday and Friday classes . . . , set 6 to 9 appointments, and make 500 dials" was intended to help Ryerson achieve and maintain his productivity requirements. *Id.* at 123-124. Lastly, McHugh addressed Ryerson's complaints that he was unfairly blocked from transitioning to P2 status by stating that he was being held to the current requirements because the old requirements only applied to

advisors appointed prior to October 3, 2001 who met the criteria of \$120,000.00 in GDC and 40 acquired clients with plans as of December 24, 2002. *Id.* at 124.²⁴

K. Compliance and Performance Warnings

At some point in the Spring of 2004, Ryerson decided that there was no prohibition against him selling a SPS investment product to a client and that he had “nothing to lose” by proceeding to recommend such investments when he felt they were appropriate for a client. HT at 1080. In an e-mail to D’Atri dated May 3, 2004, Micelotta reported that Ryerson had (1) completed a \$60,000.00 SPS transaction on April 20, 2004 without his approval, (2) not completed work on any of the seven plans that he had been directed to redo and (3) failed to timely forward two additional client checks. RX 27. Micelotta stated that he was “very concerned” about Ryerson “conducting business in a compliant manner,” and he requested D’Atri’s advice on what to do. *Id.* Micelotta testified that he considered Ryerson’s second sale of an SPS product without first getting approval as a repeat of the same transgression for which he had been counseled in March and that he decided, after consulting with D’Atri, to issue a written disciplinary action in accordance with his with his practice of providing verbal education in response to a first offense and written discipline for a second. HT at 613, 646-650, 653-654.²⁵

On May 20, 2004, Micelotta issued a “Compliance Written Warning” to Ryerson for failure to follow proper AEFS procedure in handling client funds, improper risk tolerance analysis, the use of inappropriate tools to make investment recommendations and failure to provide proper “deliverables” for the specific transactions undertaken on behalf of clients. RX 29 at 137-138. In this regard, Micelotta quoted from the AEFS Compliance Resource Guide which states that a client profile must be on file for all SPS Advantage clients along with an SPS Advantage application form, an asset allocation analysis prepared for the client, initial and ongoing portfolio recommendations and documentation of client decisions regarding account balance adjustments. *Id.* at 139.²⁶ In addition, the warning letter noted that Ryerson had determined one client’s risk tolerance as “moderately aggressive” in order to avoid compliance oversight in violation of company policy. *Id.* Micelotta then outlined the “FITS” factors (*i.e.*, Financial Circumstances, Investment and Planning Objectives, Tolerance for Risk and Situational Profile) for determining suitability of investments for a client. *Id.* at 138-139. He concluded that Ryerson should work closely with D’Atri and Micelotta to ensure ongoing compliance, submit all future SPS transactions to Micelotta for approval, and conduct proper risk

²⁴ Ryerson satisfied the first criterion under the old P2 requirements because he was hired before October 3, 2001, but he did not meet the second criterion of \$120,000.00 in GDC and 40 acquired clients with plans as of December 24, 2002.

²⁵ It is noted that Ryerson’s witness Brian Costello testified that he had received a verbal reprimand from Micelotta for selling a non-proprietary product prior reviewing the proposed sale with Micelotta. HT at 878-880.

²⁶ Ryerson presented no evidence disputing Micelotta’s charge that he failed to include required ‘deliverables in the MT case and no evidence that Micelotta did not enforce these requirements with other similarly-situated advisors. In a letter dated June 30, 2004, he did challenge some of Micelotta’s charges and accused Micelotta of “twisting the facts” in order to paint a “picture of an advisor recklessly indifferent to his client’s needs and wishes.” RX 44 at 187.

tolerance analysis based on AEFS policy and the “FITS” factors. *Id.* at 139-140. Ryerson signed the warning letter on May 21, 2004. *Id.* at 140.

D’Atri testified that she considered the written compliance warning appropriate because it concerned a second instance of Ryerson failing to gather sufficient information to evaluate suitability. HT at 169, 179-180. She also considered it “incredibly egregious” for Ryerson to state that he had determined a risk tolerance for a client to keep compliance oversight “off his back.” *Id.* at 181. According to D’Atri, determining risk compliance for the purpose of avoiding oversight constituted a violation of company policy. *Id.*

Ryerson called Keith Bixby, a P2 advisor and AEFS Registered Principal from another office in an effort to defend his work in the MT case. Bixby was asked to read the March 6, 2004 Financial Planning Considerations memorandum (CX 23) that Ryerson had prepared for the MT case. HT at 785-786. Bixby testified that he saw nothing problematic in Ryerson’s two-page memorandum but added that he would have to see much more information about the client such as age and financial objectives to provide a judgment on the appropriateness of Ryerson’s recommendations. *Id.* at 788-790.²⁷ Bixby was also asked to review the May 20, 2004 Complinance Written Warning (RX 29), and he agreed that the issues raised by Micelotta regarding Ryerson’s compliance were legitimate areas for a Registered Principal to address. *Id.* at 794.

Ryerson wrote a response to the May 20, 2004 warning but did not send his response until June 30, 2004, the date he resigned from AEFS. RX 44.²⁸ As noted above, he accused Micelotta of “twisting the facts” to place him in an unfavorable light. *Id.* at 187. He also offered the following explanation of his comments regarding his reasons for classifying MT’s risk tolerance as moderately aggressive:

[MT] wanted to invest in ways quite different from what she had done so far, and was very unhappy with the conservative returns her money (an insurance award of \$100,000) was getting at the bank. [MT’s] risk tolerance is moderately aggressive, and since that was the style and tolerance level [MT] wanted me to use in investing her money, I put down *moderately aggressive*. Knowing that [MT] was inexperienced in variable investments, however, I strongly emphasized (as of our first February meeting) that my doing what she wanted would include the possibility of her holdings going down. I added that in her case, in view of her limited equity experience, I would like to use investments heavy in bonds, and that I felt she could do well with such a strategy over time. I showed her how steady the two major investments we would use had performed, a bond fund, and an equity income fund, both from American Century, neither of which have ever

²⁷ This inquiry somewhat missed the point that Ryerson was not criticized and ultimately warned because Micelotta disagreed with his investment recommendations but rather because he had not followed the prescribed steps for supporting his recommendations and consulting with Micelotta first.

²⁸ This letter contains a headnote that it was written on May 20, 2004 but not sent until later based on D’Atri’s recommendation that Ryerson hold off on responding so as to avoid escalation of tensions. RX 44 at 185; HT at 1381-1382.

lost money in two successive calendar years and in combination have never lost money in the same year. In other words, the actual investments would be closer to “moderate” than “moderately aggressive,” which I pointed out to you several times in our meeting. You then asked me why I put down “moderately aggressive.” I said that is what [MT] wanted. I then made a fatal error, dropped my guard (not realizing you were playing the role of prosecutor) and noted that Nicole Reilly’s sense of how risk tolerance categories translate in practice -- in the actual investments advisors choose -- may trigger her claim that the parameters have been violated, even when the choices are perfectly suitable for the client’s portfolio and temperament. In practice, therefore, I try to align the investments I have determined as suitable and that my client wants and needs, with what Nicole Reilly rates such investments to be in terms of risk tolerance. I see nothing wrong with this.

Id. at 187. While offering an exculpatory explanation, Ryerson thus acknowledged the conduct and statements that Micelotta considered to be the most egregious shortcoming in the MT case. Ryerson concluded by reiterating that he had not supported his recommendations with the generic ‘Ibbotson’ chart but rather had referred to a Thomson chart, and he defended his recommendations on SPS investments as appropriate. *Id.* at 187-188.

On May 25, 2004, Micelotta issued a written warning to Ryerson, advising that he had “fallen below the national minimum standard of 60% TOS [Time of Service] GDC Pace.” RX 35. Micelotta noted that Ryerson at that time was “at 55% PACE. Actual TOS GDC \$38,723. Required TOS GDC \$70,000.” *Id.* He further advised Ryerson that he would have one additional service period (*i.e.*, two weeks) to reach 60 percent of PACE or he would “be placed on a final warning for two additional service periods.” *Id.* Ryerson acknowledged receipt of this warning on May 28, 2004. *Id.*

On May 27, 2004, McHugh sent Ryerson an e-mail with the subject heading “Behavior Warning” in response to “recent complaints raised about your behavior.” RX 37 at 167. McHugh wrote that the complaint was based on Ryerson’s actions in contacting a client and “asked pointed questions to determine if [the Client] was coached to request Mr. O’Donnell as his advisor or if he made the decision on his own accord ... [and to] ascertain how [the Client’s] account(s) was ultimately assigned to Mr. O’Donnell.” *Id.* McHugh stated that contacting a client for such purposes was inappropriate, and she stated that this had been discussed with Ryerson in May of 2003. *Id.* Finally, McHugh warned that any “future substantiated inappropriate behavior on your part will lead to further disciplinary action, which could include termination.” *Id.*

Micelotta sent D’Atri an e-mail on June 3, 2004 regarding a meeting Micelotta and Ryerson had with another AEFS client. HT at 184; RX 38. Micelotta’s concerns revolved around Ryerson’s communications regarding investment / sales strategy and recommendations that he was presenting to an elderly client’s son who did not hold a durable power of attorney for his parent. *Id.* at 185. D’Atri testified this was a “possible company violation.” *Id.* at 185, RX 38. D’Atri testified Micelotta was acting appropriately in raising his concerns and suggestions for resolving them. HT at 186. Micelotta also decided to bring Costello in for consultation in

view of Costello's experience with long-term care, and after Micelotta, Ryerson and Costello all met with the elderly client, Costello advised Ryerson and Micelotta that he did not believe that the investment recommendations were in the client's best interest. *Id.* at 885-888; RX 41. Although Costello described Ryerson as a highly ethical advisor who always had his clients' interests at heart, he was critical of Ryerson's investment recommendations to this particular client as it involved taking assets out of a tax-sheltered annuity and reinvesting in other products. *Id.* at 857, 888. Costello also disagreed with Ryerson's assertion that Micelotta's primary objection was to Ryerson's recommendation for investment in "B" shares:

I'm disagreeing that the B shares were the major issue. They weren't. The B shares could've been part of any type of portfolio. My interpretation of the incident was that the annuities should not have been surrendered, and never should have been brought out and put into other investment vehicles because the annuity was sheltered.

Id. On June 11, 2004, Ryerson received a final warning from Micelotta for being below the minimum national GDC PACE standard. RX 40. Micelotta's warning stated that Ryerson remained "at 55% PACE" as his "TOS 26PD GDC" was \$38,739.00 while the required TOS GDC was \$70,000.00. *Id.* This warning stated that Ryerson has two additional service periods (*i.e.*, four weeks) to reach the minimum retention requirement of 60 percent GDC or he would be terminated. *Id.* Ryerson does not challenge AEFS's figures regarding his low GDC. HT at 964.

Ryerson was asked to explain at the hearing how Micelotta's allegedly discrimination and harassment prevented him from increasing his GDC PACE above the minimum level for continued employment, and he testified (1) that Micelotta hurt his sales by preventing him from selling SPS products and (2) that he became discouraged by Micelotta's treatment which impaired his initiative to contact clients. HT at 1081-1089.²⁹ He also did not contradict Micelotta's testimony that even if Ryerson had been allowed to make the SPS sale for \$100,000.00 it would not have raised his GDC PACE above the 60 percent threshold for retention. *Id.* at 692.

L. Ryerson's Resignation

As Ryerson came to the recognition that his career as an AEFS P1 financial advisor was nearing an end for failure to increase his GDC PACE to the minimal level required to avoid a termination, he and Micelotta arrived at the idea of Ryerson going to work as a para-planner for Bernie Nadeau, a P2 advisor. HT at 1090-1091. Ryerson spoke to Nadeau who agreed to take him on. *Id.* at 1091-1092. On June 29, 2004, Ryerson submitted a letter to Micelotta in which he stated, "I understand that my employment with AEFS will be terminated on July 6th next for not meeting sales levels required of a fourth year advisor." RX 42. Ryerson added that "my termination as a financial advisor by American Express is not an event I can avoid" and stated that he had followed Micelotta's suggestion that he seek employment with Nadeau. *Id.* On June 30 2004, Ryerson submitted an amended version of his June 29, 2004 letter, emphasizing that

²⁹ It is noted that this latter assertion is somewhat contradicted by the evidence that Ryerson continued to contact clients and attempt to sell investments right into June of 2004.

“THIS IS A LETTER OF RESIGNATION” and explaining that he was leaving AEFS to work as a para-planner for Bernie Nadeau. RX 41. Ryerson explained that he “wanted the record to show that this is not any conventional resignation. This was a forced resignation that I was doing because that's what had to be done.” HT at 1090-1091.

IV. Discussion and Conclusions of Law

Section 806 complaints are governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code (the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West Supp. 2005)). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, the burden is on Ryerson to prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) AEFS knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Getman v. Southwest Sec., Inc. (Getman)*, ARB No. 04-059, 2005 WL 1827748 at *5, 23 IER Cases 377, 382 (ARB July 29, 2005); *aff'd sub nom Getman v. Admin. Rev. Bd.*, No. 07-60509 (5th Cir. Feb. 13, 2008) (unpublished); *Allen v. Admin. Rev. Bd. (Allen)*, ___ F.3d ___, 2008 WL 171588 at *5 (5th Cir. Jan 28, 2008); *Fraser v. Fiduciary Trust Co. Intern. (Fraser)*, 417 F.Supp.2d 310, 322 (S.D.N.Y. 2006). Even if Ryerson proves these facts, AEFS may avoid liability if it can demonstrate by “clear and convincing evidence” that it would have taken the same unfavorable personnel action in the absence of Ryerson’s protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Getman*, 2005 WL 1827748 at *5; *Allen*, 2008 WL 171588 at *6.

A. Did Ryerson engage in protected activity?

Ryerson contends that he engaged in protected activity on December 18, 2003 when he first reported his concern to Micelotta that the F-118 Mutual Fund Disclosure Form contained false and misleading language and again on March 16, 2004 when he repeated these concerns in the e-mail sent to Micelotta, D’Atri and O’Connell. Comp. Br. at 4, 8. He also contends that his complaint in the March 16, 2004 e-mail about Micelotta preventing him from selling non-proprietary investment products was protected by Section 806. HT at 1133.

Section 806 extends protection to a internal corporate whistleblowers such as Ryerson who,

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 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], 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 . . . 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.A. § 1514A(a)(1). In order to draw protection, the information provided must “definitively and specifically” relate to conduct which the employee “reasonably believes” to be in violation of one of the categories of securities law specified in section 806 – namely, section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. *Platone v FLYi, Inc.*, ARB No. 04-154, 2006 WL 3246910 at *8 (ARB Sept. 29, 2006); *Allen*, 2008 WL 171588 at *6; *Fraser v. Fiduciarey Trust Co. Inter. (Fraser)*, 417 F.Supp.2d 310, 322 (S.D.N.Y. 2006).

1. The F-118 Mutual Fund Disclosure Form

Based on his research which disclosed no provision in any AEFS prospectus or other document for reducing the front-end sales charge on “A” shares for clients who already held mutual funds offered by the same fund family, contrary to the original language in the F-118, Ryerson testified that he “fully believed that the form was illegal and ... violated the Investment Acts of ’33 and ’34.” HT at 1047; Comp. Br. at 5. Ryerson specifically contends that the former language in the F-118 relating to reduction of front-end sales charges violated Section 17 of the Securities Act of 1933³⁰ and Section 18 of the Securities Exchange Act of 1934.³¹ Comp. Br. at 6-7. AEFS counters that Ryerson’s complaints about the F-118 are not protected, arguing

³⁰ Section 17 of the Securities Act of 1933, 15 U.S.C. § 77q(a), makes it “unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). *See also* 17 C.F.R. 240.10b-5.

³¹ Section 18 of the Securities Exchange Act of 1934, which is codified at 15 U.S.C. § 78r (“Liability for misleading statements”), in relevant part states,

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

25 U.S.C. § 78r(a). The record in this case does not establish whether the F-118 form is the type of document covered by Section 18.

that “Ryerson could not possibly have reasonably believed that [AEFS] was engaged in a fraudulent act,” because “fraud involves the intent to deceive.” Resp. Br. at 8-9. AEFS avers that the evidence, including Ryerson’s own testimony at the hearing, shows that it simply followed guidelines from the NASD in creating F-118 and that it lacked the requisite intent necessary for fraud. *Id.*

Ryerson’s claim that the F-118 violated the Securities Act of 1933 and the Securities Exchange Act of 1934, which are not specifically mentioned by Section 806, falls under Section 806’s “any provision of Federal law relating to fraud against shareholders” clause which requires that “the employee must reasonably believe that his or her employer acted with a mental state embracing intent to deceive, manipulate, or defraud its shareholders.” *Allen*, 2008 WL 171588 at *9 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)). Whether Ryerson reasonably believed that AEFS was in violation of a law covered by Section 806 must be assessed under both an objective and a subjective standard. *Allen* at *6. That is, Ryerson must prove both (1) that he “actually believed” that AEFS intended to deceive, manipulate, or defraud its shareholders (the subjective test) and (2) a person with his expertise and knowledge would have reasonably believed that as well (the objective test). *Welch v. Cardinal Bankshares Corp.*, ARB No. 05-081, 2007 WL 3286331 at *7 (ARB May 31, 2007).

I have found Ryerson to be a generally credible witness, and I specifically credit his testimony that he actually believed the former language of the F-118 to be fraudulent and misleading with respect to the matter of reduced front-end sales charges on purchases of “A” shares in mutual funds when he voiced his concerns on December 19, 2003 and March 16, 2004. Further, Ryerson’s uncontradicted assertion that he found no company documentation that a reduction in front-end sales charges was available to investors already holding mutual funds offered by the same fund family, combined by the undisputed fact that AEFS quickly acknowledged that the F-118 required revision, is supportive of a finding that a reasonable financial advisor with comparable experience and education would have believed that the former language was problematic. But problematic is not the same thing as intentional fraud, deception or manipulation, and Ryerson has not introduced any evidence of particular conduct or circumstances that might have led a reasonable advisor to believe that actual fraud was at play. On the other hand, some courts have defined securities fraud broadly so as to include “recklessness” which is defined as “[h]ighly unreasonable (conduct), involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” *S.E.C. v. Infinity Group Co.*, 212 F.3d 180, 192-193 (3d Cir.2000) (citing *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir.1977)). In my view, it would not be unreasonable for a non-attorney financial advisor such as Ryerson, who is generally familiar with the complex scheme of Federal securities laws and regulations designed to protect the investing public, to form a belief that a demonstrably inaccurate statement in a mutual fund disclosure form provided to shareholders involved at least the level of recklessness that amounts to “fraud against shareholders” in violation of Federal securities law.

While the evidence that AEFS borrowed the challenged language from the NASD Investor Alert now shows that Ryerson’s belief was wrong, “an employee’s reasonable but

mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.” *Allen* at *6 (citing *Collins v. Beazer Homes USA, Inc.* (*Collins*), 334 F.Supp.2d 1365, 1376 (N.D.Ga.2004); *Halloum v. Intel Corp.*, ARB Case No. 04-068, 2006 WL 3246900 at *5 (ARB Jan. 31, 2006). Moreover, a Section 806 whistleblower does not need to show an actual violation of law or even cite a particular statute that he believed was being violated. *Fraser*, 417 F.Supp.2d at 322; *Collins*, 334 F.Supp.2d at 1375; *Mahony v. KeySpan Corp.*, 2007 WL 805813 at *5 (E.D.N.Y. Mar. 12, 2007). Nevertheless, Ryerson did cite Section 17 of the 1933 Securities Act which, along with the SEC’s implementing rule, is “aim[ed] at reaching ‘misleading or deceptive activities, whether or not they are precisely and technically sufficient to sustain a common law action for fraud and deceit . . . carried on ‘in connection with’ the purchase or sale of securities. *Herpich v. Wallace*, 430 F.2d 792, 802 (5th Cir. 1970) (quoting *Cady, Roberts & Co.*, 40 S.E.C. 907 (1961)). “They are not intended as a specification of particular acts or practices that constitute ‘manipulative or deceptive devices or contrivances,’ but are instead designed to encompass the infinite variety of devices that are alien to the ‘climate of fair dealing’ that Congress sought to create and maintain. *Id.* (quoting *SEC v. Capital Gains Research Bur.*, 375 U.S. 180, 201 (1963), and citing *A. T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967); *Cady, Roberts & Co.*, 40 S.E.C. 907 (1961)). In my view, a reasonable financial advisor with Ryerson’s background and experience could believe that the F-118 form was alien to the climate of fair dealing to the extent that it contained inaccurate statements about sales charges.

For these reasons, I conclude that Ryerson has proved that he reasonably believed, albeit mistakenly, that the information about the F-118’s statements regarding reduction in front-end sales charges on purchases of “A” shares involved a violation of Federal securities law dealing with fraud against shareholders. Accordingly, I conclude that his actions in raising these concerns to Micelotta on December 19, 2003, to Micelotta, D’Atri and O’Connell on March 16, 2004, and to AEFS President Cracchiolo on March 29, 2004 were protected by Section 806.

2. Proprietary versus Non-proprietary Products

Ryerson did not raise any concerns about being prevented from selling non-proprietary investments in his December 18, 2003 memorandum or during his December 19, 2003 meeting with Micelotta. In his March 16, 2004 e-mail, he alleged that Micelotta’s “repeated efforts to stop me from using non-proprietary products” has put AEFS “in a position of legal jeopardy.” RX 15 at 107. However, Ryerson did not elucidate any basis for this allegation or otherwise provide AEFS with any information as to how Micelotta’s requirement that he consult before selling a non-proprietary product “definitively and specifically” involved conduct which he reasonably believed to be in violation of one of the six categories of securities law specified in Section 806. Since he never provided information, I conclude that Ryerson did not engage in protected activity when he complained about being prevented from selling non-proprietary products. *See Getman*, 23 IER Cases at 383.

B. Did AEFS have knowledge of Ryerson's protected activity?

It is undisputed that Ryerson provided information on his research into the problems with the F-118 language on front-end sales charges to Micelotta, D'Atri, O'Connell, Gressen and, eventually, AEFS President Cracchiolo. AEFS nonetheless argues that it did not have knowledge of any protected activity because its managers did not "classify" or consider Ryerson's complaints to raise issues of illegal activity and, thus, "did not consider Ryerson a whistleblower because he was not complaining about illegal conduct." AEFS Br. at 7. Accepting this argument would mean that an employer could defeat a Section 806 case by simply deciding not to interpret employee complaints as implicating illegal conduct. Beginning with his December 18, 2003 memorandum which he delivered to Micelotta, Ryerson consistently asserted to multiple AEFS officials that the F-118 contained "FALSE statements" and was "generally misleading, by looking for all the advantages of A shares only." CX 40-A (capitalization in original). Whether AEFS subjectively agreed with Ryerson that the F-118 contained illegally fraudulent or misleading language is not the point. Ryerson's claims were quite clear, and I find that AEFS officials had to be aware, or should have been aware, that Ryerson was complaining about fraud on shareholders even if they did not agree with him. This is legally sufficient to establish that AEFS had knowledge of Ryerson's protected activity. *See Jones v. EG & G Defense Materials, Inc.*, ARB No. 97-129, 1998 WL 686646 at *12 (ARB Sept. 29, 1998).

C. Did Ryerson suffer adverse personnel actions?

1. Termination of Employment

Though Ryerson submitted letters of resignation at the end of June, there is no dispute that his employment as a P1 financial advisor with AEFS was scheduled to be terminated one week later on July 6, 2004. Thus, the termination of Ryerson's employment was a *fait accompli* when he resigned on June 30, 2004. Section 806 prohibits the "discharge" of an employee because the employee engaged in protected activity; 18 U.S.C.A. § 1514A(a); and AEFS raises no argument that Ryerson's termination was not an adverse employment action. Accordingly, I find that Ryerson has proved that he suffered an adverse employment action when his employment with AEFS was terminated.

2. Other Actions

In his testimony and brief, Ryerson further alleges that he was subjected to retaliatory discrimination and harassment by being: (1) made to rewrite valid and delivered financial plans; (2) forced or encouraged to sell proprietary AEFS products even where other products may be better suited to the client's goals /needs; (3) subjected to heightened supervision; (4) denied access to a computer; (5) issued warning letters prior to the termination of his employment; (6) required to attend mandatory telephone training sessions; (7) by not being allowed to transition

to a P2 advisor position based on requirements which were in place at the time he was rehired at AEFS; and (8) not being allowed to bring clients with him to Bernie Nadeau's P2 practice.³²

Whether any of these actions constituted an adverse employment action will be considered under the "tangible job consequences" test and the "detrimental effect" test. *Allen v. Stewart Enterprises, Inc. (Allen)*, USDOL/OALJ Reporter (PDF), ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 at 14-15 (ARB July 27, 2006), *aff'd sub nom Allen v. Admin. Rev. Bd.*, ___ F.3d ___, 2008 WL 171588 (5th Cir. Jan 28, 2008). "A 'tangible job consequence' is one that 'constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.'" *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). "Under the 'detrimental effect' test, an employment action is adverse if it is reasonably likely to deter employees from making protected disclosures." *Id.* (citing *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000)).

I find that Micelotta's requirement that Ryerson rewrite plans that had previously been approved and delivered to clients, not allowing him to transition to P2 status, the warnings issued in May and June of 2004, and the post-termination restriction of his client base when he went to work for Bernie Nadeau all qualify as adverse personnel actions. The requirement that Ryerson rewrite approved and delivered financial plans involved more than a minimal amount of effort and, even though the evidence does not establish that Ryerson ever spent a significant amount of time complying with Micelotta's directive, I conclude that requiring an employee to redo work that had previously been approved constitutes a tangible job consequence and would very likely deter an employee from engaging in activity protected by Section 806. I similarly conclude that denial of P2 status, issuing the warning letters which are preliminary steps to further disciplinary action including termination, and preventing him from bringing clients to Bernie Nadeau constituted adverse employment actions.

However, I find that Ryerson has not proved that he was encouraged or forced to sell proprietary AEFS investment products even where other products may have been better suited to the client's goals and needs. Instead, the evidence from Ryerson's own witnesses establishes that he was subjected to the same requirement as other AEFS advisors that he consult with Micelotta before offering non-proprietary products.

The evidence also does not establish that Ryerson was "denied access" to a computer. Rather, he and Harrington were required to share a computer in accordance with a policy applied to all advisors below a specified GDC PACE. In addition, the evidence shows that Micelotta's decision to give Harrington exclusive access to the shared computer during the late afternoon and evening hours was motivated by Harrington's request because he, unlike Ryerson, used the computer to log his calls. Moreover, when Ryerson complained to Micelotta about his limited

³² Ryerson's claims, which are scattered throughout the record, have been considered consistent with the well-recognized principle that a court has some responsibility to assist a *pro se* litigant in clarifying pleadings. *See Young v. Schlumberger Oil Field Services*, USDOL/OALJ Reporter (PDF), ARB No. 00-075, ALJ No. 2000-STA-28 (ARB Feb. 28, 2003) at 6 (Where *pro se* litigant's brief to the court "is mostly a narrative account of [the litigant's] view of the evidence," the ALJ "has some responsibility for helping."); *Griffith v. Wackenhut Corp.*, USDOL/OALJ Reporter (HTML), ARB No. 98-067, ALJ No. 1997-ERA-52 (ARB Feb. 29, 2000) at 15 n.5 (ALJ must "construe [a *pro se* litigant's] complaints liberally and not overly technically").

access impeding his ability to rewrite the plans, Micelotta made a second computer in a vacant office available to Ryerson. While this arrangement may not have been ideal and proved irritating to both Ryerson and Harrington, there is no evidence that it materially impacted on Ryerson's ability to perform his duties or otherwise altered his employment status. *Allen*, slip op. at 15-16.

Finally, aside from the compliance and productivity warnings which I have already found to constitute adverse employment actions, there is no evidence that the heightened supervision or training that Ryerson was allegedly subjected to in 2004 had any tangible or detrimental effect on his conditions of employment.³³ Moreover, Ryerson introduced no evidence to contradict O'Connell's testimony that the training sessions he was required to attend in the Holyoke office were mandatory for all advisors below a specified GDC PACE level and that Ryerson's GDC PACE was not at a level which would have allowed him to opt out of the training. HT at 410-411; 415-416, 419-420, 520-521.

3. Hostile Work Environment

Ryerson also alleges he was subjected to a hostile work environment after reporting his concerns regarding the F-118 disclosure form. As support for this allegation, Ryerson alleges he was told to re-write previously completed and approved financial plans and was made to use a computer two offices away from his office to conduct his business, including re-writing the financial plans. Comp. Br. at 45. Ryerson claims that his ability to re-write the plans was adversely impacted by the requirement that he share a computer with his office-mate, John Harrington. While acknowledging this was a company wide policy, Ryerson claims it was unfairly enforced as to his situation. *Id.* at 23. In this regard, Ryerson alleges that "Micelotta arranged with Harrington for him to have a disproportionate share of time on the computer" and, as a result, Ryerson was relegated to an unused computer "two offices down the hall." *Id.* at 23-24. Ryerson claims this negatively impacted his ability to re-write his financial plans and also made it more difficult for Ryerson to answer his phone. *Id.* at 24. Ryerson asserts that "no other AEFS advisor . . . was forced to conduct business in this manner." *Id.* at 25. Though the allegations relating to the rewriting of plans and computer access have already been addressed, I will separately consider the hostile work environment claim.

In *Allen v. Stewart Enterprises, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006), *aff'd sub nom Allen v. Admin. Rev. Bd.*, ___ F.3d ___, 2008 WL 171588 (5th Cir. Jan 28, 2008), the Administrative Review Board discussed the necessary elements for proving a hostile work environment:

A hostile work environment claim involves repeated conduct or conditions that occur over a series of days or perhaps years. To recover, the employee must establish that the conduct complained of was serious and pervasive. Circumstances germane to gauging a hostile work environment include the frequency of the discriminatory conduct, its severity, whether it is physically

³³ It is noted that while Ryerson testified that Micelotta told him that he would have to attend a training session in Hartford, there is no evidence that Ryerson ever attended.

threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.

Slip op. at 16 (citations omitted). From the testimony of Ryerson and his former colleagues, it is apparent that the working environment in the Holyoke office could be stressful at times, especially for advisors with low sales. It appears that Micelotta managed with an iron fist and that his style was regarded by some advisors as abrasive and condescending. In addition, the evidence shows that Micelotta threatened Ryerson with retaliation if he persisted with raising complaints regarding the F-118 form. While the office environment in Holyoke was less than pleasant, I find that the evidence does not establish that any allegedly discriminatory or harassing conduct by Micelotta, apart from the specific conduct which I have found to constitute adverse employment actions, were sufficiently severe or pervasive that it altered Ryerson's conditions of employment and created an independently actionable abusive working environment.

D. Was Ryerson's protected activity a contributing factor?

The final element of Ryerson's case requires him to prove by a preponderance of the evidence that his protected activity was a contributing factor in his constructive termination. 49 U.S.C.A. § 42121(b)(2)(B)(iii). A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, 2006 WL 3246904 at *13 (ARB May 31, 2006) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). The contributing factor standard is a broad one that was "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.* See also *Collins*, 334 F.Supp.2d at 1378-1379. Ryerson is "not required to prove pretext, because a complainant alternatively can prevail by showing "that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic." *Id.* (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

1. Rewriting Plans

The record shows that Micelotta gave Ryerson a list of seven previously completed and approved financial plans to Ryerson in January of 2004 with instructions to do additional work which included redoing four of the plans. None of these plans was mentioned in Ryerson's 2003 performance evaluation which was completed by Micelotta in November of 2003 prior to any protected activity, and there is no evidence that Micelotta ever discussed any of the alleged deficiencies with Ryerson prior to December 19, 2003 when Ryerson first raised his concerns about the language of the F-118 form. Indeed, the evidence shows that Micelotta himself had approved the plans in question. On these facts, and noting particularly that Micelotta threatened Ryerson with a mandate to rewrite plans at the December 19, 2003 meeting, I find that Ryerson has proved that his protected activity on December 19, 2003 was a contributing factor in Micelotta's directive in January of 2004 that he redo plans that had previously been approved and delivered to clients.

2. Denial of Transition to P2 Status

Ryerson alleges that AEFS's failure to allow him to attempt to qualify for a P2 position based on the requirements which were in place when he returned to AEFS in 2001 was retaliatory in nature. HT at 1349-1350. However, the record shows that AEFS changed the requirements for P2 transition in October of 2001, long before Ryerson engaged in any activity protected by Section 806, and Ryerson has introduced no evidence that he was treated differently than any other similarly-situated P1 financial advisor. Accordingly, I find that he has not met his burden of showing that his protected activity played any role whatsoever in AEFS's failure to grant his request that he be allowed to move into a P2 position based on the requirements that were in effect in 2001.

3. May 20, 2004 Compliance Warning

The May 20, 2004 warning memorandum was issued in part based on Micelotta's charge that Ryerson had used "inappropriate tools" (*i.e.*, the generic "Ibbotson" chart) to recommend an investment product to a client. Micelotta's allegation is directly refuted by Ryerson's "Financial Planning Considerations" package which clearly shows that he used "Thomson" charts. CX 23. In light of Micelotta's previous threat in response to Ryerson's protected activity, I find it reasonable to infer that protected activity was a contributing factor to this unsubstantiated allegation and the May 20, 2004 warning memorandum.

4. May 27, 2004 Behavior Warning

Ryerson did not refute any of the allegations contained in McHugh's warning about his conduct in inappropriately contacting a client, and he offered no evidence that would suggest that his protected activity played any role in the issuance of this warning.

5. May 25, 2004 and June 11, 2004 Sales Warnings and Termination

The record shows that these warnings were issued in accordance with AEFS policy because Ryerson had fallen below the minimum level of GDC PACE. O'Connell testified without contradiction that "a national policy [was] implemented that once an advisor fell below 60 percent of PACE, the advisor was given a certain amount of time on a written warning to get above the 60 percent ... then another period of time to get above PACE on a final warning." *Id.* at 416. O'Connell further testified that advisors are "given two service periods, four weeks to get above 60 percent of PACE on that written warning, and then another four weeks to get above 60 percent if they weren't above after the written warning period ended." *Id.*

Ryerson himself testified that he was aware that GDC PACE was used to track AEFS advisor's productivity and that he did not meet the minimum required levels of GDC PACE, as set forth by AEFS policy. *Id.* at 1261-1262. Furthermore, Ryerson admitted he knew that AEFS policy stated that an advisor would be terminated if he or she failed to meet minimum GDC PACE requirements for three consecutive service periods. *Id.* at 1262, 1397. Ryerson acknowledged that he was aware of, and did keep track of, his PACE numbers. *Id.* at 1269, 1290. Ryerson knew his sales performance was slipping, and he acknowledged that other

advisors had been terminated as a result of falling below GDC PACE requirements. *Id.* at 1259-1260, 1397-1398. He also acknowledged that when his GDC PACE numbers started to dip in 2004, Micelotta attempted to work with him to assist him in raising his numbers. *Id.* at 1398-1399. Ryerson does not dispute that his GDC PACE fell below the minimum level for retention, and he introduced no evidence that other similarly-situated P1 advisors were not issued warnings and ultimately terminated when their productivity fell below 60 percent of GDC PACE. Finally, Ryerson was unable to explain how any of the discriminatory or harassing conduct that he ascribed to Micelotta materially impacted on his sales and GDC PACE. *Id.* at 1081-1089.

Based on these undisputed facts, I conclude that Ryerson has not proved that his protected activity played any role in AEFS's issuance of the two performance warnings or in his ultimate involuntary resignation and termination which was based on the non-discriminatory application of AEFS's minimum GDC PACE policy.

6. Restriction of Client Base

Ryerson alleges that he was unfairly and discriminatorily prevented from bringing all of his AEFS clients along with him when he went to work for Bernie Nadeau as a paraplanner. Comp. Br. at 59-63. However, he introduced no evidence to contradict the testimony of AEFS witnesses that he was permitted to take his "natural market" consisting of family and friends but that his other clients were considered AEFS property and, thus, were reassigned to other P1 advisors in accordance with AEFS policy after Ryerson resigned his P1 position. HT at 578-579, 595-596. Therefore, I find that Ryerson has not shown that his protected activity played any role on AEFS's actions relating to the reassignment of his clients after he resigned on June 30, 2004.

E. Has AEFS introduced "clear and convincing" evidence that it would have taken the adverse employment actions in the absence of Ryerson's protected activity?

Since Ryerson has proved that his protected activity contributed to Micelotta's decision to make him redo completed and approved financial plans and the May 20, 2004 compliance warning, the burden is on AEFS to demonstrate by "clear and convincing evidence" that it would have taken these actions in the absence of Ryerson's protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Getman*, 2005 WL 1827748 at *5; *Allen*, 2008 WL 171588 at *6.

1. Redoing Plans

Micelotta testified regarding the deficiencies that he found in the seven financial plans on which he instructed Ryerson to do additional in January of 2004, and Ryerson conceded that some of the plans could benefit from additional work. HT at 574; 1079. In addition, O'Connell testified that it was Micelotta's responsibility as the Registered Principal to require a financial advisor to rewrite any plan that he found to be deficient. *Id.* at 439. However, the fact remains that Micelotta had previously approved these plans and made no mention of any of them in the 2003 performance evaluation which predates Ryerson's protected activity. The question is not whether Micelotta had the responsibility to review plans and to order rewriting when deemed necessary, but whether he would have exercised this responsibility with respect to the seven previously-approved plans had Ryerson not engaged in protected activity. In view of (1) the

absence of any credible reference to deficiencies in these plans prior to December 19, 2003, (2) Micelotta's threat on December 19, 2003 that he would make Ryerson rewrite plans if he persisted with his complaints about the F-118 form and (3) the fact that Ryerson was not instructed to redo any plans until January of 2004, I conclude that AEFS has not demonstrated by clear and convincing evidence that Ryerson would have been made to redo the plans in the absence of his protected activity.³⁴ This record simply does not support any other conclusion.

2. May 20, 2004 Compliance Warning.

Based on Micelotta's inclusion of a reference to Ryerson's alleged use of the "Ibbotson" chart to recommend an investments, an allegation that lacks any credible support in the record, and Micelotta's prior threat in response to Ryerson's protected activity, I determined that Ryerson proved that his protected activity was a contributing cause in the issuance of the May 20, 2004 compliance warning. However, this was only one of several compliance deviations cited in the warning including the most egregious charge that Ryerson had determined a client's risk tolerance to avoid compliance oversight. While Ryerson challenges certain details and accuses Micelotta of twisting facts, which appears to be a valid point in regard to the allegation that Ryerson employed an "Ibbotson" chart, I am persuaded by the testimony of Ryerson's own witnesses, Costello and Bixby, that the warning did raise legitimate compliance issues. In particular, I note that Ryerson's own testimony that he decided to ignore Micelotta's instructions about not selling SPS products because he had "noting to lose" is tantamount to an admission of insubordination. I also take note of Costello's testimony explaining AEFS policy against P1 advisor's recommending SPS investments, and Costello's statement that he was reproached by Micelotta for recommending a SPS investment without Micelotta's approval. This evidence leaves no room for doubt that Ryerson would have been warned given his repeat behavior. Accordingly, I conclude that AEFS has demonstrated by clear and convincing evidence that the May 20, 2004 warning would have been issued even in the absence of any protected activity.

V. Conclusion

Based on the foregoing findings of fact and conclusions of law, I conclude that Ryerson has proved by a preponderance of the evidence that he was directed to redo completed and approved client financial plans because he engaged in activity protected by 18 U.S.C.A. § 1514A and that AEFS has not demonstrated by clear and convincing evidence that it would have taken this action in the absence of Ryerson's protected activity. I have further concluded that while Ryerson did prove that his protected activity contributed to the issuance of the May 20, 2004 compliance warning, AEFS demonstrated by clear and convincing evidence that it would have issued the warning without Ryerson's protected activity. As to Ryerson's other allegations, I conclude that he has either (1) not shown that he was subjected to an adverse employment action or (2) not met his burden of proving by a preponderance of the evidence that his protected activity played a contributing role in the challenged actions.

³⁴ It is noted that Micelotta went ahead with his threat to have Ryerson rewrite plans even though Ryerson had not asked him to forward the December 18, 2003 critique of the F-118. In the absence of any other credible explanation, it thus appears that Micelotta was sufficiently motivated by Ryerson's conduct at the December 19, 2003 meeting to act on his threat even in the absence of further action by Ryerson.

VI. Remedies

The Sarbanes-Oxley Act provides that any employee who prevails in an action under the whistleblower provision of the statute “shall be entitled to all relief necessary to make the employee whole.” 18 U.S.C. § 1514A(c)(1). Relief under the Act includes reinstatement, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees, and reasonable attorney fees. 18 U.S.C. § 1514A(c)(2)(A)-(C). Similarly, the Secretary of Labor’s implementing regulation provides:

If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

29 C.F.R. § 1980.109(b). Reinstatement, lost pay and other economic damages are not warranted as Ryerson failed to prove that his protected activity played any role termination of his employment as a P1 advisor or in the reassignment of his clients after he left AEFS. However, I will order that AEFS expunge from its records any reference to Micelotta’s January 2004 directive that Ryerson do additional work on the seven financial plans that Micelotta had previously approved. I will also allow Ryerson 30 days to submit an itemization of his litigation costs and expenses. AEFS will thereafter have fifteen days within which to challenge payment of the costs and expenses sought by Complainant.

VII. Order

(1) Respondent American Express Financial Services shall expunge any reference in the Complainant’s personnel file and other records to the January 2004 directive that he redo financial plans that had previously been approved by his supervisor and delivered to clients;

(2) The Complainant shall have 30 days from the date of this order to file an application, supported by documentation, for his litigation costs and expenses; and

(3) The Respondent shall have 15 days from the date of service of the Complainant’s application for costs to file any objection.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. See 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).