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Issue Date: 12 September 2016

CASE NO.: 2015-ERA-00003

In the Matter of:

KIRTLEY CLEM,
Complainant,

v.

COMPUTER SCIENCES CORPORATION,
Respondent.

CASE NO.: 2015-ERA-00004

In the Matter of:

MATTHEW SPENCER,
Complainant,

v.

COMPUTER SCIENCES CORPORATION,
Respondent.

DECISION AND ORDER

These claims, consolidated for hearing, arise under the Energy Reorganization Act, 42 U.S.C. §§ 5801 *et seq.* The hearing was completed in Kennewick, Washington, on February 18, 2016.

Introduction

The Complainants, Kirtley Clem and Matthew Spencer, were employed by Respondent Computer Sciences Corporation (CSC). CSC hired Mr. Clem as a Senior Programmer Analyst on June 20, 2011 (TR,[1] p. 67 line 20 - p. 68, line 12; CX 9), and Mr. Spencer as a Senior Programmer Analyst on July 11, 2011 (TR p. 490, lines 16-22; CX 10). At the time, CSC was under contract with the Department of Energy ("DOE") to provide occupational medical services at DOE's Hanford site in eastern Washington (CX 2). It subcontracted some of its obligations to a subcontractor, HPM Corporation.[2] Among other things, the prime contractor was responsible to provide tests and examinations of the 15,000 workers at the Hanford site in support of the Hanford Site and National Laboratory missions; diagnose and provide first aid for injuries or diseases to workers; and provide medical monitoring for prior exposures and current exposures to protect the health and well-being of the workers (CX 2, pp. 9-11).

In 2012, when most of the events relevant to this claim took place, there were two important changes taking place essentially simultaneously with respect to occupational medical services at the Hanford site.

First, CSC's contract with DOE was set to expire on September 30, 2012. CSC would not be eligible to renew its DOE contract thereafter, because DOE had established a small-business set-aside for which CSC presumably did not qualify (Deposition of Lisa Poulter, p. 21, lines 3-11; Deposition of Cleve Mooers, p. 9, lines 7-15). CSC and HPM had decided, apparently in 2010, to solve this problem by simply trading places when the time came (RX 2). Thus, on October 1, 2012, HPM Corporation entered into a new prime contract with DOE to provide occupational medical services at the Hanford site, and simultaneously subcontracted with CSC to carry out some of its obligations under the prime contract (*see* TR, p. 36, lines 17-22; TR p. 13, lines 8-17).

Second, in the waning months and weeks of its own prime contract with DOE, CSC was introducing a new software program called OHM[3] on which the Hanford medical clinic would maintain the clinic's medical records. OHM was to replace two older systems known as HSS and OHS (TR p. 334, line 22 – p. 335, line 20; TR p. 506, lines 21-24). Among Mr. Clem's duties at the time he was hired was to support the older HSS and OHS systems (TR p. 335, lines 1-5; p. 68, lines 3-12), but beginning around April, 2012, he also became responsible, among other things,

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[1] Citations to "TR" in this Decision and Order are to the transcript of the hearing.

[2] Some of HPM Corporation's employees refer to it as "HPMC" (TR p. 777, lines 7-23), which helps make the record more confusing.

[3] Other theories appearing in the record notwithstanding (TR p. 81, lines 14-22; TR p. 506, lines 16-20; TR p. 794, lines 13-19), "OHM" appears to stand for "Occupational Health Management" (RX 79, p. 237).

for converting applications to operate with the new OHM database (TR p. 82, lines 2-14). OHM, HSS, and OHS all contained medical records of Hanford site workers, which records might be used, *inter alia*, to determine whether it was safe for a particular worker to work at a particular location on the Hanford site (*see* CX 2, pp. 14-15; TR p. 88, lines 3-15; TR p 757, line 21 - p. 758, line 19; TR p. 1004, line 13 - p. 1005, line 6).

I. STATEMENT OF THE CASE

CX 15 shows the organization of Hanford Occupational Services as of April 19, 2012. Messrs. Clem and Spencer were employed in the IT Department under the supervision of Eric Elsethagen. Mr. Elsethagen and Business Process Analyst Lisa Zaccaria[4] reported to the Business Operations Director, a position then temporarily filled by George Baxter, who was also the Principal Manager of Occupational Services, the highest-ranking position on the organizational chart. In his capacity as Business Operations Director, Mr. Baxter, along with Clinic Director Kim Conley, reported to himself in his capacity as Principal Manager. Although her name does not appear on the chart, Mr. Baxter, the Principal Manager of Occupational Services, reported to Lisa Poulter in September, 2012 (Deposition of George Baxter, p. 13, lines 14-20).[5] Ultimately, Ms. Poulter became CSC's Public Health Sciences Manager, although whether she held that title in September, 2012, is not clear (Deposition of Lisa Poulter, p. 14, lines 19-22).

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[4] Before CSC and HPM traded places, CSC was Ms. Zaccaria's employer. Beginning October 1, 2012, HPM employed her (TR p. 847, lines 4-9; Deposition of Lisa Zaccaria, p. 5, line 19 - p. 6, line 11).

[5] With regard to her supervision of Mr. Baxter, Ms. Poulter testified:

> Q: . . . I want to get an idea of what your day-to-day duties were with regards to Mr. Baxter when you – and what obligation you had to make sure that that project or contract ran smoothly. What would you do on a day-to-day basis with regards to it?
>
> A: Well, it wasn't day-to-day. I mean, George was ultimately responsible as the project manager. I was in touch with him periodically when needs arose about issues or things he needed – he might need to escalate to me or questions he might have. I would provide access to corporate resources when he was having difficulty assessing them, although I can't think of an example of that.
>
> You know, he did program reviews for me monthly in which he would review the technical and business aspects of the – of the program, and we would talk about any good things that happened, any issues that needed to be addressed.
>
> So it was oversight. It was not on a day-to-day basis. (Deposition of Lisa Poulter, p. 20, lines 1-21).

Although entitled "CSC Hanford Occupational Health Services," CX 15 also lists persons who were employed, not by CSC, but by HPM. For example, CX 15 shows Joe Vela, as head of Performance Assurance, reporting both to Kim Conley and to Medical Director Dr. Karen Phillips. In April, 2012, Mr. Vela was an HPM employee, while two of the employees he supervised – Terri Johnson and Teresa Reseck – were CSC employees (TR p. 783, line 7 - p. 784, line 18), although Mr. Vela did not conduct their performance reviews (TR p. 860, lines 1-25).

At the time, Mr. Clem was working on converting certain applications so that they would continue to work, after adoption of OHM, with the new OHM database. But he found himself distracted by other problems that arose, including several Active X controls that were not loading properly to clinic computers, and problems with various reports. Sometime that spring, Eric Elsethagen announced to the CSC IT Department that the new OHM system would "go live" on August 20, 2012, and assigned various OHM-related tasks to the employees he supervised (TR p. 629, line 17 - p. 630, line 25; p. 83, lines 14-24). Mr. Clem complained to Mr. Elsethagen that he was distracted by other tasks and having trouble getting his assigned work done on the OHM implementation (TR p. 84, lines 3-12). Mr. Spencer testified he was working Saturdays and Sundays, in addition to his regular work schedule, in an effort to meet the August 20 "go live" date (TR p. 633, line 3 - p. 634, line 24).

On July 10, 2012 (*see* RX 6, p. 1), HPM announced that, when it became the prime contractor, it would reduce the IT Department by half (CX 15) to only three employees (TR p. 639, line 16 – p. 640, line 22) – a reduction that potentially could include both Mr. Clem (TR p. 322, lines 14-18) and Mr. Spencer (TR p. 648, lines 11-14). Both began looking for another job straightaway, and both also applied for one of the three CSC positions that would remain after HPM became the prime contractor, Mr. Clem on July 24, 2012 (CX 24), and Mr. Spencer by July 27 (TR p. 655, lines 7-20). The reduction of the IT Department to three appears to have struck a number of witnesses as a bad idea, including not only Mr. Clem (TR p. 322, line 14 – p. 323, line 2; "I think pretty much everyone" argued against the proposed cut) and Mr. Spencer (TR p. 586, line 25 - p. 587, line 12; "We, as an IT group . . . all thought three was not enough"), but also Polly Riley (TR p. 1378, lines 4-16; "It's too big of a cut. Six people was too many, but three was too few"); Joe Vela (TR p. 808, line 8 – p. 810, line 6), and Mr. Elsethagen (TR p. 1019, line 21 - p. 1021, line 6). In fact, after a careful search of the record, the court can find only one person who thought it was a good idea: Cleve Mooers, HPM's Transition Manager[6] (Deposition of Cleve Mooers, p. 6, lines 23-25; p. 24, line 14 – p. 25, line 11). Mr. Mooers seemed to think it was a good idea because he was under the impression that OHM would produce

[6] Mr. Mooers was also a "member of the board" at HPM (Deposition of Cleve Mooers, p. 5, lines 10-11), and describes his wife as the President and "sole owner" of the company (Deposition of Cleve Mooers, p. 6, lines 14-18).

what he called a "comprehensive medical record" that would eliminate the need for any other kind of record-keeping, a notion not universally shared.[7]

In the weeks and months leading up to August 20, CSC and HPM employees appear to have worked generally cooperatively together. Mr. Clem, for example, attended monthly meetings of CSC and HPM employees (TR p. 80, line 18 - p. 81, line 13), and testified "I work with HPM employees, like I said, on a daily basis. It was no different than working with a CSC employee" (TR p. 79, lines 3-5). CSC employees and HPM employees wore identical badges (TR p. 497, lines 4-11). Mr. Spencer testified that from the outset of his CSC employment, "Everybody worked harmoniously, there was no distinction between the two companies," employees from both companies sat together, and there was no way to distinguish an HPM employee from a CSC employee except to ask the person who his or her employer was (TR p. 496, line 13 - p. 497, line 11; p. 511, lines 13-22). During the development of OHM, Ms. Zaccaria held regular meetings with "power users," including employees of both CSC and HPM (Deposition of Lisa Zaccaria, p. 12, line 2 - p. 13, line 19); Mr. Elsethagen participated in those meetings as well (TR p. 970, line 20 - p. 971, line 8). Mr. Mooers held weekly transition meetings with DOE and "begged" CSC to attend as well, which its employees sometimes did (Deposition of Cleve Mooers, p. 41, line 19 - p. 50, line 3). Mr. Vela spoke with Mr. Clem and Mr. Spencer in his office without any concern about it, and knowing of no policy suggesting any impropriety in it (TR p. 805, line 12 - p. 806, line14). Ms. Zaccaria discussed OHM with Mr. Vela before transition, while she was still employed with CSC (TR p. 846, line 14 - p. 847, line 24). Ms. Conley testified she thought Mr. Vela would have been better served asking her his questions about OHM, rather than Messrs. Clem and Spencer, but acknowledges she knows of no prohibition preventing him from talking with them (TR p. 1080, line 3 - p. 1081, line 3). Former CSC employee Michael Johnston likewise testified there was no prohibition preventing Messrs. Clem, Spencer, and Vela from talking to each other (TR p. 1484, lines 6-11). Mr. Mooers testified he had "meetings with tons of CSC people during transition" (Deposition of Cleve Mooers, p. 50, lines 20-21). Most importantly of all, when asked about CSC employees "talking to HPM," Mr. Baxter replied "It happened every day. You know, we work in the same building and employees talk to each other" (Deposition of George Baxter, p. 149, lines 5-15).

In July, Mr. Clem turned his attention to "data feeds" – information outbound from a database to be delivered to contractors at the Hanford site. Ms. Riley had transferred data from an old database into a new OHM database, and it fell to Mr. Clem to compare the output from the two databases – one from the old database

[7] Witnesses who disagreed with Mr. Mooers about OHM producing a "comprehensive medical record" include Ms. Zaccaria (Deposition of Lisa Zaccaria, p. 14 line 11 - p. 15, line 8); Mr. Elsethagen (TR p. 1051, lines 10-19); Ms. Riley (TR p. 1358, lines 5-10); Mr. Clem (TR p. 340, line 25 - p. 342, line 22); Mr. Spencer (TR p. 620, line 18 - p. 621, line 7); Michael Johnston (TR p. 1477, line 18 - p. 1478, line 8); and former DOE employee Darius Slade (TR p. 1184, line 24 - p. 1189, line 7; p. 1202, lines 6-24). By contrast, Mr. Vela apparently shared Mr. Mooers' opinion (TR p. 887, lines 15-25).

using the old system, and one from the new database using OHM – to be sure they matched. But in fact, they did not match (TR p. 97, line 13 – p. 98, line 22). Mr. Clem and Mr. Spencer also set up a computer test lab where they allowed clinic employees to try to work with the OHM system, and found that the clinic users likewise got different information from the new system than they did from the old one (TR p. 90, line 16 - p. 91, line 3). Mr. Clem and Mr. Spencer raised this question at an IT team meeting in July, 2012. Mr. Clem recalls Mr. Elsethagen laughing and saying the mis-matching feeds "would be a real problem and that that would just have to be fixed after it went live" (TR p. 91, lines 4-13). Mr. Elsethagen describes the discussion differently:

> Q: Now, do you recall, in 2012, that Matt Spencer and Mr. Clem would bring up concerns about OHM in the OHM meetings?
>
> A: Yes.
>
> Q: And do you recall what those concerns were?
>
> A: I don't remember, exactly. It was, essentially, we can't do it.
>
> Q: And what do you mean by "we can't do it?"
>
> A: I mean we can't do it, too difficult, maybe not enough time, I don't remember, that's the gist.
>
> Q: And do you remember the concerns that they would bring up in 2012 were, essentially, that the sky is falling?
>
> A: Yes.
>
> Q: And for Kirt, he was working on feeds, so you assumed it was about feeds?
>
> A: Kirt's primary responsibility would have been feeds, dealing with OHM. He had to work on a couple other little small applications, but I would never have assumed that would have been the issue.
>
> Q: And they – do you remember Mr. Spencer also vocalizing concerns about the feeds?

A: I'm sure they were, if they were talking to each other, it probably would have been about the same thing, but I don't remember (TR p. 974, line 22 - p. 975, line 21).

. . .

Q: . . . Now, at some point after the staff meetings, where Mr. Clem and Mr. Spencer were saying, basically, the sky is falling, correct?

A: Um-hum.

Q: Yes?

A: Correct, yes.

Q: Okay.

A: Sorry.

Q: It's okay, it happens. What did you do about those concerns?

A: Essentially, whenever I brought it up in meetings, I would just reaffirm to them that there's no way we're going to release this thing if we put one employee at the Hanford site in jeopardy.[8] And it's our jobs to fix issues like this, this is why we get a paycheck. So, to me, it's go out and do your job. After you've talked to your co-workers, if you still have issues, let me know.

Q: So you would simply reiterate that each time they brought it up at a meeting?

A: Yes, do your job. I don't know if I said, "Do your job," but the one mandate or the one mantra I always had was we will not release this thing if we're not confident on its success (TR p. 986, line 20 - p. 987, line 17).\

[8] At the hearing, Mr. Elsethagen also testified – until impeached by his earlier deposition testimony – that the disparity in data feeds did not necessarily indicate a problem with data quality; and because an OHM data feed "is not even the official record," it could not jeopardize worker safety (TR p. 975, line 22 – p. 978, line 16). Confronted with his earlier deposition testimony, Mr. Elsethagen acknowledged that the reported data-feed problem might at least potentially compromise worker safety. He also acknowledged it in CX 29, as set forth below, and in the second paragraph of CX 30.

At some point, Ms. Zaccaria likewise told Mr. Spencer to stop raising his concerns about OHM at IT staff meetings. She told him to ask Mr. Baxter if he had any questions about that instruction. When Mr. Spencer could not find Mr. Baxter, he told Mr. Elsethagen, who said he would take up the matter with Mr. Baxter (TR p. 529, line 23 – p. 531, line 3; p. 688, line 3 - p. 689, line 3).

Additionally, Mr. Spencer was concerned, as August 20 approached, that OHM apparently did not generate expected reports and was sending out numerous error messages, among other things (TR p. 521, line 21 - p. 527, line 2).

Dissatisfied with CSC's responses, Mr. Clem and Mr. Spencer began talking about taking their concerns directly to DOE. On August 10, 2012, Mr. Clem solicited Mr. Vela's views on the subject. Mr. Vela had been asking Mr. Elsethagen whether sufficient validation testing was taking place, and felt Mr. Elsethagen's responses were "vague or incomplete" (TR p. 802, line 1 - p. 803, line 12; p. 806, line 15 - p. 807, line 10). In this, or some other meeting before August 20, Mr. Vela encouraged them to take their concerns to DOE (TR p. 361, line 25 - p. 362, line 11; p. 899, line 12 - p. 900, line 3).

On August 10, 2012, at 9:52 a.m., Mr. Clem, signing himself anonymously as "Hanford Worker," sent an e-mail to DOE Employee Concerns (CX 28, pp. 7-8):

> I and a fellow employee have a concern with the potential to affect nearly every employee on the Hanford site – including former employees.
>
> We wish to speak to one of you today. Preferably around lunch time so we will not be missed.
>
> We are coming to you because we believe going through the normal channels will be too slow. The issue we wish to speak of must be addressed within nine days, including weekends, or it will be too late. You have that much time to make a decision about placing a hold or stoppage on the event that will occur.
>
> I'm being vague and using a temporary email address because we need to know if it is feasible for DOE to place a hold on work within that timeframe. If not, if your hands are pretty much tied to a 30 day investigation, then it will be too late. There are only nine days.
>
> The issue is not one of safety or death. It is one of PHI and PII and site wide information systems.
>
> We can provide the names of people who can and will corroborate what we say, but again, if something cannot realistically

> be done with nine days then there is no reason for us to put ourselves in jeopardy.
>
> I'm monitoring this email address for your reply.
>
> Thank you.

Bonnie A. Lazor of DOE replied within minutes, and after an exchange of messages she and Mr. Clem settled on a meeting that afternoon at 3:45 (CX 28, pp. 5-7).

Meanwhile, at 10:55 a.m., Mr. Clem sent an anonymous e-mail to Ms. Riley[9] telling her he and another worker had "made arrangements to start an employee concern with DOE-RL regarding the readiness of OHM" and asking if she would be willing to discuss the issue with DOE (CX 32, p. 1).

At 12:28 p.m., Mr. Elsethagen sent an e-mail to the six members of the IT Department and others, under the subject "Feeds" (CX 31, p. 1). The message read in part

> All,
>
> ***If you receive any question on our feeds below is our mantra*** then redirect the person to me if they continue to have an issue.
>
> It seems there has been great confusion recently on CSC's implementation of OHM in regards to the impacts to recipients of our data. I hope to clear up that confusion, and if there are any further issues after reading this email feel free to give me a call or set up a meeting to discuss.
>
> First off we at CSC understand the impacts to the worker/company if an employee is allowed to work in an Area they shouldn't because of an issue with a Clearance or other medical condition. CSC is committed to the safety of the workers and would not put into place any solution unless we are confident of the outcome. That being said the current data in OHM is currently incomplete because we are waiting until next week to complete the load. We have loaded ~15 years' worth of data and have had a team performing QA for months. Come Monday all Data up to 7/1/2012 will be loaded into OHM.

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[9] Ms. Riley worked off-site from her home in Bend, Oregon (TR p. 1277, lines 19-20; p. 1284, lines 13-18).

> **Background** – OHM is an OTS system purchased ~1 year ago to replace a multitude of systems. OHM will be used for Scheduling, Work Restrictions, Program Enrollment, Case Management, Clearances… If you would like more information on OHM click on the following link: OHM

Thirty minutes after Mr. Elsethagen sent out this e-mail, Ms. Riley forwarded to him the anonymous e-mail message that Mr. Clem has sent her, asking if she would be willing to talk with the Department of Energy, saying "FYI. What's with this?" (CX 32, p. 1).

At 3:19 p.m., Mr. Clem e-mailed Ms. Riley identifying himself and Mr. Spencer as the two workers who were going to DOE at 3:45 that day. He said they would identify 13 people who had agreed to talk with DOE (CX 37, p. 2). At 5:29, Ms. Riley replied

> I was shocked, saddened and disappointed when I read this email. Although we've had "gripe" sessions, I don't remember ever hearing this level of concern from anyone – either at the weekly staff meetings which would have been the appropriate route – or on the side. To resort to secretive enrollment of co-conspirators to derail the project just doesn't seem like your style.

Ms. Riley added that in her opinion OHM was "ready to go" on August 20 and she would tell DOE so if asked (CX 37, p. 1). At 8:45 p.m., she forwarded Mr. Clem's 3:19 p.m. message, and her response to it, to Mr. Elsethagen, with the observation

> It really rubs me the wrong way to buy into this corporate backstabbing. I just don't like being involved in these tactics. I hope this doesn't burn me, but I feel a responsibility to keep you in the loop, at the potential cost of a continuing relationship with CSC and my coworkers (*Id.*)

On August 17, 2012, Mr. Baxter sent out an e-mailed "Message to All Hands from George Baxter re: OHM Implementation" announcing a postponement of the OHM Implementation Date from August 20, 2012, to August 23, 2012, in order to allow for additional staff training, practice with mock patients, and better preparation by August 23. He also stated "Key staff will continue to conduct QA of the data to ensure no worker is placed at risk" (RX 20, p. 53).

On August 22, 2012, Mr. Baxter sent an e-mail to Lisa Poulter (CX 46, pp. 1-2):

> I wanted to let you know that I have delayed the implementation of OHM until the week of 9/17/12. . . . If it was absolutely necessary, we could have implemented tomorrow but in light of the employee concern (which has been investigated by DOE and closed as unsubstantiated), I deferred implementation to ensure we are as close to perfection as possible when we do release.

Also on August 22, CSC notified Mr. Clem that it had decided not to hire him for one of the three IT Department positions that would remain after October 1, 2012 (TR p. 453, line 21 – p. 454, line 24).[10] CSC had chosen Mr. Elsethagen, Mr. Spencer, and Mike Johnston as the three people who would comprise the IT Department after HPM became the prime contractor (TR p. 656, lines 15-25; p. 543, lines 2-11; p. 1431, lines 16-22). But around September 4, Mr. Elsethagen resigned the offer of continued employment (TR p. 739, line 21 – p. 740, line 6).

On September 6, 2012, Ms. Conley met with Mr. Spencer after receiving complaints about him from Mike Johnston (TR p. 741, lines 4-16). Mr. Spencer's notes of that meeting suggest she directed Mr. Spencer not to discuss OHM with Mr. Vela or with anyone at HPM (CX 26, P. 13; TR p. 741, line 17 - p. 742, line 3). Mr. Spencer testified

> A: So, the whole purpose of this meeting, from what I recall, was from Mike going to Kim with his concerns. . . . So, in the meeting, I remember talking to her about these different issues and stuff, and the commitment and what not. I remember having a discussion about Joe and HPM. I remember there was a conversation or discussion about the fact that she said I couldn't talk to Joe about OHM stuff. But talking to Joe was part of my job responsibilities. I had to, in order to successfully get my tasks done and to successfully implement OHM. I don't remember specifics of what came out of that, but I do remember coming out of that feeling that I could talk to Joe, related to OHM related issues, because he was the QA manager. I believe the only reason I wrote this down was just because I was shocked that she would say that.
>
> . . .

[10] Mr. Clem later received written confirmation of this decision by letter dated September 13, 2012, from Mr. Baxter (CX 53).

Q: Did Ms. Conley give you any instructions as to Mike Johnston, after this meeting?

A: Specific instructions, I don't recall. But I did go have a conversation with Mike after this meeting.

Q: And did Mike have a concern that you were talking with HPM?

MR. SCOTT: Objection, Your Honor, hearsay.

JUDGE LARSEN: Overruled.

THE WITNESS: That was one of the things that came up, yes.

BY MR. PETERSON:

Q: And tell me about that?

A: He felt that because he was the most senior person and was going to be the most senior person on the carryover contract, that he felt everything should be filtered through him, including conversations with OHM, OHM related conversations with HPM and CSC should filter through him.

Q: And did you agree with that?

A: I thought it strange. I remember talking with him and we left on good terms, so I felt that the concerns that were brought up in Kim's meeting, I brought up with Mike, and we left on good terms and we left it at that.

. . .

Q: Was Mr. Johnston a manager at HPM?

A: No.

Q: At CSC?

A: No.

Q: Was Mr. Johnston a co-worker of yours?

A: Yes, in the IT group.

Q: And did he have any supervisory responsibility?

A: No (TR p. 760, line 3 - p. 763, line 13).

On September 10, 2012, Mr. Johnston sent an e-mail to Ms. Conley:

> Kim, I had a good talk with Matt this morning. We're eye to eye on issues, and talked about how to handle them going forward. I feel fine working with him. – Mike (RX 100, p. 310)[11]

On September 13, 2012, Mr. Spencer notified CSC that he would resign effective September 27 in order to take a job with ConAgra (RX 33, p. 71; TR p. 543, lines 17-23). Also on September 13, Mr. Clem returned to DOE, where he met with Ben Ellison (DOE's Chief Information Officer) and with Sheree Dickinson. He was concerned that OHM still was not ready, and he was concerned about a rumor he had heard that Lockheed Martin was interested in bidding to replace CSC as the subcontractor on the HPM prime contract, a change he thought would be detrimental. Mr. Spencer did not participate in this meeting and Mr. Clem did not mention his name (TR p. 110, line 6 - p. 112, line 8).

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[11] In Respondent's view, at some point, "CSC management announced to HPM and to all CSC employees that ***any transition work should be filtered through CSC management***" (emphasis in original), a "policy" which should have prohibited any communications between Messrs. Clem and Spencer, on the one hand, and anyone outside CSC, on the other (Respondent's Brief, pp. 4-5). Such a policy would have been, by all accounts, a dramatic departure from the easy association CSC employees had with HPM before, so one might expect that such a policy would be stated clearly and certainly. The record is considerably less certain. Mr. Johnston remembers Mr. Baxter having said that if HPM or Lockheed asked for "information" from anyone in the IT department, "'if you are requested information from them *and you're not sure*, ask me" (emphasis added); but Mr. Johnston does not remember when Mr. Baxter said it, and he does not remember that he himself ever took any such request to Mr. Baxter (TR p. 1437, line 12 - p. 1438, line 4). Ms. Conley testified that CX 29 was an e-mail containing such an instruction (TR p. 1510, line 20 – p. 1511, line 13), but the subject of CX 29 is the proper coding of time cards, and it does not instruct CRC employees not to communicate with third parties directly. It simply tells them to "talk to either Kim or George" if they have questions about "whether the work is CSC transition or HPM transition" (CX 29). Respondents cite RX 5 as a direction for CSC employees not to talk with HPM (Respondent's Brief, p. 4), but to the extent RX 5, particularly at page 25, says any such thing, it is an e-mail message from Mr. Baxter to Ms. Poulter, with no indication of wider distribution. Mr. Mooers does not identify any such policy on page 39 of his deposition, to which Respondent cites (*Id.*). Asked at her deposition "whether there was any written prohibition in place telling employees they could not talk to other HPM employees without management approval," Ms. Poulter replied only "Well, we sent out an e-mail on September 20, that's for sure" (Deposition of Lisa Poulter, p. 53, lines 4-9). September 20 was, of course, the day Messrs. Clem and Spencer were suspended. A change of policy on September 20 would be no excuse for disciplining the two of them for something they had done earlier.

On September 14, at 7:22 a.m., Mr. Johnston e-mailed Ms. Conley again (RX 34, p. 72):

> Kim, I just wanted to let you know I'm concerned about Matt's behavior. He's talking to lots of people, and spent a lot of yesterday behind closed doors with Kirt. Wednesday he came in to ask me what I knew about the job posting, and I told him that last I heard, it was going to be for an experienced dba.
>
> He also expressed concern for Kirt, which is interesting because just a few months ago he was very upset about Kirt's absenteeism and began documenting Kirt's hours, and talked about turning him in for time card fraud.
>
> I'm going to quit talking with him, but if he says anything about his conversations with me that don't sound like something I would say, then please check with me.

That same day, at 11:31 a.m., Mr. Elsethagen sent an e-mail to Messrs. Clem, Spencer, and Johnston, among others (RX 35, p. 74):

> All,
>
> This is a last call if anyone has any show stoppers with the release of OHM. I haven't heard of any from Managers, Managers Responsible for QA of Data/Reports, or my staff.
>
> Reminder: As discussed in an earlier OHM meeting HSS will be down starting tonight at COB (~3:45pm) and the clinics will be paper based for the weekend. Once HSS is down IT will start importing over the last month of data and performing all other necessary steps for OHM implementation on Monday. None of these activities will start until COB today. If you have any issues come up or something which you believe is a show stopper please let IT know ASAP.

On September 17, 2012, CSC implementedOHM. Mr. Spencer notified Mr. Elsethagen and Ms. Zaccaria that he was receiving a number of error messages from the new system (CX 59, p. 2). Mr. Elsethagen replied that evening (*Id.*)

> This is important to know but last week you didn't identify any show stoppers when asked. If you believe that was an issue why didn't you bring it up then. *[Sic]* Why are you bringing it to my attention now as an issue when you informed me Monday that you had seen these same types of issues in Devl during the prior weeks. *[Sic]*

> As you know we would never of *[sic]* released the application on Monday if any Manager, IT Staff member, of other Staff felt we were not ready. Please advise *[sic]*

The next morning, Mr. Spencer replied, in part (CX 59, pp. 1-2):

> These types of errors have been happening for some time. Are they show stoppers? I have no idea. All I know is I've brought this up on numerous occasions to Lisa, OHM, and you and no one seems to think it was an issue. . . .
>
> Also, since we went live on Monday, 9/17, we've had 213,000+ errors from OHM emailed to us.

Eighteen minutes later, Mr. Elsethagen responded (CX 59, p. 1):

> You are a Senior Programmer/Analyst if you believed this was an issue you should of *[sic]* investigated and not brought it up Monday as a concern when you didn't bring it up Friday as one. As your manager I rely on you to make decisions given your knowledge and expertise to solve and address issues which you believe are of concern. If you wish to talk about this further please come by my office.

At the hearing, Mr. Spencer testified with respect to Mr. Elsethagen's message:

> A: I think he is covering for himself, to be honest. I had been bringing these errors up. They're on – both Eric and Lisa – are both on distribution of these errors. This wasn't something that was new, it had been ongoing from day one of my involvement. So, yeah, this was nothing new. But I was a little – I can't say surprised, but I was, after the fact.
>
> Q: And had you brought this up to Eric before Monday?
>
> A: Many times. I had brought up to him, other staff brought it up to him. I know Polly, for sure, had brought it up with him, because Polly and I had both been discussing these errors coming out of the system. I had worked with Polly on these errors, so she was familiar with some of them. But I mean 213,000 errors, that's a lot of errors to go through (TR p. 546, line 16 - p. 547, line 5).

OHM "crashed" twice on September 17, and once again on September 19, and could not generate reports as anticipated. Users could not enter data into the sys-

tem if too many users were logged on at the same time (CX 58; TR p. 553, line 3 - p. 557, line 5).

On September 18, 2012, Mr. Clem, Mr. Spencer, Mr. Vela, and Mr. Mooers met in the evening after work at Bob's Burgers and Brew in Richland. According to Mr. Mooers,

> We talked about the state of the IT system. We talked about – and that included the OHMB system. And I was more there as an observer because they got into a level of technograph talk that I don't have a clue about (Deposition of Cleve Mooers, p. 14, lines 10-14).

As Mr. Spencer remembers it,

> We got there, I remember Cleve doing a lot of the talking. I don't remember specifics of what he was talking about. Eventually, OHM came into discussion. I remember discussing some of the concerns that I had seen with the errors and the crashes, stuff that I was working on in regards to OHM. I remember talking about our – the staffing concern, still going forward. The 18th, as of the 18th, it was just going to be Mike Johnston left on, you know, October the 1st. So, we had concerns about that. I don't remember specifics other than that. It was fairly short, probably less than an hour (TR p. 539, lines 5-15).

Mr. Spencer also had a recollection of "one document" being discussed at the meeting, "I think Kirt had talked about writing or making, but yeah, it hadn't been written" (TR p. 541, lines 5-6).

As Mr. Clem remembers it,

> A: Well, I mean part of it was just a personal – Cleve talking about his horses and stuff. But then, other than that, it was we spoke about what we had told DOE when we went to the Department of Energy.
>
> Q: Okay. And what, specifically, do you recall?
>
> A: The problems with the data that we had run into, I know that came up. And we mentioned concern about three IT people not being enough for the follow-on contract.
>
> . . .

> Q: Tell me about any documents that you offered to create?
>
> A: I – in the August 10th meeting with DOE, I had told them that I was considering writing something discussing risks. I felt risks to the clinic, due to OHM and also under-staffing of IT. And after August 10, things began to continue to move forward and the August 20th date got pushed, so I didn't work on that. On September 13th, I told DOE the same thing, that I was still considering writing this. So, I mentioned that to Cleve and he asked for a copy of it (TR p. 115, line 9 - p. 116, line 14).[12]

Mr. Clem had also heard from Mr. Elsethagen, whose sister worked for Lockheed Martin (TR p. 956, lines 12-13), that "Lockheed was bidding on the IT scope for the clinic" (TR p. 111, lines 3-7). According to Mr. Clem, at the Bob's Burgers meeting, "[o]ne of us mentioned that we'd heard this rumor that Eric had told us. And Cleve, in some manner, I don't remember the details, confirmed that something like that was going on" (TR p. 117, line 23 - p. 118, line 2).[13]

According to Mr. Vela,

> It was the systems issues. We discussed the concerns with the data feeds, the concerns with the system itself. You know, its functionality, issues that they saw in their part. So we had those kinds of discussions. We asked questions about other things that we wanted, like the HL-7 feeds and just trying to figure out, you know, information about the system, so we can be more versed about it or more knowledged *[sic]*, any pitfalls or concerns or issues that we may need to be aware of going into the transition (TR p. 823, line 17 - p. 824, line 1).

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[12] Mr. Clem further testified that Mr. Mooers offered to pay him $3,000 for a copy of the document (TR p. 116, lines 21-24). Mr. Mooers denies he offered to pay, claiming such an offer would represent a "conflict of interest" (Deposition of Cleve Mooers, p. 47, lines 21-25). Mr. Clem reports he never took any money from Mr. Mooers in fact, and there is no evidence to the contrary in the record. Mr. Clem completed the document after he was suspended (TR p. 116, line 21 – p. 117, line 18).

[13] According to former DOE employee Darius Slade, whose testimony at the hearing on this point was uncontradicted, Lockheed Martin (or Lockheed Martin Systems, or "LSMI") was another contractor with DOE at the Hanford site. Lockheed Martin provided services site-wide under the "Mission Support Contract." (Lockheed operated the e-mail system at Hanford, and was responsible, among other things, for security on some, but not all, of the CSC servers, TR p. 271, line 20 - p. 274, line 5; *see also* TR p. 493, line 18 - p. 495, line 18.) At some time "during the transition period," HPM proposed to DOE that after October 1, 2012, at least some of the work of the IT department at the clinic should be shifted to Lockheed Martin under the "Mission Support Contract." DOE denied the proposal based on its understanding that CSC, HPM's subcontractor, should provide all of the IT services under its subcontract with HPM (TR p. 1192, line 13 - p. 1197, p. 1).

Asked if he shared "any pricing information – CSC pricing information" at the meeting, Mr. Clem replied "No, I don't have access to anything like that" (TR p. 118, lines 2-4). Mr. Vela denied that the four discussed "the rate of pay" for any CSC employees, or any "CSC business proprietary information" (TR p. 824, line 22 - p. 825, line 5). Likewise, Mr. Mooers, asked at deposition whether either Mr. Clem or Mr. Spencer passed along any "CSC proprietary information" during the meeting, replied

> A: No. The fact is, I don't know that they would have any CSC proprietary information.[14] The system was owned by the government. The government paid for it. So anything that they worked on was already being bought and paid for by the government, as far as I know, there was no CSC stuff in there.
>
> Q: Did Mr. Spencer or Mr. Clem provide you any labor rates of CSC?
>
> A: No. I had all the labor rates from CSC from Lisa Poulter (Deposition of Cleve Mooers, p. 15, line 16 - p.16, line 2).

The day after the meeting, Mr. Clem asked to meet with Ms. Conley, together with Mr. Spencer (TR p. 130, lines 7-23).[15] The three met, in two separate meetings, on September 20. In the first meeting, as Mr. Clem recalls it, he and Mr. Spencer told Ms. Conley about their concerns with OHM, including the many error messages the system had been generating since September 17; the staff reductions in the IT department; and the rumor they had heard about Lockheed Martin bidding to provide IT services (TR p. 131, line 8 – p. 132, line 17). Mr. Spencer likewise recalls talking about OHM, "discussing the error messages, in particular;" the reduction in the IT staff (TR p. 558, line 6 - p. 559, line 2); and the rumors of the Lockheed bid (TR p. 559, lines 17-22). Ms. Conley agrees the three of them discussed problems with OHM, specifically the error messages, and the levels of staffing (TR p. 1144, line 10 - p. 1146, line 14). But Ms. Conley also remembers two additional details. First:

> They warned of, you know, the system crashing and that type of a failure (TR p. 1147, lines 6-7).

[14] In her testimony at the hearing, Ms. Conley appeared to agree (TR p. 1109, line 18 - 1110, line 18).
[15] Mr. Clem also met briefly with Dan McCann of Lockheed on September 19 (TR p. 428, p. 12 – p. 429, p. 4; RX 39). Mr. Clem was never asked to describe the substance of that meeting, so the record is silent on that point.

And second:

> I do know that Mr. Spencer very clearly said that he provided – he had spoken to individuals at all levels of Lockheed, you know, up to senior management. And that, basically, anything they asked or needed, he would tell them (TR p. 1157, lines 11-15).

As Ms. Conley tells it, after the meeting she went to Mr. Baxter, rehearsing the content of her meeting with Messrs. Clem and Spencer, including their warning of a system failure. The two of them telephoned Ms. Poulter:

> A: I told Ms. Poulter that these gentlemen had shared with me that Mr. Spencer had said that he had provided information to Lockheed Martin for – to do their scope of work for, you know, defining their work. He shared the information on systems, on projects, on – you know, really the knowledge he had about our operations with Lockheed.[16] And he said for them to develop their pricing proposal –
>
> Q: Okay.
>
> A: -- for their subcontract they were going to have going forward, that they were bidding on.
>
> Q: Okay.
>
> A: And also, I had told her that they had been having meetings with HPM, in addition, and they had shared with me that they had several meetings they were providing all kind of information to HPM.[17] They were providing – they were having meetings offsite, that they had not talked to their manager

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[16] According to his supervisor, Mr. Elsethagen, Mr. Spencer was required to communicate with Lockheed Martin as part of his regular job duties (TR p. 980, line 18 – p. 982, line 2).

[17] In fact, Respondent now argues that HPM "prepared, with information supplied by Clem and Spencer, proposals for [Lockheed Martin Services, Inc.] to work on the Clinic's IT scope" (Respondent's Brief, p. 5). Messrs. Clem and Spencer do not deny that they spoke frequently with Mr. Vela, and participated in the Bob's Burgers meeting with Mr. Vela and Mr. Mooers. But Respondent's inability precisely to identify exactly what information Mr. Clem or Mr. Spencer allegedly supplied to HPM speaks volumes. Respondent is quick to suggest that the "information" which allegedly passed between Messrs. Clem and Spencer, on the one hand, and HPM, on the other, was highly-sensitive confidential information of the sort that would confer a competitive advantage on those who possessed it. But there is simply no evidence in the record that Mr. Clem or Mr. Spencer had such information in the first place, much less that they passed it on to HPM – or, for that matter, to Lockheed. The record does show that *if* Mr. Clem and Mr. Spencer had such information, they *could* have given it to HPM, or to Lockheed. But it does not show they *did*.

> about any of these meetings or any of the information that had been asked of them (TR p. 1153, line 13 - p. 1154, line 5).

According to Ms. Conley, Ms. Poulter directed her to suspend Mr. Clem and Mr. Spencer immediately, to prevent them from sabotaging the system (TR p. 1147, line 8 - p. 1148, line 5). Ms. Poulter, on the other hand, has a much different recollection:

> Q: Now, was this – the fact that Mr. Clem and Mr. Spencer, as you were told, met with HPM off site and discussed CSC business, was that the sole reason that you decided to suspend them?
>
> A: *I didn't decide to suspend them. Employee relations decided to suspend them* (emphasis added).
>
> Q: Okay. Can you tell me everything you can remember about the phone call with Ms. Conley where she told you anything about what was going on with Mr. Clem and Mr. Spencer?
>
> A: I recall almost nothing of the conversation other than that she told me that they had come in and shared with her that they had been talking to HPM, and I think there was more detail around specifically what they were talking about, but I don't have that level of recollection. *I told her that, you know, we needed to get employee relations involved, and she did that.* Kim was meticulous in making sure that all the I's were dotted and the T's crossed (emphasis added). Deposition of Lisa Poulter, p. 68, line 13 - p. 69, line 9.

Mr. Baxter remembers even less. He is quite sure that he personally did not make the decision to suspend Mr. Clem and Mr. Spencer (Deposition of George Baxter, p. 139, lines 14-19), but he does not recall who did. Neither does he recall whether he made any recommendation about what should be done, whether he consulted with anyone in human resources, whether he and Ms. Conley called Ms. Poulter, or whether he gave Ms. Conley any instructions about what to do under the circumstances (*Id.*, p. 139, line 20 – p. 141, line 3).

In any case, Ms. Conley suspended Mr. Clem and Mr. Spencer that day. According to Mr. Clem, Ms. Conley told them they were suspended "for aiding the competition and supplying confidential business sensitive information to a competitor" (TR p. 137, lines 6-10). Ms. Conley did not give them any written notification of their suspension; "I was not asked to provide one. I was instructed by Employee Relations of what to do. . . . They told me, you know, verbally, let them know what they were being suspended for and that they – evidently they provided that or they provide that letter" (TR p. 1166, line 21 - p. 1167, line 9). Messrs. Clem and Spencer

were escorted from the building forthwith (TR p. 138, lines 6-24; p. 560, line 12 - p. 561, line 15).

That afternoon, Cleve Mooers e-mailed Lisa Poulter and Joe Best, with copies to Hollie Mooers, Ms. Conley, and Mr. Baxter:

> Lisa,
>
> I understand CSC just fired/suspended the IT Professionals that talked to HPMC for "aiding the competition." Is this true? (CX 61, p. 1)

Ms. Poulter replied,

> No. (*Id.*)

At his deposition, Mr. Baxter testified

> Q: Do you recall Mr. Mooers asking you if CSC had fired or suspended the IT professionals for talking to them for aiding the competition?
>
> A: I don't recall if he asked me that, no.
>
> Q: And do you consider that the reason for Mr. Clem and Mr. Spencer being suspended?
>
> A: I believe the reason for their suspension was that they shared company proprietary information that was not in accordance with the terms of employment. I don't have that documentation in front of me, so I can't speak to exactly what the terms were. (Deposition of George Baxter, p. 80, lines 4-16.)

Following their suspension, Messrs. Clem and Spencer went back to DOE and complained CSC had retaliated against them (TR p. 154, line 25 - p. 156, line 18; CX 69).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainants assert claims under 42 U.S.C. § 5851, the employee-protection provisions of the Energy Reorganization Act. "To establish a prima facie case of ERA retaliation, an employee must show: (1) he 'engaged in a protected activity'; (2) 'the respondent knew or suspected . . . that the employee engaged in protected activity'; (3) '[t]he employee suffered an adverse action'; and (4) '[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.'" Once the employee establishes a prima facie case, the burden shifts to the employer to introduce clear and convincing evidence that it would

have taken the same unfavorable personnel action if the protected activity had never occurred. *Tamosaitis* v. *URS, Inc.*, 781 F.3d 468, 481 (9th Cir. 2014).

The Act "serves a 'broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality.'" *Sanders* v. *Energy Northwest*, 812 F.3d 1193, 1197 (9th Cir. 2016), citing *Mackowiak* v. *University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984).

A. Complainants Engaged in Protected Activity

I conclude Mr. Clem and Mr. Spencer engaged in protected activity when they met with the Department of Energy on August 10 and when Mr. Clem met with DOE a second time on September 13. They also engaged in protected activity when they reported problems with the OHM software to Mr. Elsethagen and others at CSC before and after they met with DOE. I find that failure of the OHM software could jeopardize worker safety at the Hanford site, since one of its functions was to memorialize when a particular worker could safely be assigned to work in a particular area of the site. Among others, Mr. Elsethagen (CX 29; 30; 31, p. 1) and Mr. Baxter (RX 20, p. 53) acknowledge this.

Respondent argues these complaints do not comprise "protected activity" because 1) the complaints did not refer to "a specific practice, condition, directive or occurrence" implicating safety "definitively and specifically," and 2) they did not raise any question of compliance with applicable nuclear safety standards (Respondent's Brief, p. 7). The Ninth Circuit has not taken such a narrow view of § 5851. *Mackowiak*, *supra*. Mr. Clem and Mr. Spencer had first-hand knowledge of the safety concerns they raised with their supervisors and with DOE. *See Sanders* v. *Energy Northwest*, *supra*, 813 F.3d at 1198. Respondents point out that at times the Complainants told others their complaints about OHM were *not* safety related (CX 28; Respondent's Brief, pp. 8-10). But ultimately, whether the Complainants realized it or not at the time, their complaints were relevant to worker safety, as even Mr. Elsethagen and Mr. Baxter acknowledged. The employee-protection provisions of the Act would mean very little if a whistleblower could be estopped by his failure initially to appreciate, or properly to categorize as such, a genuine safety problem. More seriously, such an estoppel could prevent genuine safety problems from coming to light, which is inconsistent with the Congressional intent underlying the statute.

B. Respondent Knew of the Protected Activity

CSC knew of Messrs. Clem's and Spencer's complaints to CSC itself. Indeed, it appears Mr. Elsethagen grew tired of hearing them (TR p. 974, line 22 - p. 975, p. 10; p. 986, line 20 - p. 987, line 17). Ms. Zaccaria, too, appears to have told Mr. Spencer to stop discussing OHM at IT staff meetings (TR p. 529, line 23 – p. 531, line 3; p. 688, line 3 - p. 689, line 3). CRC also knew of the first complaint to the

DOE, because Ms. Riley e-mailed Mr. Elsethagen about it the day it occurred (TR p. 990, line 21 - p. 992, line 22), and a DOE investigation followed (CX 46, pp. 1-2).

C. Complainants Suffered Adverse Employment Actions

CSC suspended Mr. Clem and Mr. Spencer without pay on September 20, 2012.

On August 22, 2012, and by letter dated September 13, 2012, from Mr. Baxter, CSC notified Mr. Clem that it had decided not to hire him for one of the post-October 1, 2012, IT Department positions.

Mr. Clem applied for a Senior Program Analyst position at CSC in December, 2012 (after Mr. Johnston resigned from the IT Department) (CX 94, p. 1; RX 99, pp. 295-308; TR p. 158, line 16 - p. 159, line 13) and was not interviewed or hired.

Mr. Clem applied for a Programmer Analyst position at CSC in October, 2013 (CX 94, p. 2; RX 99, pp. 288-294; TR p. 159, line 14 - p. 196, line 8), and was not hired.

CSC has not paid "special pay" due to both Complainants, contending they were not entitled to it because "it had become clear to Ms. Conley that both Clem and Spencer were spending a significant amount of time colluding with HPM who was attempting to have CSC removed from the contract" (Respondent's Brief, p. 48).

D. The Circumstances Support a Reasonable Inference That the Protected Activity Was a Contributing Factor To Some Adverse Actions

i. Suspension Without Pay

For these reasons, I conclude the circumstances support a reasonable inference that the protected activity was a contributing factor to CSC's suspension of Messrs. Clem and Spencer without pay.

First, the suspension occurred shortly after the protected activity.

Second, CSC has not articulated a consistent reason for the suspension, having contended variously that it occurred because Messrs. Clem and Spencer met with HPM and/or Lockheed Martin personnel in violation of a policy forbidding it, and that it suspected them of an intention to sabotage OHM.

Third, CSC did not issue a Memorandum of Disciplinary Action, as required under its own policy (CX 18, p. 6, ¶4.2.4.4), which would have memorialized the reason.

Fourth, no individual at CSC takes responsibility for the decision. Mr. Baxter testifies the decision was not his; Ms. Conley testifies the decision was Ms. Poulter's; Ms. Poulter testifies the decision was made by someone in Employee Relations; and the only witness from the Human Resources Department to testify in this action, Ms. Martinez, has no recollection of ordering the suspension (Deposition of Kobra Martinez, p. 32, lines 14-21; p. 37, lines 17-22; p. 38, line 22 - p. 39, line 9). Given the time interval between the two meetings the Complainants had with Ms. Conley on September 20, it seems highly unlikely that Employee Relations or Human Resources could have been involved in the decision to suspend them, unless the subject of suspension had somehow come up before the first meeting with Ms. Conley that day.

Fifth, Ms. Conley had no supervisory responsibilities over Mr. Clem or Mr. Spencer (TR p. 1098, lines 9-11), yet appears to have had some role, at least, in suspending them.

Sixth, when Mr. Mooers e-mailed to ask if CSC had suspended employees for meeting with HPM, Ms. Poulter answered "No."

Seventh, the idea that collaboration with HPM would be a legitimate basis for discipline is severely undercut by Mr. Baxter's evident confusion about whether HPM is, in fact, a competitor of CSC's. He admits he does not know, and has no idea how any employee of his would know, either (Deposition of George Baxter, p. 181, line 8 – p. 185, line 12).

It is not any one of these factors, standing alone, but the combination of all of them, which supports my conclusion that CSC's knowledge of the protected activity contributed to the suspension without pay.

ii. Failure to Retain Mr. Clem

I conclude the circumstances do not support a reasonable inference that the protected activity was a contributing factor to CSC's first decision, communicated to him in August and September, 2012, not to retain Mr. Clem in the IT Department after October 1, 2012. While this decision might have been finalized after Mr. Clem and Mr. Spencer began complaining to their CSC supervisors about OHM, and perhaps even after they first went to DOE on August 10, the reduction of staff in the IT Department had been announced on July 10, 2012. What is more, CSC offered a post-October-1 position to Mr. Spencer, and he accepted it – an unlikely outcome, if CSC were retaliating against protected activity.

But the circumstances do support a reasonable inference that the protected activity was a contributing factor to CSC's decision not to retain Mr. Clem after Mr. Elsethagen and Mr. Spencer resigned before assuming their post-October-1 positions at CSC. In originally selecting Messrs. Elsethagen, Spencer, and Johnston to stay on after October 1, CSC had retained three senior programmer analysts. It re-

placed Messrs. Elsethagen and Spencer with Polly Riley, who continued to work off-site, and Ray Matthews, who was a more junior Program Analyst (TR p. 193, lines 2-5; p. 159, line 21 - p. 160, line 8). As discussed above, virtually everyone at CSC thought reducing the IT Department to three people was a bad idea, so it is counter-intuitive that CSC would pass over a more experienced IT person in favor of a less-experienced one to include in the three. What is more, there is some evidence that Mr. Matthews' relative unfamiliarity with OHM was a problem after October 1 (TR p. 838, line 3 - p. 839, line 10).

iii. Failure to Re-Hire Mr. Clem

I conclude the circumstances support a reasonable inference that the protected activity was a contributing factor to CSC's decision not to hire Mr. Clem as a Senior Program Analyst in December, 2012, or as a Programmer Analyst in October, 2013. First, CSC suspended him without pay, as set forth above, under very curious circumstances. Second, CSC had not retained him after Messrs. Elsethagen and Spencer resigned their post-October-1 positions, although he was more experienced than Mr. Matthews, whom CSC hired. Third, Mr. Johnston testified that Ms. Conley had said, after Mr. Johnson's resignation, that she was concerned because she thought Mr. Clem might apply for his job (TR p. 1451, lines 9-10) – which, in fact, Mr. Clem did, without ever being called for an interview, although he had done the job before. Fourth, CSC's failure to resolve the Complainants' claims for "special pay," as discussed below, and its failure to issue a written Memorandum of Disciplinary Action after the suspension, as discussed above, both suggest that CSC simply intended to ignore Mr. Clem in the future.

iv. "Special Pay"

I conclude the circumstances support a reasonable inference that the protected activity was a contributing factor to CSC's decision to withhold "special pay" from the Complainants. Respondent does not deny having promised "special pay," but contends 1) Mr. Baxter had the authority, in essence, to change his mind and withhold it; 2) that Mr. Elsethagen frequently forgot to pass along time sheets; 3) that somebody decided, and Ms. Conley told the Complainants, that CSC had decided not to give them their "special pay;" and 4) that Mr. Clem and Mr. Spencer do not deserve "special pay" because "neither Clem nor Spencer were giving 100% to the work necessary for the contract transition" at the end of their employment (Respondent's Brief, p. 48). In the first place, these arguments are inconsistent. As with the suspension without pay, Respondent seems to have difficulty deciding on a single justification for what it has done. Mr. Elsethagen's administrative lapses are no excuse for docking some other employee's pay, and they are irrelevant if Mr. Clem and Mr. Spencer have no legal right to be paid for the hours they submitted to him. More importantly, Respondent does not deny that it offered the Complainants "special pay," or that the Complainants worked the hours they claim in response to the offer. For that reason, equity appears on the Complainants' side here.

E. Respondent's Evidence of Justification Is Not Clear and Convincing

With respect to the suspension without pay, the failure to re-hire Mr. Clem after Mr. Johnston's resignation, the failure to consider Mr. Clem's applications for employment in 2012 and 2013, and the failure to pay "special pay," the burden now shifts to Respondent to show, by clear and convincing evidence, that it would have taken the same actions had the protected activity not occurred. *Tamosaitis* v. *URS, Inc.*, *supra,* 781 F.3d at 481.

i. Suspension Without Pay

On this point, Respondent's evidence is unclear, much less unconvincing. The evidence does not clearly establish that CSC at any time articulated a clear, understandable policy prohibiting its employees from speaking to HPM or Lockheed Martin. Even if it had, it has variously argued that it suspended the Complainants for violating that policy, or that it suspended them because it concluded they were about to sabotage OHM itself. It has scrupulously avoided committing itself to either reason, as it would have done had it issued the Memorandum of Disciplinary Action required under its own policy. All three persons who witnessed the events leading to the suspension – Mr. Baxter, Ms. Conley, and Ms. Poulter – deny the decision to suspend was theirs, and except for Ms. Poulter, whose explanation is highly unlikely under the circumstances, claim not to know whose the decision was.

ii. Failure to Retain Mr. Clem After Mr. Elsethagen and Mr. Spencer Resigned

As discussed above, CSC did *not* retaliate against Mr. Clem when it failed to retain him when it chose Mr. Elsethagen, Mr. Spencer, and Mr. Johnston in late August, 2012, to comprise the IT Department after October 1. But it is reasonable to infer it did so after Mr. Elsethagen and Mr. Spencer resigned shortly thereafter.

The record includes little direct evidence about CSC's choice to retain Mr. Matthews, as opposed to Mr. Clem or anyone else, after Messrs. Elsethagen and Spencer resigned. Respondent argues that when it chose Mr. Elsethagen, Mr. Spencer, and Mr. Johnston to comprise the post-October-1 IT Department, Ms. Conley made the decision based on her assessment that those three employees offered "the best mix of skills" to staff the Department (Respondent's Brief, pp. 39-40). Respondent further argues Ms. Conley must have done the same after Messrs. Elsethagen and Spencer resigned (Respondent's Brief, p. 40). Ms. Conley herself filled out a "Reduction in Force Action Justification Form" in which she wrote

> Candidates were compared based on knowledge/skill/experience of key applications and defined scope; performance;

> productivity; quality and timeliness of work; and customer service/customer impact (CX 72, p. 1).

But at the hearing, no one elicited any testimony from Ms. Conley about how she went about doing those things.[18] The lack of such testimony is important, because Ms. Conley did not supervise Mr. Clem personally (TR p. 1098, lines 9-11). Respondent's assurance, therefore, that Ms. Conley must carefully have weighed the respective qualifications of Messrs. Matthews and Clem, in the context of the ultimate "mix of skills" she wanted for the three-person IT Department, rings hollow. If she had, it would have been simple to ask her to say so at the hearing, and Respondent did not.

Respondent also argues that Ms. Conley's choice of Mr. Matthews depended at least in part on her realization that she "was already over-budget with overhead" (Respondent's Brief, p. 40). In support of this argument, Respondent points out that Mr. Clem assumes CSC paid Mr. Matthews less money than it paid Mr. Clem (TR p. 455, line 22 - p. 456, line 1), and Ms. Conley testifies Mr. Clem's assumption was correct (TR p. 1547, lines 1-5). But nowhere in the record can I find Mr. Matthews' actual salary at the time Ms. Conley chose him; nor can I find the amount of her budget, or the salaries CSC was obligated to pay Mr. Johnston and Ms. Riley. There is, in fine, no way for me to test Ms. Conley's implicit argument that she could not afford Mr. Clem. Because I cannot test it, I cannot distinguish this argument from an after-the-fact rationalization.

I conclude Respondent has not produced clear and convincing evidence to show that the protected activity did not contribute to Ms. Conley's choice of Mr. Matthews over Mr. Clem, after Messrs. Elsethagen and Spencer resigned.

iii. Failure to Re-Hire Mr. Clem

Again Respondent argues that because Ms. Conley can now articulate business reasons for disregarding Mr. Clem's December, 2012, and 2013 applications for jobs as a Senior Program Analyst and Program Analyst, her conduct cannot be retaliatory (Respondent's Brief, p. 42). But the burden is on Respondent to show, by clear and convincing evidence, that it would have disregarded Mr. Clem's applications if the protected activity had never occurred. Ms. Conley's current assurances that she picked stronger candidates in each case do not satisfy this evidentiary standard.

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[18] Respondent cites me to page 1143 of the hearing transcript (Respondent's Brief, p. 40), but the testimony on that page is irrelevant. There, Ms. Conley testifies about a different document, one she did not write, and what is more, that document pertains to the decision to retain Mr. Elsethagen, Mr. Spencer, and Mr. Johnston after October 1 – *not* to the decision to retain Mr. Matthews, rather than Mr. Clem, after Messrs. Elsethagen and Spencer resigned.

iv. "Special Pay"

With regards to "special pay," Respondent's evidence is almost entirely a matter of argument. Respondent essentially admits it promised Mr. Clem and Mr. Spencer "special pay" – ten additional hours of "straight" time per week, and later additional hours of "straight time," in addition to their regular salary. It likewise admits Mr. Clem and Mr. Spencer claimed additional hours. It offers no evidence to show Mr. Clem or Mr. Spencer's claims for those additional hours are inflated in any way. Instead, it both blames Mr. Elsethagen for not turning in time sheets in timely fashion, and contends Mr. Elsethagen believed the Complainants were not "giving 100%" towards the end of Mr. Elsethagen's tenure at CSC. It also contends, without any factual support whatever, that Mr. Baxter had the legal right to withhold "special pay" after the Complainants earned it. And, in an astonishing display of *chutzpah*, Respondent argues "both Clem and Spencer were spending a significant amount of time colluding with HPM who was attempting to have CSC removed from the contract" – a finding of fact I explicitly do *not* make – and, in the same breath, assures the court "[t]here was nothing retaliatory regarding this decision" to withhold their "special pay" (Respondent's Brief, p. 48). Whatever this evidentiary hash may be, it is not clear, and it is not convincing.

III. DAMAGES

The Office of Administrative Law Judges' Rules of Practice and Procedure, 29 C.F.R. Part 18, Subpart A, apply in this case. 29 C.F.R. §24.107, subsection (a). Under those rules, the Complainants were obligated, within 21 days of entry of an initial notice or order acknowledging the case had been docketed (29 C.F.R. §18.80, subsection (c)(1)(iv)), and "without awaiting a discovery request" (29 C.F.R. §18.80, subsection (c)(1)(i)), to disclose to Respondent, *inter alia*,

> A computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under §18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered (29 C.F.R. §18.80, subsection (c)(1)(i)(C)).

What is more, under 29 C.F.R. §18.53, Complainants had a continuing duty throughout the litigation to "supplement or correct" that disclosure if, at any time, they learned it had become incomplete or incorrect in some material respect.

Given those obligations, one would reasonably expect to find at some point in Complainants' ninety-five-page Closing Brief a computation of their claimed damages. To my astonishment, there is none. Complainants merely identify *categories* of damages – such as loss of pay (*see* Complainants' Brief, p. 76), loss of "special

pay" (*see* Complainants' Brief, pp. 81-82), and damage to reputation (*see* Complainant's Brief, pp. 82-83) – which they claim. The brief includes cross-references to lengthy excerpts from the hearing testimony, and to documents received in evidence, but *nowhere* demonstrates how that testimony and those documents support a calculation of damages in any particular amount. It is as if Complainants have simply dumped the six-volume hearing transcript and a banker's box full of documents on the court's desk, expecting the court to make their case for them.

At the hearing, for example, Mr. Clem testified about his 401(k) account:

> I won't – *I figure somebody should be able to calculate* – I was putting in the maximum amount. *Somebody should be able to calculate what my earnings would have been on that, had I continued doing that.* Plus, the earnings that I would have made on the CSC match, that I didn't get (emphasis added)(TR p. 192, lines 1-5).

"Somebody" might have indeed – but if Mr. Clem, intending to claim damages, wanted to know who that "somebody" was, he should have looked in a mirror.[19]

Complainants have placed the court in a difficult position. Having concluded Complainants are entitled to monetary relief, it is not in the interest of justice for the court to send them away empty-handed.[20] The court will accordingly make the best assessment it can from the record. But the Complainants might have been better served by presenting their own calculations. Now, having left the court with a mass of documents and little direction, they are in a poor position to complain if the court's calculation disappoints them.

Fortunately, Respondent acknowledges the Act allows the successful complainant to recover back pay and compensatory damages (including recovery for mental anguish, emotional distress, pain and suffering, and loss of professional reputation) (Respondent's Brief, p. 43). Respondent might have added that the successful complainant may recover attorney fees and costs reasonably incurred as well. *Wells* v. *Kansas Gas & Elec. Co.*, 85-ERA-72 (Sec'y Mar. 21, 1991), slip op. at 17.

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[19] Or, in fairness to Mr. Clem personally, he and his counsel should have looked in a mirror.

[20] Although I suspect that if the Complainants were before the District Court under 42 U.S.C. §5851(b)(4) and did not provide the District Court with an itemization of damages claimed, the District Court would do exactly that.

A. Pay for the Period of Suspension

I conclude Mr. Clem and Mr. Spencer are entitled to their full salary for the days they were suspended without pay.

In Mr. Clem's case, I infer from the pay stubs at CX pp. 64-65 that he was paid $3,457.93 in base salary for every two-week pay period, or $246.995 per day ($3,457.93 divided by 14). Thus, for the eleven days of his suspension (September 20-30, 2012), he should have been paid $2,716.95.

In Mr. Spencer's case, I infer from CX 114, p. 3, that he was paid $2,978.37 in salary for every two-week pay period, or $212.74 per day. His resignation was effective September 27, 2012 (RX 33, p. 71). His suspension accordingly lasted eight days (September 20-27), for which he should have been paid $1,701.92.

B. Special Pay

CSC promised Mr. Clem and Mr. Spencer "special pay" towards the end of their respective tenures. I conclude they are entitled to recover the "special pay" they earned while employed at CSC.

Mr. Clem estimates he was owed for 40-80 hours of "special pay" (TR p. 189, line 24 - p. 190, line 10), but there is no documentary evidence to show the exact number of hours. I conclude Mr. Clem may recover for 40 hours of special pay. I infer the appropriate hourly rate by dividing his two-week salary of $3,457.93 by 80 hours, a quotient of $43.22 per hour. Thus, I award Mr. Clem unpaid "special pay" of $1,728.80.

Mr. Spencer's claim for 40 hours of "special pay" is documented at CX 114, pp. 11-12, 13, 16. I calculate his hourly rate from his biweekly salary of $2,978.37 as $37.23, and award Mr. Spencer unpaid "special pay" of $1,489.20.

I am unpersuaded by Respondent's argument that it acted within its rights to withdraw, *nunc pro tunc*, its offer of "special pay" after Mr. Clem and Mr. Spencer had done the work to earn it (CX 114, p. 17). As a general proposition, an employer ought not to be able to change its mind about wages after an employee has earned them. In this case particularly, as stated above, Respondent cannot seem to decide whether its failure to pay these amounts to the Complainants was the result of Mr. Elsethagen's administrative inadequacies, or the result of a conscious decision on the part of management. Even more importantly, Respondent still seeks to justify its refusal to pay the Complainants on the grounds they were engaging in unjustified collusion with third parties – an assertion this court does not believe (Respondent's Brief, p. 48).

C. Mr. Clem's Reduced Earnings

When Mr. Clem's suspension without pay ended, his employment at CSC ended as well. At that time, he was earning $89,806.18 in salary annually ($3,437.93 times twenty-six pay periods). As discussed above, CSC retaliated against him when it failed to consider him after Mr. Elsethagen and Mr. Spencer resigned, and when he applied for employment in December, 2012, and in 2013. Since leaving CSC, Mr. Clem has earned considerably less than his $89,806.16 annual salary. As Respondent argues, his damages for pay after leaving CSC "should be limited to the difference in earnings between his previous salary with CSC and his subsequent employment" (Respondent's Brief, p. 43). Mr. Clem began working for CH2M Hill on August 31, 2015, earning a salary of about $85,000.00 per year (TR p. 180, line 20 - p. 181, line 6; p. 469, lines 12-18). I conclude Mr. Clem's employment at CH2M Hill is roughly comparable to his job at CSC, although it still pays something less than CSC did.

In between those two jobs, Mr. Clem worked from September 20, 2013, until February 26, 2015 (about seventeen months), for Express Employment, earning about $62,000 per year (TR p. 177, line 19 - p. 178, line 2). From April 6, 2015, until June 10, 2015 (about two months), he worked for Sub 2 Washington River Protection Solutions, earning $83,000 per year (TR p. 179, lines 4-24). For the rest of that period (about sixteen months), he was unemployed. His annual salary at Express Employment works out to $5,266.67 per month ($62,000 divided by twelve), while his annual Sub 2 Washington River Protection Solutions salary works out to $6,919.67 per month ($83,000 divided by twelve). His $89,806.18 annual salary at CSC was $7,492.17 per month. Thus: for the sixteen months of unemployment, Mr. Clem lost $7,492.17 per month; during the seventeen months at Express Employment, Mr. Clem lost $2,325.50 per month ($7,492.17 minus $5,266.67); and during the two months at Sub 2 Washington River Protection Solutions, he lost $575.50 per month ($7,492.17 minus $6,916.67) – a total of $160,559.22 in salary lost.

As discussed above, Mr. Clem also testified at the hearing about his CSC 401(k) plan, saying "somebody" ought to be able to calculate a loss resulting from his departure from CSC (TR p. 192, lines 1-5). I can infer from CX 117, p. 85, that at the time of his suspension, CSC was contributing $103.74 per pay period to his 401(k) account, so I can add to his damages $7,884.24, representing the value of those contributions for the seventy-six pay periods between September 20, 2012, and August 31, 2015. But beyond this, I do not have sufficient evidence to draw any conclusions about the performance of the 401(k) account, or how it would have fluctuated in value after the suspension. Mr. Clem also mentioned vacation pay and the loss of health insurance as items of damages (TR p. 192, lines 7-18), and he includes medical bills in CX 117 at pp. 14-31. To the extent Mr. Clem may be entitled to claim such damages, there simply is not sufficient evidence in the record before me to allow me to place a dollar value on them. I do not know whether Mr. Clem contends that the medical bills were caused by CSC's retaliatory conduct (in which

case evidence of causation is missing), or whether he contends that his CSC health insurance would have paid some portion of them (in which case the details of his health coverage are missing), or whether he contends something else entirely. I do not have any evidence before me of what Mr. Clem might have been owed, if anything, for vacation time he did not use before the suspension.

Respondent contends Mr. Clem failed to mitigate his damages, faulting him for failing to pursue a $50,000-per-year job with the City of Pasco because it would have required him to work with an "unpleasant person"[21] (Respondent's Brief, p. 44). But Respondent overlooks additional relevant facts, such as that it can identify only a single job opportunity that Mr. Clem failed to pursue; that the job in question would have required him to accept a 44% pay cut from his CSC salary; and that Mr. Clem had been told by an OSHA administrator to look for "comparable employment" (TR p. 263, lines 17-19). I conclude Mr. Clem's conduct with respect to the City of Pasco job was reasonable and does not comprise a failure to mitigate damages.

Interest accrues on an award of back pay at the rate specified in 26 U.S.C. §6621 until the date of compliance with the award. *Sprague* v. *American Nuclear Resources, Inc.*, 92-ERA-37 (Sec'y. Dec. 1, 1994).

Compensatory Damages

As Respondent points out, "[t]o recover compensatory damages under the Act, a complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personal *[sic]* action caused the harm. . . . A step in determining whether a complainant is entitled to compensatory damages is a comparison with awards made in similar cases" (Respondent's Brief, p. 43). The evidence also shows the Complainants suffered an injury to their reputations.

Mr. Clem testified, "I don't think you can appreciate it until it happens to you, but it's a very lonely feeling to be removed from your job under what you think or believe is false pretenses, for doing what you thought was right, to basically protect the patients, with no real knowledge for how to seek justice in that" (TR p. 195, lines 8-13). Friends told him they heard he had been "suspended or fired" for trying to help a third party "secure a bid for the clinic" (TR p. 196, lines 4-9). He felt "lonely, sad, fearful for my future" (TR p. 196, line 16). He testified he had trouble sleeping, going over events like the meeting with Kim Conley in his mind (TR p. 197, lines 14-23). His wife testified Mr. Clem's mood became more depressed in 2012,

[21] To the extent the description of the woman in question as an "unpleasant person" makes Mr. Clem's unwillingness to work with her sound petty or trivial, the parties should bear in mind that the descriptor "unpleasant person" was suggested by the court when it became clear Mr. Clem was struggling to avoid the use of a stronger term (TR p. 263, lines 10-19).

and that she found him once on the back porch of his mother's house crying, saying he was upset with issues at work (TR p. 226, lines 4-23). After the suspension,

> He definitely got more depressed. He would be waking up at night, he'd have a hard time falling asleep. When he'd wake up at night, he'd wake me up. I'd walk in there and he'd be on the computer doing job searches and things like that, and just doing all sorts of research on different things. He would just be stressed out about money and security and things like that. And you know, it's like I can console him as much as possible, you know, I've lost jobs before, too, but you know, until you go through it, it's a really emotional thing when, you know, here he's been, you know, had fairly secure employment throughout his life, you know, being an IT professional, you know, feeling like he's doing the right thing, and then getting suspended or laid off, or whatever the term was at the time. It was pretty devastating (TR p. 228, line 17 - p. 229, line 6).

Mr. Clem also attended therapy with Dr. Lowe (TR p. 199, lines 10-23) and Dr. Boyd (TR p. 201, lines 5-21). At the hearing, Dr. Boyd testified that Mr. Clem had been depressed, anxious, and experienced a loss of confidence (TR p. 291, lines 3-6).

Respondent argues that Dr. Lowe's treatment casts "significant doubt" on Mr. Clem's claims of emotional distress (Respondent's Brief, p. 44), and goes on at some length to catalog all of the statements Dr. Lowe made in deposition allegedly adverse to Mr. Clem's interest, culminating in the italicized-and-boldfaced assertion that "Lowe did not believe that Clem suffered from any mental health conditions directly related to his layoff from CSC" (Respondent's Brief, pp. 44-46).[22] Respondent misses the point. Mr. Clem does not have to show that CSC's retaliation caused him to develop a "mental health condition;" in particular, a mental condition still plaguing him three years later. He need only show that CSC's retaliation caused him emotional distress – a fact Dr. Lowe does not deny, and the testimony cited above supports. What is more, Respondent's references to Mr. Clem's "long history of mental health issues and issues with his chosen field of IT" (Respondent's Brief, p. 44) cut both ways. Respondent is dangerously close to arguing that while it is obligated to treat its healthy-minded employees fairly, it can abuse employees with a "long history of mental health issues" to its heart's content, since those employees are presumably off their rockers already. In this court's view, a complainant with a "long history of mental health issues" is just as entitled to ERA anti-retaliation pro-

[22] What Dr. Lowe actually said, when deposed on October 23, 2015, was that Mr. Clem did not have, *at that time*, either PTSD or "any mental health conditions directly related to his layoff from CSC" (Deposition of Dr. Lowe, p. 86, lines 9-16). At no time did Dr. Lowe testify, or as nearly as I can tell imply in any way, that CSC's retaliation against Mr. Clem had never caused Mr. Clem any distress of any kind at any time.

tection as a complainant whose mental health has never been compromised in any way. I see nothing in Dr. Lowe's testimony, or in the evidence of record anywhere else, to suggest that a person with Mr. Clem's psychiatric history would be any less upset, when treated unfairly by an employer, than a person who had no such history.

In the recent case of *Menendez* v. *Halliburton, Inc.*, ARB No. 12-026 (ARB March 15, 2013), 2013-WL-1385561, the Administrative Review Board upheld an award of $30,000 in compensatory damages to a whistleblower in a SOX case who was subjected to the hostility of his co-workers after his employer "outed" him as the person who had touched off an investigation of the employer. In *Fink* v. *R&L Transfer, Inc.*, ARB No. 13-018 (March 19, 2014), 2014-WL-1401089, the Board upheld a $100,000 economic-damage award to an STAA whistleblower who suffered considerable financial difficulties, including the loss of his home, as a result of his employer's retaliation. Twenty years ago, the Board upheld a $40,000 award to a whistleblower in an Energy Reorganization Act case who suffered a heart attack as a result of the retaliation in *Creekmore* v. *ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (DOL Off.Adm.App., February 14, 1996), 1996-WL-171403. Mr. Clem, of course, did not lose his home or suffer a heart attack, but endured a long period of unemployment and under-employment. I conclude an award of $30,000 in his case is appropriate.

Mr. Spencer testified

> I mean nothing like this had ever happened, to be kind of escorted out the way we were. We were told – eventually we were told that we were suspended for, you know, aiding the competition. The act of us being suspended eventually got out to people that I worked with at Lockheed, people that I worked with, previous co-workers, they've heard about that. There's been a lot of trying to explain, to people that I see on the street, what had happened. The rumors that people hear, it's pretty amazing. My sleep has changed quite a bit. I find it hard to go to sleep. I run through all of this stuff – I mean it's been three years – I've run through all of it multiple times throughout the day. I mean there's no switch to turn it off. I mean it happened. And now we're going through it all (TR p. 577, line 25 - p. 578, line 13).

Mr. Spencer worries that CSC's actions will make it harder for him to find a job in the future, should he need to do so (TR p. 580, line 22 - p. 581, line 18). He testified he has lost interest in activities he used to enjoy, such as running and golf (TR p. 582, lines 1-10). His wife testified that after the suspension, Mr. Spencer became withdrawn from their children, lacked energy, and had difficulty sleeping (TR p. 766, lines 19-24). At the same time, he was lucky enough to move smoothly into

other employment after leaving CSC. I conclude an award of $10,000 in his case is appropriate.

ORDER

Respondent must pay damages as follows:

1. To Mr. Clem: back pay totaling $172,889.21, including

   $2,716.95 in pay lost because of his suspension;

   $1,728.80 in special pay withheld;

   $7,884.24 in employer contributions to his 401(k); and

   $160,559.22 in lost wages,

together with interest, compounded quarterly, calculated under *Doyle* v. *Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 89-ERA-22, slip op. at 19-20 (ARB May 17, 2000).

2. To Mr. Clem: back pay totaling $3,191.12, including $1,701.92 in pay lost because of his suspension, and $1,489.20 in special pay withheld, together with interest, compounded quarterly, calculated under *Doyle* v. *Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 89-ERA-22, slip op. at 19-20 (ARB May 17, 2000).

3. $30,000.00 to Mr. Clem, and $10,000.00 to Mr. Spencer, in compensatory damages.

4. The Complainants' attorney fees and costs reasonably incurred in this action. Complainant's counsel must file a fee petition (*see Jackson* v. *Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), 2004-WL-1955436, slip op. at 10-11) within 30 days of the final decision of the Secretary of Labor in this matter. Respondent must file its objections within 14 days of service of the fee petition. Within 14 days of service of those objections, the parties must

meet in person or voice-to-voice to discuss and attempt to resolve any objections. Both parties are charged with the duty to arrange the meeting. Within seven days of the meeting, Complainant's counsel must file a report identifying the objections that have been resolved, the objections that have been narrowed, and the objections which remain unresolved. The report may also reply to any unresolved objections.

SO ORDERED.

Digitally signed by John C. Larsen
DN: CN=John C. Larsen,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

The date of the postmark, facsimile transmittal, or e-filing communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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

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

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

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor.

If a timely petition for review is filed with the Board, and the Board issues an order notifying the parties that the case has been accepted for review, this Decision and Order will be inoperative unless and until the Board issues an order adopting my decision. However, that portion of my Decision and Order that orders relief (except any order awarding compensatory damages) is effective immediately upon receipt and will remain effective while review is conducted by the Board, unless the Board grants a motion by the Respondent to stay the order based on exceptional circumstances. See 29 C.F.R. §§ 24.109(e) and 24.110.