



**Issue Date: 08 December 2011**

**Case No.: 2007-SOX-5**

**IN THE MATTER OF**

**ANTHONY MENENDEZ,  
Complainant**

**vs.**

**HALLIBURTON, INC.,  
Respondent**

**DECISION AND ORDER ON REMAND**

**Background**

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002<sup>1</sup> (the Act) and the regulations promulgated pursuant thereto<sup>2</sup> brought by Complainant against Respondent. Complainant alleged that Respondent retaliated against him after he alerted the SEC and Respondent's Audit Committee to his concerns about violations of Generally Accepted Accounting Principles (GAAP) with respect to revenue recognition and joint venture accounting practices. Following an investigation by the Occupational Safety and Health Administration, the case was referred to the Office of Administrative Law Judges and assigned to me for a formal hearing. The issues actively litigated at hearing were whether Complainant engaged in protected activity and whether Respondent took adverse employment actions against Complainant because Complainant engaged in that protected activity. After listening to three days of testimony and presentations by counsel and reviewing hundreds of lengthy exhibits, I issued my decision.<sup>3</sup>

Original Decision

As to the question of protected activity, I found that Complainant had shown that his initial communications and participation in the investigation were related to his reasonable belief that there was a violation, but that his reasonable belief ended when the SEC completed its investigation and concluded he was wrong.

As to the adverse action, I considered Complainant's allegations that Respondent had breached his confidentiality, isolated him, investigated him, removed him from his duties, demoted him, and constructively discharged him.

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<sup>1</sup> 18 U.S.C. § 1514A *et seq.*

<sup>2</sup> 29 C.F.R. Part 1980.

<sup>3</sup> *Menendez v. Halliburton Inc.*, 2007-SOX-005 (ALJ 18 September, 2008).

I found that the disclosure of Complainant's identity as the individual behind the SEC investigation was essentially moot because members of the finance and accounting group would have known it was him anyway, since the investigation dealt with the exact matters over which Complainant had had highly visible and contentious disputes with others in the finance and accounting group. Accordingly, I found that the disclosure had no impact and as such could not have dissuaded a reasonable employee in these circumstances from engaging in protected activity. I also found that Respondent's rationale and motive in disclosing Complainant's name was that since his identity was known anyway, it would clarify the scope of the document retention requirements, show him Respondent intended to comply with a full investigation into his allegations, and help ensure Complainant was not subjected to isolation and frustration from other members of the finance and accounting group.

I found that any isolation suffered by Complainant was largely a consequence of the natural reticence of people to freely interact with an individual who had essentially accused them of fraud and was working with the SEC to investigate them. I also found that any isolation was also a function of the fact that Complainant left the office immediately after the document hold notice containing his name was sent out and came to work only sporadically until his leave of absence. I found that Complainant did not experience a hostile environment that was pervasive, humiliating or interfered with his work performance and therefore found no adverse activity related to isolation.

Complainant alleged that in retaliation for his communication, he was removed from the RTA committee and from a teaching assignment. I found he was not removed from the RTA team. I also found that Complainant's place on the teaching roster was a "peripheral" duty and not one of Complainant's central job responsibilities. I additionally found that he was unavailable to teach at that time anyway, and his removal would not be the type of action that would dissuade a reasonable employee from engaging in protected activity.

I determined that Complainant's allegation of an "investigation" was no more than a request from an upper level manager to a work group member for information about that work group's activities and did not rise to the level of an adverse action against the leader of the work group, since it would not dissuade a reasonable employee from engaging in protected activity.

I found that Complainant's alleged demotion was not an adverse action, since upon his return to work, Complainant was to have the same title, salary, and responsibilities. I noted the only difference was his reporting relationship, which neither materially impacted Complainant's ability to do his work nor was materially adverse to the point it would dissuade a reasonable employee from engaging in protected activity.

Finally, I found that there was no constructive discharge, because Respondent did not create conditions so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign. I found that Complainant's motivation for refusing to return to work for Respondent was that he subjectively believed its accounting practices were deeply flawed and misleading, did not want to return to an organization that engaged in that type of accounting, and had another job that paid at least as well and allowed him to advocate his views on accounting issues.

Both parties appealed my ruling to the Administrative Review Board. Complainant, who was apparently pro se for the purposes of appeal, argued there was error in the finding of no adverse action. Respondent cross appealed the finding of protected activity.

## Order on Remand

In its decision on appeal,<sup>4</sup> the Board affirmed the findings that there was protected activity and no constructive discharge, but also ruled that the original decision applied an overly strict standard that required Complainant to show tangible job consequences in order to establish adverse action. In addressing confusion over the proper standard, the Board clarified that the controlling language is in the statute and emphasized that it states no company “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.” It then went on to interpret that language as explicitly proscribing non-tangible activity. In support of that interpretation, it cited legislative history, noted that whistleblower protection statutes minimize regulatory violations that could cost lives, and found a clear congressional intent to prohibit a very broad spectrum of actions against whistleblowers.

Moreover, although the words “in the terms and conditions of employment” come immediately after the words “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee” and would appear to modify that phrase, the Board looked to the broad remedial context of the Act and found they “are not significant limiting words.”<sup>5</sup> Consequently, the Board found that adverse actions need not be economic or even related to a complainant’s employment.

Applying that standard, the Board first noted I had focused on the SEC complaint when considering disclosure as a protected activity. It cited Section 301 of the Act,<sup>6</sup> which is not part of the whistleblower protection provisions but requires issuers to establish procedures for the submission of anonymous complaints by employees. The Board ruled that Section 301 creates a term or condition of employment and found that Complainant’s Audit Committee complaint was submitted pursuant to that provision. Considering the “chain of events” the disclosure “precipitated,”<sup>7</sup> the Board concluded that the disclosure constituted adverse action.

The Board then addressed my finding that any disclosure of Complainant’s identity was insignificant, since his coworkers would have known it was him anyway. Besides noting that finding was “purely speculative,”<sup>8</sup> the Board ruled that my finding was legally immaterial, noting that “a reasonable employee in [Complainant’s] position would be deterred from filing a

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<sup>4</sup>*Menendez v. Halliburton, Inc.*, Nos. 09-002, 09-003 (ARB September 13, 2011) (hereinafter “ARB”).

<sup>5</sup> *Id.* at 18.

<sup>6</sup> 15 U.S.C. § 78j-1(m)(4).

<sup>7</sup> ARB at 24.

<sup>8</sup> *Id.* at 25. In its discussion of consequential events and damages flowing from the disclosure of the Audit Committee complaint, the Board observed that even though the SEC did not disclose Complainant’s identity, his coworkers must have known it was him because they knew he had filed the same complaints with the Audit Committee. My finding was based on similar logic: that they knew because both the Audit Committee and SEC complaints specifically related to the issues on which Complainant had written a memorandum. That memorandum resulted in a new study in which neither Respondent nor its outside auditor agreed with Complainant. Finally, as specifically noted by the Board, when Complainant continued to insist his was the only correct view, he was advised to take his complaint to the Audit Committee or the SEC. I thus found it would have been unrealistic for anyone familiar with the situation not to have deduced that Complainant was behind the Audit Committee and SEC complaints. Moreover, that conclusion was supported by what I found to be the credible live testimony of two coworkers. In ruling that assessment of the evidence to be speculative, the Board observed that I failed to consider that since revenue recognition had been a focus of recent scrutiny by the SEC, that agency might have instituted its inquiry *sua sponte* or because of a complaint from one of Respondent’s competitors. However, in light of its legal ruling, the Board did not specifically vacate my finding as unsupported by the evidence.

confidential disclosure regarding misconduct if there existed the prospect that his identity would be revealed to the very people implicated in the alleged misconduct.”<sup>9</sup>

Noting the importance of confidentiality in the statutory scheme and observing that the knowledge that anonymity might not be protected would discourage reasonable employees from reporting misconduct, the Board found as a matter of law that the disclosure of his identity in regard to his Audit Committee complaint was an adverse action, independent of any concurrent suspicions or preexisting knowledge of his identity.

Having found adverse action in the disclosure, the Board went on to consider the other allegations of adverse action in light of the correct legal standard. While it stopped short of reversing my findings that as discrete events the alleged isolation, removal of duties, and demotion did not constitute adverse action, it noted they should be viewed in the aggregate and as such could be a measure of damages flowing from the adverse action of breach of confidentiality.

The Board then turned to the issue of causation and the question of whether Complainant’s protected activity was a contributing factor in Respondent’s decision to disclose his identity. I had found by clear and convincing evidence that Respondent’s disclosure was not a consequence of a motive to retaliate against Complainant. The Board ruled that my decision conflated the elements of adverse action and contributing factor. It also distinguished motive from causation and ruled that my finding that Respondent had no retaliatory motive in disclosing Complainant’s identity was irrelevant.

Nonetheless, it also went on to address my factual finding, which was based on my observation of the live witness testimony. The Board noted that Respondent’s argument “that [Complainant’s] name was revealed based solely on a desire to retain documents necessary for a review of the accounting practices that [Complainant] identified to the SEC...is disingenuous at best.”<sup>10</sup> It concluded that based on the evidentiary record, “there does not appear to be any legitimate reason to divulge [Complainant’s] name in connection with the document retention notice [Respondent] circulated in preparation for the SEC inquiry.”<sup>11</sup>

The Board then again noted that the Act does not require a showing of retaliatory motive and emphasized that “[p]roof of ‘retaliatory motive’ is not necessary to a determination of causation.”<sup>12</sup> Nonetheless, it also again addressed my factual finding of no motive, which was based on my observation of the live witness testifying to his subjective state of mind. The Board held that testimony was incredible and cited common sense in reaching its finding that “[n]o reasonable CAO” could believe what the witness claimed.<sup>13</sup>

Having found the disclosure to be an adverse action as a matter of law and holding that the motive of Respondent in making the disclosure was irrelevant, the Board then clarified the causation analysis and directed me on remand to “determine whether [Complainant’s] protected activity, including his internal allegations and those to the SEC and the Audit Committee, contributed to the breach of the confidentiality to which his complaint to the Audit Committee was entitled and whether, if it did, [Respondent] can prove by clear and convincing evidence that

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<sup>9</sup> *Id.* at 26.

<sup>10</sup> *Id.* at 30.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 31.

<sup>13</sup> *Id.*

there existed legitimate business reasons dictating the disclosure of [Complainant's] identity.”<sup>14</sup> However, in the decretal portion of its opinion, the Board directed me to “make findings on whether [Complainant's] protected activity was a contributing factor to this adverse action and, if so, whether [Respondent] demonstrated by clear and convincing evidence that it would have acted adversely in the absence of [Complainant] whistleblowing.”<sup>15</sup>

If I were to find Respondent was unable to sustain its burden, I was directed to “fashion relief as [I] deem appropriate in light of [the Board's] holding that the fallout from the exposure of [Complainant's] identity – personal and professional isolation as well as loss of professional opportunities and advancement – should serve as a measure of damages.”<sup>16</sup>

In that regard the Board reviewed the evidence related to the “fallout” from the disclosure, stating that it clearly adversely affected the conditions of Complainant's employment. The Board found “he was subjected to a harmful chain of events.”<sup>17</sup> It noted that the “[e]vidence of record strongly suggests” that the disclosure “led inexorably to the circumstances and events that followed, including the isolation and loss of professional opportunities and advancement,”<sup>18</sup> viewing “these conditions as fallout, inextricably connected to the disclosure ... from which the *degree* of adversity or harm associated with the breach may be measured.”<sup>19</sup>

The Board conceded that disclosure, while always an adverse action, may not always result in untoward consequences or compensable harm.<sup>20</sup> It held, however, that “this is not such a case,” because “[i]mmediately after Menendez was ‘outed,’ his life on the job changed for the worse.”<sup>21</sup> The Board found that to the extent his isolation and loss of job opportunities were due, as I had found, to his voluntary absence from the office, that absence itself was an unsurprising reaction to the foreseeable hostility of his colleagues and a manifestation of the harm the breach of his confidentiality produced.

The Board concluded its review of the adverse action allegations by again pointing out that “[a]lthough the events may not individually constitute actionable ‘adverse action’ under SOX Section 806, they may nevertheless constitute indicia of harm and a measure of the damages to which [Complainant] may be entitled”<sup>22</sup> should his protected activity be found to be a “contributing factor” to the breach of confidentiality and the resultant harm.

#### Post Remand

After receiving the order of remand, I conducted a telephonic conference with both sides. Complainant was once again represented by counsel. The parties agreed to submit supplemental briefs based on the issues raised in the order of remand and did so in a timely fashion.

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<sup>14</sup> *Id.* at 32.

<sup>15</sup> *Id.* at 33.

<sup>16</sup> *Id.* at 32.

<sup>17</sup> *Id.* at 26.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 27

## **Analysis** Causation

In the main body of its opinion, the Board directs me to determine (1) if the protected activity contributed to the adverse action of disclosure and (2) if it did, whether Respondent proved by clear and convincing evidence legitimate business reasons dictating the disclosure. The end of the opinion orders me to find (3) if the protected activity was a contributing factor to this adverse action and (4) if so, whether Respondent demonstrated by clear and convincing evidence that it would have acted adversely in the absence of the protected activity.

Items (1) and (3) present what is essentially the same question. That is, whether Complainant's complaints to the Audit Committee and SEC were a contributing factor in Respondent's disclosure<sup>23</sup> of his identity as the person who filed those complaints. As Complainant aptly observes in his brief, it would be impossible to arrive at any answer other than yes. Question (4) involves the same analysis and is logically the same as (1) and (3). It is metaphysically impossible for Respondent to show that if Complainant had never filed his complaints (the protected activity), it still would have disclosed him as the one who made them (the adverse action). Consequently (1), (3), and (4) are essentially rhetorical questions and require no discussion.

Conversely, question (2) asks whether there was a legitimate business reason for the disclosure. It is problematic, since it appears to raise the issue of motive and must be read consistently with the Board's instruction in that "[t]he statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer. Proof of 'retaliatory motive' is not necessary to a determination of causation."<sup>24</sup> That language would certainly indicate that even if there were a legitimate business reason for the adverse action, it would be immaterial in the presence of retaliatory impact.

The only interpretation to resolve the apparent conflict would be to distinguish "reason for" and "motive in" taking an action. Given the extensive case law that has developed concerning "pretext" and causation,<sup>25</sup> it seems clear that simply having a legitimate business reason for an adverse action is insufficient to absolve an employer of liability if the motive is retaliatory. Accordingly, I conclude that, notwithstanding the language regarding the irrelevance of motive, question (2) directs me to find whether or not the record shows by clear and convincing evidence that Respondent had a legitimate business reason for the disclosure.<sup>26</sup>

Although the Board held I incorrectly relied on it as part of my conclusion that there was no adverse action, in my original decision I made findings related to why Respondent made the disclosure. In making those findings, I personally observed the witnesses and considered their

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<sup>23</sup>Directly, or by implication.

<sup>24</sup> ARB at 31.

<sup>25</sup>*See, e.g. Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (ALJ January 28, 2004) (purported insubordination was mere pretext to justify complainant's termination); *Marano v. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (setting out contributing factor test); *Allen v. Stewart Enterprises, Inc.*, No. 06-081 (ARB July 27, 2006) (a contributing factor is any one which, alone or in combination with others, tends in any way to affect the outcome of the decision); *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, No. 04-149 (ARB May 31, 2006) (complainant not required to establish pretext because he can prevail by showing the defendant's reason, while true, is only one of the reasons for its conduct and another motivating factor is plaintiff's protected activity).

<sup>26</sup>One of the main distinguishing aspects between reason and motive may be that motive is subjective and need not be objectively reasonable, as long as it is subjectively honest. That differentiation, to the extent it exists, is moot in this case because the term "legitimate business motive" imposes an objective standard.

ability to accurately recall and communicate. I weighed their potential bias, how they might be affected by the decision, and the degree to which their testimony was consistent with other evidence in the case.

In doing so, I found that the credible evidence in the record established by clear and convincing evidence that Respondent did not believe including Complainant's name would be of any consequence, since he had already made his disagreement over those accounting issues a *cause célèbre* in the accounting community. Respondent also wanted to avoid taking any action that would indicate it did not take its obligations seriously or that it was trying to punish him. Given the premise that everyone knew who he was anyway, Respondent anticipated that including his name would show Complainant his issues and concerns were being addressed, at least marginally assist in identifying documents for retention, and communicate its intention that Complainant was not to be treated any differently. In short, I found Respondent proved by clear and convincing evidence legitimate business reasons<sup>27</sup> for the disclosure. Based on those findings of fact and the applicable legal standard, the complaint is dismissed.

However, based on the Board's opinion, I recognize the possibility that on appeal, the Board may once again reverse the dismissal. First, it may find that I have incorrectly applied the language from the main opinion and should have followed only the directions in the decretal section. In that event, my findings as to motive or legitimate business reasons were irrelevant. The only question would be whether Respondent showed it would have disclosed his name as the whistleblower, even if he would not have blown a whistle, and, of course, it could not.

On the other hand, even if the Board holds that I properly have followed its direction to determine if Respondent proved by clear and convincing evidence a legitimate business reason dictating the disclosure, it may still reverse the dismissal. The Board did not specifically vacate my findings as unsupported by the record. However, it described suggestions that there was a non-retaliatory reason for the disclosure as disingenuous, unlikely, and contrary to common sense, concluding that “[b]ased on the evidentiary record before us, there does not appear to be any legitimate reason to divulge [Complainant's] name in connection with the document retention notice [Respondent] circulated in preparation for the SEC inquiry.”<sup>28</sup> Since the evidentiary record is unchanged, I am compelled to anticipate the probability that the Board will find that as a matter of law, the evidence is insufficient to support a finding by clear and convincing evidence that Respondent had a legitimate business reason for the disclosure.

Therefore, as a matter of judicial efficiency and to minimize the probability of another remand that will further delay the parties' opportunity to appeal the Board's ruling to the Circuit Court, I also enter alternative findings. In the event I have misinterpreted the Board's legal direction that I address the existence of a legitimate business reason for the disclosure, there would have been no issue to review as to liability. However, even if I have properly followed their direction to make a factual finding on that matter, their opinion clearly indicates that they fundamentally disagree with my assessment of the evidence. In either event, it is appropriate to address the alternative if I had found Respondent liable and discuss damages.

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<sup>27</sup> Reasonable minds may differ as to the business benefit of disclosure, much as they differed as to the accounting issues Complainant raised.

<sup>28</sup> ARB at 30.

## Damages

The Board instructed that, if Respondent did not demonstrate a legitimate business reason for the disclosure by clear and convincing evidence, I should “fashion relief as ... appropriate in light of [its] holding that the fallout from the exposure of [Complainant’s] identity – personal and professional isolation as well as loss of professional opportunities and advancement – should serve as a measure of damages.”<sup>29</sup> The Board also highlighted a number of actions that may not have constituted specific instances of adverse action, but were instances of “harm the breach of his confidentiality produced.”<sup>30</sup> They included “personal and professional hostility,” marginalization, and “diminution of his authority, responsibility, and opportunity for professional advancement.”<sup>31</sup> The Board found “People avoided him....[n]o one came by his office...he was excluded from decision-making.”<sup>32</sup>

Complainant does not seek reinstatement or argue that he is entitled to loss-of-pay damages, back pay, or any other pecuniary damages, so my analysis is confined to whether special, compensatory damages are warranted. These include damages for Complainant’s alleged isolation, removal of duties, and constructive demotion.

The actual language of the statute allows for damages that “include” reinstatement, back pay, and special damages, “including litigation costs, expert witness fees, and reasonable attorney fees.”<sup>33</sup> Respondent argues the list is exhaustive and that the Act does not allow for the award of special compensatory damages.<sup>34</sup> In support of such an award, Complainant cites a number of ARB cases under SOX and other whistleblower statutes in which complainants were awarded significant amounts (ranging from \$4,000 to \$100,000) in special compensatory damages.<sup>35</sup> I will not address the merits of Respondent’s legal argument since I am bound to follow the Board’s interpretation of the Act. Therefore, I must revisit my conclusions of fact as to the harms Complainant suffered to determine if those factual findings support an award of damages.

In doing so, I note that just as I did in reaching my findings on the issue of protected activity, I found Complainant to be credible, trying to tell the truth as best as he could, given the limits of memory and perspective that impact any witness. However, I also note that the clear impression he gave was that while he was saddened and frustrated with the way his working relationships were impacted, he was most upset that Respondent refused to concede that it was doing things the wrong way. It appeared that the most important thing he sought from the litigation was vindication that his position was, if not correct according to the SEC, at least

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<sup>29</sup> *Id.* at 32.

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 26.

<sup>33</sup> 18 U.S.C. § 1514A(c)(2).

<sup>34</sup> Respondent’s brief on remand at 19, *citing Murray v. TXU Corp.*, No. Civ. A. 3:03-CV-0888-P, 2005 WL 1356444 at \*3 (N.D. Tex. June 7, 2005) (finding that though the Act allows for non-pecuniary damages, the list is exhaustive and limited to reinstatement, back pay, litigation costs, expert witnesses and attorney fees); *Walton v. Nova Information Systems*, 514 F.Supp. 2d 1031, 1035 (E.D. Tenn., 2007) (finding claimant not entitled to damages for injury to reputation, emotional, mental and physical distress and anxiety because those are not listed under the SOX remedies provision).

<sup>35</sup> Claimant’s brief on remand at 17-18, *citing Evans v. Miami Valley Hosp.*, 2006-AIR-022 (ARB June 30, 2009) (awarding \$100,000 to a terminated helicopter pilot who suffered “significant depression”); *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-00056 (ALJ July 18, 2005) (awarding \$22,000 for a “garden variety” emotional distress claim); *Jackson v. Butler & Co.*, 2003-STA-26 (ARB August 31, 2004) (awarding \$4,000 to a truck driver for emotional distress).

sufficiently reasonable to qualify him as a whistleblower. While none of that prevents him from seeking damages to which he is entitled, it is relevant evidence as to the impact the disclosure and consequences had on him.

Not surprisingly, the evidence in the record establishes that once Complainant's coworkers and associates learned he had essentially accused them of fraud, he became isolated. His good friend John Christopher was very upset and refused to enter his office.<sup>36</sup> A friend at KBR with whom Complainant often had lunch no longer wanted people to know he was meeting with him.<sup>37</sup> The number of people with whom he spoke or emailed dropped noticeably and one, Dennis Whalen of KPMG, gave him dirty looks.<sup>38</sup> Charlie Geer, with whom he used to speak often, no longer came by his office.<sup>39</sup> After the email was sent, there was no more communication with Complainant at the Oak Park Office and he was not involved in issues, consulted on problems, or included on emails.<sup>40</sup> John Christopher was instructed by KPMG not to interact with Complainant about technical accounting or auditing issues.<sup>41</sup>

On the other hand, the record also shows that Complainant voluntarily left Respondent's workplace and took a paid leave of absence during which Respondent instructed him to cooperate with the SEC during its investigation.<sup>42</sup> Laura Lewis had great difficulty getting Complainant to respond to her inquiries about his leading courses at an accounting summit.<sup>43</sup> Kelly Youngblood had a good relationship with Complainant and they spoke on a daily basis about personal and work-related things, but after the email Complainant was not at work much.<sup>44</sup> Mark McCollum instructed individuals that they were in no way to treat Complainant differently<sup>45</sup> and was prepared to accept him back into the department and work with him, but Complainant never returned.<sup>46</sup>

Complainant also alleged that he suffered a diminution in responsibility and removal from his role on the RTA committee and his position as an instructor for a revenue recognition course at Respondent's financing and accounting summit. It would be fair to conclude that but for the protected activity, Complainant would not have been absent from work and but for the absence, he would have remained in those roles. However the record is devoid of evidence that would allow for a conclusion that his absence from the RTA and training programs resulted in any career disadvantage or quantifiable loss. Thus the only real damage would be the intangible loss of enjoyment from participating in those events.

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<sup>36</sup> *Menendez*, ALJ No. 2007-SOX-005 at 12 (hereinafter "D&O").

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *Id.* at 13.

<sup>40</sup> *Id.* at 37.

<sup>41</sup> *Id.* at 54.

<sup>42</sup> Tr. at 494-98.

<sup>43</sup> D&O at 13-14.

<sup>44</sup> *Id.* at 66.

<sup>45</sup> *Id.* at 69.

<sup>46</sup> *Id.* at 76.

Complainant also alleged that he suffered a constructive demotion when his reporting relationship was changed in order that he report to Charles Geer rather than Mark McCollum. However, I found that “[e]ven in the absence of the protected activity, G[eer] would have been promoted and Complainant reassigned.”<sup>47</sup> The ARB did not disturb my factual findings on that issue. As Complainant did not suffer a demotion, I find that he suffered no compensable damages in relation to Mr. Geer’s promotion.

Viewed in the aggregate as suggested by the Board, the damages Complainant suffered as a result of the disclosure of his identity were primarily related to his isolation. He was clearly marginalized and at times ostracized in the workplace. He testified that he was stunned and had “probably the worst day” of his life.<sup>48</sup> He lost the opportunity to participate in the RTA and training programs.

On the other hand, he suffered no financial loss and no real evidence of reputational damage beyond Respondent and KMPG. In fact, he was able to obtain employment in a suitable position at the same or better pay. Moreover, there is no evidence that damages impacted him beyond the workplace. There is no evidence of medical or psychological problems, sleeplessness, depression, or impact of stress on the family. In his post-hearing brief, Complainant requested special and compensatory damages in a minimal amount of no less than \$1,000.<sup>49</sup>

A complainant can recover for pain, suffering, mental anguish, and embarrassment.<sup>50</sup> Medical or psychiatric evidence is not required, but may strengthen a case for compensatory damages.<sup>51</sup> However, awards generally require both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress.<sup>52</sup> “To recover compensatory damages under the Act, a complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm.”<sup>53</sup>

The record shows that Complainant sustained distress related to isolation at the workplace because of the Respondent’s adverse action. However, the record does not disclose any significant impact outside of his work. Moreover, Complainant originally sought only \$1,000, which was consistent with my impression from his testimony and conduct throughout the course of the litigation that his primary concern was to vindicate his position that Respondent was wrong to have not at least conceded his position was reasonable. Therefore, for the purposes of judicial efficiency, I note that had I found no legitimate business reason for the adverse action,

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<sup>47</sup> *Id.* at 17.

<sup>48</sup> Tr. at 457.

<sup>49</sup> Complainant’s post-hearing brief at 40-41. However, after the publication of the Board’s order of remand, he amended that amount to \$40,000.

<sup>50</sup> *Kalkunte v. DVI Financial Services, Inc.*, Nos. 05-139, 05-140 (ARB February 27, 2009) (affirming ALJ’s award of \$22,000 in damages).

<sup>51</sup> *Kalkunte* 2004-SOX-00056 at 62-63, citing *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec’y Sept. 17, 1993) *et al.*

<sup>52</sup> *Id.* at 64 n. 55, quoting *Moder v. Village of Jackson, Wisconsin*, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003).

<sup>53</sup> Also cited in *Kalkunte* was *Gutierrez*, in which the ARB reversed an ALJ’s award of compensatory damages for emotional distress. *Gutierrez v. Regents of the University of California*, No. 99-116, ALJ No. 98-ERA-19 (ARB November 13, 2002).

I would have awarded Complainant \$1,000 in compensatory damages and appropriate attorney fees and litigation costs.

However, just as in the issue of whether there was a legitimate business reason for the disclosure, the Board expressed a view of the evidence that was fundamentally at odds with my findings. Specifically, it stated that the “[e]vidence of record strongly suggests that the exposure of Menendez’s identity led inexorably to ... isolation and loss of professional opportunities and advancement .... from which the *degree* of adversity or harm associated with the breach may be measured.<sup>54</sup> I did not find the record to establish any loss of professional opportunities and advancement sufficiently substantial to justify the award of damages. However in the event that I had found those damages as identified by the Board, I would have awarded a total of \$30,000 in damages, and held the record open for a supplemental petition for attorney fees and litigation costs.

### **Conclusion**

In summary, I originally found the disclosure did not constitute adverse action because Complainant’s identity would have been known anyway and Respondent did not have a motive to retaliate. The Board held that those factual findings were not legally relevant to the adverse action analysis and the disclosure was an adverse action. Turning to causation, the Board ruled that motive was not relevant and noted that the credible evidence failed to establish a non-retaliatory motive. It nonetheless instructed me to determine whether the evidence showed by clear and convincing evidence that there was a legitimate reason for the disclosure. I find it did and I therefore dismiss the complaint.<sup>55</sup>

The Complaint is **DISMISSED**.

**ORDERED** this 8<sup>th</sup> day of December, 2011 at Covington, Louisiana.

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**PATRICK M. ROSENOW**  
**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 the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. 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.

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<sup>54</sup>ARB at 26.

<sup>55</sup> However, I also clarify what my alternative findings in terms of damages would have been, had I found causation. I also make an additional alternative finding in the quantum of damages had I found the same loss of professional opportunities and advancement the Board stated was “strongly suggested” by the evidence.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

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

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.

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 pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).