U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 February 2012

Case No.: **2005-SOX-15**

In the Matter of:

CARRI S. JOHNSON,
Complainant

v.

SIEMENS BUILDING TECHNOLOGIES, INC.,
and SIEMENS AG,
Respondents

Appearances:

Jacqueline Williams, Esq.
Minneapolis, Minnesota
For the Complainant

Gregg F. LoCascio, Esq.
Kathryn Albrecht, Esq.
Rebecca Ruby Anzidei, Esq.
Kirkland & Ellis LLP
Washington, D.C.
For the Respondents

Before:

Alice M. Craft
Administrative Law Judge

DECISION AND ORDER ON REMAND DISMISSING THE COMPLAINT

This proceeding arises from a claim for whistleblower protection under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), as amended.[1] The SOX Act and implementing regulations[2] protect employees of publicly-traded companies from discharge, discipline and other forms of discrimination for engaging in protected activity under the statute. This protected activity includes providing information, causing information to be provided or otherwise assisting in an investigation "regarding conduct

[1] 18 U.S.C. § 1514A (2010).
[2] 29 C.F.R. Part 1980 (2011).

which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [of the SOX Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[3] In this case, the Complainant, Carri S. Johnson, alleges that she was terminated from her position as a Branch Administrator with the Respondent, Siemens Building Technologies, Inc., after reporting suspected fraud, accounting irregularities and improper business practices to her supervisors at the Minneapolis branch of Siemens Building Technologies.

STATEMENT OF THE CASE

This case has a lengthy procedural history.

Ms. Johnson filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") on June 8, 2004. She alleged that she had been illegally discharged by Siemens Building Technologies ("SBT") "in retaliation for reporting her suspicions that Siemens had violated the law and committed fraud." More specifically, she contended that she reported "fraudulent billing practices, misreporting of income, over booking of jobs, and creation of phantom jobs to inflate earnings." After investigation, the Regional Administrator for OSHA concluded that there was no merit to the allegations, issued findings on behalf of the Secretary of Labor, and dismissed the complaint. Ms. Johnson appealed to the Office of Administrative Law Judges ("OALJ") on December 15, 2004.

This matter was initially assigned to Judge Robert L. Hillyard, who set the claim for hearing in October 2005. Judge Hillyard later granted the parties' joint request to continue the hearing. On December 2, 2005, the case was reassigned to me due to Judge Hillyard's impending retirement. I re-scheduled the hearing for May 2006.

On March 23, 2006, SBT filed two motions for summary decision. The first motion addressed the merits of the claim, while the second sought dismissal on jurisdictional grounds. More specifically, the second motion argued that SBT, as a non-publicly traded subsidiary of a publicly traded parent company, was not a covered employer under the SOX Act.

On April 3, 2006, Ms. Johnson filed a motion to amend her complaint to add Siemens Corporation and Siemens AG as additional respondents to the claim.

All three motions were fully briefed by the parties. During a telephone conference on May 9, 2006, I ruled on the pending motions. A transcript of that conference is part of the record. I granted in part Ms. Johnson's motion to amend the complaint by adding Siemens AG as a party, on the grounds that it had been named during the proceedings before OSHA, had been served with the OSHA findings, and had received all notices from OALJ. But I denied Ms. Johnson's motion to add Siemens Corporation as a party because it had never been named or served as a party until Ms. Johnson filed the motion

[3] 18 U.S.C. § 1514A(a)(1).

to amend the complaint. As a result, I found that the motion to amend was untimely as to Siemens Corporation.

I also denied both of SBT's motions for summary decision. As to the merits of the claim, I found that genuine issues of material fact remained as to whether SBT violated the SOX Act by terminating Ms. Johnson's employment. As to the jurisdictional issue, I found that genuine issues remained as to whether SBT is a covered entity under the SOX Act. In particular, I found that there was no case law addressing the issue from either the federal courts or the Administrative Review Board ("ARB" or "the Board"). I also noted that the decisions from other Administrative Law Judges were split on the issue.

I conducted a hearing on this claim from May 15-19, 2006 and from July 18-21, 2006, in St. Paul, Minnesota. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.[4] At the hearing, the following exhibits were admitted into evidence, either without objection or over the opposing party's objection: (1) Complainant's Exhibits ("CX") 1, 4-7, 10, 14, 17-18, 21-22, 27, 32, 35, 53, 57-58, 68, 79, 82, 84, 88-90, 92, 102-103, 110-112, 154, 157-158, 160, 201, 222, 226, 228, 230, 234, 259, 259A, 261A, 289 (except handwritten entries), 290, 299-300, 303, 318-320, 328, and 350; (2) Respondents' Exhibits ("RX") 1-16, 18, 20-33, 37, 52, 58-60, 63, 69, 74-75, 77, 81, 83-84, 88, 92-93, 99-102, 109, 111-113, 116-119, 130, 132, 136-137, 137A, 143, 148, 157-160, 162-168, 171, 173, 178, 182-184, 186, 188, 190, 193-194, 196-197, 206-219, 222, 225, 229-230, 234, 241, 247, 249A, 253-259, and 261-265; and (3) Administrative Law Judge Exhibit ("ALJX") A. The following exhibits were excluded from evidence: CX 3, CX 46, CX 63, CX 87, CX 132, CX 139, CX 196, CX 221, CX 329, and CX 350. The remaining exhibits that are not listed as admitted or excluded were either not offered or were withdrawn, and have not been considered. The witnesses were separated and, therefore, did not hear each others' testimony. Transcript ("Tr.") at 4. The record was held open after the hearing for the following reasons: (1) to allow Ms. Johnson to submit the Department of Labor's investigative file as an additional exhibit; (2) to allow the parties to designate or brief objections to designations from the depositions of Michael Fenton, Craig Lamfers and Susan Forte, who did not testify at the hearing; and (3) to allow the parties to file post-hearing motions and briefs. I instructed the parties to perform post-hearing briefing in two stages. First, in light of the ARB's intervening decision in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*,[5] I directed the parties to brief coverage and jurisdictional issues. Second, I instructed the parties to postpone briefing on the merits of the claim until after I had ruled on SBT's anticipated post-hearing motion regarding coverage under the SOX Act. Tr. 2378-2382, 2531-2543.

On September 18, 2006, SBT filed a Motion for Judgment as a Matter of Law under Rule 50 of the Federal Rules of Civil Procedure. In its motion, SBT first argued that none of the named Respondents are covered entities under the SOX Act. More specifically, SBT contended that: (1) Siemens AG is not a proper party to the action; (2)

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[4] 29 C.F.R. Part 18 (2011).

[5] ARB No. 04-149 (ARB May 31, 2006) (SOX) (addressing the issue of whether a publicly-traded parent company is liable for a SOX Act violation committed by a non-publicly traded subsidiary).

SBT should not be held liable for a violation of the SOX Act because it is a non-public subsidiary of Siemens AG; and (3) there is no evidence that SBT acted as an agent of Siemens AG in discharging Ms. Johnson. In addition, SBT argued that Ms. Johnson failed to produce any evidence to support her *prima facie* case under the SOX Act. SBT attached copies of supporting exhibits from the record to be considered in connection with its motion.

Ms. Johnson never filed a response to SBT's motion. Instead, she sought a total of three time extensions to file a reply. On October 11, 2006, I issued an Order granting SBT's request to deny any further extensions of time for Ms. Johnson to file a response to the motion for judgment as a matter of law. On October 13, 2006, I denied Ms. Johnson's request for reconsideration of that order. Ms. Johnson subsequently filed an interlocutory appeal with the ARB. The Board, however, denied the appeal on January 19, 2007.[6]

Under cover of letter dated January 25, 2007, Ms. Johnson submitted a certified copy of the Department of Labor's Investigative File. SBT did not object to admission of the investigative file, and the file was admitted into evidence as CX 346 on February 15, 2007. Ms. Johnson also requested a time extension to submit additional outstanding evidence (deposition designations). SBT objected to the admission of any additional evidence. On February 5, 2007, I issued an Order holding any further evidentiary matters in abeyance until after I had ruled on SBT's motion for judgment as a matter of law. Because I have considered the entire record in reaching this decision on remand, including the depositions, I find Ms. Johnson's request and SBT's objections to be moot.

On November 27, 2007, I issued a Decision and Order Dismissing the Complaint. Relying on the ARB's decision in *Klopfenstein*, I found that in order to hold SBT liable under the SOX Act, Ms. Johnson was required to show that either SBT or its employees were acting as agents of Siemens AG, the publicly-traded company, in terminating her employment. I also found that this showing must be made under the common law principles of agency. I found, however, that Ms. Johnson had failed to satisfy her burden of establishing an agency relationship between SBT and Siemens AG. For these reasons, I concluded that SBT was not a covered entity under the SOX Act and Siemens AG could not be held liable for the actions of SBT in terminating Ms. Johnson's employment. Accordingly, I dismissed Ms. Johnson's complaint. I did not address the merits of Ms. Johnson's claim that she was the victim of a retaliatory discharge under the SOX Act.

On December 18, 2007, Ms. Johnson appealed the dismissal of her complaint to the ARB. Before her appeal was resolved, however, on July 21, 2010, the SOX Act was amended by Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[7] The amendment expressly clarified that Section 806 of the SOX Act covers "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of a publicly-traded company that is covered by the statute.[8]

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[6] *See Johnson v. Siemens Bldg. Techs., Inc.* (*Johnson I*), ARB No. 07-010 (ARB Jan. 19, 2007) (SOX).
[7] Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (July 21, 2010).
[8] *Id.*

In light of this amendment to the SOX Act, the ARB vacated my dismissal of Ms. Johnson's complaint on March 31, 2011.[9] The Board held that an "employee of a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements is protected against retaliation where the employee engages in whistleblower protected activity under Section 806."[10] Accordingly, the Board remanded the case for resolution of three issues: (1) whether SBT was a consolidated subsidiary of Siemens AG at the time of Ms. Johnson's termination; (2) whether dismissal of Siemens AG as a party to the claim was proper; and (3) if SBT was a consolidated subsidiary, whether it is liable for wrongful termination under Section 806 of the SOX Act.

Following remand of the case, on May 18, 2011, SBT renewed the Motion for Judgment as a Matter of Law originally filed in September 2006. I held a telephone conference with the parties on May 27, 2011. A transcript of that conference is part of the record. In light of the Board's findings on appeal, the Respondents conceded that SBT is a consolidated subsidiary of Siemens AG for purposes of this litigation only. The parties agreed on a schedule for further briefing. I confirmed the schedule in an Order issued on May 31, 2011. Ms. Johnson agreed to file a response to the motion by June 28, 2011. Respondents agreed to file a reply brief by July 15, 2011.

On June 9, 2011, Ms. Johnson filed a request to defer briefing on certain issues raised in the Motion for Judgment as a Matter of Law. Ms. Johnson noted that the motion "raises merits-type issues ... including protected activity, reasonable belief, and contributing factor." She thus requested that "these issues should be reserved for a second round of briefing." SBT filed a reply opposing Ms. Johnson's request. On June 10, 2011, I issued an Order denying Ms. Johnson's request to defer briefing on the merits issues. In particular, I noted that Ms. Johnson "never raised any objection to responding to all issues in the motion until after the May 27, 2011 conference." Ms. Johnson filed a request for reconsideration on June 13, 2011, which was opposed by SBT. On June 14, 2011, I issued an Order denying the request for reconsideration.

Under cover of letter dated June 28, 2011, Ms. Johnson filed her Memorandum of Law in Opposition to Respondents' Motion for Judgment as a Matter of Law. In her memorandum, Ms. Johnson briefed the following issues: (1) whether Siemens AG is a proper party to the case; (2) whether she engaged in protected activity under Section 806 of the SOX Act; (3) whether her alleged protected activity was a contributing factor in SBT's decision to terminate her employment; (4) whether SBT established by clear and convincing evidence that it would have terminated her without regard to her protected activity; and (5) whether judgment as a matter of law can be entertained in a non-jury trial. Thus, Ms. Johnson has briefed the merits of her claim under the SOX Act, as well as its procedural posture. In support of her arguments, Ms. Johnson also submitted four volumes of exhibits. These volumes include exhibits I previously admitted, as well as some which were withdrawn or excluded. Ms. Johnson also referred

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[9] *Johnson v. Siemens Bldg. Techs., Inc.* (*Johnson II*), ARB No. 08-032 (ARB Mar. 31, 2011) (SOX) (en banc).
[10] *Id.*, slip op. at 18.

to some evidence she offered when the case was on appeal to the ARB, accompanied by a motion to reopen the record. The ARB never ruled on the motion, and Ms. Johnson never filed a motion to reopen the record with OALJ.

On July 18, 2011, the Respondents submitted their reply to Ms. Johnson's memorandum. Respondents attached additional exhibits for reference, all of which were previously admitted into evidence. In the reply, the Respondents pointed out that in her response to the motion, Ms. Johnson had referred to exhibits which had not been admitted into evidence. Ms. Johnson responded on July 21, 2011, acknowledging that some of the exhibits she referred to in her brief were not in evidence. I have not considered any exhibits which were not admitted into evidence.

No additional evidence or briefing has been filed, and the record is now closed. In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at the hearing and depositions, and the arguments of the parties on the merits of the claim.

ISSUES

The issues remaining for decision on remand in this case are as follows:

1. Whether Siemens AG is a properly named party to this case.

2. Whether SBT violated the SOX Act when it terminated Ms. Johnson's employment.

3. If SBT violated the SOX Act, what remedies should be awarded to Ms. Johnson.

For the reasons discussed below, however, I find that SBT did not violate the SOX Act when it terminated Ms. Johnson's employment. Accordingly, I need not address whether Siemens AG is a properly named party to this case, or remedies.

APPLICABLE STANDARDS

In relevant part, the employee protection provision of the SOX Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, provides as follows:

> (a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company* ... or any officer, employee, contractor, subcontractor, or agent of such company ... may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and

conditions of employment because of any lawful act done by the employee—

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
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> > (A) a Federal regulatory or law enforcement agency;
> >
> > (B) any Member of Congress or any committee of Congress; or
> >
> > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).[11]

This employee protection provision was enacted in response to "a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities ... but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity."[12] Thus, the goal of providing whistleblower protection under the SOX Act was to restore "trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted."[13]

The current version of the SOX Act provides that whistleblower complaints shall be governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b).[14] Under the AIR 21 standard, complainants must initially make a *prima facie* showing by a "preponderance of the evidence" that a protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint."[15] If a complainant makes this *prima facie* showing, an employer can only overcome that showing if it demonstrates "by clear and convincing evidence, that [it] would have taken

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[11] 18 U.S.C. § 1514A(a) (emphasis added).
[12] *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, slip op. at 8 (May 25, 2011) (SOX) (en banc) (quoting S. Rep. No. 107-146, at 5 (2002)).
[13] *Johnson II*, ARB No. 08-032, slip op. at 12 (ARB Mar. 31, 2011) (SOX) (en banc) (quoting S. Rep. No. 107-146, at 2).
[14] 18 U.S.C. § 1514A(b)(2).
[15] 49 U.S.C. § 42121(b)(2)(B)(i) (2010). *See also* 76 Fed. Reg. 68,084, 68,088 (Nov. 3, 2011) ("It is the Secretary's position that the complainant [in SOX cases] must prove by a 'preponderance of the evidence' that his or her protected activity contributed to the adverse action; otherwise the burden never shifts to the employer to establish its defense.").

the same unfavorable personnel action in the absence of [the protected] behavior."[16] Thus, in order to prevail on her claim under the SOX Act, Ms. Johnson must prove the following by a preponderance of the evidence: (1) that her reports about alleged fraud, accounting irregularities and improper business practices constitute protected activity; (2) that her employer, SBT, knew or suspected that she had engaged in protected activity; (3) that SBT took an adverse employment action against her by terminating her employment; and (4) that her protected activity was a contributing factor in the unfavorable employment action.[17] If Ms. Johnson satisfies this burden, SBT may avoid liability by demonstrating "by clear and convincing evidence" that it would have terminated Ms. Johnson's employment even if she had not reported her concerns regarding alleged fraud, accounting irregularities, and improper business practices.[18]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Rule 50 Motion for Judgment as a Matter of Law

As stated above, the Respondents have renewed their Motion for Judgment as a Matter of Law under Rule 50 of the Federal Rules of Civil Procedure. In relevant part, Rule 50(a) provides as follows:

> (1) *In General.* If a party has been fully heard on an issue during a *jury trial* and the court finds that a reasonable jury would not have a legally sufficient basis to find for the party on that issue, the court may:
>
> > (A) resolve the issue against that party; and
> >
> > (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.[19]

Thus, the express language of Rule 50 recognizes that a motion for judgment as a matter of law is only appropriate for a jury trial. In addition, the United States Court of Appeals for the Eighth Circuit, in whose jurisdiction this claim arose, has found that a motion for judgment as a matter of law under Rule 50 does not apply to non-jury or bench trials.[20] Accordingly, I find that judgment as a matter of law is not the appropriate means of resolving the issues in this case.

Nonetheless, the parties have briefed the merits of the claim in connection with the motion. Further briefing is not needed for me to decide the merits of the claim. In

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[16] 49 U.S.C. § 42121(b)(2)(B)(ii). *See also* 76 Fed. Reg. at 68,088.
[17] 29 C.F.R. § 1980.104(b)(1) (2011); 76 Fed. Reg. at 68,094. *See also Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010); *Inman v. Fannie Mae*, ARB No. 08-060, slip op. at 6 (ARB June 28, 2011) (SOX); *Sylvester*, ARB No. 07-123, slip op. at 10.
[18] *See* 29 C.F.R. § 1980.104(c); *Tides*, 644 F.3d at 814; *Coppinger-Martin*, 627 F.3d at 750; *Funke v. Fed. Express Corp.*, ARB No. 09-004, slip op. at 7 (ARB July 8, 2011) (SOX).
[19] Fed. R. Civ. P. 50(a) (emphasis added).
[20] *See Schoedinger v. United Healthcare of Midwest, Inc.*, 557 F.3d 872, 878 (8th Cir. 2009) (noting that a motion for judgment on partial findings under Rule 52(c) is the appropriate avenue in a bench trial).

addition, as is demonstrated below, I have considered all of the evidence admitted during proceedings on the claim, including but not limited to the exhibits referenced in the parties' briefs (but only those admitted into evidence), the testimony of the witnesses at the hearing, and the testimony of deposition witnesses. For these reasons, I find that my decision in this case would be the same regardless of whether the Respondents had filed a motion for judgment as a matter of law.

II. **Summary of the Evidence**

As stated above, a number of documentary exhibits were admitted into evidence at the hearing. The parties also presented a number of witnesses to testify in support of their respective cases. Ms. Johnson testified on her own behalf, and also presented the following witnesses in support of her case: Penny Kelly, Jennifer Deurr, Diana Roy, and Dr. David Jones. The Respondents presented the following witnesses as a part of its defense: Andre Audette, Scott Salazar, Michael Knoll, Rita Jardiolin, Joseph Schmit, Joseph Krisch, Amy Liedman, Tom Schlesinger, and Dr. Keith Bockus. In addition, the Respondents submitted the deposition testimony of Craig Lamfers, Susan Forte, and Michael Fenton. While I have reviewed and considered all of the evidence in the record, I will only discuss the testimony and exhibits that are relevant to the resolution of the merits of Ms. Johnson's claim for whistleblower protection under the SOX Act.

A. Siemens Building Technologies

Siemens Building Technologies ("SBT") is a wholly-owned subsidiary of Siemens AG. CX 248. Siemens AG describes itself as "a global network of innovation comprising more than 400,000 people," which "offers innovative products, solutions and services spanning the entire field of electronics and electrical engineering." CX 248 (p. 01986). SBT is a business within Siemens AG's "operations group," and "provides products, systems and services for monitoring and regulating the temperature, safety, electricity, lighting and security of commercial and industrial property." CX 248 (p. 02152). More specifically, SBT provides "systems and services for building security, fire protection and comfort control." CX 248 (p. 02004). SBT's overall corporate headquarters was located in Buffalo Grove, Illinois. CX 346; RX 12. At all times relevant to this claim, SBT was comprised of three divisions: Fire Safety, Security, and Building Automation. Tr. 1750; CX 346; RX 12. Each division is divided into several geographic regions, which are then subdivided into districts and branches. RX 12.

Ms. Johnson worked in the Minneapolis Branch of the Fire Safety Division. The Fire Safety division was headquartered in Florham Park, New Jersey. CX 346; RX 12. As noted above, SBT concedes that it is a subsidiary of Siemens AG. A number of SBT's employees, however, testified regarding the independent corporate structures of SBT and Siemens AG. For example, Michael Knoll, who was the Regional Director for SBT's North Region from 2002 to 2004, testified that he never worked for Siemens AG nor involved the parent company in any of his business decisions. Tr. 1575. Similarly, Scott Salazar, who was the Branch Manager for SBT's Minneapolis branch until December 2003, testified that he never involved anyone from Siemens AG in any business or employment decision that he made. Tr. 1279. Several other managers and headquarters

personnel have testified that Siemens AG was not involved in any of the business or personnel decisions at SBT. These individuals include: Tom Schlesinger (Regional Director for the West Region); Michael Fenton (Operations Manager for the West Region); Joseph Schmit (Operations Manager at the Minneapolis branch); Joseph Krisch (Director of Human Resources); Susan Forte (Regional Administrator for the North Region); and Rita Jardiolin (Financial Analyst at Fire Division headquarters). Tr. 1643-1644 (Jardiolin), 1748-1749 (Schmit), 2035-2036 (Krisch), 2154 (Schlesinger); Fenton Deposition at 6-7; Forte Deposition at 164-165. I find that all decisions regarding Ms. Johnson's employment were made by SBT alone.

As a part of its business operations, SBT's Fire Division implemented a collection of "Administrative Best Practices." RX 182. The "Best Practices" were designed to "serve as a giant Reference Tool for all employees in the Administrative Department" of the various branch offices. RX 182 (p. 024989). The practices provide descriptions of various administrative positions, as well as guidance on the following topics: (1) "booking process and job cost"; (2) "purchasing & accounts payable"; (3) "revenue/billings & accounts receivable"; (4) "capital appropriation request"; (5) "warranty & RMA [returned material authorization] procedures"; (6) financial; (7) commissions; and (8) human resources. RX 182. According to Mr. Knoll, the "Best Practices" are "recommended or proven procedures that are in place to assist workers, managers, with … doing their daily job." Tr. 1578. He emphasized, however, that the "Best Practices" are merely "recommended procedures that are not policy." Tr. 1579. A similar description was provided by Mr. Salazar, who testified that the "Best Practices" are "a guideline for the branch offices to process and execute work they're contracted for from our customer." Tr. 1400. Ms. Johnson also acknowledged that the "Best Practices" are not the law, but instead are a "guideline to use in one's business." Tr. 1030-1031.

The guidelines set forth in SBT's "Best Practices" include procedures for "booking" jobs and recognizing revenue. As to the "booking" process, the "Best Practices" provide extensive guidance on the necessary documentation and required steps for entering jobs into SBT's computer system. *See* RX 182 (pp. 025005-025057). In relevant part, the guidelines provide that a job estimate "becomes a firm order when the customer agrees with the proposal and returns the necessary documentation." CX 2; RX 182 (p. 025011). Accordingly, the "Best Practices" state that a customer "must return" a signed purchase order, a signed proposal or a signed contract in order for the estimate to become a firm order. CX 2; RX 182 (p. 025011). One of these documents must be included in a "booking package" before it is entered into the system. At the hearing, Ms. Johnson confirmed that at least one of these documents was required for each of SBT's booking packages. Tr. 80. As stated above, the "Best Practices" also address SBT's method of recognizing revenue on its job contracts. The guidelines provide that "revenue is 'earned' based on cost recognition" and "[i]f you do not have the appropriate costs recognized, revenue cannot be earned." RX 182 (p. 025118). The "Best Practices" provide the following example: "if 25% of total cost on a job has been recognized, you will receive 25% of the earned revenue." RX 182 (p. 025118). According to Susan Forte, who was the Regional Administrator for SBT's North Division during Ms. Johnson's employment, the company recognizes revenue on a job based on the amount of work completed and the costs incurred. Forte Deposition at 177-178. She

opined that this was a process that a Branch Administrator was expected to know. Forte Deposition at 178.

B. Ms. Johnson's Hiring and Training by SBT

On February 11, 2002, Ms. Johnson received an offer letter for employment with SBT as a Branch Administrator at the company's Minneapolis branch. RX 81. The Minneapolis branch was originally in SBT's North Region, but was transferred to the West Region in late 2002. Before her employment with SBT, Ms. Johnson worked for 18 years as a field representative in the "Sales and Use Tax Department" of St. Mary's Parish, Louisiana. Tr. 55-58. Her position involved contacting business that were delinquent on tax payments in order to collect the amounts owed. Tr. 55-56. Ms. Johnson left St. Mary's Parish in 1999 and relocated to Wisconsin, where she worked as a sales coordinator with Rice Lake Weighing Systems. Tr. 71. Her work at Rice Lake involved verifying expenses from sales personnel and submitting them for payment. Tr. 71-72. Ms. Johnson remained at Rice Lake for approximately 1.5 years before accepting a position with SBT. Tr. 72.

Ms. Johnson initially applied for the Branch Administrator position through an internet job posting site. Tr. 73. She was then interviewed in Minneapolis by Scott Salazar and Joseph Schmit. Tr. 73. Mr. Salazar testified that Ms. Johnson appeared to demonstrate an understanding of the accounting principles required for the position. Tr. 1291-1292. In particular, he noted that Ms. Johnson "seemed like she understood credits and debits and very basic accounting skills ... [and] presented herself in a professional manner." Tr. 1438. Mr. Salazar's observations were echoed by Mr. Schmit, who noted that Ms. Johnson's "industry experience," as well as her apparent understanding of auditing and accounting concepts, presented her as a candidate who could perform the job of Branch Administrator. Tr. 1751-1753. Based on her interview, Ms. Johnson received a written offer of employment on February 11, 2002, which was made contingent upon an interview with SBT's regional manager on February 13, 2002. RX 81. Ms. Johnson testified that she met with Mr. Knoll on February 13, 2002, where "he told me what my job responsibilities would be, that the fire safety division was new, being newly collocated ... [a]nd that ... I was going to be hired to get the branch in compliance with Best Practices." Tr. 74. Mr. Knoll denied, however, that he told Ms. Johnson that her job was to bring the branch into compliance with the "Best Practices." Tr. 1578. Following this interview, Ms. Johnson was officially hired by SBT. Tr. 76, 1289-1290.

Ms. Johnson began her employment as the Branch Administrator for SBT's Minneapolis branch on March 4, 2002. Tr. 76; RX 81. According to SBT's "Best Practices," the Branch Administrator has the following overall responsibilities:

> Provides general financial/administrative support to the Branch Manager, coordinating various functions of the Branch office operations while maintaining proper records and documentation in accordance with Corporate Policies and Procedures.

RX 12; RX 182 (p. 024995). More specifically, the Branch Administrator position has a number of "essential tasks," which include:

> Responsible for the communication of Monthly Financial results to include but not limited to, Gross Margin Analysis ... Operating Expenses and other pertinent information with regard to branch profitability.
>
> Responsible for input/maintenance and accuracy of all Branch Sales Orders, Monthly Billings, Credits and Adjustments.
>
> Responsible for processing of all accounts payable invoices, maintaining proper job files and the timely recognition of related expenses/costs.

RX 182 (p. 024995). The position has been described as the "glue" that "pulls all financial reporting and operating aspects of the branch together." RX 12. According to Penny Kelly, a former Branch Administrator and administrative assistant at the Minneapolis branch, it is "a difficult position to be in because there's so many different things that you have to know." Tr. 565. She testified that "expectations were high for a person in that position." Tr. 567.

At the outset of Ms. Johnson's employment, SBT provided her with a series of training sessions to help her learn her job duties as Branch Administrator. According to Joseph Schmit, Ms. Johnson "received training on several of our systems' processes" over a two-day period, including SBT's AS400 accounting system and the cost-to-complete process. Tr. 1760-1761, 1905. He identified Tamra Little, who is a field training specialist for SBT's Fire Division, as the individual who performed Ms. Johnson's initial training. Tr. 1761, 1904. This testimony is confirmed by an e-mail from Ms. Little on March 21, 2002, where she states that Ms. Johnson received training in the following areas: (1) SBT's accounting calendar; (2) an overview of SBT's "AS400" system; (3) an overview of SBT's "BPCS" [basic process control] computer system; (4) SBT's job cost system; (5) SBT's service agreement system; (6) SBT's "percentage-of-completion" formula and the order entry process; (7) SBT's revenue recognition policy and billing process; (8) the monthly progress billing procedure; (9) accounts payable and purchasing; (10) preparation and interpretation of commissions; and (11) SBT's financials. RX 130. This training occurred from March 19, 2002 to March 21, 2002. Tr. 1306; RX 130. Ms. Little indicated, however, that a "follow-up session will be required to complete not only the system training, but also act as a review for items already covered." RX 130. A subsequent e-mail from Ms. Little to Ms. Johnson on April 24, 2002, indicates that Ms. Little was scheduled to return to the Minneapolis branch to complete Ms. Johnson's training on April 30, 2002 and May 1, 2002. RX 157. According to Scott Salazar, this follow-up training did occur on these two dates. Tr. 1308-1309. Furthermore, an e-mail from Ms. Little to Mr. Salazar on August 27, 2002, confirms that Ms. Johnson received training in SBT's percentage-of-completion system "when she was first hired." RX 158.

During her first year on the job, Ms. Johnson continued to receive training in the various requirements for her work as Branch Administrator. According to Mr. Salazar,

Ms. Johnson received additional training from Susan Forte, Rita Jardiolin, Joan Schaan, and Michael Fenton. Tr. 1312. Ms. Forte, who was the Regional Administrator for SBT's Northern Region, testified that Ms. Johnson regularly contacted her with "procedural questions" regarding her job duties. Forte Deposition at 99. In addition, an e-mail from Ms. Forte on August 21, 2002, indicates that Ms. Johnson was scheduled to receive training on SBT's "accounts receivable." RX 63. According to Mr. Salazar, Ms. Johnson did receive accounts receivable training from Ms. Forte. Tr. 1314. In December 2002, Ms. Johnson received further training from Ms. Jardiolin on a number of topics relating to her job as Branch Administrator. According to a list prepared by Ms. Jardiolin, the following topics were reviewed over a two-day period: (1) monthly profit and loss statements; (2) costs of sales; (3) total other costs; (4) total costs of sales; and (5) operating expenses. RX 255-256. A number of reports were also reviewed with Ms. Johnson, including an invoice register, aged trial balance sheet, branch shipment report, and open order report. RX 255-256. Ms. Johnson acknowledged that she had been trained on these topics by signing a copy of the list on December 5, 2002. *See* RX 256. According to Ms. Jardiolin, the list was prepared in order to have written proof that Ms. Johnson had been trained in the areas listed. Tr. 1652, 1655. Based on this documentation, Mr. Salazar, Mr. Schmit and Ms. Forte all opined that Ms. Johnson received training that was more than adequate to enable her to perform her job duties as Branch Administrator. Tr. 1298, 1761; Forte Deposition at 167-168. According to Tom Schlesinger, the Regional Director for SBT's West Region, Ms. Johnson "received a lot of training ... more than I've ever ... exposed a Branch Administrator to in the Region at that point in time." Tr. 2163.

C. Events of 2002

A thorough review of the record reveals that the following events occurred in 2002 that are relevant to the present claim under the SOX Act.

On April 17, 2002, SBT submitted a "Fire Alarm and Security/Access Control System Proposal" to the Elliot Contracting Corporation ("Elliot Contracting") for the Brookdale Regional Center ("Brookdale job"). RX 16. The proposal was for a combined project involving SBT's Fire and Security Divisions, with a total contract amount of $265,000.00. RX 16. According to Mr. Schmit and Mr. Schlesinger, this type of project was known as a "synergy job," in which SBT was to install both a fire system and a security system. Tr. 1830, 2188-2190. On April 19, 2002, a sales order was completed for the fire system in the amount of $70,745.31. RX 15 (p. 000034). SBT subsequently completed a "Standard Subcontract Agreement" for the "synergy" job on May 20, 2002. CX 92 (pp. 005220-005222). On August 6, 2002, however, SBT received a "Change Order" from Elliot Contracting instructing the company to "[d]elete all work associated with the security system." CX 92 (p. 005223). The order was submitted in response to SBT's inability to follow through on the security component of the "synergy" job. Tr. 1414-1415, 1830, 1835-1837, 1848; CX 82; RX 33. Thus, the "Change Order" reduced the project amount to $54,343.00. CX 92 (p. 005223). SBT's financial documents indicate that this reduced amount reflected a deduction in the "Fire Safety price by approx. $17,000 due to increased costs caused by Security pullout." RX 15 (p. 000029). This is confirmed by an e-mail from Dip Sengupta, a member of SBT's Security Division,

on March 25, 2004, noting that Elliot Contracting had charged the Fire Division $17,000.00 for the failed security component. RX 29 (p. 000085). In an e-mail dated March 24, 2003, Penny Kelly informed Ms. Johnson, Mr. Salazar and Mr. Schmit that a "negative change order" was needed to account for the reduction in contract price. CX 82. From February 2003 through April 2004, several additional "Change Orders" were submitted which increased the contract amount to a total of $68,493.00. *See* RX 15 (pp. 000037 to 000041, 000043). According to SBT's Aged Trial Balance sheets, the work was completed and the amounts billed to Elliot Contracting were fully-paid by October 2004. *See* RX 214.

In her OSHA complaint, Ms. Johnson alleged that the Brookdale job was booked "in the amount of $70,745.31 ... and without a purchase order," which she opined was "not allowed by Siemens policy." RX 229. At the hearing, she reiterated that the Brookdale job was booked without a purchase order and was "over-revenued." Tr. 423. She opined that approving a job that is "over-revenued" constitutes fraud. Tr. 471, 473. In addition, in an e-mail to Penny Kelly on February 6, 2004, Ms. Johnson attached a document in which she alleged that the Brookdale job had been "over billed by $4,501.31." RX 253. At the hearing, however, Ms. Kelly denied that anyone at SBT was trying to inflate revenue on the Brookdale job. Tr. 694-695. Instead, she noted that the sole issue with the job was the fact that SBT was unable to follow through with the security component. Tr. 694-695. In response to Ms. Johnson's allegations, SBT produced the expert report of Dr. Keith Bockus. RX 206. Dr. Bockus was recognized by both parties as an expert in accounting and economics. Tr. 2246. In assessing the Brookdale job, he reviewed SBT's cost-to-complete reports for each month of the project, the Aged Trial Balance sheet for the project, and the individual job documents. Tr. 2265-2266. Dr. Bockus first opined that a signed purchase order "is only one of several alternative documents ... that can be used to document customer agreement when initially entering a job into the system." RX 206 (p. 12). Citing SBT's "Best Practices," he noted that a signed proposal is another means of documenting customer agreement, and emphasized that SBT had obtained a signed proposal from Elliot Contracting on April 17, 2002. RX 206 (p. 12); *see also* RX 16.

As to SBT's recognition of revenue, Dr. Bockus opined that the "[r]evenue was properly recognized on the Brookdale Regional Center fire safety job ... based on the original contract price of $70,745." RX 206. While acknowledging that the August 2002 "Change Order" reduced the project amount to $54,343.00, he opined that this amount "represented, in substance, the contract price for the fire safety component ($70,745) less the amount the customer (Elliot Contracting) requested that SBT reimburse it for the costs incurred ... after SBT's Security Division withdrew from the project ($16,402)." RX 206 (p. 13). This is consistent with SBT's financial records, which note that Elliot charged the Fire Division approximately $17,000.00 for costs incurred as a result of the failed security component. RX 15 (p. 000029). Dr. Bockus opined, however, that a "proper method of account for such a transaction would be to continue to account for the Fire Safety portion of the contract separately and to continue to recognize revenue on the percentage of completion method based on the contract price of $70,745." RX 206 (p. 13). For these reasons, Dr. Bockus concluded that there was nothing improper or fraudulent about the booking or revenue recognition for the Brookdale job.

Tr. 2268-2270; RX 206 (p. 12).

On June 28, 2002, Ms. Johnson sent an e-mail to Mr. Salazar regarding "Future processing of sales orders." CX 7. In the e-mail, Ms. Johnson discussed a telephone call with Susan Forte, during which she was informed that "there will no longer be a tolerance for booking jobs without proper paperwork supporting the sale." In addition, she was notified that "anyone not in compliance, would be 'reprimanded and/or fired.'" Ms. Johnson requested Mr. Salazar to forward the e-mail to all of SBT's sales personnel at the Minneapolis branch. In his response, Mr. Salazar confirmed that obtaining proper paperwork "has always been policy." CX 7.

On July 23, 2002, Ms. Johnson received an e-mail regarding SBT's "Revenue Recognition Policy." RX 60. The e-mail, which was sent to all of SBT's Branch Administrators, indicates that an attached revenue recognition policy was "effective immediately." RX 60. In relevant part, the company's policy expressly states that "[t]he percentage-of-completion method of accounting for long-term contracts is the method used by Siemens Building Technologies, Inc. for revenue recognition." RX 60 (p. 004079); RX 209 (p. 004079). The policy explains that "[r]evenue is calculated based on costs incurred compared to total estimated job costs." RX 60 (p. 004079); RX 209 (p. 004079). Both Mr. Salazar and Mr. Schmit confirmed that SBT followed the "percentage-of-completion" method for recognizing revenue on each of its jobs. Tr. 1408, 1852-1853. Accordingly, both opined that the mere "booking" of a job has no impact on SBT's revenue. Tr. 1408, 1853.

On August 13, 2002, Mr. Salazar sent an e-mail to the entire Minneapolis branch regarding "Administrative Responsibilities." RX 160. He provided a list of duties that were assigned to several different employees, and noted that the assignments were made "to streamline the process [of processing and tracking orders] and limit the amount of time spent on administration issues." RX 160. Mr. Salazar noted that Ms. Johnson was responsible for the following tasks: accounts payable, systems order entry, returned material authorizations, payroll and commissions, and human resources. He delegated the following duties to Penny Kelly: systems accounts receivable, service order entry, billing, reclassifications, job costing, and monthly reports. In addition, Mr. Salazar instructed that "Penny will audit every job file accepted by [Ms. Johnson] and Jen [Deurr] each Monday to ensure the files are created accurately and complete." RX 160. At the hearing, Mr. Salazar testified that he asked Ms. Kelly to review Ms. Johnson's work because there were "issues with [her] work and we wanted to ... make sure the work was correct [and] build confidence within the office that when we did do jobs as a team, that they would be accurate going into the system." Tr. 1426-1427.

On September 17, 2002, an e-mail exchange took place between Ms. Johnson and Mr. Schmit regarding "POC [percentage-of-completion] Conversions." CX 10. In her initial e-mail, Ms. Johnson indicated that she had converted a number of job orders into "T" and "l" orders. In response, Mr. Schmit stated that this had not been his instructions to Ms. Johnson. In addition, he noted that "[i]t seems your lack of understanding on job procedures confuses others and creates major obstacles for the branch." CX 10. Ms. Johnson responded that she did "not have a lack of understanding on job procedures

and the confusion that was created today was created by [Mr. Schmit]." CX 10.

In an e-mail dated October 9, 2002, John Fabian notified Mr. Salazar of "a couple of issues regarding [Ms. Johnson's] processing of orders that is slowly processing through our system. RX 118. Mr. Fabian was one of SBT's sales personnel during Ms. Johnson's tenure with the company. Tr. 1300. In his e-mail, Mr. Fabian opined that Ms. Johnson demonstrated a "serious lack of ... understanding of 'the system.'" RX 118. In particular, he noted that Ms. Johnson had informed him that she "does not compare the uploaded [order] information to the information that is provided on the hand written sales order." RX 118. As a result, there were inconsistencies in shipping addresses on job orders. Mr. Fabian opined that Ms. Johnson "does not fully understand the ... importance of her role" and "needs to be able to analyze the work, catch mistakes and get them corrected." RX 118. At the hearing, Mr. Salazar testified that he was "shocked" when he learned of this issue, since comparing uploaded orders to a written sales order "is one of the most basic elements of the [Branch Administrator] position." Tr. 1302. While admitting that he had requested this information from Mr. Fabian, Mr. Salazar stated that he did so to "help train and get things corrected." Tr. 1304. He opined, however, that as of October 2002 "[i]t was apparent that the training and communication that was going on was not being retained." Tr. 1303.

On October 22, 2002, Ms. Johnson e-mailed Mr. Salazar regarding her interest in attending a "POC refresher" class in Columbus, Ohio, on December 10, 2002. RX 69. In response, Mr. Salazar noted that Ms. Johnson had already "been to Administrator training at HQ ... Susan [Forte] has been here three times, and Tamra [Little] twice for support and training." RX 69. He thus opined that he needed to see a syllabus for the course "to ensure this is productive time." RX 69. At the hearing, Ms. Johnson alleged that Mr. Salazar denied her request to attend the refresher course and that she was the only administrator not to attend the training. Tr. 137. While acknowledging that he did not consider it necessary for Ms. Johnson to travel for additional training, Mr. Salazar testified that the training courses were also available over the Internet. Tr. 1319.

From October 2002 to November 2002, a series of e-mails were exchanged between Ms. Johnson, Mr. Salazar and Penny Kelly regarding "Overbilling for Wells Fargo." RX 116-117. Ms. Kelly originally requested information regarding a Wells Fargo job in order to issue a credit for SBT overbilling the customer. When Ms. Johnson provided the information, Ms. Kelly inquired as to "[w]hy wasn't this job 'fixed' months ago with a negative open order?" RX 117 (p. 005838). The two then exchanged e-mails in which they debated over whether they should be concerned as to why mistakes were made on the billing. Following this exchange, Ms. Kelly e-mailed Mr. Salazar on November 5, 2002, noting that she had still "not received a response from Carri as to the correct amount of the credit." RX 117 (p. 005836). On November 7, 2002, Ms. Kelly sent an additional e-mail to Mr. Salazar and stated as follows:

> I am not copying Carri on this response, as it is clear that she doesn't intend to cooperate with me to get this issue resolved. Again, here is another example of me having to ask her over and over for the same information. Clearly, she doesn't understand the impact this has on the

branch, as it is an overstatement of our revenue.

RX 116 (p. 005834). She also requested a meeting to discuss "the difficulties I am experiencing with Carri." RX 116 (p. 005834). At the hearing, Ms. Kelly confirmed that she had experienced a lack of cooperation from Ms. Johnson in her attempts to resolve the overbilling issue. Tr. 677-678.

On November 5, 2002, Ms. Kelly sent an additional e-mail to Mr. Salazar and Mr. Schmit regarding "job responsibilities." RX 159. In the e-mail, she listed a number of job duties for which Ms. Johnson was the current contact person, but recommended that a new contact be established for each responsibility. At the hearing, Ms. Kelly testified that she considered Ms. Johnson to be deficient in the following areas: order entry systems, accounts payable, returned material authorizations, payroll, human resources, and commissions. Tr. 672-673. Ms. Kelly confirmed that, as of November 2002, she did not believe that Ms. Johnson should have remained the contact person for any of these job responsibilities. Tr. 672-673.

In December 2002, the Minneapolis branch was transferred from SBT's North Region to the West Region. As a part of this transition, Michael Fenton and Rita Jardiolin visited the branch from December 4-5, 2002. Tr. 464. Mr. Fenton was SBT's Operations Manager for the West Region, while Ms. Jardiolin was a Financial Analyst at the Fire Division's headquarters in New Jersey. Tr. 1643-1644; Fenton Deposition at 6-7. At the hearing, Ms. Johnson alleged that Mr. Fenton told her that the visit was "under false pretenses" and that "they really wanted to talk to me because they wanted to know what was going on in the branch." Tr. 465. She made a similar claim in an e-mail to Susan Forte on December 10, 2002, stating that "Mike Fenton and Rita Jardiolin felt something wasn't just right with things ... they felt I wasn't getting the support I needed from my co-workers and they decided that they would get involved." CX 12. In addition, Ms. Johnson claimed that she reported a number of issues regarding the Minneapolis branch's revenue practices and job booking procedures. Tr. 466. She admitted, however, that she did not provide any information to support her allegations. Tr. 1117. At his deposition, Mr. Fenton denied that he and Ms. Jardiolin visited the Minneapolis branch under "false pretenses." Fenton Deposition at 14. Instead, he stated that the actual purpose of the visit was "to cover a whole list of issues that I have to look at," including cost-to-complete documents, the branch's business portfolio, and issues with the administration. Fenton Deposition at 14. In addition, both Mr. Fenton and Ms. Jardiolin expressly denied that Ms. Johnson reported any issues regarding the branch's revenue practices or job booking. Tr. 1669; Fenton Deposition at 22.

During their two-day visit to the Minneapolis branch, Mr. Fenton and Ms. Jardiolin performed an extensive amount of training with Ms. Johnson. According to a list prepared by Ms. Jardiolin, the following topics were covered: (1) monthly profit and loss statements; (2) cost of sales for systems and services; (3) total other costs; (4) total costs of sales; and (5) operating expenses for the administration, system sales department, service sales department, operations department, and engineering department. RX 255. In addition, a number of documents were reviewed. Throughout the training, Mr. Fenton and Ms. Jardiolin both observed that Ms. Johnson had

demonstrated significant "retention" problems with the material covered. Tr. 1649-1650, 1658-1659; Fenton Deposition at 11, 14. Ms. Jardiolin described the issues as follows:

> I trained her the whole day the first day. On the next day, I noticed that she could not remember topics I trained her [on] the previous day. Even sometimes I would train her or talk about a certain topic extensively, you know, by the afternoon she does not remember it.

Tr. 1649. At his deposition, Mr. Fenton provided a similar account of Ms. Johnson's unfamiliarity with SBT's financial systems and procedures:

> She had a very, very minimal level of understanding of the financial system that we use, the Best Practices, the revenue recognition policies and procedures and methods. Most of the things that a typical branch administrator would know, she seemed not to be familiar with.

Fenton Deposition at 11-12. Ms. Johnson provided several excuses for this unfamiliarity, including a lack of training and an absence of support from the branch. Fenton Deposition at 10-11. When asked about the lack of support, however, Ms. Johnson was unable to provide any examples. Tr. 1656. As to the lack of training, Mr. Fenton and Ms. Jardiolin both testified that Ms. Johnson's allegations were not true. Tr. 1649, 1655, 1657; Fenton Deposition at 13-14. According to Mr. Fenton, after viewing a list of training that Ms. Johnson had previously perceived, he "certainly felt like I had been misled, or I came away misled from what the facts actually were." Fenton Deposition at 13.

Based on their meetings with Ms. Johnson in December 2002, Mr. Fenton and Ms. Jardiolin both determined that she was unable to grasp the concepts and procedures required for her job as Branch Administrator. Tr. 1659; Fenton Deposition at 14, 21-22. As noted by Mr. Fenton, "given [Ms. Johnson's] inability to remember some of the things we'd discussed the day before, I started to ... give credence to [Scott Salazar's] perception that she may have a retention issue or her aptitude just wasn't appropriate for this job." Fenton Deposition at 14. In addition, he observed that Ms. Johnson "didn't have an understanding of the Best Practices enough to really determine if they were or were not being followed." Fenton Deposition at 21-22. According to Tom Schlesinger, SBT's Regional Director for the West Region, Mr. Fenton provided the following impression of Ms. Johnson:

> Mike felt that Carrie [sic] definitely needed some help, that he was a little concerned that maybe some of the concepts that they were going over she should have already known.

Tr. 2158. Both Mr. Fenton and Ms. Jardiolin reiterated, however, that Ms. Johnson never made any accusations of fraud or improper business practices at the branch. Tr. 1669; Fenton Deposition at 22.

As a result of the December 2002 meeting between Ms. Johnson, Mr. Fenton and Ms. Jardiolin, it was decided that Ms. Johnson should participate in a mentoring program. According to Mr. Fenton, it was his decision to assign a mentor and he selected Joan Schaan "to be that person." Fenton Deposition at 25-26. Ms. Schaan was a branch administrator located in SBT's office in Portland, Oregon. Fenton Deposition at 25. Mr. Fenton testified that Ms. Schaan "was one of our most competent administrators" and was someone who "we had a lot of respect for [her] competency and someone who also had the time to devote." Fenton Deposition at 25-26.

On December 18, 2002, a series of e-mails were exchanged between Ms. Johnson, Mr. Salazar and Tamra Little regarding "POC refresher San Fran." RX 74-75. Ms. Johnson requested authorization from Mr. Salazar to attend a POC refresher course in San Francisco, California, in January 2003. RX 74 (p. 004677). When Mr. Salazar inquired about a potential electronic course over the Internet, Ms. Johnson responded that "[i]f I'm expected to perform at my best possible, then I need to attain the most that I can with what is available to me." RX 74 (p. 004676). In response, Mr. Salazar listed the training that Ms. Johnson had already received and commented that she had "received more training than most administrators in the company." RX 74 (p. 004676). He also suggested several alternatives to the refresher course, including a mentorship program with another Branch Administrator in the West Division. RX 74 (p. 004676). At the hearing, Mr. Salazar testified that he never received a response from Ms. Johnson regarding his suggestions. Tr. 1323. Instead, Ms. Johnson sent an e-mail to Ms. Little, alleging that "I have never had POC training." RX 75 (p. 004679). Ms. Little disputed this allegation and stated as follows:

> I'm a little disappointed in your statement that you have ***never*** rec'd POC training. I'm attaching my outline that shows items you were trained on .... You will see you were indeed trained on POC. That was the bulk of your training. I don't expect you to remember everything, but to say you were NEVER trained is untrue.

RX 75 (p. 004678). Ms. Little's statements are consistent with the documentary evidence in the record, which shows that Ms. Johnson did receive POC training in March 2002. *See* RX 130.

D. Events of 2003

A review of the record reveals that the following events occurred in 2003 that are relevant to the present claim under the SOX Act.

In her role as Ms. Johnson's mentor, Joan Schaan visited the Minneapolis branch on February 12, 2003. Tr. 2161; RX 112. In a subsequent letter addressed to Thomas Schlesinger, Ms. Schaan recorded her observations of Ms. Johnson. RX 112. As an initial matter, she communicated to Ms. Johnson that the purpose of her visit was to "establish a mentor-type relationship with another administrator in the Western Region." RX 112. Ms. Schaan noted that she provided training on a number of topics, including SBT's "Best Practices," the booking procedure, the job tracking process, and the major duties

of a branch administrator. She also shared ideas and procedures with Ms. Johnson. At the end of the training, Ms. Schaan noted that Ms. Johnson "had no major concerns or questions regarding branch administrative processes." RX 112. Ms. Johnson also disclosed some of her "past" problems with various co-workers at the Minneapolis branch. Based on her meeting with Ms. Johnson, Ms. Schaan made the following observation: "Carri seems very capable of performing the job duties of a branch administrator. However, or at least while I was there, she seemed pre-occupied with pressing personal issues and easily distracted." RX 112.

The Minneapolis branch underwent a "Branch Operations Review" in March 2003. CX 84. The review was performed by Michael Fenton and Serge Cardinal, who was SBT's National Operations Manager for Canada. CX 84. Ms. Johnson, Mr. Salazar and Mr. Schmit all participated in the review, which included assessments of 11 different jobs, the branch's collection practices, and customer satisfaction. The review also listed a number of "action items" for improvement. Based on their review, Mr. Fenton and Mr. Cardinal provided the following "Management Summary" regarding the branch:

> Excellent Branch structure, good implemented processes for filing and consistant [sic] approach. System filing is in very good shape and well structured. Service filing, Sales Contract estimating and order entry needs supporting documentation and organization to be more effective and easy to work. Branch customer champion need [sic] to be identified to work with OCV program. Branch was extremely cooperative during the review and helpful in providing the required information. Scott, Carri and Joe have demonstrated leadership to further develop the Branch and implementation of those actions [sic] items will help managing the business risks for each projects [sic] and/or service contracts.

CX 84. The Minneapolis branch was given an overall rating of 7/10. CX 84. Ms. Johnson testified that this was an improvement from the 5/10 that the branch received in March 2002. Tr. 788-789.

Despite this positive management review, Mr. Fenton opined that Ms. Johnson continued to demonstrate no knowledge or recognition of SBT's "Best Practices" in March 2003. Fenton Deposition at 30-31. He also testified that the "Management Summary" was deceiving because Mr. Cardinal did not know who was actually performing the job functions. Fenton Deposition at 33-34. In particular, he noted that "[a]t this time Ms. Johnson, due to performance issues, was not performing all the duties of a branch administrator" and "[m]ost of the significant duties had been removed from her and she was doing more menial tasks." Fenton Deposition at 34. Mr. Fenton thus opined that it "would be logical for [Mr. Cardinal] to assume that she was fulfilling the full role of administrator and, therefore, his comments would include her in his praise for the end results." Fenton Deposition at 34. Instead, he reiterated his prior observations that Ms. Johnson did not possess the level of knowledge or understanding of SBT's practices or procedures that was required for her job as Branch Administrator. Fenton Deposition at 32, 34.

On April 15, 2003, Ms. Johnson underwent her first performance review with SBT. RX 1; RX 21. The review covered Ms. Johnson's job performance from March 2002 through March 2003. Both Mr. Salazar and Mr. Schmit participated in the performance and preparation of the review. Tr. 1330-1331, 1766. Mr. Salazar described what occurred during a typical performance review:

> We talk about [an employee's] general overall performance of the job, we solicit input from the people they work with and based on observations and input, we come up with a review that summarizes the performance.

Tr. 1332. He emphasized the importance of obtaining input from an employee's co-workers in order to "[s]ee the good things, see the not so good things and more importantly, react to those things that may not be as good as needed and get them up to speed." Tr. 1332. As to Ms. Johnson, Mr. Salazar testified that he elicited input from Mr. Schmit and the sales personnel at the Minneapolis branch. Tr. 1332-1333. Based on this input, as well as his review of Ms. Johnson's performance, Mr. Salazar provided comments regarding "major results accomplished," "personal and leadership strengths," and "developmental needs." RX 1; RX 21. He also individually rated a number of personal factors and leadership factors.

As to the personal factors, Mr. Salazar provided commentary regarding Ms. Johnson's interpersonal skills, job and technical knowledge, problem solving and decision-making, administration, and adaptability. RX 1 (p. 005079); RX 21 (p. 000064). In regards to interpersonal skills, he commented that Ms. Johnson "demonstrates the ability to work with people from all departments and divisions within SBT" and "puts in extra effort when the Minneapolis branch has visitors and treats her co-workers well." As to Ms. Johnson's job and technical knowledge, Mr. Salazar noted that she "is behind in her understanding of all the systems and processes" and "needs to further grasp the companies [sic] accounting reports and the impact on each department." Regarding Ms. Johnson's problem solving and decision-making, he commented that she "has developed relationships with the appropriate persons to work through issues that impact the branch." As to her administration skills, Mr. Salazar opined that "the implementation of Best Practices needs greater focus" and a "strong understanding of all the forms that Mike Fenton summarized during the last Branch Review is required." Mr. Salazar also determined that Ms. Johnson's initiative needed improvement, in that she "needs to 'take charge' of the appropriate day-to-day business functions." In addition, he identified "shipping materials timely, administrative meetings each week, filing [and] receivables" as areas that needed improvement. Finally, Mr. Salazar gave Ms. Johnson positive reviews for her adaptability and noted that she "consistently responds to any change that may be required of her." Based on these observations, Mr. Salazar made an overall determination that Ms. Johnson demonstrated the skills, knowledge and personal factors required for her job. RX 1 (p. 005079); RX 21 (p. 000064).

Mr. Salazar next assessed a number of leadership factors, including Ms. Johnson's aptitude for planning and organizing, directing others, coordinating, and representation. RX 1 (p. 005080); RX 21 (p. 000065). As to planning and organizing,

Mr. Salazar opined that she was "unable to 'get ahead' of the day-to-day workflow which sometimes creates a very reactive environment." Regarding the ability to direct others, he determined that Ms. Johnson "treats all employees very graciously but the direction could be enhanced." As to her coordinating skills, Mr. Salazar commented that "[t]here is too much follow up on some of the basic functions of the branch." He cited a need for more consistency in "[s]hipping materials, clearing credit-hold with sales persons, timely entering of invoices, [and] managing the billing to the draw dates." Finally, as to Ms. Johnson's "representation" abilities, he opined that she was "very well spoken and represents the branch well." In light of these observations, Mr. Salazar made an overall determination that Ms. Johnson "[r]epresents the effective use of leadership skills to meet performance objectives." RX 1 (p. 005079); RX 21 (p. 000064).

Based on his findings regarding Ms. Johnson's personal factors and leadership skills, Mr. Salazar determined that her overall performance qualified for a rating of "meets requirements." RX 1 (p. 005078); RX 21 (p. 000063). He made the following comments regarding her "major results accomplished":

> Carri has completed Administration training, assisted in implementing the Service Coordinator position, created several spreadsheets (inventory log, booking log) to manage the business, and assisted in the Co-Location efforts (badges, etc.).

RX 1 (p. 005078); RX 21 (p. 000063). As to Ms. Johnson's "personal and leadership strengths," Mr. Salazar opined that she was "extremely personable and her attendance is very good." He also found that she was "able to work with all other employees in a positive respectful manner." Regarding Ms. Johnson's developmental needs, he provided the following opinion:

> Carri has a few areas that need attention for her to succeed in her position. She needs to achieve a broader knowledge of the accounting fundamentals, understanding how all the reports tie together, more timely follow up to internal customers. In short, the first six months were very challenging for Carri in many ways but there has been improvement in the last six months of her employment.

RX 1 (p. 005078); RX 21 (p. 000063). Mr. Salazar concluded, however, that he was "extremely confident that Carri will become very proficient in her job." RX 1 (p. 005078); RX 21 (p. 000063).

On April 16, 2003, Ms. Johnson received a copy of her performance review, which she signed to indicate that she had reviewed Mr. Salazar's determinations. RX 1 (p. 005078); RX 21 (p. 000063). At the hearing, however, she opined that a "below requirements" rating for her job and technical knowledge was not appropriate. Tr. 778-779. In particular, she alleged that she was not behind in her understanding of SBT's systems and processes in April 2003. Tr. 779-780. Instead, she alleged that Mr. Salazar gave her negative marks because it was the beginning of SBT's "efforts to get rid of me." Tr. 781. Mr. Salazar testified, however, that Ms. Johnson accepted the performance

review when he discussed it with her. Tr. 1337-1338. In addition, he explained why he gave her a "below requirements" rating for her job and technical knowledge:

> The overall job or technical knowledge just wasn't there. And the amount of training that was provided and the continued issues, it was very evident that the job or technical knowledge just was not there.

Tr. 1336. Mr. Salazar maintained, however, that he "absolutely" believed Ms. Johnson could improve because "that's what every manager wants and there is no benefit to have an Administrator not work out." Tr. 1335.

Mr. Schmit provided a similar opinion regarding the performance review during his hearing testimony. He testified to his belief that Mr. Salazar was "charitable" towards Ms. Johnson during the review in "an effort to keep it positive in hopes to turn the situation around." Tr. 1768. Mr. Schmit agreed, however, with the performance review's criticism of Ms. Johnson's job and technical knowledge, as well as her initiative and organizational skills. Tr. 1769-1771. He described Ms. Johnson's performance as follows:

> Ms. Johnson's performance was not what we needed it to be. It was poor. We had problems getting jobs booked correctly, customers getting billed correctly. We had prevailing wage issues with technicians we could not get resolved. And bills out to contractors we could not get resolved.

Tr. 1755. He noted that Ms. Johnson also failed to follow SBT's procedures whenever a "change order" was submitted for job. Tr. 1757. In addition, he described the complaints that he received from SBT's sales personnel that Ms. Johnson would not follow through when they asked for assistance on tasks. Tr. 1759-1760. Mr. Schmit therefore concluded that Ms. Johnson's performance "needed improvement" as of April 2003. Tr. 1772.

Despite her performance issues, Ms. Johnson was given a salary increase following her April 2003 performance review. Tr. 1338-1339; RX 22; RX 84. According to an SBT "Personnel Action Form," Ms. Johnson's salary was raised to $41,200.00 per year. RX 22. This increase was applied retroactively to March 4, 2003. At the hearing, Mr. Salazar testified that this amounted to a three percent raise. Tr. 1339. Ms. Johnson's next performance review was scheduled for October 2003. Tr. 1338-1339. According to an e-mail exchange between Mr. Salazar and Lauren Mueller, a member of SBT's human resources department, on May 12, 2003, Ms. Johnson's next review was scheduled for October 2003 to correspond with the new fiscal year. RX 83. At the hearing, Mr. Salazar explained that "we wanted to get everyone on the fiscal calendar for reviews, so complete the reviews at the same time every year." Tr. 1338. In addition, he noted that it allowed SBT to prorate any additional salary increases back to March 2003. Tr. 1338-1339. He testified that he was attempting to motivate Ms. Johnson to improve her performance with the prospect of an additional salary increase. Tr. 1342. A similar explanation was provided by both Mr. Schmit and Mr. Schlesinger. Tr. 1774, 2167. Mr. Salazar and Mr. Schmit also noted that their own performance reviews had been scheduled for October 2003 in order to coincide with the fiscal year. Tr. 1340, 1774.

On May 28, 2003, SBT executed a "Standard Subcontract Agreement" with Elliot Contracting for a job with the St. Paul Public Housing Agency ("SPPHA job"). RX 18 (pp. 000046-000048). The subcontract specified that SBT would "[p]rovide and install a complete addressable fire alarm system per plans and specifications." RX 18 (p. 000046). The contract noted that SBT would receive a total of $49,000.00 for the work. RX 18 (p. 000047). The SPPHA job, however, was not booked until November 21, 2003. CX 108 (pp. 021606-021610); RX 18 (p. 000049). The job was booked for the contract price of $49,000.00, plus $1,341.49 in tax, for a total amount of $50,341.49. CX 108 (p. 021608). An e-mail from Ms. Johnson to Craig Lamfers on January 30, 2004, confirmed that the SPPHA job was booked on November 21, 2003. RX 18 (p. 000054). According to Dr. Keith Bockus, SBT's cost-to-complete reports show that costs were first applied to the SPPHA job in December 2003. RX 206 (p. 14). This is consistent with SBT's records, which show that costs were first incurred, and revenue first recognized, in December 2003. RX 211A (p. 027929). On March 12, 2004, SBT received a "Change Order" from Elliot Contracting that added an additional $4,763.00 to the contract price for the SPPHA job. CX 108 (p. 021596); RX 18 (p. 000053). The increased contract price was for the addition of several components to the job. The "Change Order" was booked on March 16, 2004. CX 108 (pp. 021593-021595). Based on his review of the records, Dr. Bockus concluded that the "project was completed and 100 percent of the contract price was recognized as revenue by June 2004." RX 206 (p. 15). This is again consistent with SBT's records, which show that the SPPHA job was completed by June 2004. RX 211A (p. 027859). In addition, SBT's "Aged Trial Balance" sheet for the SPPHA job reveals that the amounts billed were fully-paid by Elliot Contracting as of March 2005. RX 206 (p. 15); RX 214 (p. 027332).

In her OSHA complaint, Ms. Johnson alleged that the SPHHA job was authorized by Mr. Salazar and Mr. Schmit, and "booked without a purchase order." RX 229. In addition, she contended that "[t]his job never existed and was only booked so that [SBT] could make the monthly projected numbers." RX 229. At the hearing, Ms. Johnson testified that she had refused to book the SPPHA job in May 2003 because the booking package lacked a proposal, an in-house booking order, and many other documents. Tr. 289-290. She alleged that Mr. Salazar then forced her to book the job on the last day of the fiscal month because the Minneapolis branch "had not made our projected, our forecast of numbers for the month." Tr. 290, 303, 858. On cross-examination, however, Ms. Johnson admitted that a valid subcontract had been executed for the job in November 2003. Tr. 967. Ms. Johnson alleged that she reported her concerns about the job to Craig Lamfers, the new Branch Manager for the Minneapolis branch, on January 8, 2004. Tr. 959-961. She later admitted, however, that she never alleged any fraud regarding the job in her January 2004 e-mail to Mr. Lamfers. Tr. 974. In addition, she acknowledged that SBT does not recognize revenue on a job until actual costs are incurred. Tr. 868, 881. In response to Ms. Johnson's allegations, Mr. Salazar acknowledged that he may have occasionally instructed her to book jobs before receiving signed customer authorization. Tr. 1409. He emphasized, however, that SBT's revenue recognition policy prevented the company from benefitting financially from a premature booking. Tr. 1407-1408, 1410-1411. Mr. Schmit provided similar testimony at the hearing, reiterating that it would not make sense to prematurely book a job just to

"make the numbers." Tr. 1852-1853. Mr. Schmit also emphasized that SBT's records confirm that the SPPHA job actually existed. Tr. 1850-1851. He opined that there would be no financial benefit to the branch or company from booking a fictitious job. Tr. 1851. For these reasons, Mr. Salazar and Mr. Schmit both opined that it was not reasonable for someone in Ms. Johnson's position to believe that there was any fraud or accounting regularities associated with the SPPHA job. Tr. 1407-1408, 1853. In his expert report, Dr. Bockus provided a similar opinion and concluded that SBT's records confirmed that the SPPHA job "did not inflate the branch's revenue in the month the job was booked" and supported "the timing and amount of revenue recognized on the [SPPHA] job." RX 206 (p. 14). He also noted that the "branch's records confirm that the [SPPHA] job was not fictitious." RX 206 (p. 14). Mr. Salazar and Mr. Schmit, as well as Mr. Lamfers, all testified that Ms. Johnson never voiced any complaints to them regarding fraud or other improprieties relating to the SPPHA job. Tr. 1426, 1853; Lamfers Deposition at 84.

On August 8, 2003, SBT received a "Quotation Request" form from Collins Electrical Construction Company ("Collins Electrical") for the "Roseville City Hall and Public Works Project" ("Roseville job"). RX 20 (p. 000057). The form requested that SBT provide a quote for the installation of the following: (1) a fire alarm system; (2) a video communications system; (3) an interview room CCTV/audio monitoring system; (4) a digital video recording system; (5) a jail access control system; and (6) a car access control system. RX 20 (p. 000057). In response, SBT submitted a proposal for the fire alarm system in the amount of $49,015.00. ALJX "A." On August 22, 2003, the fire alarm system component of the Roseville job was booked by SBT for the total amount of $49,015.02. ALJX "A." An e-mail exchange between Penny Kelly and Mr. Salazar reveals that the Roseville job was placed on "credit hold" on August 22, 2003. ALJX "A." According to Mr. Schmit, the Roseville job was intended to be a "synergy" project involving both the Fire Division and the Security Division. Tr. 1855-1856. On February 11, 2004, however, Mr. Schmit instructed Ms. Johnson to cancel the Roseville job because it "needed to be [an] all inclusive Security and Fire project" and the Security Division "could not [p]rocure the needed material or get a substitution." RX 20 (p. 000061). Both Mr. Schmit and Ms. Johnson confirmed that the Roseville job was cancelled in February 2004. Tr. 1018, 1856. SBT's cost-to-complete reports indicate that no costs were ever applied to, and no revenue was recognized on, the Roseville job from August 2003 through February 2004. RX 206 (p. 16); RX 211A (pp. 027834-027847).

In her OSHA complaint, Ms. Johnson alleged that Mr. Salazar and Mr. Schmit authorized the booking of the Roseville job without a purchase order. RX 229. She noted that the job was booked "on the last day of [SBT's] fiscal month end" and that Mr. Salazar ordered the branch to "inflate the selling amount because the forecasted revenue number for the month had not been met." RX 229. At the hearing, Ms. Johnson alleged that the Roseville job highlighted "the issue of booking jobs without purchase orders to fraudulently increase respondent's revenue." Tr. 374. On cross-examination, however, Ms. Johnson admitted that she did not mention her concerns to Mr. Schmit when she cancelled the job in February 2004. Tr. 1025-1026. In addition, she was unable to recall whether she discussed her allegations with any other managers or supervisors at SBT. Tr. 1003-1004. She also conceded that SBT did not recognize revenue on a job when it

was booked; instead, actual costs needed to be incurred on the job. Tr. 868, 881. In response to Ms. Johnson's allegations, Mr. Schmit and Mr. Salazar both testified that there was nothing fraudulent or improper about how the Roseville job was booked and subsequently cancelled. Tr. 1416-1417, 1857. In addition, Susan Forte, Thomas Schlesinger and Rita Jardiolin all testified that booking a job has no impact on a branch's revenue under SBT's revenue recognition policy. Tr. 1682-1683, 2182-2183; Forte Deposition at 172-178, 181-182. Dr. Keith Bockus provided a similar opinion in his expert's report, concluding that the Minneapolis branch records "confirm that the City of Roseville job did not inflate the branch's revenue in the month the job was booked ... or any subsequent month since no revenue or income was ever recognized on this job." RX 206 (p. 15). At the hearing and depositions, Mr. Schmit, Mr. Salazar, Mr. Schlesinger, Ms. Forte and Ms. Jardiolin all testified that Ms. Johnson never communicated any complaints involving fraud or improper business practices relating to the Roseville job. Tr. 1430-1431 (Salazar), 1683 (Jardiolin), 1857-1858 (Schmit), 2205-2206 (Schlesinger); Forte Deposition at 120-121, 184.

On September 25, 2003, Ms. Johnson exchanged e-mails with Ms. Jardiolin regarding "Journal entries." RX 132. In her e-mail, Ms. Johnson indicated that she did not know how to change a job number without cancelling and re-booking the job. RX 132. At the hearing, Ms. Jardiolin testified that Ms. Johnson had incorrectly booked a change order as a new job and did not understand how to fix the problem. Tr. 1661-1664. She noted that this was a frequent problem with Ms. Johnson, and opined that the e-mail was a typical exchange between them during her employment with SBT. Tr. 1648, 1664.

Mr. Salazar exchanged e-mails with Lynne Dvoracek regarding "Phone Coverage" on September 29-30, 2003. CX 154. Ms. Dvoracek was a back-up receptionist at SBT's Minneapolis branch. Tr. 326. Mr. Salazar acknowledged that Ms. Dvoracek had "previously expressed a dissatisfaction in the phone coverage that [the Fire Division] has demonstrated." CX 154. He noted that he had requested Ms. Johnson and Jennifer Deurr to ensure that one of them was "at their desk at all times." In her response, however, Ms. Dvoracek indicated that the "larger problem" was the use of SBT's "Office View" program by the sales personnel. She noted that Ms. Johnson was one of the only employees who used the program effectively. In addition, she opined that "Carri and Jen do always use their phone & Office View, so their being away together is a relatively minor problem for us." CX 154.

On October 16, 2003, SBT submitted a proposal for the installation of a fire alarm system at the "Unisys Roseville Facility." CX 88 (p. 00010); RX 167. The proposal listed a total price of $71,293.00 for the system and installation, including freight and sales tax. The proposal also indicated that the cost for after-hours installation would be $3,260.00, and listed a number of unit prices for various pieces of equipment. The Unisys job was booked on October 24, 2003, for a total price of $74,538.67. CX 88 (pp. 00001-00003); RX 162. On October 29, 2003, however, Rob Hynes, a salesperson for SBT, received an e-mail from a Unisys representative indicating the company's desire to revise the amount of the booked job. Tr. 1867; RX 166. The representative requested a deduction of $1,500.00 from the job proposal. RX 166. Accordingly, SBT submitted a

new proposal for the Unisys job on November 4, 2003. RX 194. The new proposal listed a total price of $65,330.00 for the fire alarm system and installation, as well as an additional $2,630.00 for after-hours installation. RX 194. As a result, SBT received a "Standard Purchase Order" from Unisys on November 10, 2003, in the amount of $67,960.00. CX 88 (p. 00020); RX 163. The revised Unisys job, however, was not immediately booked. SBT's cost-to-complete records indicate that the job incurred costs of $906.00 in December 2003, and recognized $1,133.00 in revenue. RX 211A (p. 027929). The Aged Trial Balance sheet reveals, however, that Unisys was not invoiced for this amount in December 2003. RX 214. In an e-mail exchange with Ms. Johnson on January 12, 2004, Mr. Hynes indicated that he was "waiting on a couple of things from the customer" before re-booking the Unisys job. RX 58. He noted that Unisys had "changed [its] mind a couple of times" about the job. RX 58. On January 23, 2004, however, the Unisys job was re-booked at a revised price of $67,960.02. RX 165. In an e-mail dated January 26, 2004, Ms. Johnson confirmed that the Unisys job had been "cancelled and re-booked." RX 52. SBT's cost-to-complete reports reveal that additional costs were not incurred on the re-booked job until February 2004. *See* RX 211A (pp. 027848, 027932).

Ms. Johnson did not address the Unisys job in her complaint to OSHA. *See* RX 229. At the hearing, however, she alleged that Mr. Salazar had instructed an SBT salesperson to inflate the price of the Unisys job. Tr. 406. She also noted that the job was originally booked in October 2003 without customer authorization. Tr. 405. In addition, she alleged that Mr. Salazar had forced her to "push through" the Unisys job in October 2003 to "make the numbers." Tr. 858. Ms. Johnson admitted, however, that she did not voice any concerns regarding fraud or other misconduct involving the Unisys job in her e-mails on January 12, 2004 and January 26, 2004. Tr. 1006-1009, 1011-1014. As stated above, she has also admitted that SBT did not recognize revenue on a job until actual costs were incurred. Tr. 868, 881. In response to Ms. Johnson's allegations, Mr. Schmit and Mr. Salazar both testified that nothing improper occurred with respect to the Unisys job. Mr. Salazar denied ever instructing an SBT salesperson to book the job for an amount higher than what had been authorized by Unisys. Tr. 1422-1423. Mr. Schmit similarly testified that no one had communicated that it was improper to book the Unisys job in October 2003 at a price of $74,538.67. Tr. 1863. He also reiterated that no revenue was recognized merely by booking the job, so it did not make sense to book the Unisys job at an inflated price. Tr. 1863, 1872. Mr. Schmit opined that it was not reasonable for someone in Ms. Johnson's position to believe that there was fraud or other improper conduct associated with the Unisys job. Tr. 1878. In his expert's report, Dr. Bockus agreed with the opinions of Mr. Schmit and Mr. Salazar:

> The branch's records show that ... the job did not inflate [the October 2003] revenues since no revenue was recognized until after the purchase order was received (November 2003) and costs were incurred (December 2003).
>
> The branch's records show that ... SBT properly recognized revenue based on the revised contract price once additional costs were incurred on the reissued job beginning in February 2004.

RX 206 (p. 16). Mr. Salazar and Mr. Schmit, as well as Craig Lamfers, all reiterated that Ms. Johnson never voiced any complaints to them regarding fraud or improper business practices involving the Unisys job. Tr. 1430-1431, 1863, 1890; Lamfers Deposition at 96.

On October 17, 2003, Mr. Salazar sent an e-mail to Michael Fenton and Rita Jardiolin regarding "Diligence and Support." RX 24-25. In his e-mail, he requested "a brief bullet point response of your observations of [Ms. Johnson]." He noted that he was "concerned about continued processing issues and based on her tenure (18 months), I don't [believe] certain errors should still happen." He also indicated that he wanted to "ensure that I provide Carri with every opportunity necessary to succeed." RX 24-25. At the hearing, Mr. Salazar testified that he never tried to convince Ms. Jardiolin or Mr. Fenton that Ms. Johnson should be terminated. Tr. 1350. In her response on October 17, 2003, Ms. Jardiolin provided two observations of Ms. Johnson's continued performance issues. RX 24. First, she noted that "Carri still needs help from Finance looking up costs in oracle although she was trained to do this." Second, she noted that there was "still confusion on her part determining which transactions should be credits and what should be debits." RX 24. At the hearing, Ms. Jardiolin confirmed that these were Ms. Johnson's deficiencies as of October 2003. Tr. 1659-1661. In addition, she testified that she did not consider Mr. Salazar's e-mail to be an attempt to "get rid of Ms. Johnson." Tr. 1659.

Mr. Fenton provided his observations of Ms. Johnson on October 18, 2003. RX 25. He noted that Ms. Johnson was "a very polite and seemingly intelligent and professional person," and was "very likeable and everyone wants to see her succeed." RX 25. Mr. Fenton wrote, however, that during the March 2003 "Branch Operations Review," Ms. Johnson "appeared not to be aware of the Best Practices even though [Ms. Jardiolin] and I had gone over them specifically in a previous visit." RX 25. He also observed that "the most basic items that are common to Operations and Administration seem to be a new item every time they are discussed." RX 25. He therefore agreed with Mr. Salazar's suspicion that Ms. Johnson had a "retention problem" and indicated his concern "that the Branch is paying for a level of performance that it is not receiving." RX 25. At his deposition, Mr. Fenton testified that he did not consider Mr. Salazar's e-mail to be an attempt to terminate Ms. Johnson's employment. Fenton Deposition at 28. Instead, he opined that Mr. Salazar "was very concerned about losing someone that he had invested 18 months in [and] wanted us to help him try to make Carri successful." Fenton Deposition at 28.

On November 25, 2003, Ms. Johnson underwent her second performance review with SBT. RX 2; RX 23. The review covered Ms. Johnson's job performance from March 2003 through October 2003. RX 2; RX 23. Both Mr. Salazar and Mr. Schmit participated in the performance and preparation of the review. Tr. 1344-1346, 1775. Mr. Salazar testified that he solicited input from Mr. Schmit, Mr. Fenton and Ms. Jardiolin, as well as the sales personnel at the Minneapolis branch, during his preparation of the performance review. Tr. 1345. Based on this input, as well as his own observations, Mr. Salazar again provided comments regarding "major results accomplished," "personal and leadership strengths," and "developmental needs." RX 2; RX 23. He also

individually rated a number of personal factors and leadership factors.

As to the personal factors, Mr. Salazar assessed Ms. Johnson's interpersonal skills, job and technical knowledge, problem solving and decision-making, administration, initiative, and adaptability. RX 2 (p. 005119); RX 23 (p. 000072). Regarding interpersonal skills, he opined that Ms. Johnson "does not accept responsibility and has teamwork issues with sales, engineering, and operations [personnel]." He noted, however, that Ms. Johnson put in extra time whenever the Minneapolis branch had visitors. Mr. Salazar expressed a similar concern at the hearing, testifying that "[w]hat was particularly concerning is when mistakes happen, there never seemed to be a willingness or acceptance that mistakes were made." Tr. 1296. As to Ms. Johnson's job and technical knowledge, Mr. Salazar commented that "Carri does not fully understand the systems and processes." RX 2 (p. 005119); RX 23 (p. 000072). He reiterated these concerns at the hearing, noting that Ms. Johnson had consistent difficulty with processing, credits and debits, and job booking. Tr. 1294. Mr. Schmit also echoed these observations in a list of deficiencies that he provided to Mr. Salazar. Tr. 1776-1779; RX 148. In particular, he noted that Ms. Johnson's accuracy was a concern, as "jobs consistently need to be cancelled and rebooked because of data entry errors." RX 148. He also commented that she "needs to be reminded two or three times before most tasks will be completed." RX 148.

In regard to Ms. Johnson's problem-solving and decision-making, Mr. Salazar noted that "Carri documents what has transpired on issues within the branch[,] however, these issues need to be prevented during the booking process." RX 2 (p. 005119); RX 23 (p. 000072). Mr. Schmit provided a more critical assessment, observing that Ms. Johnson was "not a problem solver" because "she has been known to give inaccurate and misleading information." RX 148. As to Ms. Johnson's administrative skills, Mr. Salazar commented that she "does not fully understand all of the processes and does not view sales and operations as internal customers." RX 2 (p. 005119); RX 23 (p. 000072). He also opined that "Carri has not managed the personell [sic] effectively to stay on top of all the administration functions within the branch." He noted, however, that Ms. Johnson's rating on this point had been changed based on information and discussion during the performance review. Mr. Salazar next addressed Ms. Johnson's initiative, observing that "Carri needs to 'take charge' of the appropriate day-to-day business functions." Finally, as to Ms. Johnson's adaptability, he noted that she "responds to change very well," but "needs to be more solution oriented." Based on these observations, Mr. Salazar made an overall determination that Ms. Johnson "[r]epresents several areas of deficiency or the need for general development of the skills, knowledge and personal factors that are detracting from performance." RX 2 (p. 005119); RX 23 (p. 000072).

Mr. Salazar next assessed a number of leadership factors, including Ms. Johnson's aptitude for planning and organizing, directing others, coordinating, and representation. RX 2 (p. 005120); RX 23 (p. 000073). As to planning and organizing, Mr. Salazar reiterated his prior concern that she was "unable to 'get ahead' of the day-to-day workflow which sometimes creates a very reactive environment." Regarding Ms. Johnson's ability to direct others, he noted that "Carri has not directed her staff

accordingly and does not perform consistently on a day to day basis." As to her coordinating skills, Mr. Salazar again found that "[t]here is too much follow up on some basic functions of the branch." Mr. Schmit similarly opined that Ms. Johnson consistently had issues with "entering receivables" and "entering jobs" on a timely basis, and noted that "Ops needs to continually follow up on order status of parts needed for projects." RX 148. Finally, as to Ms. Johnson's representative capabilities, Mr. Salazar commented that "Carri is very well spoken and represents the administration employees well." RX 2 (p. 005120); RX 23 (p. 000073). He noted, however, that her "communication needs to become more solutions oriented." In light of these observations, Mr. Salazar made an overall determination that Ms. Johnson "[r]epresents several areas of deficiency or the need for general development of skills needed for effective leadership." RX 2 (p. 005120); RX 23 (p. 000073).

Based on his assessment of Ms. Johnson's personal and leadership qualities, Mr. Salazar determined that her overall performance qualified for a rating of "below requirements." RX 2 (p. 005118); RX 23 (p. 000071). Despite this rating, he noted that Ms. Johnson's "major results accomplished" included assisting "with the new booking package, QWEST collections, and service POC initiative that resulted in a very strong Q4." He also opined that she was "extremely personable and is able to research and document the facts regarding issues with accounts and/or projects." Mr. Salazar provided the following opinion, however, regarding Ms. Johnson's developmental needs:

> Carri has accuracy and timing issues processing transactions which has also resulted in significant teamwork issues within the branch. Examples include that salespersons believe that Carri is not processing orders timely, operations has expressed that there is an attention to detail issue, and engineering frequently requests job files though they have been booked many days prior, etc.

RX 2 (p. 005118); RX 23 (p. 000071). As stated above, Mr. Schmit provided similar concerns in the list of deficiencies that he provided to Mr. Salazar. *See* RX 148. At the hearing, Mr. Schmit also expressed his agreement with Mr. Salazar's findings, and opined that Ms. Johnson's performance had gotten worse since her prior performance review in April 2003. Tr. 1780-1782. Ms. Johnson also acknowledged that she received the same criticisms in both April 2003 and November 2003. Tr. 1041-1043.

As a result of her negative performance review, Ms. Johnson was placed on a "Performance Improvement Plan" ("PIP") on November 25, 2003. RX 3; RX 27. Mr. Salazar described a PIP as follows:

> Generally, it's a document to provide an employee with some direction on short term goals that they're not achieving. They're not achieving their performance, so we document the key areas and really plan it out so they can be successful.

Tr. 1353. Mr. Schmit similarly testified that a PIP is designed as "an effort to keep [an

employee] and to get them to perform better." Tr. 1784-1785. According to SBT's policy regarding "Short Term Goals & Performance Improvement Plan (PIP)," the recommended approach for an employee with Ms. Johnson's level of experience was to institute "short term goals" for improvement. RX 11. The "short term goals," however, only give an SBT employee 30 days to improve their performance. On the other hand, a PIP gives an employee 90 days to meet their improvement goals. At the hearing, Mr. Salazar testified that he placed Ms. Johnson on a PIP to give her "longer than required" to improve her performance. Tr. 1355. He stated that his motive was to give her "every single opportunity to succeed and achieve." Tr. 1395.

Under her PIP, Ms. Johnson was given the chance to improve her performance over a 90-day period from November 25, 2003 through February 25, 2004. RX 3; RX 27. In a memorandum to Ms. Johnson on November 25, 2003, Mr. Salazar outlined eight different areas of improvement:

1. Your current understanding of AS-400 accounting systems and the weekly, monthly reports is not where it needs to be. You need to demonstrate a better understanding of the financial processes and utilize the Best Practices procedures as a guideline when processing orders. As part of your regular duties, you are required to run, analyze, and interpret these reports on as needed basis. Examples would include, verifying the booking utilizing the 60 report, verifying commissions utilizing AS-400 (margins and receivables), verifying billing utilizing the 61 report, etc.

2. Job files must be booked and files created within 48 hours of receipt.

3. Commission payment reports must be verified for accuracy within one week of receipt of the report and any discrepancies brought to the attention of the Branch Manager immediately.

4. All K-drive documents and folders maintained at the branch must be updated on a weekly basis.

5. Breaks must be managed in a manner to ensure either you or Jennifer Deurr are at your desks at all times.

6. Billings and Payables delegated to you by the Branch Manager or Branch Operations Manager must be completed according to the deadlines given to you.

7. Ordered parts must be shipped as requested by OTL's via email or receipt of the order if the order reflects immediate shipment of material (service orders).

8. Must ensure all orders are booked correctly (what is received from sales). A verification of the data submitted must take place. Example: A

> booking package that reflects 80k in revenue against a purchase order from the customer reflecting 78k should be flagged for followup [sic] during the booking process.

RX 3; RX 27. At the hearing, Mr. Salazar testified that he prepared these goals after receiving input "from virtually every department in the office." Tr. 1463-1464. He also explained that he included the fifth goal because Ms. Johnson and Ms. Deurr were "the two key people in the Fire Division for dealing with Fire issues that needed to be at their phones." Tr. 1493. In the memorandum, Mr. Salazar also noted that he had scheduled monthly follow-up sessions "with Joan Schaan, Joe Schmit, and Mike Fenton to evaluate your progress during this period." He encouraged Ms. Johnson to hold bi-monthly conference calls with Ms. Schaan "to review the above action items and your progress, questions, concerns, etc." Mr. Salazar emphasized, however, that Ms. Johnson's failure to show improvement in these areas "by the end of the 90 days will result in further disciplinary actions up to and including termination of your employment." RX 3; RX 27.

Following the completion of her performance review, Ms. Johnson had a meeting with Mr. Salazar and Mr. Schmit on November 25, 2003, to discuss her review and the PIP. Tr. 475-476, 478, 1356-1357, 1508. She did not sign her performance review or her PIP during the meeting. Mr. Salazar testified that Ms. Johnson did not sign her performance review because "[s]he was concerned about it and I didn't make her sign." Tr. 1356. He noted that "it's not uncommon for me to let the employee have the review, make some comments and we can discuss it again." Tr. 1356. In an e-mail to Melissa Muldoon, one of SBT's human resources representatives, Mr. Salazar noted that Ms. Johnson had "disputed most of the review." RX 93. Ms. Johnson similarly testified that many aspects of her performance review were incorrect and alleged that it had "Joe Schmit written all over it." Tr. 480. Mr. Schmit denied, however, that he wrote her performance review. Tr. 1914. According to Mr. Salazar, he gave Ms. Johnson a copy of her performance review on November 25, 2003, and the plan was that "she would make any comments that she had to make and we would either reconvene or I would send her the review." Tr. 1356. Mr. Schmit similarly stated that the plan was to give Ms. Johnson "the opportunity to present any rebuttals" to her performance review. Tr. 1912. Ms. Johnson did not sign her PIP until January 8, 2004. RX 3; RX 27.

After her meeting with Mr. Salazar and Mr. Schmit, however, Ms. Johnson confronted a number of SBT employees regarding the contents of her performance review. Tr. 1358-1359, 1915-1916, 1921. Ms. Johnson initially denied that she had confronted any co-workers, but instead alleged that Mr. Salazar and Mr. Schmit were lying. Tr. 908-909. She subsequently admitted, however, that she had spoken with several SBT employees regarding her review. Tr. 917, 1074-1076, 1228-1229. According to Mr. Schmit, Ms. Johnson confronted Denny Kernan, Dave Kress and John Fabian regarding her performance review. Tr. 1921. This is consistent with an e-mail that he sent to Mr. Salazar and Ms. Muldoon on November 26, 2003. CX 290; RX 93. In the e-mail, Mr. Schmit reported as follows:

> We had had Three employee's [sic] who have come forward as being

> confronted. John Fabian had said that he feels he needed to say she was doing a good job or she would make his job harder. The others who were confronted are Dave Kress (Sales) and Denny Kernan (O.T.L.). Two others[,] Andre Audette and John Haglin[,] had come to us saying they overheard these conversations.

CX 290; RX 93. In a subsequent e-mail to Mr. Salazar on December 17, 2003, Mr. Fabian confirmed that Ms. Johnson had spoken with him about her performance review. RX 111. He noted that Ms. Johnson "said that she did not agree with how it went and she made a comment about [Mr. Schmit's] lack of people skills." RX 111. He noted that the conversation "caught me completely off guard and did make me feel uncomfortable." RX 111.

As a result of her actions, Ms. Johnson was given a "final warning" regarding retaliation and harassment during a follow-up meeting with Mr. Salazar and Mr. Schmit on November 26, 2003. Tr. 1362-1365. The "final warning" was authorized by Ms. Muldoon, who noted that "[t]his warning is to state the seriousness of what [Ms. Johnson] did after [the November 25] meeting, and that this behavior cannot and will not be tolerated in any way, shape or form." RX 92. As a result, Ms. Johnson received copies of SBT's "Respectful Workplace" and "Retaliation" policies during the meeting on November 26, 2003. Tr. 1362-1365; CX 320; RX 225. According to a "Counseling Report" completed after the meeting, Ms. Johnson was notified that her confrontations with SBT employees "are in clear violation of the Respectful Workplace and Retaliation policies." RX 26. She was therefore advised that "going forward, if we hear of any other confrontations with your colleagues of this or a similar nature, it may result in termination of your employment." RX 26. The counseling report, however, was not placed in Ms. Johnson's employment file because she promised to cease confronting SBT employees about her performance reviews. Tr. 1788; RX 93.

On December 1, 2003, Ms. Johnson received an e-mail from Mr. Salazar regarding her "Performance Review and Performance Improvement Plan (PIP)." CX 160; RX 6; RX 136. As an initial matter, Mr. Salazar noted that he had "changed the administrative ranking portion of [the] review based on our conversation during your review last week." CX 160; RX 6; RX 136. He testified that he changed the ranking from "less than satisfactory … to satisfactory." Tr. 1357. Mr. Salazar also included copies of Ms. Johnson's performance review and PIP as attachments to the e-mail. In addition, he provided the following points:

> 1. A letter stating that you are performing at a satisfactory level will be created at the end of your 90-day improvement plan if you are meeting your objectives. This provides you an opportunity to have your successful performance documented.
>
> 2. Per our discussion last week, further discussions regarding the content of your review with other employees will cease immediately.
>
> 3. You have expressed a disagreement with the review. I will not make

any further changes to this review based on the number of documented incidents regarding administrative issues over the past six months.

4. As part of your PIP, I have assigned Joan Schaan and Mike Fenton to work with you over the next 90 days. They are committed to assist the branch and you [to] reach a satisfactory level.

CX 160; RX 6; RX 136. Mr. Salazar concluded, however, that he had "every confidence that [Ms. Johnson], Joan, Mike, and Joe can work together to ensure a positive result." CX 160; RX 6; RX 136. At the hearing, Ms. Johnson acknowledged that she had received the e-mail and attachments from Mr. Salazar on December 1, 2003. Tr. 533-534, 896. In addition, she acknowledged that the PIP stated that her 90-day improvement period ran from November 25, 2003 through February 25, 2004. Tr. 925. She admitted, however, that she never read the PIP. Tr. 928. Ms. Johnson nonetheless alleged that none of the follow-up meetings or conference calls with Ms. Schaan, Mr. Fenton or Mr. Schmit ever occurred. Tr. 500.

In December 2003, Mr. Salazar left his position as Branch Manager of the Minnesota branch after being promoted to District Manager of SBT's Gulf Coast District. Tr. 1281. He was replaced by Craig Lamfers, who was a District Manager responsible for the Minneapolis branch, as well as SBT's offices in Kansas City, Missouri, and Des Moines, Iowa. Lamfers Deposition at 20-21. Mr. Lamfers received a copy of Ms. Johnson's PIP, as well as her November 2003 performance review, from Mr. Salazar. Tr. 1400; Lamfers Deposition at 42-43.

Ms. Johnson received approved leave for 11 working days in December 2003 to attend her wedding and honeymoon. Tr. 516. According to an e-mail from Joe Schmit to Ms. Johnson and Penny Kelly on December 15, 2003, Ms. Johnson was scheduled to be out of the office on the following dates: December 16-19, 22-23, and 29-31. RX 137 (p. 020516); RX 186 (p. 025507). In the same e-mail, Mr. Schmit instructed Ms. Kelly to "[h]old off on entering [Ms. Johnson's] time sheets for the remainder of the year." RX 137 (p. 020516); RX 186 (p. 025507). He noted that Ms. Johnson had only eight (8) hours of vacation time left, so the "remaining 64 hours will be coded as excused leave non payable." RX 137 (p. 020517); RX 186 (p. 025507). He suggested, however, that Ms. Johnson's remaining three (3) sick days could be applied. RX 137 (p. 020517); RX 186 (p. 025507).

On December 16, 2003, Ms. Johnson e-mailed her response to Mr. Schmit, Ms. Kelly and Mr. Salazar. RX 137 (p. 020516); RX 186 (p. 025506). Ms. Johnson opened her message as follows:

> I've tried to find out from you what 'your beef' was with me but obviously you just don't care. The way I see as do others, you are trying to make work life at Siemens as difficult as possible so that I would turn tail and leave.

RX 137 (p. 020516); RX 186 (p. 025506). Ms. Johnson then stated that she was "appalled with the way that you presented yourself with the issue on yesterday." She

alleged that Mr. Schmit "had to 'twist the knife' just a little deeper and try to inflict any type of discomfort" before she left for her wedding and honeymoon. She next opined that she considered it to be "prejudice and discriminating on your part that you would go to the lengths that you have investigating my company time when you don't even submit time off that you take yourself." Ms. Johnson then stated as follows:

> I'm letting you know that I'm no longer going to be the person in which you can push around; I will not go quietly or without my say to those 'powers that be'. You can try and make me look as incompetent as you like and have me fired, but I would rather have us get over the issues that you have with me instead. The ball is in your court now, you can decide to get over the vendetta that you have with me and help me to help one another to make this branch a successful one instead of having me feel uncomfortable all the time, or we can continue this onto a higher level which wouldn't look too well on either of us.

RX 137 (p. 020516); RX 186 (p. 025506). At the hearing, Mr. Schmit testified that he was "disturbed" by Ms. Johnson's e-mail and considered it to be a threat. Tr. 1792, 1926. He opined that this response was "typical," in that Ms. Johnson used e-mails to "over exaggerate what I thought were very simple issues." Tr. 1792. Mr. Schmit denied, however, that he had any beef with Ms. Johnson. He also opined that Ms. Johnson's e-mail had violated SBT's Respectful Workplace policy. Tr. 1793. Ms. Kelly also commented on the e-mail and opined that Ms. Johnson had a deteriorating and argumentative relationship with Mr. Schmit. Tr. 612-613. She admitted, however, that Mr. Schmit's original e-mail did not create the appearance that he was treating Ms. Johnson unfairly. Tr. 655.

As a result of Ms. Johnson's e-mail, Mr. Schmit completed a "Recommendation of Discharge" form on December 17, 2003. RX 100. He recommended that Ms. Johnson be immediately terminated from employment with SBT. He noted that "Carri's performance has been below average" and described Ms. Johnson's e-mail as containing "some very strong opinions not related to [her] performance." RX 100. Mr. Schmit also took issue with the fact that Ms. Johnson had sent the e-mail to Ms. Kelly and noted that "Penny did express at the end of the day on [December 16] that this E-mail made her uncomfortable, not to mention the threatening nature." RX 100. At the hearing, Mr. Schmit reiterated that he completed the recommendation because Ms. Johnson's e-mail had made Ms. Kelly feel uncomfortable. Tr. 1929. He acknowledged, however, that SBT did not follow through on his recommendation to terminate Ms. Johnson's employment. Tr. 2025. He also denied that the recommendation was motivated by any whistle-blowing activity by Ms. Johnson. Tr. 2026.

On December 19, 2003, Mr. Lamfers provided written notice of the issue involving Ms. Johnson's e-mail to Judy Bieber and Melissa Muldoon. CX 158; RX 101. The record does not reveal Ms. Bieber's position or role with SBT. Ms. Muldoon, however, is a member of SBT's human resources department. In his e-mail, Mr. Lamfers noted that the "Carri issue" had become a "major disruption to the Minneapolis business." CX 158; RX 101. Accordingly, he opined that "an on-site investigation by the

Human Resources department is required." CX 158; RX 101. He requested that the investigation take place during the week of January 5, 2004. Ms. Bieber subsequently forwarded the e-mail to Joseph Krisch, who is SBT's Director of Human Resources. Tr. 2035, 2038-2040; CX 158; RX 101. Mr. Krisch testified that he then had individual discussions about the issue with Ms. Bieber, Mr. Lamfers, and Mr. Schmit. Tr. 2040.

E. Events of 2004

A review of the evidence in the record reveals that the following relevant events occurred in 2004.

In response to Mr. Lamfers' request for an investigation, Mr. Krisch visited the Minneapolis branch on January 6, 2004, on behalf of SBT's human resources department. Tr. 2040. He described the purpose of his visit as follows:

> I was asked specifically to look into the follow up to the Performance Improvement Plan that Ms. Johnson had been placed on, the insubordination that was alleged to have occurred following that in the month of December whereby ... there had [been] a series or some questionable e-mails that were initiated between parties up here in Minneapolis.

Tr. 2040. He testified that he investigated three items during his visit: (1) Ms. Johnson's time entries for her absence in December 2003; (2) the e-mail exchange between Ms. Johnson and Mr. Schmit on December 16, 2003; and (3) the requirements of Ms. Johnson's PIP. Tr. 2041-2042, 2078-2080. Mr. Krisch noted that he met with Ms. Johnson and Mr. Schmit regarding the December 2003 e-mail exchange. Tr. 2041. As to the PIP, he assessed whether the "specific objectives outlined ... were specific, measurable, achievable, realistic and could be done in the 90 day time frame that had been prescribed under the PIP." Tr. 2042. After reviewing the objectives with Mr. Lamfers and Mr. Schmit, Mr. Krisch concluded that they were achievable goals for Ms. Johnson. Tr. 2042. He also advised Mr. Lamfers not to take any action against Ms. Johnson for the e-mail that she had sent to Mr. Schmit. Tr. 2098-2099. Instead, he told him to meet with Ms. Johnson to reaffirm her obligations under the PIP. Tr. 2099.

On January 7, 2004, Ms. Johnson underwent a monthly review of her progress under the PIP. RX 4. Mr. Lamfers and Mr. Schmit both participated in the PIP review. At the hearing, Ms. Johnson alleged that she had informed Mr. Lamfers of her concern that the SPPHA job had been booked without a purchase order to inflate the branch's revenue. Tr. 959-961. Mr. Lamfers, however, repeatedly denied that Ms. Johnson ever raised this issue with him. Lamfers Deposition at 66, 84, 94-96. The PIP review involved an assessment of Ms. Johnson's progress from December 2003 to January 2004 on the eight improvement areas listed in her PIP. Tr. 1801-1802; Lamfers Deposition at 34-35. These goals have already been summarized above. *See* RX 3; RX 27. As to the first goal, the PIP indicates that Ms. Johnson needed to "demonstrate a better understanding of the financial processes" and "run, analyze, and interpret [weekly and monthly] reports on an as needed basis." RX 3; RX 27. The January 2004 progress report identifies the

following "key tasks" for improvement: "Review the results of data entry by reviewing the reports the next day." RX 4. Ms. Johnson, however, was given a "not achieved" for this goal in January 2004. RX 4. The progress report explains this assessment as follows:

> We had to write several tax credits in December because taxable line items were changed, there are still jobs open that have been cancelled and rebooked and parts only jobs that have not been closed out.

RX 4. Ms. Johnson did not comment on this portion of the progress report at the hearing. Mr. Schmit, however, confirmed that Ms. Johnson had not shown any improvement in this area. Tr. 1805. As to the second goal, the PIP indicates that "job files must be booked and files created within 48 hours of receipt." RX 3; RX 27. Accordingly, the progress report lists Ms. Johnson's "key task" as "create job files after they are booked." RX 4. The report, however, indicates that "[j]ob [f]iles are still not received in operations" and states that folders had not been received for 11 different jobs. RX 4. While the report does not state whether Ms. Johnson had achieved this second goal, Mr. Schmit testified that her progress "was not going well" and SBT "had examples of [jobs] that were booked and we did not have job folders for." Tr. 1805-1806. At the hearing, Ms. Johnson disputed the accuracy of this assessment and asserted that she "was being retaliatory, chastised for jobs that were booked when I was not there." Tr. 510.

The third goal in Ms. Johnson's PIP states that "[c]ommission payment reports must be verified for accuracy within one week of receipt of the report and any discrepancies brought to the attention of the Branch Manager immediately." RX 3; RX 27. Accordingly, the January 2004 progress report states that Ms. Johnson's "key task" was to "[p]rocess reports timely, give others adequate time to review." RX 4. The report, however, indicates that Ms. Johnson had "not achieved" this goal for the following reason: "November commission reports were completed at the last minute; sales had complained that they never received for review." RX 4. Mr. Schmit confirmed that there "were issues with the commission reports at that time." Tr. 1806. At the hearing, however, Ms. Johnson alleged that this assessment was false. Tr. 512. She explained that the commission reports were not ready to be completed until December 2003, when she was out of the office for her wedding and honeymoon. Tr. 513. As to the fourth improvement goal, the PIP states that "[a]ll K-drive documents and folders maintained at the branch must be updated on a weekly basis." RX 3; RX 27. The January 2004 progress report states that Ms. Johnson's "key task" was to "[k]eep booking package and other documents on K drive updated timely." RX 4. Ms. Johnson, however, was given a "not achieved" for this goal in January 2004. The progress report explains as follows:

> Carri decided this task was taking to [sic] much time out of her day and has put it on hold until help is received. The same day she notified me of this VIA E-mail she was noticed boxing and shipping personal packages during working hours.

RX 4. At the hearing, Mr. Schmit confirmed that the fourth goal had not been achieved. Tr. 1806. He denied, however, that this was due to Ms. Johnson having "too much other work to do." Tr. 1806. Ms. Johnson disputed the accuracy of the progress report on this point, and instead alleged that it was Scott Salazar's idea to delay updates to the K-drive. Tr. 513-514. She also denied that she had been boxing a personal package during working hours. She explained that she merely "shipped it, didn't box it." Tr. 514.

As to the fifth goal for improvement, Ms. Johnson's PIP indicates that "[b]reaks must be managed in a manner to ensure either you or Jennifer Deurr are at your desks at all times." RX 3; RX 27. The January 2004 progress report therefore lists Ms. Johnson's "key task" as "[m]ake sure Phones and Dispatch system are maintained." RX 4. The report, however, indicates that Ms. Johnson had "not achieved" this goal because "Carri was out 11 of the working days in December [and] Phone coverage and service dispatch entry continue to be a problem in Jennifer's absence." RX 4. At the hearing, Ms. Johnson disputed this negative assessment because her absence in December 2003 had been approved by SBT. Tr. 516. She also alleged that phone coverage and service dispatch were not her responsibility. Tr. 516. This is consistent with the testimony of Penny Kelly, who noted that service dispatch was Mr. Schmit's responsibility. Tr. 629. Mr. Schmit responded, however, that Ms. Johnson was not penalized for her approved 11-day absence. Tr. 1807. He explained the basis for the negative assessment as follows:

> We did take into consideration she was off for part of December. But while she was here ... one of the main phone covers we wanted was on the service dispatch system. And those calls were not managed by a service dispatch or admin. It ended up [going] to sales people and other operations people, slowing down their performance.

Tr. 1807. Mr. Schmit also testified that Ms. Johnson was responsible for handling the calls when the service dispatch or administrative personnel were not available. Tr. 1807.

The sixth improvement goal in Ms. Johnson's PIP states that she needed to complete billings and payables "according to the deadlines given to you." RX 3; RX 27. Accordingly, the January 2004 progress report indicates that Ms. Johnson's "key task" was to "[p]rocess billings and payables to maximize monthly branch profit goals." RX 4. The reported states that Ms. Johnson "achieved" this task because "[t]hese goals were met by Penny [Kelly] for the Month of December." RX 4. At the hearing, Mr. Schmit commented that he "gave [Ms. Johnson] credit" for the sixth improvement goal because "Penny worked for her [and] Department was part of her responsibility and it was taken care of." Tr. 1807. Ms. Johnson, however, disputed this assessment and alleged that she completed the billings and payables prior to her wedding. Tr. 517. She explained that she was the only individual at the Minneapolis branch authorized to use SBT's Oracle system for processing billings and payables. Tr. 517. Ms. Kelly confirmed that she had covered for Ms. Johnson in December 2003, but testified that she "wouldn't take full credit for processing all of the billings and payables because [Ms. Johnson] was there part of the month." Tr. 630.

The seventh goal outlined in the PIP specifies that "[o]rdered parts must be shipped as requested by [Operations Team Leaders] via email or receipt of the order if the order reflects immediate shipment of material." RX 3; RX 27. The January 2004 progress report states that Ms. Johnson's "key task" was to "[s]hip parts timely and verify shipments." RX 4. Ms. Johnson, however, was assessed a "not achieved" for this goal and the report notes that "[t]racking of parts continues to be a problem." RX 4. At the hearing, Mr. Schmit explained that "[t]here were still parts that we had asked to have shipped and do follow up [that] were still not released, creating shipping problems." Tr. 1808. Ms. Johnson alleged, however, that she had never heard of this job requirement until January 2004. Tr. 517-518. The eighth and final goal in the PIP indicates that Ms. Johnson "[m]ust ensure all orders are booked correctly" through a "verification of the data submitted." RX 3; RX 27. Accordingly, Ms. Johnson's "key task" in the January 2004 progress report was to "[m]onitor accuracy of jobs." RX 4. She was given a "not achieved" for this goal and the progress report notes that the Unisys job "was booked higher than [the purchase order]." RX 4. At the hearing, Ms. Johnson alleged that she booked the job at an amount higher than the purchase order only after being ordered to do so by Scott Salazar. Tr. 518-519. Both Mr. Salazar and Mr. Schmit, however, denied that any SBT employee was ever instructed to book a job at a price exceeding the amount of a purchase order. Tr. 1422-1423, 1808.

The January 2004 progress report also included an assessment of Ms. Johnson's "competency framework." RX 4. She received a rating of "almost never" for the following categories: (1) "works to meet others [sic] standards"; (2) "breaks down problems into lists of tasks or activities"; (3) "monitors data or projects against milestones or deadlines"; (4) "gets resources, supports and promotes the group"; and (5) "seeks inputs [and] [g]enuinely values others [sic] input and expertise." RX 4. She received a rating of "occasionally" for "responds effectively" and "maintaines [sic] clear communications with customers regarding mutual expectations." RX 4. In the progress report's "Summary of Overall Performance," Ms. Johnson was given a rating of "Unsatisfactory," where her performance had "consistently fallen below position requirements or deficient in several key result areas." RX 4. At the hearing, Mr. Schmit confirmed that Ms. Johnson's overall performance was unsatisfactory as of January 7, 2004. Tr. 1804, 1809. He opined that "[t]here were very little improvements made from the original PIP." Tr. 1804. In addition, he acknowledged that he included the following comments in the progress report:

> Employees have expressed a concern that you continue to drag them into your performance problems and it is making them uncomfortable. Judging by the results from your original PIP you do not seem to take your performance issues seriously. A recent E-mail indicates that you feel this is a personal issue between you and myself. As I have stated in the past, we would like this to work, we have made a substantial investment in training and have been trying to work with you on your productivity. You need to change your attitude towards your current situation, spend time doing what is asked of you and concentrate on your job and what is affecting you from completing it.

RX 4; *see also* Tr. 1809-1811. Mr. Schmit opined that Ms. Johnson's performance "was a very important issue that needed to be addressed and she was doing nothing to help resolve the issues on it." Tr. 1809-1810. In the progress report, he informed Ms. Johnson that "[y]our understanding of processes is still very weak [and] this needs to be your main focus of improvement." RX 4. In addition, he put Ms. Johnson on notice that there would be "another review around February 8th and if [your] performance is not satisfactory by the end of your PIP it will result in termination." RX 4; *see also* Tr. 1811. Following the meeting with Mr. Schmit and Mr. Lamfers, Ms. Johnson signed the progress report on January 8, 2004. RX 4.

On January 8, 2004, a "final discussion" was held between Ms. Johnson, Mr. Schmit and Mr. Lamfers regarding retaliation in the workplace. Tr. 1812-1814; CX 319; RX 102. The discussion took place in response to the e-mail that Ms. Johnson sent to Mr. Schmit on December 16, 2003, which is discussed above. Tr. 1812; CX 319; RX 102. The "Counseling Report" for the meeting contains the same information as the prior report completed on November 26, 2003. *See* RX 26; CX 319; RX 102. The new report, however, also notes that following the November 2003 meeting, "a derogatory E-mail went out being CC'd to a subordinate [and] [t]his subordinate also had a discussion with Carri about the E-mail Via Phone." CX 319; RX 102. At the hearing, Mr. Schmit confirmed that the e-mail at issue was the one in which Ms. Johnson raised personal issues with him. Tr. 1812. The "Counseling Report" was signed by Ms. Johnson, Mr. Schmit and Mr. Lamfers on January 8, 2004. Tr. 1814; CX 319; RX 102.

Joseph Krisch returned to the Minneapolis branch for a follow-up investigation on January 12, 2004. The visit was in response to Penny Kelly's concerns regarding a "heated exchange" between Ms. Johnson and Mr. Schmit on January 8, 2004. Tr. 645-646. In an e-mail to Mr. Lamfers on January 9, 2004, Ms. Kelly indicated that she was "emotionally rattled" by the incident. RX 184. In an e-mail to Ms. Kelly, Mr. Krisch confirmed that he would be visiting the branch on January 12, 2004, and requested a meeting with her. CX 227; RX 196. According to Mr. Krisch, the purpose of his visit to the Minneapolis branch was to investigate the following: (1) Ms. Johnson's claim that she was being singled out for disparate treatment; and (2) Ms. Kelly's concern that the branch had a hostile work environment. Tr. 2043-2044. During the visit, Mr. Krisch met with Ms. Johnson, during which he addressed her concern that she was being "singled out" at the branch. Tr. 2046. Ms. Johnson testified that she voiced her concerns that the SPPHA job involved fraud and improper business practices during a joint meeting with Mr. Krisch and Ms. Kelly. Tr. 1233-1234. Ms. Kelly also alleged that "questionable business practices" were discussed, but she was unable to recall the specific issue. Tr. 604, 608. She subsequently denied, however, any recollection of discussing fraudulent billings or improper business practices with Mr. Krisch. Tr. 649. In addition, Mr. Krisch testified that Ms. Johnson never raised any concerns regarding fraud, accounting irregularities or business practices in January 2004. Tr. 2047.

On February 5, 2004, Ms. Johnson met with Mr. Lamfers for a second PIP progress review. Tr. 825-826; CX 201; RX 5. According to an "Interoffice Memo" completed by Mr. Lamfers, Ms. Johnson had demonstrated "improvement" in the third, fourth and eighth improvement goals of her PIP. CX 201; RX 5. He noted that these

goals "relate to the commission reports, updating the K drive, and verifying accurate data of booking packages prior to booking." CX 201; RX 5. He opined that each goal was "accomplished in a successful [manner]." CX 201; RX 5. Mr. Lamfers concluded, however, that "the remaining 5 items need improvement." CX 201; RX 5. He commented as follows:

> Item #1 – There continues to be a delay in getting parts orders and cancelled jobs on the system. Job # 653126 and 653885 should be closed. H.C.M.C. was not post-shipped-billed by month end as requested.
>
> Item #2 – Job files have not been booked and files created within 48 hours of receipt. Refer to the attached spreadsheet for details.
>
> Item #5 – It is your responsibility to manage the phone coverage during business hours. An administrative person must be available to address and direct FIS customer phone calls from 8 am to 5 pm.
>
> Item #6 – Billings and payables must be completed within the deadlines. On the last day of fiscal January, you sent an email stating that you needed to leave at 11:30 am. This caused disruption with getting data entry completed and one order did not get processed.
>
> Item #7 – Parts must be ordered and shipped to meet the customer requirements. You had confirmed that Job # 653792 was ordered. However, a couple weeks later it was found that the shipper was not released for shipment.

CX 201; RX 5. Mr. Lamfers also identified Ms. Johnson's inconsistent attendance as an issue "considering that you are on a performance improvement plan." CX 201; RX 5. The memo concluded with the following warning:

> Your 90-day performance improvement period expires at the end of February 2004. All items detailed in the original performance improvement plan must be met to a satisfactory level. Failure to meet these requirements will result in termination of your employment.

CX 201; RX 5.

At the hearing, Ms. Johnson acknowledged that she received the memo from Mr. Lamfers on February 5, 2004. Tr. 749-750, 1056. She testified that she did not "focus on the details" raised by Mr. Lamfers. Tr. 1056. She also acknowledged that she e-mailed a copy of the progress review to Ms. Kelly on February 6, 2004. Tr. 1061-1063. She admitted, however, that she read the entire memo when she e-mailed it to Ms. Kelly, including the notice regarding the consequences of her failure to improve. Tr. 1065. Ms. Johnson also disputed a number of the points raised by Mr. Lamfers. First, she alleged that Mr. Lamfers did not have any knowledge regarding "Item #2" and "Item #5." Tr. 754. Second, she alleged that "Item #6" was not true because it was not possible to

process billings or payables on the last day of a fiscal month. Tr. 755-757. Finally, she alleged that her attendance had not been "inconsistent" in January 2004. Tr. 761-762. Ms. Johnson did not allege, however, that she raised any issues with Mr. Lamfers regarding fraud or improper business practices. Instead, Mr. Lamfers testified that Ms. Johnson never voiced any concerns involving any improper business practices at the Minneapolis branch. Lamfers Deposition at 94-96, 103, 105-106.

On February 9, 2004, an e-mail exchange took place between Ms. Johnson, Ms. Kelly and Mr. Schmit regarding "Brookdale/Elliot." CX 226; RX 28. The Brookdale job has been previously discussed above. The initial e-mail was sent by Ms. Kelly to Ms. Johnson, in which she noted that Elliot Contracting was refusing to pay two invoices "due to their purchase order being over billed." CX 226; RX 28. She then described her unsuccessful efforts to have SBT's sales and management departments fix the over-billing issue. Accordingly, she asked Ms. Johnson for information on "who I can contact to stop these fraudulent billings." CX 226; RX 28. At the hearing, Ms. Kelly denied that she discussed her allegations of "fraudulent billings" with Ms. Johnson prior to sending the e-mail. Tr. 2428. In her response, Ms. Johnson noted that a recent change order, which had been signed by Mr. Schmit, was responsible for the job "being over revenued by $6692.58." CX 226; RX 28. She then opined that Elliot Contracting "shouldn't be penalized for errors made by Siemens." CX 226; RX 28. Ms. Johnson also sent this e-mail to Mr. Schmit and Mr. Lamfers. Mr. Schmit subsequently sent a reply e-mail to Ms. Johnson and Mr. Schmit, asking Ms. Johnson to bring the Brookdale file "over for review." CX 226; RX 28. He also opined that Ms. Johnson's e-mail was "very inappropriate and you also know that making sure P.O.'s match Job costing is a Admin function and has been addressed in your review." CX 226; RX 28.

Ms. Johnson's 90-day improvement period under her PIP expired on February 25, 2004. Tr. 1816-1818; Lamfers Deposition at 101-102; RX 3; RX 27. Ms. Johnson, however, failed to meet all of the goals outlined in the plan. Tr. 1816-1818; Lamfers Deposition at 80, 101. Accordingly, SBT initiated the process of terminating her employment with the company. Tr. 1817; Lamfers Deposition at 102. The testimony in the record establishes that the following individuals were involved in the termination decision: Craig Lamfers, Joseph Krisch, and Tom Schlesinger. Tr. 2054, 2174-2175; Lamfers Deposition at 91-92, 102. Joseph Schmit and Scott Salazar, however, were not involved in the decision. Tr. 1430-1431, 1817, 2053, 2175. The three decision-makers all testified that Ms. Johnson was terminated solely because of her unsatisfactory job performance and her failure to comply with the terms of her PIP. Tr. 2057, 2174, 2206; Lamfers Deposition at 80, 104. This is consistent with an e-mail from Mr. Lamfers on March 5, 2004, noting that "Carri Johnson's Performance Improvement Plan ended on March 1st, 2004" and she had "failed to meet the minimum requirements of the PIP." RX 9. Mr. Lamfers, Mr. Krisch and Mr. Schlesinger were adamant, however, that they were not aware that Ms. Johnson had made any complaints regarding fraud, accounting irregularities or other improper business practices when they made the decision to terminate her employment. Tr. 2069, 2111, 2115 (Krisch), 2177-2178, 2181-2182 (Schlesinger); Lamfers Deposition at 103.

The official termination decision was made prior to a branch review at the

Minneapolis branch in early March 2004. Tr. 2174-2175; Lamfers Deposition at 102. This is consistent with an e-mail exchange between Mr. Lamfers and Mr. Krisch on Friday, March 5, 2004, which references a "conversation in Minneapolis Wednesday" regarding the decision to fire Ms. Johnson. RX 9. At the hearing, Mr. Krisch and Mr. Schlesinger each confirmed that this conversation took place on March 3, 2004. Tr. 2052, 2175-2176. In addition, Michael Fenton, who was SBT's Operations Manager for the West Region, testified that he learned of the termination decision in the week before the March 2004 branch review. Fenton Deposition at 37-38. Ms. Johnson was not notified of her termination, however, until the week after the branch review. In his e-mail on March 5, 2004, Mr. Lamfers communicated his intent to implement Ms. Johnson's termination on March 10, 2004. RX 9. At his deposition, Mr. Lamfers explained that "in order not to disrupt the branch review we decided to wait till after the branch review" to notify Ms. Johnson of her termination from employment with SBT. Lamfers Deposition at 102. For her part, Ms. Johnson admitted that she did not know who made the final decision to terminate her employment or when that decision was made. Tr. 1137.

The branch review was performed at the Minneapolis branch between March 3, 2004 and March 5, 2004. According to Mr. Lamfers, the following individuals were involved in the review process: Michael Fenton, Rita Jardiolin, and Susan Forte. Lamfers Deposition at 111-112. Ms. Jardiolin, Mr. Fenton and Ms. Forte all confirmed that they attended the branch review. Tr. 1667-1668; Fenton Deposition at 39; Forte Deposition at 124-125. At the hearing, Ms. Johnson alleged that she raised issues regarding improper bookings and accounting problems during a meeting with Mr. Fenton, Ms. Jardiolin and Ms. Forte in March 2004. Tr. 1138. At her deposition, Ms. Forte confirmed that Ms. Johnson had raised these issues during a meeting with herself and Ms. Jardiolin. Forte Deposition at 124-125. Ms. Forte testified that she then informed Mr. Fenton of the complaints. Forte Deposition at 127. Ms. Jardiolin, however, denied that Ms. Johnson ever raised these issues. Tr. 1667-1669. More specifically, she testified that Ms. Johnson did not do any of the following during their conversations at the March 2004 branch review: (1) report any instances of accounting fraud; (2) complain about improper bookings; or (3) complain about jobs being booked to inflate revenue. Tr. 1668. Instead, Ms. Jardiolin stated that their conversation was limited to Ms. Johnson's complaints about co-workers being mean to her. Tr. 1667. Mr. Fenton provided similar testimony at his deposition, stating that Ms. Johnson never made any specific complaints regarding fraud or business irregularities. Fenton Deposition at 40-41. Instead, he testified that she made "very general" complaints that SBT's "Best Practices" were not being followed. Fenton Deposition at 40-41. In addition, he denied that Ms. Forte ever informed him that "Ms. Johnson had come to her complaining of accounting irregularities." Fenton Deposition at 41. At the hearing, Ms. Johnson testified that she also discussed the "over-revenued" Brookdale job with Ms. Jardiolin on either March 4 or March 5, 2004. Tr. 463-464. She alleged that Ms. Jardiolin acted "like she didn't want to hear it." Tr. 464. As stated above, however, Ms. Jardiolin testified that Ms. Johnson never raised any issues with her regarding accounting fraud, improper bookings, or inflating revenue. Tr. 1668-1669.

As a result of the branch review, the Minneapolis branch received an overall

rating of 9/10. RX 188. This was an improvement from the 7/10 rating that the branch had received in March 2003. *See* CX 84. According to Mr. Schmit, the review "went quite well" and the job files that were examined "were all in compliance with what SBT would like and they gave us a nine out of ten which is a very good rating for that." Tr. 1824. On March 5, 2004, Mr. Schmit sent an e-mail to the Minneapolis branch in which he discussed the results of the review. CX 222. He wrote that he "wanted to thank everyone for the success of the branches [sic] recent accomplishments" and noted that the branch review "supported a well run business in most aspects." CX 222. He also identified several items "that we are to focus on in the future," including "job cost accountability" and "job documentation." CX 222. At the hearing, however, Mr. Schmit opined that Ms. Johnson's job performance did not contribute to the positive rating. Tr. 1827. He explained as follows:

> Well at this point everyone was doing additional work and they [had] practically given up on Ms. Johnson's performance and compensated by other means to get their work done. And they knew what was required of job files and it was [a] pretty clear check and balance when a job was closed out that needed to be in there and they did follow that.

Tr. 1827-1828. Mr. Fenton provided a similar explanation at his deposition, noting that most of Ms. Johnson's duties as Branch Administrator "had been transferred to other people in the branch, and that really she was relegated to more menial tasks and really not involved in the true branch administration role." Fenton Deposition at 40.

On March 10, 2004, Ms. Johnson was terminated from her employment with SBT as the Branch Administrator for the Minneapolis branch. Tr. 522, 770-771, 1817; CX 228; RX 88. According to a "Personnel Action Form" completed on March 10, 2004, Ms. Johnson was terminated due to her "failure to meet PIP requirements." CX 228; RX 88. The form was signed by Mr. Lamfers, Mr. Schmit, and Mr. Krisch. CX 288; RX 88. Ms. Johnson also received a "Termination Checklist," which she signed "under protest." Tr. 812; CX 230; RX 8. Ms. Johnson testified that she did not read the items on the checklist. Tr. 933-934. At his deposition, Mr. Lamfers provided an overall assessment of Ms. Johnson that "she did not have the minimum skills required ... to do the job, to function in the job" as Branch Administrator. Lamfers Deposition at 100. In a similar manner, Mr. Schmit opined that, despite receiving substantial training, sufficient support and numerous chances to improve, Ms. Johnson never performed adequately in her job at SBT. Tr. 1889. Scott Salazar also testified at the hearing that Ms. Johnson "just never fully grasped the job" of Branch Administrator. Tr. 1293. Furthermore, Mr. Fenton opined that SBT "did everything they could to help her succeed and stay in her position." Fenton Deposition at 210. He concluded, however, that Ms. Johnson's termination "was justified, and I have no qualms about supporting that decision." Fenton Deposition at 64-65. Mr. Fenton, Mr. Salazar and Mr. Schmit, as well as Ms. Jardiolin and Ms. Forte, all emphasized that they were not involved in the decision to terminate Ms. Johnson's employment. Tr. 1430-1431 (Salazar), 1684 (Jardiolin), 1817 (Schmit); Fenton Deposition at 63; Forte Deposition at 156. Furthermore, Mr. Fenton, Mr. Salazar, Mr. Schmit, Ms. Jardiolin, Mr. Schlesinger and Mr. Krisch all reiterated that they never knew that Ms. Johnson had made complaints

regarding fraud, accounting irregularities, improper bookings or other impermissible business practices during her employment at SBT. Tr. 1430-1431 (Salazar), 1667-1669, 1683 (Jardiolin), 1888-1890 (Schmit), 2047, 2069, 2111, 2115 (Krisch), 2177-2178 (Schlesinger); Fenton Deposition at 40-42, 63; Lamfers Deposition at 103, 105-106.

On June 8, 2004, Ms. Johnson filed her whistleblower complaint with OSHA, alleging that SBT terminated her employment "because of reports she made of suspected fraudulent and illegal activity." RX 229. In her complaint, Ms. Johnson alleged that she had "noticed several discrepancies in [SBT's] business practices at the [Minneapolis] branch," including "fraudulent billing practices, misreporting of income, over booking of jobs, and creation of phantom jobs to inflate earnings." RX 229. She cited the Brookdale job, SPPHA job and Roseville job as examples. She also alleged that she had "discovered and reported ... fraudulent invoicing practices," when customers were receiving invoices "for work and/or equipment that they had not received." RX 229. At the hearing, however, she admitted that she was not alleging that SBT had improperly recognized actual revenue; instead, she testified that the company was making improper revenue projections. Tr. 869-870. Ms. Johnson alleged that she received a "poor performance review from Scott Salazar and Joe Schmit" after complaining about these business practices. RX 229. She stated that she subsequently reported her concerns to Mr. Krisch in January 2004. In addition, she alleged that she had disclosed the "discrepancies" to Ms. Jardiolin, Mr. Fenton and Ms. Forte during the March 2004 branch review. She noted that "[t]hree working days after the branch review and [her] last report of illegal activity, [she] was terminated by Craig Lamfers purportedly for, 'failing to meet the minimum requirements for the position in a timely and correct manner.'" RX 229. At the hearing, however, Ms. Johnson admitted that she has no documentary evidence of her alleged complaints to anyone at SBT. Tr. 1124-1125. Instead, she testified that her sole evidence is her own recollection of verbal exchanges and the job files that were submitted into the record. Tr. 1125-1126.

SBT submitted its response to Ms. Johnson's OSHA complaint on August 17, 2004. RX 230. In the response, the company argued that the complaint should be dismissed "in its entirety." First, SBT stated that an "extensive and thorough investigation" revealed "no accounting or other financial improprieties by SBT with respect to Ms. Johnson's allegations." RX 230. Second, SBT argued that "Ms. Johnson was fired because of her poor performance." RX 230. In support, the company emphasized that she "demonstrated a lack of understanding of and an inability to adequately perform many of the requirements of a Branch Administrator" throughout her tenure with SBT. RX 230. In addition, SBT highlighted the unsuccessful attempts that it had made to help Ms. Johnson improve her performance, and noted that she was fired only after she "failed to satisfy the targets in her PIP." RX 230. For all of these reasons, SBT concluded that Ms. Johnson's allegations are without merit.

III. **Discussion**

In order to prevail on her claim under the SOX Act, Ms. Johnson must initially make a *prima facie* showing that her protected activity was a contributing factor in her

termination by SBT.[21] If Ms. Johnson satisfies her *prima facie* case by a "preponderance of the evidence," the burden shifts to SBT to demonstrate by "clear and convincing evidence" that it would have terminated Ms. Johnson even absent the protected activity.[22] For the reasons discussed below, I find that Ms. Johnson has failed to establish that she engaged in protected activity under the SOX Act. I also find, however, that even if Ms. Johnson had engaged in protected activity, she has failed to show that her complaints were a contributing factor in SBT's decision to terminate her employment. Furthermore, I find that even if Ms. Johnson established her *prima facie* case, SBT has presented "clear and convincing evidence" that it would have fired her even absent any protected conduct.

A. Ms. Johnson Has Failed to Satisfy Her *Prima Facie* Case by a "Preponderance of the Evidence"

To satisfy her *prima facie* burden under the SOX Act, Ms. Johnson must prove four elements by a "preponderance of the evidence." First, she must show that her alleged internal complaints about fraud, accounting irregularities and improper business practices constitute protected activity under the SOX Act.[23] Second, she must establish that SBT knew or suspected that she had engaged in protected activity.[24] Third, she must show that SBT took an adverse employment action against her.[25] Finally, she must demonstrate that her complaints regarding fraud, accounting irregularities and improper business practices were a "contributing factor" in SBT's decision to terminate her employment.[26]

1. *Protected Activity*

In relevant part, the SOX Act protects an employee from retaliation where she "provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee *reasonably believes* constitutes a violation of section 1341 [fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[27] Under the statute, when an employee's asserted protected conduct "involves providing information to one's employer, the [employee] need only show that he or she

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[21] 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1980.109(a) (2011). *See also* 76 Fed. Reg. 68,084, 68,088 (Nov. 3, 2011) ("It is the Secretary's position that the complainant [in SOX cases] must prove by a 'preponderance of the evidence' that his or her protected activity contributed to the adverse action; otherwise the burden never shifts to the employer to establish its defense."); *Funke v. Fed. Express Corp.*, ARB No. 09-004, slip op. at 7 (ARB July 8, 2011) (SOX).
[22] 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1980.109(a). *See also* 76 Fed. Reg. at 68,088; *Funke*, ARB No. 09-004, slip op. at 7.
[23] 29 C.F.R. § 1980.104(b)(1); 76 Fed. Reg. at 68,094. *See also Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011); *Funke*, ARB No. 09-004, slip op. at 7.
[24] 29 C.F.R. § 1980.104(b)(1); 76 Fed. Reg. at 68,094. *See also Tides*, 644 F.3d at 814; *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010); *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, slip op. at 8 (ARB Feb. 28, 2011) (SOX).
[25] *Id.*
[26] *Id.*
[27] 18 U.S.C. § 1514A(a)(1) (emphasis added).

'reasonably believes' that the conduct complained of constitutes a violation of the laws listed."[28] The SOX Act employs a reasonableness test that mirrors the "normal reasonable person standard used and interpreted in a wide variety of legal contexts."[29] The ARB, however, has interpreted the "reasonable belief" standard "to require a complainant to have a *subjective belief* that the complained-of conduct constitutes a violation of relevant law, and also that the belief is *objectively reasonable*."[30]

a. Ms. Johnson Must Show That She Actually "Provided Information" to a Manager or Supervisor at SBT

As a threshold matter, Ms. Johnson must establish by a "preponderance of the evidence" that she actually "provided information" or "caused information to be provided" regarding alleged illegal activity to someone at SBT with supervisory authority over her or who had "the authority to investigate, discover, or terminate misconduct."[31] When a complainant fails to produce sufficient evidence that she "provided information" or "caused information to be provided," she has not engaged in protected activity under the SOX Act.[32]

In the present case, Ms. Johnson alleges that, beginning in 2002 and continuing until her termination, she provided information to "her direct supervisor, Scott Salazar, her co-worker, Penny Kelly, her regional administrator, Susan Forte, the regional operations manager, Mike Fenton, and field finance representative, Rita Jardiolin, Craig Lamfers, acting district manager, and Joe Krisch, human resources representative, of the improper booking and billing practices at the Minneapolis/Roseville branch." Complainant's Brief at 21-22. Ms. Johnson contends that she first "provided information" to Mr. Salazar via e-mail on June 28, 2002. In the e-mail, Ms. Johnson discussed a conversation with Ms. Forte, during which she was informed that "there will no longer be a tolerance for booking jobs without proper paperwork supporting the sale." CX 7. Ms. Johnson did not, however, raise any concerns that SBT had engaged in any improper, fraudulent or otherwise illegal conduct. Instead, she merely relayed the message that she had received from Ms. Forte. I therefore find that Ms. Johnson's e-mail on June 28, 2002, does not constitute "providing information" or "causing information to be provided" about alleged illegal activity, as required by the SOX Act. Accordingly, this e-mail does not constitute protected activity.

Ms. Johnson next contends that she had "weekly phone calls" with Ms. Forte, during which she would discuss non-compliance with SBT's "Best Practices" and complain that "she was being asked to book jobs without proper documentation." Complainant's Brief at 22-23. At the hearing, however, Ms. Johnson admitted that she

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[28] *Sylvester v. Parexel Int'l LLC,* ARB No. 07-123, slip op. at 14 (ARB May 25, 2011) (SOX) (en banc).
[29] *Id.*
[30] *Id.* (emphasis added).
[31] 18 U.S.C. § 1514A(a)(1).
[32] *See Joy v. Robbins & Myers, Inc.*, ARB No. 08-049, slip op. at 5–6 (ARB Oct. 29, 2009) (SOX) (dismissing a SOX complaint where there was no evidence in the record that the complainant actually provided information to management regarding alleged fraud violations); *Giurovici v. Equinix, Inc.*, ARB No. 07-027, slip op. at 6–7 (ARB Sept. 30, 2008) (SOX) (finding no protected activity where there was no evidence that the complainant actually provided information to his supervisors).

has no documentary evidence of her complaints to anyone at SBT. Tr. 1124-1125. Instead, she testified that she was relying on her own recollection of these conversations. Tr. 1125-1126. While Ms. Forte acknowledged that she had regular contact with Ms. Johnson, she testified that the conversations were limited to "procedural questions." Forte Deposition at 99. In addition, she repeatedly denied that Ms. Johnson had ever complained to her about being instructed to book jobs without proper documentation. Forte Deposition at 120-121, 184. I can find no reason to question the credibility of Ms. Forte as a witness. In light of the conflicting testimony between Ms. Johnson and Ms. Forte, as well as the lack of documentary evidence to support Ms. Johnson's allegations, I find that she has failed to establish that she "provided information" or "caused information to be provided" regarding alleged illegal activity during her conversations with Ms. Forte.

Ms. Johnson also contends that she "provided information" regarding the Minneapolis branch's revenue practices and job booking procedures during a December 2002 meeting with Michael Fenton and Rita Jardiolin. Tr. 465-466; Complainant's Brief at 23-24. She testified that she also informed them that she had been instructed to book jobs without authorization. Tr. 108-109. As stated above, however, Ms. Johnson admits that she does not have any documentary evidence to support her claim that this conversation took place. Tr. 1124-1125. To the contrary, when she summarized her meeting in an e-mail to Ms. Forte on December 10, 2002, Ms. Johnson did not mention that she had complained to Mr. Fenton and Ms. Jardiolin about SBT's revenue practices or job booking procedures. *See* CX 12. In addition, Mr. Fenton and Ms. Jardiolin expressly denied that Ms. Johnson reported any issues involving revenue practices or job booking during their visit. Tr. 1669; Fenton Deposition at 22. I find no reason to doubt the credibility of either individual. I therefore find that Ms. Johnson has failed to establish that she "provided information" or "caused information to be provided," within meaning of the SOX Act, during her December 2002 meeting with Mr. Fenton and Ms. Jardiolin.

While not addressed in her brief, Ms. Johnson testified at the hearing that she had reported her concerns about the SPPHA job to Craig Lamfers in January 2004. Tr. 959-961. More specifically, she alleged that she informed him that the job "didn't exist" and that she was forced to book it to meet the Minneapolis branch's numbers. Tr. 959-960. Mr. Lamfers testified, however, that Ms. Johnson never discussed the SPPHA job with him in January 2004. Lamfers Deposition at 95-96. In addition, he stated that she never raised any issues with him regarding fraud, improper job bookings or other business irregularities at the Minneapolis branch. Lamfers Deposition at 66, 84. I can find no reason to doubt Mr. Lamfers' credibility as a witness. As stated above, Ms. Johnson admitted that her sole evidence is her own recollection of the conversation with Mr. Lamfers. Tr. 1125-1126. In light of this conflicting testimony, I find that Ms. Johnson has failed to establish that she "provided information" or "caused information to be provided" to Mr. Lamfers regarding fraud or improper business practices involving the SPPHA job.

At the hearing, Ms. Johnson next alleged that she disclosed her concerns about the SPPHA job to Joseph Krisch during a meeting on January 12, 2004. Tr. 1233-1234.

More specifically, she testified that she informed Mr. Krisch that the SPPHA job involved the commission of fraud and improper business practices by the Minneapolis branch. Tr. 1233-1234. She stated that Penny Kelly was also at the meeting. Mr. Krisch denied, however, that Ms. Johnson ever raised concerns with him in January 2004 regarding fraud, accounting irregularities, or improper business practices. Tr. 2047. I can find no reason to doubt Mr. Krisch's credibility. While Ms. Kelly initially testified that "questionable business practices" had been discussed, Tr. 604, 608, she later denied any recollection of discussing fraudulent billings or improper business practices with Mr. Krisch. Tr. 649. As stated above, Ms. Johnson admitted that she does not have any documentary evidence that this conversation took place. Tr. 1124-1125. Instead, she is relying upon her own recollection of the conversation, which is directly contrary to Mr. Krisch's testimony. Absent any additional evidence, I find that Ms. Johnson has failed to establish that she "provided information" or "caused information to be provided" to Mr. Krisch regarding the SPPHA job on January 12, 2004.

The final instance of Ms. Johnson's alleged disclosures occurred during the March 2004 branch review. In her OSHA complaint, Ms. Johnson alleged that she disclosed "discrepancies" regarding the SPPHA job, the Brookdale job and the Roseville job during a meeting with Mr. Fenton, Ms. Jardiolin and Ms. Forte. RX 229. These "discrepancies" consisted of "fraudulent billing practices, misreporting of income, over booking of jobs, and creation of phantom jobs to inflate earnings." RX 229. Ms. Johnson reiterated these allegations at the hearing. Tr. 1138. She also testified that she discussed the "over-revenued" Brookdale job with Ms. Jardiolin on either March 4 or March 5, 2004. Tr. 464. At her deposition, Ms. Forte confirmed that these issues arose during a conversation with Ms. Jardiolin, and testified that she then took the complaints to Mr. Fenton. Forte Deposition at 124-126. Mr. Fenton and Ms. Jardiolin both denied that these issues were ever raised during their meetings with Ms. Johnson. Tr. 1667-1669; Fenton Deposition at 40-41. Mr. Fenton acknowledged, however, that Ms. Johnson did make "very general" complaints that SBT's "Best Practices" were not being followed. Fenton Deposition at 40-41. I can find no reason to doubt the credibility of Ms. Forte, Mr. Fenton or Ms. Jardiolin as witnesses. Thus, at least two SBT officials who had supervisory authority over Ms. Johnson, or were in a position to "investigate, discover, or terminate misconduct,"[33] have confirmed that she did raise some form of a complaint regarding "discrepancies" in the Minneapolis branch's business practices or accounting procedures. I therefore find that Ms. Johnson has established that she "provided information" regarding job "discrepancies" in March 2004.

For the reasons discussed above, I find that Ms. Johnson has failed to establish that she "provided information" or "caused information to be provided" to SBT regarding alleged fraud, accounting irregularities or other improper business practices in June 2002, December 2002, and January 2004. In addition, there is insufficient evidence to establish that she discussed these issues during her "weekly phone calls" with Ms. Forte throughout her employment. I also find, however, that Ms. Johnson has established that she "provided information" regarding job "discrepancies" to Mr. Fenton, Ms. Jardiolin and Ms. Forte in March 2004.

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[33] 18 U.S.C. § 1514A(a)(1).

b. Ms. Johnson Must Have a "Reasonable Belief" That the Conduct She Reported Violates a Law or Regulation Covered Under the SOX Act

The next inquiry is whether Ms. Johnson "reasonably believed" that the conduct she reported "constitutes a violation of the laws [or regulations] listed" in Section 806 of the SOX Act.[34] As stated above, this involves a two-step analysis. First, Ms. Johnson must show that she had "a subjective belief that the complained-of conduct constitutes a violation of relevant law."[35] Second, she must establish that her belief was "objectively reasonable."[36]

To satisfy the subjective component of the "reasonable belief" test, Ms. Johnson "must actually have believed that the conduct [she] complained of constituted a violation of relevant law."[37] The legislative history of the SOX Act "makes clear that its protections were 'intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise."[38] In other words, absent evidence that an employee's complaints were made in bad faith, the subjective component is satisfied.[39] In this case, SBT argues that Ms. Johnson did not actually believe that "what she was complaining about violated the law." Respondents' Reply Brief at 23. The company points to Ms. Johnson's own admission that SBT's "Best Practices were merely internal guidelines, and not following them did not amount to violating the law." Respondents' Reply Brief at 23; *see also* Tr. 1030-1031. SBT also emphasizes that Ms. Johnson has acknowledged that her complaint was not alleging that the company had improperly recognized revenue. Respondents' Reply Brief at 21; *see also* Tr. 869-870. Accordingly, the company argues that Ms. Johnson has admitted that "there was nothing improper about SBT's accounting or invoicing practices." Respondent's Reply Brief at 21. For these reasons, SBT contends that Ms. Johnson did not have the requisite "subjective belief" that SBT had violated the law.

As stated above, however, the subjective component merely requires that a complainant have an actual and good faith belief that the conduct "complained of constituted a violation of relevant law."[40] As correctly noted by Ms. Johnson, a complainant's belief that conduct constitutes illegal activity can be in "good faith" even if

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[34] *Sylvester v. Parexel Int'l LLC,* ARB No. 07-123, slip op. at 14 (ARB May 25, 2011) (SOX) (en banc).
[35] *Id.*
[36] *Id.*
[37] *Id.* (citing *Harp v. Charter Commc'ns, Inc.,* 558 F.3d 722, 723 (7th Cir. 2009)); *see also Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (1st Cir. 2009) ("Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law.'" (quoting *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008))).
[38] *Sylvester*, ARB No. 07-123, slip op. at 14 (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009)).
[39] *See Van Asdale*, 577 F.3d at 1002 ("In this case, there is no evidence that [the complainant's] various complaints were made in bad faith and [the respondent] does not suggest otherwise."); *Day*, 555 F.3d at 54 ("Here, there is no evidence that [the complainant] did not make his complaints in subjective good faith.").
[40] *Sylvester*, ARB No. 07-123, slip op. at 14 (citing *Harp,* 558 F.3d at 723).

that belief is mistaken.[41] While SBT presents evidence of Ms. Johnson's beliefs regarding the company's "Best Practices" and actual revenue recognition policies, this does not compel a finding that Ms. Johnson's complaints were made in bad faith. To the contrary, while admitting that she was not challenging SBT's *actual* revenue recognition, Ms. Johnson testified that her complaints pertained to the company's improper revenue *projections*. Tr. 869-870. In addition, Ms. Johnson voiced other concerns regarding "fraudulent billing practices" and "over booking of jobs" during her meeting with Michael Fenton, Rita Jardiolin and Susan Forte in March 2004. Tr. 464, 1138; Forte Deposition at 124-126; RX 229. In determining whether Ms. Johnson subjectively believed that this conduct was illegal, it is irrelevant whether this fraudulent billing or over-booking actually occurred.[42] Furthermore, SBT has presented no evidence, nor even suggested, that Ms. Johnson's complaints were made in bad faith.[43] Accordingly, I find that Ms. Johnson had a subjective belief that the conduct she was reporting to SBT violated a law or regulation covered by the SOX Act.

Ms. Johnson must also establish that her belief that SBT violated an enumerated law or regulation was "objectively reasonable."[44] This requires a showing that the belief was "reasonable for an individual in [Ms. Johnson's] circumstances having [her] training and experience."[45] In other words, the objective component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the *same training and experience* as the aggrieved employee."[46] The standard "requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities."[47]

As an initial matter, I must determine the proper "reasonable person" for assessing the objective component. Ms. Johnson alleges that the "reasonable person" in this case should be someone who "worked for the same employer for 18 years," "never studied accounting," and "has a high school education and no formal post-secondary education." Complainant's Brief at 29. This interpretation, however, overlooks a key requirement that the "reasonable person" must also be one with the "same training and experience" as Ms. Johnson.[48] While Ms. Johnson's education was limited, the record in this case establishes that she received an extensive amount of training throughout her

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[41] *See Van Asdale*, 577 F.3d at 1001–02; *Sylvester*, ARB No. 07-123, slip op. at 16 (citing *Halloum v. Intel Corp.*, ARB No. 04-068, slip op. at 6 (ARB Jan. 31, 2006) (SOX)).
[42] *See Van Asdale*, 577 F.3d at 1002 ("Requiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure.").
[43] *See id.* (finding the "subjective belief" prong satisfied where there was "no evidence that [the complainant's] various complaints were made in bad faith and [the respondent] does not suggest otherwise"); *Day*, 555 F.3d at 54 ("Here, there is no evidence that [the complainant] did not make his complaints in subjective good faith.").
[44] *Sylvester*, ARB No. 07-123, slip op. at 14. *See also Van Asdale*, 577 F.3d at 1000; *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Day*, 555 F.3d at 54.
[45] *Sylvester*, ARB No. 07-123, slip op. at 14 (quoting *Melendez v. Exxon Chems.*, ARB No. 96-051, slip op. at 28 (ARB July 14, 2000) (ERA)).
[46] *Id.*, slip op. at 15 (quoting *Harp*, 558 F.3d at 723) (emphasis added).
[47] *Id.* (citing *Knox v. U.S. Dep't of Labor*, 434 F.3d 721, 725 (4th Cir. 2006)) (emphasis in original).
[48] *Id.*

employment with SBT. In particular, she was trained on numerous occasions in SBT's "Best Practices," the revenue recognition policy and billing process, and the "percentage-of-completion" formula and order entry procedure. Tr. 1306-1309, 1760-1761, 1905; RX 130; RX 157-158; RX 255-256. In addition, Scott Salazar, Joseph Schmit, Susan Forte and Thomas Schlesinger all opined that Ms. Johnson had received training that was more than adequate to enable her to perform the job duties as Branch Administrator. Tr. 1298, 1761, 2163; Forte Deposition at 167-168. Accordingly, I find that the "reasonable person" in this case is someone with not only Ms. Johnson's level of education and experience, but also the extensive amount of training that she received from SBT.

Under this "reasonable person" standard, however, I find that Ms. Johnson did not have an objectively reasonable belief that SBT had engaged in "fraudulent billing practices, misreporting of income, over booking of jobs, and creation of phantom jobs to inflate earnings," as well as "fraudulent invoicing practices." As stated above, Ms. Johnson alleges that she reported her concerns regarding the Brookdale job, the SPPHA job, the Roseville job, and the Unisys job. Tr. 996-1000; RX 229. For the reasons discussed below, I find that Ms. Johnson's beliefs and allegations regarding each job are not objectively reasonable.

As to the Brookdale job, Ms. Johnson alleges that it was booked without a purchase order and was "over-revenued." Tr. 423; RX 229. At the hearing, she opined that approving a job that is "over-revenued" constitutes fraud. Tr. 471, 473. A review of the Brookdale job file and SBT's "Best Practices," however, does not support Ms. Johnson's allegations. First, Ms. Johnson is correct that there was no purchase order submitted for the Brookdale job. The "Best Practices," however, expressly state that a purchase order is only one of several ways in which a customer can submit authorization for a job. *See* CX 2; RX 182 (p. 025011). Another acceptable form of authorization is a signed proposal from the customer. CX 2; RX 182 (p. 025011). The Brookdale job file contains such a signed proposal from Elliot Contracting dated April 17, 2002. *See* RX 16. As stated above, Ms. Johnson received extensive training in SBT's "Best Practices," as well as the order entry process. I therefore find that an individual with the "same training and experience" as Ms. Johnson would have known that the signed proposal from Elliot Contracting constituted sufficient customer authorization to book the Brookdale job. Accordingly, I find that it was not objectively reasonable for Ms. Johnson to believe that there was anything wrong with SBT's booking of the Brookdale job.

Second, the record does not support Ms. Johnson's allegation that any "over-revenuing" of the Brookdale job constitutes fraud. As an initial matter, I note that Ms. Johnson has not explained *why* approving an "over-revenued" job constitutes fraud. Instead, she merely asserts that this type of conduct is fraud. Tr. 471, 473. While a SOX Act complainant does not need to actually prove a violation of substantive laws or "definitively and specifically" show a relationship to an enumerated statute,[49] a general or conclusory statement that conduct constitutes "fraud" is not sufficient to reach the level of objective reasonableness.[50] Thus, Ms. Johnson's general assertion that any

[49] *Id.*, slip op. at 17, 22.
[50] *See, e.g.*, *Day v. Staples, Inc.*, 555 F.3d 42, 57 (1st Cir. 2009) (noting that a "generalized allegation" that

"over-revenuing" on the Brookdale job constitutes fraud does not alone establish a reasonable belief that fraud actually existed. Notwithstanding this general assertion, the evidence in the record does not support Ms. Johnson's allegation. The Brookdale file reveals that the job was originally a "synergy" between SBT's Fire Division and Security Division. Tr. 1830, 2188-2190; RX 16. The individual fire system component was valued at $70,745.31. RX 15 (p. 000034). The Security Division, however, was unable to follow through on its part of the job. Tr. 1414-1415, 1830, 1835-1837, 1848; CX 82; RX 33. Accordingly, Elliot Contracting issued a "Change Order" reducing the project amount to $54,343.00, which also accounted for increased costs incurred by Elliot Contracting to locate a replacement security system. CX 92 (p. 005223); RX 15 (p. 000029). At the hearing, Penny Kelly testified that there was never any indication that SBT was attempting to defraud Elliot Contracting on the Brookdale job. Tr. 693. Instead, she stated that the only issue dealt with the "security part falling through" on the job. Tr. 694-695. Thus, the record clearly indicates that any disparity in the cost of the Brookdale job was due to the inability of SBT's Security Division to supply its services to the job. As stated above, Ms. Johnson received extensive training in SBT's order entry procedure, billing process, and accounting system. I therefore find that an individual with the "same training and experience" as Ms. Johnson would have known that there was nothing fraudulent about the "revenuing" of the Brookdale job. Accordingly, I find that it was not objectively reasonable for Ms. Johnson to believe that the Brookdale job was fraudulently "over-revenued."

Ms. Johnson next alleges that she reported her concerns that the SPPHA job was "booked without a purchase order." Tr. 959-961; RX 229. She also contends that the job "never existed and was only booked so that [SBT] could make the monthly projected numbers." RX 229. She testified that she reported these concerns to Craig Lamfers in January 2004, but admitted that she did not raise any issues of fraud. Tr. 959-961, 974. A review of the job file, however, does not support Ms. Johnson's belief that there was something wrong with the SPPHA job. On May 28, 2003, SBT executed a "Standard Subcontract Agreement" with Elliot Contracting for the job. RX 18 (pp. 000046-000048). The job was not booked until November 21, 2003. CX 108 (pp. 021606-021610); RX 18 (p. 000049). SBT's "Best Practices" expressly state that a signed contract is an acceptable form of customer authorization for a job. CX 2; RX 182 (p. 025011). Thus, the record clearly establishes that there was nothing wrong with booking the SPPHA job without a purchase order. As stated above, Ms. Johnson received extensive training in SBT's "Best Practices," as well as the order entry process. I therefore find that a reasonable person with Ms. Johnson's level of training and experience would have known that the signed subcontract with Elliot Contracting constituted sufficient customer authorization for the SPPHA job. Accordingly, I find that Ms. Johnson did not have an objectively reasonable belief that it was improper to book the SPPHA job without a purchase order.

The evidence in the record also fails to support Ms. Johnson's belief that the SPPHA job "never existed and was only booked so that [SBT] could make the monthly projected numbers." RX 229. The job file itself clearly shows that the SPPHA job did, in

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accounting inaccuracies constitute shareholder fraud does not support "a reasonable belief in shareholder fraud").

fact, exist. As stated above, SBT and Elliot Contracting executed a subcontract agreement on May 28, 2003. RX 18 (pp. 000046-000048). The job was booked on November 21, 2003, for a total of $50,341.49. CX 108 (pp. 021606-021610); RX 18 (p. 000049). An e-mail from Ms. Johnson to Mr. Lamfers confirmed that the SPPHA job had been booked. RX 18 (p. 000054). The company's cost-to-complete reports show that costs were first incurred on the job in December 2003. RX 211A (p. 027929). On March 12, 2004, a "Change Order" increased the contract price by $4,763.00. CX 108 (p. 021596); RX 18 (p. 000053). SBT's cost-to-complete records show that the job was completed as of June 2004. RX 211A (p. 027859). The "Aged Trial Balance" sheet reveals that the contract was fully-paid by Elliot Contracting as of March 2005. RX 206 (p. 15); RX 214 (p. 027332). Based on this evidence, Joseph Schmit testified that the SPPHA job actually existed. Tr. 1851. In addition, both Mr. Schmit and Scott Salazar testified that SBT's revenue recognition policy, which requires costs to be incurred on a job before revenue can be recognized, prevents the company from benefitting financially from a fictitious job. Tr. 1407-1411, 1851. Accordingly, Mr. Schmit and Mr. Salazar opined that it was not reasonable for someone in Ms. Johnson's position to believe that there was any fraud or accounting irregularities associated with the SPPHA job. Tr. 1407-1408, 1853. As stated above, Ms. Johnson received extensive training in SBT's order entry process, job cost system, and "percentage-of-completion" formula. Tr. 1760-1761, 1905; RX 130; RX 158. She was also familiar with the company's "Aged Trial Balance" sheets. RX 255-256. In addition, she received a copy of SBT's revenue recognition policy in July 2002, RX 60, and acknowledged that the company does not recognize revenue until actual costs are incurred on a job. Tr. 868, 881. I therefore find that a reasonable person with Ms. Johnson's level of training and experience would have known that the SPPHA job actually existed and was not merely booked so that SBT could "make the monthly projected numbers." Accordingly, I find that Ms. Johnson's belief that the SPPHA job was fictitious was not objectively reasonable.

As to the Roseville job, Ms. Johnson alleges that the job was booked without a purchase order "on the last day of [SBT's] fiscal month end" in order to "inflate the selling amount because the forecasted revenue number for the month had not been met." RX 229. At the hearing, she testified that the Roseville job highlighted "the issue of booking jobs without purchase orders to fraudulently increase [SBT's] revenue." Tr. 374. While the Roseville job file confirms that there was no purchase order for the job, the file also shows that SBT submitted a proposal for the job on August 8, 2003. ALJX "A". This proposal was in response to a "Quotation Request" from Collins Electrical. RX 20 (p. 000057). On August 22, 2003, the Roseville job was booked for the total amount of $49,015.02, which is similar to the amount listed on SBT's proposal. ALJX "A". As stated above, Ms. Johnson alleges that the Roseville job was booked "to fraudulently increase [SBT's] revenue." Tr. 374; RX 229. Ms. Johnson, however, was familiar with SBT's revenue recognition policy, which clearly states that the company does not recognize revenue on a job until actual costs are incurred. *See* RX 60 (p. 004079); RX 209 (p. 004079). At the hearing, she acknowledged her familiarity with the revenue recognition policy. Tr. 868, 881. In addition, she received extensive training in SBT's order entry process, job cost system, and "percentage-of-completion" formula. Tr. 1760-1761, 1905; RX 130; RX 158. I therefore find that a reasonable person with Ms. Johnson's "same training and experience" would not believe that the Roseville job was

prematurely booked to inflate the company's revenue. Accordingly, I find that Ms. Johnson did not have an objectively reasonable belief that there was anything improper about the Roseville job.

The final job that Ms. Johnson deemed problematic was the Unisys job. While not addressed in her OSHA complaint, Ms. Johnson testified at the hearing that Mr. Salazar had instructed an SBT salesperson to inflate the job's price. Tr. 406. She also noted that the Unisys job was originally booked in October 2003 without customer authorization in order to "make the numbers." Tr. 405, 858. While the Unisys job file does not contain any evidence of customer authorization, the record establishes that booking a job does not have any impact on SBT's revenue recognition. *See* RX 60 (p. 004079); RX 209 (p. 004079). As stated above, Ms. Johnson has acknowledged that SBT does not recognize revenue until actual costs are incurred on a job. Tr. 868, 881. In addition, she has received extensive training in SBT's order entry process, job cost system, and "percentage-of-completion" formula. Tr. 1760-1761, 1905; RX 130; RX 158. Accordingly, I find that her belief that the Unisys job was booked in October 2003 to "make the numbers" was not objectively reasonable.

The record equally fails to support Ms. Johnson's belief that SBT inflated the original price of the Unisys job in October 2003. According to the Unisys job file, the job was originally booked on October 24, 2003, at a price of $74,538.67. CX 88 (pp. 00001-00003). Both Mr. Salazar and Mr. Schmit signed the booking package. CX 88 (p. 00003). At the hearing, however, Mr. Salazar expressly denied that he instructed an SBT salesperson to book the job at an inflated price. Tr. 1422-1423. Mr. Schmit similarly testified that no one had ever communicated that it was improper to book the job at this price. Tr. 1863. In addition, an e-mail from a representative for Collins Electrical on October 29, 2003, does not raise any issue with the original booking amount. *See* RX 166. Instead, the representative requested that $1,500.00 be reduced from the price because the company had planned "to change our installation crew so to extend savings from utilizing less expensive labor." RX 166. Furthermore, the job price listed in the booking package is similar to the amount listed in the proposal submitted on October 16, 2003, which provided a total job price of $74,553.00. CX 88 (p. 00010); RX 167. In fact, the booking price was less than the amount provided in the proposal. As discussed above, Ms. Johnson received substantial training in SBT's order entry and job cost systems. Tr. 1306, 1760-1761, 1905; RX 130. Based on this training, as well as the documents contained in the job file, I find that a reasonable person with Ms. Johnson's level of training and experience would not have believed that the Unisys job was booked at an inflated price in October 2003. Accordingly, I find that her belief on this point was not objectively reasonable.

For the reasons discussed above, I find that Ms. Johnson had an actual and subjectively reasonable belief that the conduct she reported to SBT constitutes a violation of a law or regulation covered by the SOX Act. I also find, however, that a reasonable person with the "same training and experience" as Ms. Johnson would not consider any of the conduct to be fraudulent, illegal, or improper. Accordingly, I find that Ms. Johnson's beliefs and allegations regarding the four jobs at issue were not objectively reasonable. For this reason, I conclude that Ms. Johnson did not have a

"reasonable belief" that the conduct she reported violates a law or regulation covered by the SOX Act.

c. Conclusion

In summary, I find that Ms. Johnson has failed to establish that she "provided information" or "caused information to be provided" to SBT regarding alleged fraud, accounting irregularities or other improper business practices in June 2002, December 2002 and January 2004, or during her "weekly phone calls" with Susan Forte. I also find, however, that Ms. Johnson "provided information" to Ms. Forte, Michael Fenton and Rita Jardiolin regarding job "discrepancies" in March 2004. Accordingly, Ms. Johnson "provided information" to someone at SBT who had "the authority to investigate, discover, or terminate misconduct,"[51] as required by the SOX Act.

For the reasons discussed above, however, I find that Ms. Johnson did not have a "reasonable belief" that the conduct she reported violates a law or regulation covered by the SOX Act. While Ms. Johnson subjectively believed that the conduct at issue was fraudulent, illegal or improper, I find that a reasonable person with her "same training and experience" would not have shared this belief. I therefore find that Ms. Johnson's beliefs and allegations were not objectively reasonable. Accordingly, I conclude that Ms. Johnson did not engage in "protected activity" when she reported the conduct at issue to SBT. For this reason, her complaint for whistleblower protection under the SOX Act must fail.

2. *SBT's Knowledge or Suspicion of Protected Activity*

Although I find that Ms. Johnson has failed to establish that she engaged in protected activity under the SOX Act, I will nonetheless analyze the remaining elements of the *prima facie* case. The second requirement is that SBT "knew or suspected, actually or constructively, that [Ms. Johnson] engaged in ... protected activity."[52] As discussed above, I find that Ms. Johnson "provided information" regarding "discrepancies" involving the Brookdale job, SPPHA job and Roseville job during a March 2004 meeting with Michael Fenton, Rita Jardiolin, and Susan Forte. Tr. 1138; Forte Deposition at 124-126; RX 229. These "discrepancies" consisted of "fraudulent billing practices, misreporting of income, over booking of jobs, and creation of phantom jobs to inflate earnings." RX 229. Mr. Fenton was the Operations Manager for SBT's West Region, Ms. Jardiolin was a financial analyst at the Fire Division headquarters, and Ms. Forte was the Regional Administrator for the North Region. Thus, three officials outside of the Minneapolis branch were aware of Ms. Johnson's allegations in March 2004. I therefore find that, assuming Ms. Johnson had engaged in protected activity when she reported the "discrepancies" to Mr. Fenton, Ms. Jardiolin and Ms. Forte, SBT became aware of her complaints in March 2004. As will be discussed below, however, none of the "decision-makers" involved in Ms. Johnson's termination were

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[51] 18 U.S.C. § 1514A(a)(1).

[52] 29 C.F.R. § 1980.104(b)(1) (2011); 76 Fed. Reg. 68,084, 68,094 (Nov. 3, 2011). *See also Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010); *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, slip op. at 8 (ARB Feb. 28, 2011) (SOX).

aware of her allegedly protected activity when the decision was made to terminate her employment.

3. *Adverse Employment Action*

I also find that Ms. Johnson was the subject of an adverse employment action by SBT. The SOX Act expressly provides that a covered company, or representative of that company, may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for engaging in protected activity.[53] The evidence clearly shows, and SBT does not dispute, that Ms. Johnson was terminated from her employment with the company's Minneapolis branch on March 10, 2004. Tr. 522, 770-771, 1817; CX 228; RX 88. I therefore find that Ms. Johnson suffered an "adverse employment action" when SBT terminated her employment.

While not addressed in her OSHA complaint, Ms. Johnson also appears to allege in her brief that the following events constitute additional "adverse employment actions" under the SOX Act: (1) her performance review on November 25, 2003; (2) her first PIP review on January 7-8, 2004; and (3) her second PIP review on February 5, 2004. Complainant's Brief at 47-48, 51-58. In each instance, she received negative reviews of her job performance. *See* CX 201; RX 2; RX 4-5; RX 23. At the time Ms. Johnson's complaint was filed, however, the SOX Act and applicable regulations provided that a complaint must be filed within 90 days after an allegedly retaliatory employment action.[54] In other words, the statute only covered "adverse employment actions" that occurred no more than 90 days before the complaint was filed. The SOX Act has since been amended to provide a 180-day statute of limitations.[55] The ARB, however, has recently held that the amendments do not revive complaints that were filed prior to the amendments and were time-barred under the old 90-day statute of limitations.[56]

In the present case, Ms. Johnson filed her OSHA complaint on June 8, 2004. RX 229. Ms. Johnson's date of termination, March 10, 2004, was exactly 90 days before she filed her complaint. Thus, all three of her negative performance reviews occurred outside of the 90-day window provided under the original statute of limitations. Because the recent amended limitations period does not apply to this case, I find that Ms. Johnson's November 2003 performance review, January 2004 PIP review and February 2004 PIP review are not "adverse employment actions" covered by the SOX Act in this case.

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[53] 18 U.S.C. § 1514A(a).
[54] *See* 18 U.S.C. § 1514A(b)(2)(D) (2009); 29 C.F.R. § 1980.103(d) (2008).
[55] *See* 18 U.S.C. § 1514A(b)(2)(D) (2010); *see also* 76 Fed. Reg. at 68,086 ("The 2010 statutory amendments changed the statute of limitations for complaints under the Act from 90 to 180 days.").
[56] *See Lewis v. Walt Disney World*, ARB No. 10-106, slip op. at 2 n.1 (ARB Jan. 27, 2012) (SOX) ("The amendments expanding the limitations period from 90 to 180 days do not affect the outcome of this case. Lewis's complaints were time-barred under the SOX when filed in 2008. *The amended SOX limitations period does not revive Lewis's complaints on which the previous statute of limitations had run*." (emphasis added)).

4. *Protected Activity as a "Contributing Factor" to the Adverse Employment Action*

The final element that Ms. Johnson must establish to satisfy her *prima facie* case is that her alleged protected activity was a "contributing factor" in SBT's decision to terminate her employment. A "contributing factor" is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse employment] decision."[57] Under this standard, a complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's 'reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected' activity."[58]

A complainant may satisfy this element by providing either direct or circumstantial evidence of contribution.[59] Direct evidence is "smoking gun" evidence that "conclusively links the protected activity and the adverse action and does not rely upon inference."[60] If a complainant does not produce direct evidence of contribution, she must produce circumstantial evidence which, "through the inferences drawn from such [evidence], meet[s] the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor."[61] Circumstantial evidence "may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, shifting explanations for an employer's actions, and more."[62] In order to establish contribution, however, a complainant must show that her employer was aware of her protected conduct at the time the adverse employment action was taken.[63]

In the present case, Ms. Johnson alleges that she was terminated by SBT because she had complained to company officials about alleged fraud, accounting irregularities, and other improper business practices. She found it significant that she was fired "[t]hree working days after the [March 2004] branch review and [her] last report of illegal activity." RX 229. As discussed above, Ms. Johnson communicated her concerns

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[57] *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, slip op. at 12 (ARB Sept. 30, 2011) (SOX) (quoting *Marano v. Dep't of Justice*, 2 F.3d 113, 1140 (Fed. Cir. 1993), and *Clark v. Airborne, Inc.*, ARB No. 08-133, slip op. at 7 (ARB Sept. 30, 2010) (AIR)).
[58] *Id.* (quoting *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, slip op. at 18 (ARB Mar. 30, 2007) (AIR)) (alterations in original); *see also* 76 Fed. Reg. at 68,087.
[59] *Bechtel*, ARB No. 09-052, slip op. at 12–13.
[60] *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA) (citing *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, slip op. at 4–5 (ARB Jan. 30, 2008) (AIR)).
[61] *Bechtel*, ARB No. 09-052, slip op. at 13.
[62] *Id.* (citing *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, slip op. at 27 (ARB May 25, 2011) (SOX) (en banc) (Corchado & Royce, JJ., concurring)).
[63] *See Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 8–9 (ARB May 27, 2010) (SOX). *See also Litt v. Republic Servs. of Nev.*, ARB No. 08-130, slip op. at 8 (ARB Aug. 31, 2010) (STA) (dismissing an STAA whistleblower complaint where the complainant offered no evidence that the decision-makers in his termination were aware of his protected activity); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, slip op. at 15–16 (ARB Jan. 30, 2004) (AIR) (upholding the administrative law judge's finding that an AIR21 complainant had failed to show that the decision-makers in his termination were aware of his FAA complaint).

regarding "discrepancies" involving the Brookdale job, SPPHA job and Roseville job during a meeting with Michael Fenton, Rita Jardiolin and Susan Forte on either March 4 or March 5, 2004. Tr. 1138; Forte Deposition at 124-126; RX 229. These "discrepancies" consisted of "fraudulent billing practices, misreporting of income, over booking of jobs, and creation of phantom jobs to inflate earnings." RX 229. Thus, SBT became aware of Ms. Johnson's alleged "protected activity" on either March 4, 2004 or March 5, 2004.

At the hearing, however, Ms. Johnson admitted that she did not know who made the decision to terminate her employment or when that decision was made. Tr. 1137. The testimonial evidence in the record establishes that Craig Lamfers, Joseph Krisch and Tom Schlesinger were the SBT officials involved in the termination decision. Tr. 2054, 2174-2175; Lamfers Deposition at 91-92, 102. The evidence equally demonstrates, however, that none of the following individuals were involved in the decision: Michael Fenton, Rita Jardiolin, Susan Forte, Scott Salazar, or Joseph Schmit. Tr. 1430-1431 (Salazar), 1684 (Jardiolin), 1817 (Schmit), 2053 (Krisch), 2175 (Schlesinger); Fenton Deposition at 63; Forte Deposition at 156. In addition, Mr. Krisch and Mr. Schlesinger each testified that the termination decision was made on March 3, 2004, which was prior to the branch review and Ms. Johnson's meeting with Mr. Fenton, Ms. Jardiolin, and Ms. Forte. Tr. 2052, 2175-2176. Mr. Lamfers similarly testified that this decision was made prior to the Minneapolis branch review in March 2004. Lamfers Deposition at 102. This testimony is consistent with an e-mail exchange between Mr. Lamfers and Mr. Krisch on Friday, March 5, 2004, which references a "conversation in Minneapolis Wednesday" regarding the decision to fire Ms. Johnson. RX 9. Furthermore, Mr. Fenton testified that he learned about the decision *prior to* his meeting with Ms. Johnson during the branch review. Fenton Deposition at 37-38. Thus, it is irrelevant that Mr. Fenton, Ms. Jardiolin and Ms. Forte became aware of Ms. Johnson's allegations during their meeting on March 4 or March 5, 2004, since the termination decision had already been made and none of them were involved in that decision.

Instead, the proper inquiry is whether Mr. Lamfers, Mr. Krisch or Mr. Schlesinger, as the "decision-makers" in this case, were aware of Ms. Johnson's alleged protected activity when they decided to terminate her employment on March 3, 2004. Neither party has submitted any documentary evidence that these three individuals knew of Ms. Johnson's concerns about the Brookdale, SPPHA, Roseville or Unisys jobs on March 3, 2004. To the contrary, the testimonial evidence in the record establishes that Mr. Lamfers, Mr. Krisch and Mr. Schlesinger *did not know* about Ms. Johnson's concerns and allegations when they decided to terminate her employment. As to Mr. Lamfers, Ms. Johnson testified that she communicated her concerns to him regarding the SPPHA job during a meeting in January 2004. Tr. 959-961. She admitted that her only evidence is her own recollection of this conversation. Tr. 1125-1126. Mr. Lamfers testified, however, that this discussion never occurred. Lamfers Deposition at 95-96. In addition, he stated that Ms. Johnson never raised *any* issues with him regarding fraud, accounting irregularities or other improper business practices at the Minneapolis branch. Lamfers Deposition at 66, 84. Furthermore, he emphasized that he was not aware of any of these issues when he made the decision to terminate Ms. Johnson's

employment. Lamfers Deposition at 103. I can find no reason to doubt Mr. Lamfers' credibility as a witness in this case. As discussed above, I find the conflicting testimony of Ms. Johnson and Mr. Lamfers to be insufficient to establish that she "provided information" or "caused information to be provided" to him regarding fraud or improper business practices at SBT. I also find that this testimony does not support a finding that Mr. Lamfers knew of Ms. Johnson's allegations on March 3, 2004. For these reasons, I conclude that Mr. Lamfers did not know of Ms. Johnson's alleged protected activity when he made the decision to terminate her employment.

I reach a similar conclusion regarding Mr. Krisch. Ms. Johnson testified that she informed him that the SPPHA job involved fraud and improper business practices during a meeting on January 12, 2004. Tr. 1233-1234. She stated that Penny Kelly was also at the meeting. While Ms. Kelly initially confirmed that "questionable business practices" had been discussed at the meeting, Tr. 604, 608, she later denied any recollection of discussing fraudulent billings or improper business practices. Tr. 649. I find that Ms. Kelly's inconsistent testimony does not support a finding that Mr. Krisch learned of Ms. Johnson's alleged protected activity in January 2004. More importantly, Mr. Krisch expressly denied that Ms. Johnson ever raised any concerns with him regarding fraud, accounting irregularities, or improper business practices. Tr. 2047. In addition, he repeatedly testified that he did not know that Ms. Johnson had made any of these complaints when the decision was made to terminate her employment. Tr. 2069, 2111, 2115. I can find no reason to doubt Mr. Krisch's credibility as a witness in this case. As discussed above, I find that the conflicting testimony of Ms. Johnson and Mr. Krisch does not establish that she "provided information" or "caused information to be provided" to him regarding fraud or improper business practices. I likewise find that this testimony does not establish that Mr. Krisch was aware of Ms. Johnson's allegations on March 3, 2004. Accordingly, I conclude that Mr. Krisch did not know of Ms. Johnson's alleged protected activity when he participated in the decision to terminate her employment.

As to Mr. Schlesinger, Ms. Johnson has not alleged that she ever informed him of her concerns or beliefs regarding the accounting and business practices at the Minneapolis branch. To the contrary, Mr. Schlesinger testified that he was *not aware* that Ms. Johnson had made any complaints regarding fraud, accounting irregularities or other improper business practices when the decision was made to terminate her employment in March 2004. Tr. 2177-2178, 2181-2182. In addition, he emphasized that Ms. Johnson had never complained to him about these issues and he had never heard from anyone else that she had expressed these complaints. Tr. 2205-2206. Mr. Schlesinger instead testified that he first learned of Ms. Johnson's allegations when SBT received a copy of her OSHA complaint in June 2004. Tr. 2181-2182. Much like Mr. Lamfers and Mr. Krisch, I can find no reason to doubt Mr. Schlesinger's credibility as a witness in this case. Accordingly, I find that the testimonial evidence establishes that Mr. Schlesinger did not know of Ms. Johnson's alleged protected activity when he participated in the decision to terminate her employment in March 2004.

In summary, I find that the testimonial evidence in the record establishes that Mr. Lamfers, Mr. Krisch and Mr. Schlesinger *did not know* that Ms. Johnson had voiced

complaints regarding fraud, accounting irregularities and improper business practices when they decided to terminate her employment in March 2004. While Ms. Johnson communicated her allegations to Mr. Fenton, Ms. Jardiolin and Ms. Forte during a meeting on either March 4 or March 5, 2004, none of these individuals were involved in the decision to terminate her employment. In fact, this meeting took place *after* the termination decision had already been made. I therefore find that Ms. Johnson has failed to show by a preponderance of the evidence that the "decision-makers" involved in her discharge from SBT were aware of her alleged protected activity when they made the decision to terminate her employment. As stated above, an essential component of establishing contribution is showing that the employer's "decision-makers" were aware of the complainant's protected activity when the decision was made to take an adverse employment action against that employee.[64] Accordingly, I conclude that Ms. Johnson has failed to establish that her alleged protected activity was a "contributing factor" in SBT's decision to terminate her employment.

5. *Conclusion*

For the reasons discussed above, I find that Ms. Johnson has failed to establish that she engaged in "protected activity" under the SOX Act. Even were I to find that her complaints regarding alleged fraud, accounting irregularities and improper business practices constitute protected activity, Ms. Johnson has failed to show that the "decision-makers" involved in her discharge were aware of this conduct when they made the decision to terminate her employment. As a result, Ms. Johnson necessarily cannot establish that her alleged protected activity was a "contributing factor" in SBT's decision to terminate her employment. For these reasons, I conclude that Ms. Johnson has not established her *prima facie* case under the SOX Act, and her claim must therefore fail.

B. SBT Has Presented "Clear and Convincing Evidence" That It Would Have Fired Ms. Johnson Regardless of Her Complaints About Alleged Fraud, Accounting Irregularities, and Improper Business Practices

Even were I to find that Ms. Johnson has made a *prima facie* showing that her complaints about fraud, accounting irregularities and improper business practices were a contributing factor to her termination, SBT has presented "clear and convincing evidence" that it would have fired Ms. Johnson even absent her alleged protected activity. As stated above, an employer may avoid liability for retaliation under the SOX Act if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse employment action regardless of the protected conduct.[65] "Clear and convincing evidence" is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."[66] This is a higher burden of proof than the

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[64] *See Fredrickson*, ARB No. 07-100, slip op. at 8–9.
[65] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1980.109(a); 76 Fed. Reg. 68,084, 68,088 (Nov. 3, 2011). *See also Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, slip op. at 5 (ARB Nov. 9, 2011) (SOX); *Kalkunte v. DVI Fin. Servs., Inc.*, ARB Nos. 05-139, 05-140, slip op. at 8 (ARB Feb. 27, 2009) (SOX).
[66] *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA) (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006) (AIR)).

"preponderance of the evidence" standard.[67]

In the present case, SBT has presented substantial evidence that it terminated Ms. Johnson's employment due to her failure to satisfy the requirements of her Performance Improvement Plan ("PIP"). Most importantly, all of the "decision-makers" involved in Ms. Johnson's termination have testified that she was fired solely because of her poor performance and her failure to comply with the PIP. According to Craig Lamfers, he was involved in monitoring Ms. Johnson's PIP progress on a monthly basis. Lamfers Deposition at 101. He testified that she was fired in March 2004 "for not meeting the minimum objectives set forth in the Performance Improvement Plan" and emphasized that this was the sole reason for her termination. Lamfers Deposition at 80, 104. This is consistent with the testimony of Joseph Krisch and Tom Schlesinger, who each confirmed that Ms. Johnson was fired because of her failure to satisfy the PIP. According to Mr. Krisch, he had no reason to believe that Ms. Johnson was terminated "for any reason other than her failure to meet her PIP requirements." Tr. 2059. Mr. Schlesinger similarly stated that the termination decision was based solely on Ms. Johnson's "inability to do the job" and her failure to satisfy the PIP. Tr. 2174, 2206. The testimony of Mr. Lamfers, Mr. Krisch and Mr. Schlesinger is consistent with the "Personnel Action Form" completed on March 10, 2004, which states that Ms. Johnson was fired for her "failure to meet PIP requirements." CX 228; RX 88. In addition, an e-mail from Mr. Lamfers to Mr. Krisch and Mr. Schlesinger on March 5, 2004, indicates that Ms. Johnson "failed to meet the minimum requirements on the PIP." RX 9. Mr. Lamfers then revealed that he would "terminating her on Wednesday, March 10th." RX 9.

This testimony is supported by a substantial amount of the documentary and testimonial evidence in the record, which demonstrates that Ms. Johnson exhibited consistent job performance issues throughout her employment with SBT and also failed to improve her performance during her 90-day improvement period. As early as December 2002, Ms. Johnson demonstrated deficiencies in her understanding of the technical and system requirements of her job. According to Michael Fenton, who met with Ms. Johnson over a two-day period in December 2002, she exhibited a general unfamiliarity with SBT's financial systems and procedures:

> She had a very, very minimal level of understanding of the financial system that we use, the Best Practices, the revenue recognition policies and procedures and methods. Most of the things that a typical branch administrator would know, she seemed not to be familiar with.

Fenton Deposition at 11-12. Rita Jardiolin provided a similar account of Ms. Johnson's deficiencies as of December 2002. Tr. 1649, 1659. These shortcomings remained an issue at the time of Ms. Johnson's first performance review on April 15, 2003. According to the review report, she was "behind in her understanding of all the systems and processes" and needed to "further grasp the companies [sic] accounting reports and the impact on each department." RX 1 (p. 005079); RX 21 (p. 000064). Scott Salazar, who

[67] 76 Fed. Reg. at 68,088.

prepared the performance review, opined that it was "very evident that the job or technical knowledge just was not there." Tr. 1336. A similar account was provided by Joseph Schmit, who also participated in the review, when he opined that Ms. Johnson's "performance was not what we needed it to be" and "[w]e had problems getting jobs booked correctly, customers getting billed correctly." Tr. 1755.

The evidence in the record establishes that Ms. Johnson's job performance continued to be a problem through November 2003. At her second performance review on November 25, 2003, she continued to demonstrate an inability to "fully understand the systems and processes." RX 2 (p. 005119); RX 23 (p. 000072). In particular, Mr. Salazar noted that Ms. Johnson showed continuing difficulty with processing orders, entering credits and debits, and booking jobs. Tr. 1294. These concerns were echoed in a list of deficiencies prepared by Mr. Schmit, where he noted that "jobs consistently need to be cancelled and rebooked because of data entry errors." RX 148. As a result, the performance review concluded that Ms. Johnson continued to show "several areas of deficiency or the need for general development of the skills, knowledge and personal factors that are detracting from performance." RX 2 (p. 005119); RX 23 (p. 000072). Based on her continuing performance problems, Ms. Johnson was placed on her original PIP on November 25, 2003, which identified eight (8) areas where she was required to improve her performance. RX 3; RX 27. The PIP provided an extensive description of Ms. Johnson's shortcomings in each performance area and explained how she needed to improve her performance. The PIP also noted that she had 90 days, from November 25, 2003 through February 25, 2004, to improve her performance. RX 3; RX 27. Ms. Johnson met with Scott Salazar and Joseph Schmit on November 25, 2003, to discuss the PIP. Tr. 475-476, 478, 1356-1357, 1508. She also received a copy of the PIP in an e-mail from Mr. Salazar on December 1, 2003. Tr. 533-534, 896; CX 160; RX 6; RX 136. While Ms. Johnson disputed each of the PIP's performance goals at the hearing, Tr. 510-519, she admitted that she never reviewed the terms of the PIP during her employment. Tr. 928.

At the time of her first monthly progress report on January 7, 2004, Ms. Johnson failed to show improvement in seven of the enumerated categories. *See* RX 4. Ms. Johnson acknowledged that she received the January 2004 progress report. Tr. 510-519. At the hearing, Mr. Schmit confirmed that she had "not achieved" seven of her PIP goals as of January 2004. Tr. 1804-1809. He testified that Ms. Johnson's overall performance was unsatisfactory as of January 2004, and opined that "[t]here were very little improvements made from the original PIP." Tr. 1804, 1809. He also opined that her performance "was a very important issue that needed to be addressed and she was doing nothing to help resolve issues on it." Tr. 1809-1810. As of her second PIP progress report on February 5, 2004, Ms. Johnson had demonstrated improvement in three of her PIP goals. CX 201; RX 5. In particular, she improved her performance in the areas of "commission reports, updating [SBT's] K drive, and verifying accurate data of booking packages prior to booking." CX 201; RX 5. The report informed her, however, that "the remaining 5 items need improvement" and identified the performance areas where she continued to demonstrate deficiencies. CX 201; RX 5. These areas included the timely entering of job orders into SBT's computer system, booking jobs in a timely manner, managing phone coverage during business hours, completing billings and payables

within deadlines, and ordering and shipping parts to meet customer requirements. CX 201; RX 5. In addition, the progress report put her on notice that her improvement period would expire at the end of February 2004. CX 201; RX 5. At the hearing, Ms. Johnson confirmed that she received the February 2004 progress report, Tr. 749-750, 1056, but admitted that she did not "focus on the details" of the report. Tr. 1056. As stated above, Ms. Johnson's improvement period expired on February 25, 2004, and she "failed to meet the minimum requirements on the PIP." RX 9. Accordingly, Mr. Lamfers made the decision to terminate her employment effective March 10, 2004. RX 9.

Thus, the documentary and testimonial evidence in the record clearly shows that Ms. Johnson exhibited consistent performance problems from December 2002 through her termination in March 2004. This evidence therefore strongly supports SBT's argument that Ms. Johnson was terminated because of her inadequate job performance and her failure to achieve the goals of her PIP. The clear warnings outlined in the PIP and monthly progress report provide additional support for this argument. Each document expressly states that if Ms. Johnson's job performance did not improve, she would be terminated from her employment with SBT. Under the terms of the original PIP, Ms. Johnson had a period of 90 days, from November 25, 2003 through February 25, 2004, to improve her performance. RX 3; RX 27. If she failed to improve in any of the areas after 90 days, she faced "further disciplinary actions up to and including termination of [her] employment." RX 3; RX 27. Ms. Johnson's first monthly progress review, dated January 7, 2004, provides a similar warning. RX 4. The report states that if her "performance [was] not satisfactory by the end of [the] PIP it will result in termination. RX 4. On February 5, 2004, Ms. Johnson received her final PIP progress review, which again notified her of the consequences of any failure to improve her performance:

> Your 90-day performance improvement period expires at the end of February 2004. All items detailed in the original performance improvement plan must be met to a satisfactory level. Failure to meet these requirements will result in termination of your employment.

CX 201; RX 5. As discussed above, the evidence and testimony in the record establishes that Ms. Johnson received the original PIP, the January 2004 progress review, and the February 2004 progress review. Accordingly, she was on notice that she would be terminated from her employment with SBT if her performance did not improve.

As stated above, "clear and convincing evidence" must be evidence "indicating that the thing to be proved is highly probable or reasonably certain."[68] I find that the testimony of Mr. Lamfers, Mr. Krisch and Mr. Schlesinger, which is consistent with the express language of the PIP and the monthly progress reports, establishes that Ms. Johnson faced termination of her employment if she did not improve her job performance. In addition, the evidence in the record clearly documents that Ms. Johnson exhibited consistent performance problems throughout her employment with SBT and failed to satisfy the requirements of her PIP by the end of February 2004.

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[68] *Williams*, ARB No. 09-092, slip op. at 6 (quoting *Brune*, ARB No. 04-037, slip op. at 14).

While Ms. Johnson provided a different assessment of her own performance, she did not dispute that she received the PIP and progress reports. Instead, she admitted that she never reviewed the terms of her PIP or progress reports. Based on the testimony and documentary evidence in the record, I find that the evidence establishes that, at a minimum, it is "highly probable or reasonably certain" that SBT terminated Ms. Johnson's employment on March 10, 2004, for failing to comply with the terms of her PIP. Accordingly, I find that SBT has presented "clear and convincing evidence" that it would have fired Ms. Johnson even absent her complaints of alleged fraud, accounting irregularities, and improper business practices. I therefore conclude that, even if Ms. Johnson had established her *prima facie* case, her claim for whistleblower protection under the SOX Act must still fail.

IV. **Conclusion**

Because proceedings before the Office of Administrate Law Judges do not involve jury trials, I find that judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure is not a proper means of resolving this case. But the parties have briefed the issues relevant to the merits of the claim. In addition, I have considered all of the exhibits, testimony and arguments presented by the respective parties in reaching my conclusions regarding the merits of the case. My decision in this case would be the same regardless of whether the Respondents had filed a motion for judgment as a matter of law.

For the reasons discussed above, I find that Ms. Johnson has failed to establish her *prima facie* case for whistleblower protection under the SOX Act. The evidence establishes that Ms. Johnson was subject to an adverse employment action by SBT and that the company eventually became aware of her complaints regarding fraud, accounting irregularities and improper business practices. But Ms. Johnson has failed to show that she engaged in protected activity under the SOX Act when she made these complaints, because her belief that SBT was engaged in fraud, irregularities, and improper practices was not objectively reasonable. In addition, even had she established that she engaged in protected activity, Ms. Johnson has not established that SBT was aware of her complaints and allegations when the decision was made to terminate her employment. Accordingly, she necessarily cannot establish that her complaints about alleged fraud, accounting irregularities and improper business practices were a "contributing factor" in SBT's decision to terminate her employment in March 2004.

Instead, the evidence establishes that SBT fired Ms. Johnson because she was not meeting the requirements of her job, and failed to satisfy the requirements of her Performance Improvement Plan. I therefore find that SBT has produced "clear and convincing evidence" that it would have terminated Ms. Johnson's employment even absent her complaints about alleged fraud, accounting irregularities, and improper business practices. For all of these reasons, Ms. Johnson's claim of unlawful retaliation under the SOX Act must fail.

ORDER

The complaint for whistleblower protection under the Sarbanes-Oxley Act, filed by Carri Johnson with the Occupational Safety and Health Administration on June 8, 2004, is **DISMISSED**.

A

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it.[69] Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically.[70]

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health.[71]

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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[69] *See* 29 C.F.R. § 1978.110(a) (2011).
[70] *See* 29 C.F.R. § 1978.110(a).
[71] *See* 29 C.F.R. § 1978.110(a).

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor.[72] Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review.[73]

[72] *See* 29 C.F.R. §§ 1978.109(e), 1978.110(a) (2011).
[73] *See* 29 C.F.R. §§ 1978.110(a) and (b).