

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 January 2010

CASE NO.: 2008-SOX-00049

In the Matter of:

ANDREA L. BROWN,

Complainant,

vs.

LOCKHEED MARTIN CORPORATION,

Respondent.

Appearances: Diane S. King, Esq.
Joseph W. Galera, Esq.
King & Greisen, LLP
For Complainant

Matthew J. Rita, Esq.
Ford & Harrison, LLP
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (“SOX” or “the Act”), 18 U.S.C. § 1514A, enacted on July 30, 2002. The Act prohibits retaliatory actions by publicly traded companies against their employees who provide information to their employers, a federal agency, or Congress, that alleges violations of 18 U.S.C. §§ 1341, 1343, 1344, 1348, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. § 1514A.¹ Respondent, Lockheed Martin Corporation,

¹ 18 U.S.C.A. § 1514A (West Supp. 2008). The SOX’s employee protection provision protects employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934, or any officer, employee, contractor, subcontractor, or agent of such companies because the employee provided information to the employer, a Federal agency, or Congress which the employee reasonably believes constitutes a violation of 18

("Respondent" or "Employer" or "LMC") is a publicly traded company with a class of securities registered pursuant to Section 12 of the Securities and Exchange Commission Act of 1934, and is required to file reports pursuant to Section 15(d) of this Act. 15 U.S.C. § 78l; *see also* Hearing Transcript ("TR") at 14. Andrea L. Brown ("Complainant") alleges that Respondent constructively terminated her employment in retaliation for reporting mail, wire, and general shareholder fraud concerns. *See* Complainant's Post-hearing Brief at 2. Respondent maintains that Complainant did not engage in activity protected under the Act, that Employer was not aware of any such protected activity, and denies that Complainant was constructively discharged or that any protected activity played any role therein. *See* Respondent's Post-hearing Brief at 14, 22, 23.

Complainant, through counsel, lodged a complaint with the Occupational Safety & Health Administration ("OSHA") on January 25, 2008. TR at 15. On February 6, 2008, Complainant, through counsel, supplemented her Complaint alleging that she had been constructively discharged by Respondent on February 4, 2008. *Id.* at 16. Following an investigation, the Secretary's Findings in this matter were issued by OSHA on May 27, 2008, dismissing the complaint. *Id.* at 17. On June 26, 2008, Complainant objected to the Secretary's Findings, requesting a hearing on the merits of her whistleblower claim. *Id.*

The matter was referred to the Office of Administrative Law Judges and pursuant thereto a Notice of Hearing was issued on July 14, 2008, scheduling a formal hearing for September 4, 2008. Administrative Law Judge Exhibit ("AX") 1. Subsequently, on motion of Complainant's counsel, the hearing was continued to January 12, 2009. AX 2 and 3.

On January 12, 2009, and January 13, 2009, the undersigned convened a formal hearing in Denver, Colorado. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs. Administrative Law Judge Exhibits ("AX") 1-6 were admitted without objection. TR at 5. Hearing Exhibits ("HX") 1-67 were admitted into evidence without objection. *Id.* at 7-9. HX 68 was admitted over Respondent's objection. *Id.* at 323-325. Complainant testified on her own behalf as did Janice Moncallo and Brendon Gregory Pierce. *See* TR at 227, 133, 417, and 462. Complainant also presented videotape deposition testimony from Tina D. Colditz, Jean Pleasant and Judith Gan. *Id.* at 40, 430-431, 437. Deposition testimony of David Jewell and Ken Asbury was presented on behalf of Employer. *See* TR at 431-432.²

Both parties submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent. Any evidence in the record that has not been

U.S.C. sections 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (fraud "in connection" with "any security" or the "purchase or sale of any security), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, the SOX protects employees against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation.

² I overrule Respondent's evidentiary objections to portions of deposition testimony in light of the expansive evidentiary rules in SOX whistleblower proceedings. *See* 29 CFR Part 1980.107(d) ("Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied.").

discussed specifically has been determined to be either relevant, but comprised in other evidence, or insufficiently probative to affect the outcome directly. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

ISSUES

1. Whether Complainant engaged in protected activity.
2. If so, whether Respondent knew of the protected activity.
3. Whether Complainant suffered an adverse employment action by being constructively discharged.
4. Whether Complainant's protected activity was a contributing factor in the adverse employment action.
5. If successful, damages due to Complainant.

FINDINGS OF FACT

Testimony of Andrea Brown

Complainant holds a B.A. in journalism from the University of Wisconsin at Madison. TR at 227. She thereafter worked as a newspaper reporter, in copywriting jobs, and was elevated to Director of Copywriting while working in Milwaukee. Complainant stated that she thereafter moved to Houston, Texas, where within a few months she was offered a job as Communications Director with LMC in June of 2000. *Id.* at 228. She was responsible for employee communications, public relations, community relations and anything involved in the communication process. *Id.* at 228-229. Complainant testified that she worked under Wendy Owen, Vice President of Communications, and also reported to someone in Houston at the business unit. She stated that she had a very good working relationship with Owen and was eventually offered her choice of two different job promotions from which she selected the position of Director of Communications for Lockheed Martin Technical Operations ("LMTO") in Colorado Springs. *Id.* at 229-230; HX 43. Complainant indicated that she became a level-five communicator with an L-code, indicating a leadership position with supervisory responsibility over others. She reported jointly to Owen and Ken Asbury, the president of LMTO. TR at 230-231. Complainant became the spokesperson for Asbury, a president of LMC, which was a much higher profile job than at Houston. Despite being a higher profile position, she stated that at there was much more national and international media involvement at Houston than at LMTO; eighty percent of LMTO business was classified government work, so media attention was avoided at LMTO. *Id.* at 231-232. Complainant testified that her performance was rated by Asbury. She explained that the ratings scheme ran from a high of "exceptional," then to "high contributor," then "successful contributor," "basic contributor," and finally "unsatisfactory." She testified that she was rated a "high contributor" in 2003 and 2005, and "exceptional" in 2004. *Id.* at 233; HX 38. Complainant stated that she interacted daily with Asbury and weekly with Owen through staff meetings and telephone conversations. TR at 233.

Complainant testified that Owen had always been very responsive to her but, starting in early 2006, Complainant had difficulties getting responses from Owen, in particular with respect to delays in getting payments made. *Id.* at 234-235; HX 2 and 3. As a result, Complainant brought the problem to the attention of Asbury and also inquired of Owen's administrative assistant. *Id.* at 234-235; HX 2 and 3. Complainant stated that she spoke with fellow communicators Joe Adavich and Tina Colditz, both of whom confirmed that they were also having a difficult time with delays in Owen making payments. TR at 236. Complainant testified that she was good friends with Colditz, a long-time LMC employee located in the same building in Colorado Springs who managed all the trade shows and reported directly to Owen. Complainant stated that during one of their conversations about the delays in payment, Colditz told Complainant that she believed the delays were due to Owen's preoccupation with having personal affairs with soldiers she met through the Pen Pals Program, which Colditz was running for the company. *Id.* at 237-238. Complainant recalled that Colditz told her that Owen had developed sexual relationships with ten of the soldiers, purchased a laptop computer for one soldier, had sent inappropriate e-mails and a box of sex toys to soldiers in Iraq, and had traveled to welcome home ceremonies on the pretext of business while Owen actually took soldiers away in limousines to expensive hotels for intimate relations while Colditz did all the work. Colditz expressed concern that company funds were being used and Complainant understood that most expenses incurred by employees were passed on to the customer, presumably the government in this case. *Id.* at 240-241. Colditz told Complainant that Owen had personally confirmed this information to Colditz which upset Colditz. *Id.* at 241-242. Complainant stated that Colditz had personally witnessed Owen disappearing from scheduled meetings at Fort Bragg with the commanding general while she had a limousine pick up a soldier with whom she went off to an expensive golf resort. Colditz expressed embarrassment when the soldier was returned to Fort Bragg by Owen's limousine arriving in front of high-ranking military officers. *Id.* at 242.

Complainant testified that at some point she spoke to Asbury about the laptop computer. She stated that Asbury assured her that he and legal counsel, Neil Murray, were going to confront Owen and tell her to get the laptop back immediately. *Id.* at 243. Complainant testified that on one occasion she had to contact Owen on an important media inquiry and called Colditz to inquire how she could reach Owen. Colditz told her that Owen was "with one of her troops," so Complainant called Owen on her cell phone. Complainant stated that Owen answered out of breath and that she heard a male voice in the background, such that Complainant felt she had interrupted a sexual encounter. *Id.* at 243-244. Complainant stated that all employee expense reports were sent to Florida for processing by the company. *Id.* at 244.

Complainant testified that she was concerned that Owen's actions were fraudulent and illegal with respect to using company funds for a laptop, hotel, limousine, and travel expenses which may then have been passed along to the customer, the government. *Id.* at 245, 416. She was also concerned that there could be media exposure which could lead to government audits and affect current and future contracts which would all affect the value of the company's shares. Complainant stated she recalled a similar situation a few years earlier which drastically reduced the value of Boeing's stock and she was concerned of such an effect on the company's shareholders, including her. *Id.* at 246-247, 416. Complainant testified that after she spoke with Asbury and had failed in her attempts to encourage Colditz to report Owen's behavior, she then

spoke with Jan Moncallo about Owen. *Id.* at 247. Complainant stated that Colditz was afraid to report Owen and that, despite her conversation with Asbury about Owen, she did not notice any change in Owen's behavior. Thus, Complainant approached Moncallo as she knew the ethics policy required reporting such matters. *Id.* at 248-249. Complainant stated that Moncallo asked her if she thought this situation was something that might be picked up by 60 minutes, and when Complainant replied in the affirmative, Moncallo told Complainant she needed to make a formal ethics complaint. *Id.* at 249. Complainant testified that she told Moncallo she felt Owen's actions constituted fraud and were illegal. *Id.* at 249-250. Complainant stated that when Moncallo told her she would report Owen on an anonymous basis, she agreed. However, that same evening, she wrote Moncallo an e-mail expressing her fear from having made the complaint. Moncallo assured Complainant that no one would know her identity and there would be no retaliation. *Id.* at 250-252; HX 5.

Complainant testified that in her experience all costs incurred by LMC employees, including public relations costs, were billed back to the government. She stated that she believed that all business trips and other expenses incurred by LMC employees in managing the Pen Pal Program with the U.S. Army would have been billed to the Army. *Id.* at 347-350. Complainant testified that she was certain she used the term "fraud" in her conversations with Moncallo, which commenced in May of 2006. *Id.* at 352-353. Complainant indicated that her ethics complaint about Owen had three bases: her conversations with Colditz; Asbury telling Complainant that he was aware of Owen purchasing the laptop; and Complainant's own conversation with Owen when Owen apparently was in the midst of a liaison at a hotel with a soldier. *Id.* at 353-357. Complainant admitted that she never personally observed Owen engaged in any misconduct nor did she ever see her expense vouchers or any other documents. *Id.* at 358-359. Complainant stated that she experienced problems in getting Owen to pay bills before she made the ethics complaint, which problems continued thereafter. *Id.* at 359-363, 412. Complainant stated, however, that did not reflect a personal problem between Owen and her until after Owen learned of Complainant's role in the ethics complaint against her. *Id.* Complainant stated that there had been a rumor within the company that Owen had lung cancer, but that was later disproved by Owen's staff. *Id.* at 364-365; HX 48. Complainant stated that she was not aware of exactly when Owen supposedly purchased a laptop computer for a soldier, but she knew it had occurred during the Pen Pal Program which ran from 2004 until 2006; she estimated the value of a laptop to be at least \$1,000. TR at 366-367.

Complainant testified that she was never asked to be interviewed in the ensuing Owen investigation. TR at 253, 374. She continued to speak with Colditz who became increasingly fearful that she was being targeted as the ethics complainant and was being positioned to appear at fault. *Id.* Complainant recalled an e-mail from Colditz in August of 2006 that indicated that Owen had told Colditz she was going to be out of work. *Id.* at 254; HX 51. Complainant stated that she did not feel any retaliation concerns at that time because Owen apparently thought Colditz had made the complaint, but she did try to reassure Colditz that she could not be fired at least not without a settlement since Colditz knew of the damaging information about Owen which she could threaten to reveal to the media. TR at 254-255, 408-410; HX 51. Complainant testified that although she never saw the Owen investigation results, Moncallo told her within a few days of the complaint that the Pen Pal Program had been shut-down and later told her that Owen had been reined-in and would be closely monitored. TR at 255-256. In an e-mail to

Moncallo on September 1, 2006, Complainant expressed her belief that the anonymous complaint procedure had worked well. *Id.* at 256; HX 53. Complainant testified that in the fall of 2006, she complained to Asbury that Colditz was being treated unfairly and told Asbury that Complainant had made the ethics complaint, not Colditz. TR at 257. Complainant also stated that she finally told Colditz about her ethics complaint as well. *Id.* at 258.

Complainant stated that, when she received her annual performance rating from Asbury in late 2006, she was surprised that Asbury rated her as only a “successful contributor,” even though she had worked harder that year than ever before. She stated that Asbury excused the lower rating on the basis that the company wanted more of the lower ratings than the upper two and also Asbury noted he was not satisfied with Complainant’s strategic plan which she had turned in to Asbury in February of 2006. *Id.* at 258-260; HX 38. Complainant stated Asbury had made no complaints about the strategic plan up to that point, but she nonetheless told Asbury she would prepare another one, which she did. TR at 260-261. Complainant stated that despite the lower performance rating of “successful contributor” on the December 2006 evaluation, she received a larger raise than she had received the previous year and a larger raise and performance bonus than other employees. *Id.* at 261.

Complainant testified that, in December of 2006, she began getting calls from Owen inquiring who had reported her. *Id.* at 262. Owen’s calls allegedly further claimed that Owen had lost her annual bonus that she used to pay her son’s private school tuition and that someone had called her husband in the middle of the night to tell him of Owen’s affairs. *Id.* Complainant stated that eventually she told Owen that she had told a few things to Moncallo but was not sure it had resulted in the complaint. In a string of e-mails, Owen thanked Complainant for telling her of her conversation with Moncallo and seemingly expressed concern that Complainant was not happy with her job. *Id.* at 263-265, 378-380; HX 55. However, Complainant was concerned that Owen was being insincere and was worried since Owen then knew Complainant had played some role in the ethics complaint. TR at 265. Complainant stated that she reported Owen’s phone calls to both Moncallo and Asbury. *Id.* at 266.

Complainant stated that she continued to report to both Asbury and Owen until there was a major reorganization combining two of the five or six business areas of LMC which resulted in Gan being the senior vice president of communication with Owen as her assistant, although Owen retained her vice president title. *Id.* at 266-268. There had been a smaller reorganization in which LMTO assumed LM Space Operations (for whom Complainant had previously worked in Houston) resulting in Lockheed Martin Mission Services (“LMMS”). *Id.* at 267. Several months following the large reorganization, Complainant met with Gan for the first time over breakfast prior to Gan going on to meet with Asbury. Complainant testified that Gan was not very nice to her and indicated that Complainant was not the right person for the job Complainant had been doing for the past five years and also indicated there would be a reduction in staff. *Id.* at 270-271. Complainant stated that she then brought Gan in to meet with Asbury who had asked Complainant to bring her new strategic plan which Complainant had reworked and thought was terrific. Complainant testified that when she handed the plan to Gan, Gan gave an exaggerated roll of her eyes which Complainant did not understand. *Id.* at 272-273. Complainant stated that between her initial breakfast meeting with Gan and her phone call with Gan in July of 2007, she had no one on one communications with Gan, only routine conference calls involving other

people. She stated that Gan was never rude to her in public. *Id.* at 381-384. Complainant stated that her e-mail to Asbury in July of 2007, stating that she could not work for Gan, was simply an emotional response and that she did in fact continue to work for Gan thereafter. *Id.* at 384-385; HX 16.

Complainant stated that the next communication she had about her job was a phone call on June 12, 2007, from Owen in which Owen, in a chipper voice, told Complainant that her job was posted on the internet and that she should get her resume together or she would have a new boss. *Id.* at 274-275, 375-376, and 413-414. Complainant stated that she had no doubt that Owen was retaliating against her due to the amusement in her voice. *Id.* at 380-381. Complainant further stated that she was distraught and crying and immediately told Asbury about this conversation with Owen by e-mail as Asbury was out of his office. *Id.* at 275-277; HX 13. Asbury seemed surprised that Owen had told Complainant about the advertising of the position and said he would take care of it, although Complainant did not hear back from him. TR at 276-277. Complainant also e-mailed Gan telling her that Owen had told her that she was being replaced and asking Gan to watch for other opportunities for Complainant within the company. *Id.* at 277-278; HX 13. Complainant testified that she had little communication with Owen during this time. She noted that she had to write an e-mail to Gan in May of 2007, asking for Gan's help as Owen was unresponsive in getting payments made. TR at 278-279; HX 12.

Complainant testified that when she first learned of her job being advertised, she was hurt and discussed leaving the company with Moncallo. TR at 279; HX 59. She stated that she later became aware that the job being advertised was a level-six position (rather than level-five, which Complainant was at the time) and, since she felt she was qualified for the position, she put in her application and advised Asbury, Gan, and Owen, among others, of her application by e-mail on July 12, 2007. TR at 280-281; HX 15. Complainant testified that within 10 minutes of sending that e-mail, Gan called her screaming "how dare you do this?" TR at 281-282. She went on to tell Complainant that she was not qualified, that she had performed poorly during her entire career at LMC, and that she should not have copied Gan's boss on her e-mail stating that "you've really hurt your future with LMC by applying." *Id.* Complainant stated she told Moncallo of Gan's phone call and that Moncallo suggested Complainant file an ethics complaint against Gan. Complainant refused to do so, pointing out that this was the result of her first ethics complaint against Owen. *Id.* at 282. Complainant also notified Asbury of the conversation with Gan and indicated that she did not feel she could continue working under Gan. *Id.* at 283; HX 16. On July 15, 2007, Complainant drafted a response to the conversation with Gan defending herself and pointing out her external media experience as well as her high performance ratings, but she did not send it to Gan on Moncallo's advice. TR at 284; HX 17. Complainant testified that on July 18, 2009, she did send to Gan copies of her performance reviews to set the record straight since Gan had indicated Complainant was only an average performer. TR at 284; HX 18. Complainant testified that she felt like resigning but was convinced by Moncallo to wait and see if an opportunity was created for her. TR at 285. Asbury had mentioned the possibility of a community relations position but Complainant knew such a position would still be under the communications budget. *Id.* at 286.

Complainant stated that when David Jewell was hired as the new level-six Director of Communications, she knew that Jewell had a very good relationship with Owen and

characterized Jewell as Owen's "Golden Boy." *Id.* at 287. Prior to Jewell coming aboard, Complainant had occupied one of six offices along the hall where Asbury's and other vice presidents' offices were located. *Id.* Complainant stated she was told to vacate her office several weeks before Jewell arrived and that after repeatedly asking where she should go, Asbury told her she could work from home and use the visitor's office when she needed to come into the office. *Id.* at 288-289; HX 62. Complainant stated that the visitor's office contained various office supplies, files, and canned-food donations that were being collected and that, while the office had a phone, it did not connect with Complainant's line. TR at 289-290; HX 38. Complainant testified that she knew there were other offices available and did not know why she was not assigned a new office. She stated she felt humiliated when co-workers would see her in the visitor's office and she had no answer for the questions as to why she had no other office. TR at 290-291. Complainant stated that since Asbury had discussed with her the potential of working in community relations, she asked to go to a company community relations conference. However, Gan's "right-hand person" advised her by e-mail on August 22, 2007, that someone else would be going and copied Owen on the e-mail, even though Owen was no longer Complainant's supervisor; rather, Gan was. *Id.* at 291-292; HX 19. Shortly after this, Complainant was told by Colditz that Asbury had offered Colditz the community relations position. TR at 293. Complainant testified that Gan told her she could not attend the annual communications conference that Complainant had always attended despite the fact that Complainant was one of a number of Comet Award winners to be honored at the conference. She stated that the award was for assisting Colditz in a year long project involving multiple trips in commemoration of the Challenger accident. *Id.* at 293-294. Complainant was one of five employees on the team to receive the Comet Award including Colditz, Lorence, an intern, and possibly Owen. TR at 373-374; HX 22.

When Jewell arrived in November of 2007, he took Complainant's former title of Director of Communications and left Complainant with no title. TR at 295. Complainant also lost supervisory responsibility over the four employees she had previously supervised. *Id.* at 295-296. Complainant testified that she had known Jewell since she first began work for LMC and that Jewell was very friendly when he just arrived; Complainant even trained him on the new position. However, she felt that he became colder toward her as he settled into the position. *Id.* at 296-297. Complainant stated that after she finally got Jewell trained, he told her that either she or Dorothy Lorence, who worked in Houston, would be laid-off. *Id.* at 297. After that point, Complainant felt a loss of self-esteem and uncertainty. *Id.* at 298.

Complainant testified that she has three children and has been married to her current husband for seven years. She stated that she has always been the primary breadwinner and receives no child support for her three children. *Id.* at 298-299. Complainant stated that during the fall of 2007, she saw a psychiatrist for panic attacks that she related to her stress at work. *Id.* at 299-300. Complainant testified that she had a short-lived issue with her daughter in August of 2007 in which her daughter reacted badly to taking an anti-depressant medication. Her daughter was hospitalized for four days but has been stabilized since on medication. *Id.* at 300-301, 465. For two or three weeks, Complainant stated, she started work early and left early to be home when her daughter got home from school. *Id.* at 301-302. Complainant also testified that in September of 2006, she and her husband got into a fight and she called the police to pick up her husband because he had driven off from the house in a drunken state. She indicated that the

charges were all dropped and nothing further came of this incident and certainly was not a cause for stress in 2007 and 2008. *Id.* at 463-465.

Complainant stated that Jewell treated her poorly in December of 2007, as he would not give her any information on whether she would still have a job, and, if so, what the job would be. She stated that when she was told by Lorence that there would not be a lay-off, she mentioned it to Jewell who told her there would be a lay-off between Complainant and Lorence. *Id.* at 302-304; HX 24. Complainant discussed with Lorence the possibility of Lorence taking early retirement if she could get a severance package. *Id.* at 385-386; HX 24. Complainant testified that when she asked Jewell for an office, he told her she had an office in the storage area and that "You'll work wherever I tell you to work, even if it's in a storage area." TR at 303. She stated that Jewell had told her to come in and work in the visitor's office on January 3, 2008. When she arrived, someone else was working there. When Complainant spoke with Jewell, he told her he was looking for a cubicle for her. When she protested that, as a level five-with an L code, she was entitled to an office, Jewell told her he was in the process of removing her L-code and she would only be entitled to a cubicle. Complainant stated that she broke down crying and left the office. *Id.* at 304-308; HX 26. Complainant stated that once she gave her office to Jewell, she could no longer be reached at the direct office number she had used for the previous five years so that people either had to call the main number or reach her on her cell phone. *Id.* at 399-401. She stated that occasionally other visiting employees would use the visitor's office. *Id.* at 401-402. Complainant was aware of one other employee who gave up his office in the reorganization but believed that he was assigned a new office promptly. *Id.* at 403-404.

Complainant stated that she had an emotional breakdown and sank into a very deep depression. TR at 309-310. Complainant testified that Jewell tried to contact her following this conversation but she felt unable to handle anything more than e-mail. *Id.* at 311; HX 28. In fact, Complainant saw a psychiatrist and her family physician, both of whom recommended that she take three weeks on Family Medical Leave, for which she applied on January 7, 2008. TR at 311-312; HX 29. On January 18, 2008, Complainant e-mailed Moncallo and Jewell seeking guidance as to whether she would be laid off, but she received no definitive response. TR at 312; HX 30. Complainant admitted that she was never definitively told that her employment was terminated. *Id.* at 367. Complainant testified that when she received no information or guidance regarding her job, she then began to seek legal counsel, first with her brother and uncle, who are lawyers, and then with her present counsel. *Id.* at 313, 395-397. Thereafter, a complaint was filed with OSHA by her counsel on January 25, 2008. *Id.* at 313-314, 392-394; HX 41. Complainant gave notice of her "forced termination" by e-mail on February 4, 2008. *Id.* at 314; HX 31. Complainant testified that she had never heard of SOX until her brother told her in January of 2007. TR at 395-397.

Complainant testified that she immediately began looking for a new job through the internet. She took the first job offered to her after about a month doing telemarketing at a much lower salary but quit after two and a half weeks as she did not fit into the job. *Id.* at 315-317. She felt physically and mentally unable to perform that job. *Id.* at 411. Complainant stated that she then sent out at least 400 resumes seeking work in her communications field and was finally offered another job with ITT Systems in Colorado Springs, another Defense contractor. She stated that her new job was similar to the work she did at LMC but had more responsibility and

paid more. She began her new job on December 8, 2008, and had worked four weeks by the time of the hearing. *Id.* at 317-318. Complainant estimated her financial loss during the 11 months she had been out of work at \$104,196.56, including salary, loss of 401(k) employer contributions, and medical and life insurance premiums and costs. *Id.* at 319-323; HX 68. From this total, Complainant agreed that her income for the telework job of \$3,085.38 should be deducted, leaving a net loss of income of \$101,111.18. TR at 325-326; HX 37. Complainant testified that she continues to suffer emotionally from her experience at LMC as it appears that by doing the right thing, she was severely punished and she fears that this may diminish her teaching to her children to always do the right things in life. TR at 327-328. Complainant stated that at LMC, she had medical insurance and life insurance covering her husband. *Id.* at 333-334. Complainant was prescribed Prozac by her father, Dr. Levy, for depression, although Complainant stated that he never treated her. *Id.* at 336-338.

Complainant stated that she worked with Colditz on high profile media matters including the IMAX movie “Space Station 3-D” and the Challenger project. *Id.* at 367-369. While Complainant stated that attention to detail was important in her job, she admitted that her draft e-mail which she submitted to Moncallo for review on July 16, 2007, contained several typographical errors. *Id.* at 370-372; HX 17. Complainant further agreed that since she is a two finger typist, she makes typos and that Asbury had noted this in his performance review in 2003. TR at 372-373; HX 38.

Complainant stated that she never worked for Tracy Carter but she knew that Colditz was assigned to Carter near the end of her employment. *Id.* at 390. In an e-mail sent in October of 2007, Complainant told a co-worker that Asbury had told her she still had a job although she thought she knew that Asbury had already offered the community relations position to Colditz. She also noted that things were stable with her children, but recognized things could change quickly with teenage children. *Id.* at 404-406. Complainant testified that Colditz was never in a position to rate her performance. *Id.* at 412. Complainant always reported to Asbury while at Colorado Springs and felt he had treated her very well. *Id.* at 388-391. Complainant stated that she quit trusting Asbury when he stopped responding to her e-mails and would not help her find office space or tell her what her job would be. *Id.* at 414-415.

Testimony of Brendon Gregory Pierce

Pierce is the 20 year-old son of Complainant and is enrolled in community college, pending transfer to University of Colorado next semester. TR at 417-418, 420. Pierce testified that he had been aware that his mother was worried about filing some sort of complaint and her future with the company if she did so, although he was not aware of any details. *Id.* at 418-419. He stated that prior to this matter, his mother had been easy going, fun and socialized with friends and neighbors. *Id.* at 419. Pierce stated that he has a brother and a sister and that his mother had always been involved in their lives, attending all of the boys’ football games. *Id.* at 420-421. After Complainant filed her complaint, Pierce stated he noticed a gradual change in his mother as she became more depressed and less sociable to the point of being anti-social. She quit socializing with friends and neighbors and pretty much went to bed following dinner rather than spending time with the children as she formerly had. *Id.* at 421-422. Pierce also testified that Complainant became more volatile and argumentative which he attributed to her work situation.

Id. at 422-423. He stated that Complainant did not show as much interest in the children's activities, particularly his younger brother's football games. *Id.* at 423-424. Pierce stated that his mother appeared tired and depressed. *Id.* at 424. Pierce noted that Complainant seemed at her worst point about the time that she left her job. *Id.* at 426.

Pierce testified that Complainant was worried about finances and that after she left the company, she sold their mountain property and camper to meet expenses. Complainant also began to sell possessions and items she purchased at Goodwill on E-Bay and at pawn shops. Pierce stated Complainant expressed concern about paying for his college education. *Id.* at 427-428. Pierce stated that he and his siblings were left without much conversation with their mother as she went to bed early or was negative if they tried to talk to her. *Id.* at 429-430.

Testimony of Janice Moncallo

Moncallo has been Human Resources vice president for the LMC business unit in Colorado Springs, Colorado for six years. TR at 133-134. Her responsibilities include compensation and benefits, equal employment opportunity compliance, employee and labor relations, and she often supported the LMC ethics officer in ethics investigations. *Id.* at 134. Moncallo testified that some ethics violations are reported directly to her, although she did not know of any such SOX complaints. *Id.* at 135. Moncallo testified that LMC has a policy of protecting employees who make ethics complaints, which is primarily the role of the ethics officer, who may ask Moncallo to take some specific action to protect an employee from retaliation. *Id.* at 136-137.

Complainant had three or four discussions with Moncallo in May of 2006 regarding concerns Complainant had about Wendy Owen. These concerns included Owen purchasing a laptop computer for a soldier with whom Owen was having a personal relationship and Owen sending inappropriate items overseas. *Id.* at 137-138. Moncallo stated that generally employee travel expenses and purchases of equipment such as laptop computers is billed to the government, as the government is Lockheed's primary customer. *Id.* at 135-136. Moncallo did not know whether pen pal expenses were billed by the company back to the government. *Id.* at 204-205. Moncallo testified that Complainant did not use the words "fraud" or "illegal," but Complainant was concerned Owen's actions could be an embarrassment for the company and may be a misuse of company funds. *Id.* at 138-139. Complainant was in tears about this situation, which was the first time Moncallo had seen her in tears regarding a work situation. *Id.* at 139. Moncallo recalled that Complainant feared retaliation from Owen, who was one of her two bosses, along with Ken Asbury. *Id.* at 139-140. In response to one of Moncallo's questions at the time, Complainant told Moncallo that this was the type of story that would typically be picked up by the television program, *60 Minutes*. *Id.* at 140. Moncallo stated that she felt Complainant's concerns were sincere and encouraged Complainant to report her concerns as an ethics complaint. Moncallo offered to pass the information along to the ethics officer to protect Complainant's identity in view of Complainant's fear of retaliation by Owen. *Id.* at 141-142. Moncallo sent an e-mail to the ethics officer, Jean Pleasant on May 25, 2006, setting forth Complainant's concerns about Owen's use of company funds for expenses which may have then been billed to the government, including: purchasing a laptop for a soldier with whom Owen was having a personal relationship, renting limousines for soldiers for non-business purposes, renting

hotels to spend time with soldier pen pals on non-business matters, purchasing give-away items so one of her pen pals could win an award, and for traveling to pursue her personal relationships. *Id.* at 142-143; HX 4. Moncallo did not show her e-mail to Complainant before sending it to Pleasant, but she did indicate in the e-mail that Complainant was concerned about retaliation. *Id.* at 144-145; HX 4. Moncallo testified that she sent the ethics complaint to Pleasant by e-mail dated May 25, 2006, which followed several discussions with Complainant over the preceding several weeks including one such discussion on the day of the e-mail. Moncallo believes that the e-mail contains the entirety in substance of Complainant's concerns. *Id.* at 176-177. Moncallo made the report confidentially and anonymously and always treated it in that manner. *Id.* at 177. She noted in the e-mail that she did not have any details as she did not think Complainant had any first-hand information but rather had obtained her information from another person whom Complainant did not initially identify to Moncallo. *Id.* at 178-180. Moncallo testified that Complainant was concerned about company policy and potential embarrassment but never mentioned to Moncallo anything pertaining to violating any laws, including SOX and SEC regulations nor did she mention any impact on shareholders or investors. *Id.* at 180-181. Moncallo recognized that some of the actions of Owen of which Complainant complained involved misuse of company funds and could be considered as fraud and illegal. *Id.* at 212-213. Moncallo agreed that the ethics complaint involved not only "embarrassment" but also the potential to draw unfavorable publicity and could potentially affect the company's relationship with the government. *Id.* at 213-214. Moncallo received an e-mail later the same evening that the ethics complaint was e-mailed to Pleasant from Complainant expressing doubts about going forward with the ethics complaint but Moncallo reassured Complainant to follow her and the company's values and policies. *Id.* at 182-183. Moncallo revealed Complainant's identity to Pleasant several months later on August 21, 2006, when she thought the investigation process was over although she did not receive a copy of the investigative report. Pleasant, as vice president of ethics and business conduct, was a peer of Owen at the time of her ethics investigation. *Id.* at 215-216.

Moncallo stated that she did not reveal Complainant's identity to anyone else from May through August 21, 2006. *Id.* at 185. Moncallo received an e-mail from Complainant on September 1, 2006, in which Complainant stated she felt positive about the ethics matter and that she did not believe that Owen knew her identity as the ethics complainant. *Id.* at 186; HX 53. Moncallo testified that she did not think Complainant related her uncertain work status and lack of office space to retaliation until near the time of her resignation. *Id.* at 188. Moncallo advised Complainant not to tell anyone that she had made the ethics report. TR at 145. Moncallo noted in a letter a number of people to interview, including Complainant, even though she did not think Complainant had first-hand knowledge. *Id.* at 146. At some point later on, Moncallo stated that she had a discussion with Pleasant in which it was apparent that Pleasant knew Complainant had made the ethics complaint. *Id.* Moncallo was never advised the results of the investigation but she was aware that Owen had not been fired. *Id.* She testified that the ethics policy requires all employees to report potential ethics violations that may come to their attention. Thus, she agreed that both she and Asbury would have been required to report Complainant's ethics concerns once they learned of such concerns. *Id.* at 214-215. Moncallo agreed that Owen suffered an apparent demotion to Deputy Communication officer when Gan took over the vice president role in the reorganization. *Id.* at 216-217.

Moncallo testified that Complainant told her later that Owen had been calling Complainant to find out who filed the ethics complaint. She stated that she thought Owen's action was improper because the ethics investigator should have advised Owen not to try and identify the complainant. However, Moncallo did not recall whether she reported to anyone that Owen was attempting to identify the complainant. *Id.* at 147-148. Following a reorganization in January of 2007, Judy Gan replaced Owen as Complainant's direct supervisor. *Id.* at 148. Moncallo stated that although new supervisors would normally consult with the old supervisor about employee performance, she would be surprised if Gan had consulted Owen about Complainant's performance and, particularly, if Owen knew of Complainant's identity as the person who had made the ethics report about Owen. *Id.* at 148-149. Moncallo testified that she never told Gan about the Owen ethics complaint, nor did she advise Gan not to talk to Owen about Complainant's performance. *Id.* at 149-150.

Moncallo stated that after Gan decided to bring in David Jewell as a level-six communicator over Complainant, who was a level-five communicator, Complainant told Moncallo on numerous occasions that she feared losing her job and that although she was told she would have a job, no one would tell her what the job was. *Id.* at 150. Moncallo testified that she called Gan about Complainant's concerns but really got no specific assurances from Gan either. Moncallo told Complainant she felt Complainant was being treated unfairly and suggested that Complainant call the Employee Assistance Program due to her emotional distress over the uncertainty in her job situation. *Id.* at 150-152. Moncallo spoke with Complainant about applying for the new level six position which Complainant felt to be her position. However, Moncallo stated that after applying for the position, Complainant related that Gan had called her and had been very aggressive in advising Complainant to withdraw her application, so much so that Complainant eventually did. *Id.* at 152-153. Moncallo stated that Complainant sent her a draft of a letter to Gan in which Complainant rebutted some of the things that Gan had told Complainant during their conversation. Moncallo suggested to Complainant that she not send that letter, at least not in that form. *Id.* at 153-154. Moncallo knew of no reason why Complainant would not have been entitled to apply for that position although she was aware that Complainant felt that she might have been losing her position due to her ethics complaint. *Id.* at 154-155. Moncallo stated that when Jewell came in as the level-six communicator, he used the title "Director of Communications," which had previously been Complainant's title. *Id.* at 155.

Moncallo testified that about sixty percent of Mission Services' work was classified. She stated that, while Complainant had a security clearance, Jewell did not at the time and it was possible that Jewell's security clearance might take longer since Jewell was married to a foreign national. *Id.* at 156-157. During Jewell's first few months after he arrived in the fall of 2007, Moncallo recognized that there might be a lay-off of either Complainant or Dorothy Lorence. *Id.* at 157-158. Moncallo stated that she went to Jewell to discuss the possibility of Lorence retiring in order to resolve the potential lay off problem as she remained concerned about Complainant's job security despite Gan's assurances. *Id.* at 158-159. Moncallo testified that Complainant was concerned about Gan rating her performance. Moncallo stated that the rating by Gan was that Complainant was a "successful performer" although Moncallo did not recall that Complainant was not given a raise or a bonus. *Id.* at 160. Although Moncallo first advised Complainant that there would be a job for her, she later advised that Complainant should wait before considering

resigning as a lay-off might gain her benefits and make it easier to obtain unemployment benefits. *Id.* at 160-161.

When Jewell began work in the fall of 2007, he took Complainant's office, which was just down the hall from Asbury's office, and Complainant was left without an office. *Id.* at 161. Complainant was permitted to work at home and was to use a visitor's office when she came into the office. *Id.* at 162. The visitor's office was used to store office supplies and canned food that was being collected for a food drive. *Id.* at 163. Moncallo stated that Complainant complained to her a few times about not having an office and that Moncallo talked to both Jewell and Asbury about her office complaints. Complainant did not receive a new office up until the time she left the company, although Complainant did work from home and went out on medical leave in January of 2008 claiming stress from loss of her office, title, management status and from the uncertainty of her role in the company. *Id.* at 164-168. Moncallo testified that she herself was frustrated by the fact that Complainant had no office and agreed it was a stressful situation for Complainant. *Id.* at 167-168. Moncallo did not respond to an e-mail from Complainant on January 18, 2008, wherein Complainant asked about her status and indicated it seemed inevitable that Complainant would be the "chosen candidate" for the lay-off. *Id.* at 168-169. Moncallo stated that she replied to a follow up e-mail from Complainant on January 23, 2008, telling Complainant that "we don't usually talk to employees that are out," but indicated that she would connect Complainant with Jewell about taking some vacation time. *Id.* at 169; HX 30. Moncallo stated that she did not talk to Jewell about that e-mail and next got a phone call and letter from Complainant indicating that Complainant felt she was constructively discharged. TR at 170.

Moncallo stated that Complainant worked for LMC in Colorado Springs from 2003 through 2008, for LMC Technical Operations which became LMC Mission Services. This business unit again changed its name in January of 2009 to IS&GS, Civil. *Id.* at 171-172. Tina Colditz had an office in the same building as Complainant even though she worked for a different LMC business entity, as she was "loaned out" office space. *Id.* at 175. Colditz did not report to anyone on site but rather reported directly to Owen while Complainant reported jointly to Owen and Asbury, with Asbury doing the day-to-day tasking. *Id.* at 176.

Moncallo stated that reorganizations are common at LMC and that a further reorganization took place since Complainant left in early 2008, such that Jewell has moved on and there are no level-five or -six communicator positions in Colorado Springs; instead, new people have moved into the communicator positions as part of the reorganization. *Id.* at 189-190.³ Although Jewell took the title of Director of Communications, which Complainant had formerly used, Moncallo stated that he did not replace her, but rather was hired in at a higher level of six to Complainant's level-five. *Id.* at 190-191. Moncallo did not believe that Owen was involved in the reorganization since Gan had taken over as vice president of the reorganized business unit. *Id.* at 192. The reorganization memos were issued by company executives above Owen's level. *Id.*; HX 57. Moncallo stated that she spoke with Gan about Complainant's role both before and after Jewell arrived and was told Complainant would have a role, albeit an undefined one. TR at 193-194. Complainant found this lack of defined role frustrating when Moncallo shared these conversations with her. *Id.* Moncallo recalled speaking with Gan about a possible role for Complainant in community relations and recalled that Colditz was also

³ The leadership levels run from four through eight, the highest of which is a vice president position. TR at 190.

discussed for such a role. *Id.* at 218-219. Moncallo also discussed Complainant's role with Asbury, the president of Mission Services, who indicated he wanted Complainant to continue to have a role in Mission Services. *Id.* at 194-195. Moncallo testified that Jewell could recommend an employee under his authority, such as Complainant, to be laid-off but that Gan would make the final decision and that Gan could ignore Asbury's wishes in a lay-off. However, Moncallo stated that Asbury could hire Complainant for another position within Mission Services if she were laid off the communications job, if he wished, as president of that business unit. *Id.* at 196-200.

Moncallo testified that Complainant indicated several times that she was going to leave the organization and then changed her mind. Moncallo stated that she encouraged Complainant to stay due to the assurances from Gan and Asbury as to an undefined role in the organization. *Id.* at 201-202. In November of 2007, Moncallo and legal counsel, Larry Sharrar, met with Complainant about a severance agreement since Complainant had sent a letter of resignation. She stated that although they had prepared a termination agreement, they both talked Complainant into waiting to see if she would continue to have a role in the company. *Id.* at 202-203. Complainant applied for her security clearance after coming to Colorado Springs just as Jewell did. *Id.* at 206. Moncallo stated that Complainant worked from home for a number of reasons as did other employees, particularly in view of the inclement weather at times in Colorado Springs. *Id.* at 207. In an e-mail dated December 17, 2007, Complainant asked Moncallo whether a departing employee's office would be available for her or whether things should be left as is until Gan decided who would be laid-off in January or February. *Id.* at 207-208; HX 25.

Moncallo testified that Complainant confided in her with respect to family difficulties during 2007 and early 2008, involving one son's expulsion from school for a time and mental health problems with a daughter requiring counseling and time away from home. TR at 209. Moncallo felt Complainant had a great deal of stress with the uncertainty at work and her family situation. *Id.* at 209-210. Moncallo recalled that Complainant's son was actually expelled in 2005, but believed there were some school issues ongoing thereafter. *Id.* at 219. Moncallo believed that Complainant's mental health issues with her daughter were stable when she left the company. *Id.* at 219-220.

Moncallo testified she does not believe that Complainant was retaliated against for her May 2006 ethics complaint. *Id.* at 211. Moncallo stated that the company has a written ethics policy which is given to all new employees. *Id.* at 214, 221; HX 39. Moncallo testified that ethics training is given to all employees *Id.* at 220. She recalled vaguely a scenario dealing with an ethics or conflict of interest issue at Boeing which had a huge impact on Boeing's stock. *Id.* at 220-221.

Deposition Testimony of Tina Colditz

Colditz had been employed by LMC for 30 years until she received notice on December 22, 2008, that she was to be laid off on January 2, 2009. Colditz Depo. at 7-8. Colditz began as a file clerk and then became a stenographer, department secretary, general secretary, administrative assistant, trade show coordinator and then finally trade show coordinator staff, which was the title she held for her last six or seven years before the lay-off. *Id.* at 8-9. Colditz

testified that she was told she was laid off as a reduction in force but she believes she was the only one laid off. She has not as yet signed a severance agreement although she has been asked to sign one. *Id.* at 9. Colditz stated she has written to Jean Pleasant and Neil Murray indicating that she believes she has been retaliated against for her role in the 2006 ethics investigation of Wendy Owen. *Id.* at 10.

Colditz testified that the Army Pen Pal Project came about when an LMC employee who was an Army Reserve General was deployed in Iraq. Owen tasked Colditz with coming up with a program to have LMC employees become pen pals with troops assigned to duty in Iraq. Colditz came up with the terms and conditions as Federal Acquisition Regulations and security of troop assignments had to be addressed. *Id.* at 28-29. The Pen Pal Program began in August of 2004, with Colditz as project manager. *Id.* at 30. Owen, for whom Colditz had worked for ten years, was the executive over Colditz on the project. *Id.* Colditz stated that she began to have concerns about Owen and the Pen Pal Program. Owen told Colditz of having inappropriate affairs with different soldiers. *Id.* at 31. Colditz was concerned that Owen had purchased a laptop computer for one soldier and had used limousines and stayed at an expensive resort with a soldier which resulted in embarrassing calls that Colditz received. *Id.* at 33-34. Colditz stated that she did not have access to Owen's expense reports but was concerned at the least of a conflict of interest on these purchases and possibly even of spending company funds in connection with her affairs. *Id.* at 35, 43-45. Colditz stated that Owen told her she had sent a box of sex toys to a soldier in Iraq who had opened the box publicly, unaware of its contents, which led to some embarrassment both for the soldier and Owen. *Id.* at 35-36, 45-46. Colditz stated that Owen asked for ten male officer pen pals and then Owen sent them essentially form letters of a very sexual nature even though Owen had never met these men before. *Id.* at 36. Colditz stated that Owen offered in these letters to get to know the soldiers on an intimate level through the internet via webcam. *Id.* at 37. Colditz personally observed at least three different soldiers meeting Owen for a liaison upon their return from Iraq. *Id.* at 37-40. Colditz stated that Owen began falling behind on her work and several communicators complained to Colditz about Owen falling behind on paying bills. *Id.* at 41. Colditz knew that Owen was making frequent business trips to Fort Bragg, but Owen had very little to do with any real business on these trips. *Id.* at 41-42. Colditz testified that she told Owen many times that her behavior was unacceptable, but Owen shrugged it off as her own personal business. *Id.* at 45-48. Colditz told Owen she should tell the General about Owen's affairs, but Owen did not change her behavior. In fact, Owen asked Colditz to complain about one soldier to the General because that soldier responded to Owen's e-mail directing Owen not to contact him further because he was happily married. Colditz refused and was concerned that the soldier would request an investigation into Owen's behavior that would jeopardize the entire pen pal program. *Id.* at 49-51; HX 1.

Colditz testified that she told Asbury about Owen sending the laptop computer to a soldier and that Owen was involved in affairs with different people in February of 2005. She stated that Asbury said he had talked with Neil Murray in legal and that Asbury was going to talk with Owen. Colditz Depo. at 53-55. Colditz stated that a day or two later Owen told her that Asbury had spoken to her and Colditz admitted that she had spoken with Asbury. *Id.* at 56. While Owen indicated that she would get the laptop back and change her behavior, Colditz stated that she did not. Colditz was asked some time later by Asbury whether Owen was "still up to her old tricks," to which Colditz replied in the affirmative. *Id.* at 56-57.

Colditz testified that she confided in Complainant the details of Owen's behavior when Complainant complained about not being able to get the company bills paid. *Id.* at 58. Colditz stated that she and Complainant discussed whether to report Owen's behavior but Colditz indicated that she had already told Asbury and thought that was sufficient. *Id.* at 59-60. Asbury never suggested taking these concerns to ethics or human resources. *Id.* Colditz testified that Owen's continued behavior took a toll on her because she is very ethical. *Id.* at 62. Colditz was not aware that Complainant had made the ethics complaint against Owen until September or October of 2006, when Complainant called her and indicated she "might" have given the information to Moncallo. Colditz felt that Complainant was trying to clear her conscience since she was aware that the investigation had been "brutal" on Colditz. *Id.* at 63.

Colditz stated that she felt Owen violated several rules as set out for the project with the Army as well as perhaps Federal Acquisition Regulations by sending the laptop and other items to soldiers. She noted that normally items valued at up to \$20 and aggregating \$50 per year is the limit for government employees. Although the Pen Pal Program was meant to be a personal matter among the employees, Colditz felt that Owen's position as vice president over the program made her gifts a conflict of interest. *Id.* at 130-132. Colditz stated that she felt it was a grey area of ethics but did not think of it being illegal and she had not heard of the Sarbanes-Oxley Act at the time, although she was generally aware of whistleblower law. *Id.* at 133-136. Colditz has never seen any documentation to prove Owen misused any company funds nor did Owen ever admit any misuse of funds. *Id.* at 136-137. Colditz did not prepare a written statement regarding Owen's conduct until July of 2006, in connection with the investigation, so Complainant had no such written information at the time she made her complaint against Owen in May of 2006. *Id.* at 138-139; HX 8. In fact, Colditz never furnished Complainant a copy of any written statement regarding Owen's conduct. Colditz Depo. at 141-142. However, Colditz stated that she told Complainant a lot of Owen's behavior during the time that it happened over the course of a number of conversations. *Id.* at 157-158. In a July 20, 2006, e-mail from Complainant to Colditz, Complainant stated that she did not know the facts regarding Owen's behavior but Colditz did. *Id.* at 145-147; HX 50.

Colditz testified that Pleasant asked her about the laptop in July of 2006, and Colditz proceeded to tell Pleasant everything she knew about Owen's behavior over the course of several phone calls with Pleasant. Colditz Depo. at 64-65. Colditz also prepared a written statement. *Id.* at 65; HX 8. She stated that she was afraid she would be in trouble for not reporting Owen's actions sooner but she felt that doing so might have shut down the Pen Pal Project which she felt was very worthwhile. Colditz Depo. at 66. After the investigation, Owen told Colditz that she was not going to have a job. *Id.* Colditz complained to Pleasant that she feared retaliation by Owen since she remained under Owen for six months following the investigation; Pleasant told her she could not do anything about it, however. *Id.* at 67-68. Colditz testified that Pleasant told her the investigation found Owen had exercised "poor judgment" which Colditz found disturbing since she had gone to such lengths in the investigation for such apparent minor results. *Id.* at 69-70. Colditz believed that the matter was brushed aside by a division president who was retiring and did not want anything on his record. *Id.* at 70. Colditz testified that she was asked during the investigation to call the general at Fort Bragg to see if he would talk with someone at LMC about the project. She assumed the purpose was to find out if the General was familiar with Owen since

Owen claimed she had met with him on her business trips. Colditz stated that she was uncomfortable with calling the General on this pretext and because she feared the General might find out what was going on and ask for the names of his officers who had relationship with Owen, many of whom were married. Colditz called the general but he refused to cooperate with the customer satisfaction survey. *Id.* at 70-73. Colditz stated that she felt like she was grilled in the investigation and felt a lack of vindication in the result. *Id.* at 74-75.

Colditz found her relationship with Owen became very strained. *Id.* at 76. Colditz stated that shortly after she was interviewed by Pleasant she had a conversation with Owen who told her that she would “lie through her teeth” to protect Colditz if it was Colditz being investigated. *Id.* at 77-78. Colditz confirmed to Owen that she had not filed the ethics complaint. *Id.* at 79. Following that conversation, Colditz stated that her relationship with Owen deteriorated with Owen becoming more unresponsive and sarcastic and finally telling Colditz in August of 2006 that Colditz would be out of a job following the completion of the Challenger project she was working on. *Id.* at 80, 94-96. Sometime between April and June of 2006, the Pen Pal Project was canceled due to a complainant about possible security concerns arising from dissemination of location information relating to troops. *Id.* at 81-84.

Colditz testified that during the Owen investigation, she was asked whether she herself had had a relationship with a soldier. Colditz responded that she had one relationship with one soldier that she cleared in advance with the general, and neither she nor he were married. Colditz also pointed out that she had never traveled on business to Fort Bragg at a time when he was there so that all of her trips were indeed for business purposes. *Id.* at 85-88.

Colditz stated that after the end of the Pen Pal Project, she continued coordinating a year long series of 51 visits to cities to commemorate the 20 year anniversary of the Challenger accident and also was planning a gala for January 2007. Colditz testified that she had not received any new assignments to perform since shortly after the Owen investigation began. She indicated that even after the corporate reorganization, she had remained under the supervision of Owen until she found out by accident that she had been transferred to another supervisor, Tracy Carter. Colditz stated that upon her first conversation with Carter, Carter significantly reduced Colditz’s authority and told her to work at the office rather than at home as Colditz had been doing for ten years. *Id.* at 11-15. Carter told Colditz that she would be doing community service work. Colditz replied that since she had been doing special events on an international scale for ten years, the community relations work would not be much of a challenge. Carter indicated she would get back to Colditz with an assignment but did not do so until about a month later. *Id.* at 15-16. Colditz stated that she next received a performance report from Carter rating her as a “successful contributor;” lower than all her previous ratings. *Id.* at 16-17. Colditz noted that this low rating came only weeks after Colditz received the “Comet Award,” one of the highest honors for communicators within the company. *Id.* at 17. Colditz testified that she believed Carter had some preconceived ideas about Colditz and that Carter’s intention was to “put me in line.” *Id.* at 18. Colditz stated that she mentioned her interest in an international opportunity with the company in July of 2007 and, through Ken Asbury, was put in contact about a position in Darfur, Africa. Colditz testified that she was initially told she could go to Darfur on an intracompany transfer and had rented-out her house in preparation to go when Carter refused to facilitate the move in January of 2008. *Id.* at 19-21. Colditz stated that she then thought she had worked out

the move to Darfur when her potential new managers told her she was “unappreciative, not a team player, not a good fit” and would not be assigned to Darfur. *Id.* at 22-23. Colditz stated that she was then put in a temporary low-level administrative job in the Washington, D.C., area and she felt that the company was trying to get her to quit. *Id.* at 23-24. Colditz stated that Carter was the person who gave her no assignments, delayed her expense reimbursements and did not give her a parking pass. She stated that she had never had such problems in her prior 30 years with the company. Colditz filed an ethics complaint with Jean Pleasant in August of 2008, but was basically told in September that there was no wrongdoing in these job assignments and that Colditz should have gotten the job assignment in writing. *Id.* at 25. Colditz stated that she was told two weeks after the investigation that she would be laid-off. However, she was kept on doing very little for her salary while she waited for details of the lay-off and severance package. She was then told she could move back from D.C. to Colorado Springs where she thereafter was given notice of her lay-off. *Id.* at 25-26. Colditz stated she did very little work from October of 2007 through the end of 2008. *Id.* at 27. Colditz did not mention in her August, 2008, ethics complaint that she thought she had been retaliated against for the 2006 Owen investigation as she thought Carter was her problem in the events of 2008. *Id.* at 28.

Colditz noted that she had never been questioned in her prior work but found Owen questioning every expense and decision following the ethics investigation and even let Colditz’s secretary go. *Id.* at 88-92. In 2007, Colditz went to Virginia for a meeting of all communicators under the reorganization but had a severe asthma attack requiring hospitalization. She could not fly back home for five weeks and then went on medical leave for three months. She stated that Gan was to take care of putting her on leave but did not, which resulted in Colditz not being paid for several weeks. *Id.* at 96-98. In July of 2007, Colditz returned to work and had an annual career discussion with Owen, to whom she was still reporting. Colditz stated that Owen told her she would help Colditz get another position internationally but Colditz doubted that Owen helped her at all. *Id.* at 98-99. Colditz testified that she found out in October of 2007 that she had been transferred from Owen to Carter as supervisor as she was on the company website updating her emergency contact information. *Id.* at 99-100. Colditz did not believe that Carter had the experience to be her supervisor but was told this was part of a reorganization. *Id.* at 101-103.

Colditz testified that she believed Owen had tried to make Colditz look bad in retaliation for the ethics investigation and she remained nervous and feeling threatened. *Id.* at 106-108, 110-111. Colditz especially feared that Owen would retaliate against her in the reorganization by telling her new supervisor negative things about Colditz such as her not being a team player. *Id.* at 111-112. Her fears were confirmed in the low performance rating that Colditz received from Carter after Carter had been her supervisor for only four weeks. Carter told Colditz she derived much of her information regarding Colditz from Owen. *Id.* at 112-113.

Colditz testified that she noticed that Complainant was very flustered and erratic in late 2007 and early 2008, which she attributed in part to some problems Complainant was having at home. Colditz stated that Complainant had confided in her about arguments and marital problems with her husband and a daughter having emotional problems but she could not recall specifically when these happened. *Id.* at 148. She also thought Complainant was “trying to build the case that it was retaliation against her.” *Id.* at 114-115. Colditz stated that at the time everyone working with Owen was “suffering in some way with the reorganization,” and it was

“hard to tell what reasons were – were what at the time.” *Id.* at 115. However, Complainant clearly expressed her feeling that Owen was retaliating against her at the time. *Id.* at 115-116. Colditz observed the visitor’s office to which Complainant was assigned and stated that she thought it was humiliating and embarrassing and unfair treatment of Complainant. *Id.* at 116-117. Colditz recalled discussing Complainant’s threatening to quit on a couple of occasions with Asbury and indicated that Asbury said that Complainant was sweet but sometimes “she was clueless, or gotten her own way, or something to that effect.” *Id.* at 118. Colditz stated that Complainant had threatened to quit at least two times between July and November of 2007, as Complainant told Colditz she had issues with Gan about her role in the company following the reorganization. *Id.* at 155.

Colditz stated that she had turned down a proposal to have Complainant assist her on another project prior to 2006 because while she liked Complainant, she did not feel her quality of work was as high as Colditz’s standard would have been. *Id.* at 119. Colditz explained that she had found Complainant had not been very thorough with respect to details in prior projects on which they worked together. *Id.* at 153-154. She stated that she would not be surprised if Complainant’s performance reviews declined slightly over the last few years of her employment. *Id.* at 154.

Colditz stated that she knew Complainant did not attend the conference where the “Comet Award” on the Challenger project was awarded but she did not know why she was not there. Colditz stated that it was unusual for a recipient to miss such an awards ceremony. *Id.* at 120-121. Colditz testified that she had never known of any other ethics complaints at Lockheed. However, she did state that she had never known anyone to be treated as she was following the ethics investigation. *Id.* at 124-125. Colditz testified that upon her termination, she wrote to Pleasant and Murray expressing her belief that she had been terminated due to the ethics complaint against Owen as compounded by Complainant’s proceeding against LMC. *Id.* at 125-126.

Deposition Testimony of Kenneth Asbury

Asbury has been president of LMC Mission Services (“LMMS”) since January 1, 2003. Asbury Depo. at 3. LMC Technical Operations (“LMTO”) merged with LMC Space Operations (“LMSO”) to become LMMS in late 2006 to early 2007. *Id.* at 7. Another division called Business Process Solutions was also combined with LMMS in the summer of 2008. *Id.* The primary customers of LMTO were U.S Intelligence agencies and U.S. Department of Defense while LMSO worked for NASA. *Id.* at 8. Asbury testified that approximately fifty to sixty percent of the work was classified as “secret” or higher. *Id.* at 9. Asbury estimated that he was not made aware of the merger with Business Process Solutions until about four days prior to the merger. *Id.* at 10. Asbury stated that LMMS has a Code of Conduct for which its ethics organization is responsible for implementing through education of employees and furnishing an outlet for dispute resolution. *Id.* at 14-15. He testified that employees may address ethics complaints through their supervisor, through the ethics chain, through human resources or directly to the company legal counsel. *Id.* at 16. Asbury stated that his first preference would be to bring an issue to the direct supervisor. *Id.* at 17.

Asbury recalled that he received a complaint from an employee about a supervisor's behavior in 2006 and that he recommended that the employee lodge the complaint with the ethics department so that an investigation could be pursued. This complaint was unrelated to Complainant's ethics concerns. *Id.* at 19. The next employee Asbury could recall bringing an ethics concern to his attention was Tina Colditz who was complaining of the behavior of her boss, Wendy Owen. Asbury also advised Colditz to take her complaint to the ethics department in 2005 or 2006. *Id.* at 20. Asbury testified that Colditz reported that her supervisor, Owen, had acted inappropriately in dealing with the U.S. Army in connection with the Pen Pal Program, which Lockheed had set up to encourage Lockheed employees to be pen pals with Army troops deployed to Iraq. Colditz was concerned that Owen had had sexual relationships with soldiers and that Owen had given one soldier a laptop computer. Asbury stated that Lockheed has specific rules prohibiting gifts to government employees. *Id.* at 21-22. The only use of company funds that Asbury recalled was a mention by Colditz that Owen had rented a limousine to transport soldiers. *Id.* at 23. Colditz expressed concern about the negative image that Owen's conduct might have as well as the misuse of company paid trips for such liaisons and having her staff cover for her while on such liaisons. *Id.* at 24-25. Asbury testified that he had only a single conversation regarding these issues with Colditz as the ethics investigation was then conducted at a higher headquarters through Jane Pleasant. *Id.* Asbury encouraged Colditz to contact the ethics department and was aware that she had done so when he was consulted by the investigator as to his conversation with Colditz. *Id.* at 26.

Asbury estimated that LMC conducts about eighty-five percent of its business with the U.S. government. *Id.* at 33. Asbury stated that travel such as on the Pen Pal Project may potentially be charged to the government but he was not aware of whether or not these particular expenses were charged to the government. *Id.* at 34. Asbury testified that he had a telephone conversation with Owen following his conversation with Colditz. He stated that Owen told him that she had bought a laptop computer for a soldier but that it was with her own money. Owen denied that she had any relationships with soldiers. Asbury advised Owen that she needed to get the laptop back and that he did not believe that Owen was telling him the truth about her conduct. Asbury stated that Owen said she would obtain the laptop and confirm it back to him but she did not. Asbury testified that he did not disclose to Owen the source of his information. *Id.* at 34-36. Asbury stated that on several occasions he reassured Colditz that she would not face retaliation from Owen noting that Asbury as a president could intervene over Owen, who was a vice president. *Id.* at 37-39. Asbury could not recall receiving information about Owen from Complainant, only from Colditz. *Id.* at 43. Asbury was told by Complainant that she also had filed an ethics complaint against Owen through the ethics person, Jan Moncallo, which he believed occurred after he had talked with Colditz. *Id.* at 93-94. Asbury testified that, once he learned that Owen was trying to determine who had lodged the ethics complaint against her, he called the investigating officer, Jane Pleasant, to tell her since he feared some potential of retaliation by Owen against Complainant and Colditz. *Id.* at 95-97. Asbury believed Complainant had done the right thing in making the ethics complaint about Owen, although he questioned whether Complainant had any first-hand knowledge to support the complaint. *Id.* at 98-99. Following the investigation, Asbury was told by Owen that Complainant had been suspended as a result of the investigation. *Id.* at 46. Asbury testified that following his conversation with Owen, his relationship with Owen changed to become strictly business. *Id.* at 48. He also stated

that Colditz noted a change in her relationship with Owen to becoming much less warm and more clinical and professional. *Id.* at 49.

Although Asbury had met Complainant in 1997 or 1998, he had never worked with her until Owen recommended Complainant to him to be the communications person at LMTO. Asbury stated that he worked well with Complainant for the next four or five years. *Id.* at 70-71. Asbury testified that he gave Complainant generally good performance reviews. However, while he felt Complainant was excellent at community relations work, he did feel that she was not as good with employee communications and had not acquired sufficient personal knowledge about what the company actually did with the intelligence community. He indicated that he occasionally pointed these deficiencies out to Complainant both in discussions as well as in performance critiques. *Id.* at 71-73. Asbury stated that he told Complainant that perhaps the business of the company, as it had grown through the mergers, had outgrown her skill-set, an idea with which Complainant did not agree. *Id.* at 75-76. Asbury testified that he grew increasingly concerned that Complainant was not able to assist in communicating with the workforce. *Id.* at 79-82. Asbury stated that when Judy Gan took over Owen's position as chief communicator, Gan visited once in Colorado. Gan told Asbury that she was not pleased with her meeting with Complainant. Gan also agreed with Asbury that the communications strategy plan that Complainant had prepared at Asbury's request was inadequate. Asbury testified that Gan agreed with him that Complainant was a valuable member of the team, although no longer the leader given the growth of the company. Asbury and Gan thought that bringing in a supervisor over Complainant might help her. *Id.* at 82-84, 87. Asbury indicated that he did not think that Owen's name ever entered into his conversations with Gan about Complainant's performance. *Id.* at 85. Asbury recalled that Complainant felt Gan did not like her from the beginning and could not understand why, but he did not know when Complainant first expressed this to him. *Id.* at 88-90. Asbury testified that although Gan was concerned about having two senior communicators at LMMS, he got her commitment to keeping Complainant to work on community relations while hiring a more senior communicator to mentor Complainant on the more strategic skills. *Id.* at 89-92.

Asbury testified that after his meeting with Gan, Owen called him to discuss several potential candidates to serve as the new senior communicator. Asbury told Owen that Owen should evaluate the potential candidates and rank them, after which Asbury would interview one or more to assure he agreed with the choice. *Id.* at 101-102. Asbury testified that he was not surprised that Owen called as he assumed that Owen had been tasked by Gan to assist in the placement for the new position. *Id.* at 102-103. Asbury stated that sometime after this call, he was told by Complainant that Owen had called Complainant to tell her that she was being replaced and should look for another job. *Id.* at 103-105; HX 14. Asbury called Gan to tell her of Owen's conversation with Complainant and asked that Owen be removed from the hiring process for this position with LMMS. Asbury explained that he wanted to confirm his deal with Gan that he could keep Complainant and get a new senior communications person. Asbury Depo. at 108-109. Although Asbury told Complainant to apply for the position, he did so simply because he felt that the interview process was always good for one's professional growth. He had no intention of putting Complainant in the senior communicator position as he felt she was not qualified. *Id.* at 105. Asbury stated that he was aware that Gan had discouraged Complainant from applying for the senior position but stated that he disagreed with her. *Id.* at 105-106.

Asbury testified that apparently Complainant felt that the “deal” to keep her job was not secure as Complainant repeatedly threatened to resign over the next few months into the beginning of 2008, although Asbury and Moncallo asked Complainant to “chill out” as they wanted her to stay. *Id.* at 109-110.

Asbury stated that he had little to do with the selection of David Jewell as senior communicator other than to interview him and give his final approval after he was told that Jewell was the best choice. *Id.* at 11-112. He indicated that he told Jewell he could organize the communications department as he wished but that Complainant was to continue in community relations. Asbury testified that he became aware that Gan and Jewell contemplated laying-off Complainant due to budget constraints but he still felt his “deal” with Gan to retain Complainant remained in force. *Id.* at 113-114. He stated that he cannot recall Gan or Jewell ever discussing the need for a layoff but that before anyone in Complainant’s job would be laid-off, he would have been consulted even though her job was not in his budget but rather in the communications budget. *Id.* at 133-134. Asbury stated that he had a backup plan to put Complainant on his staff should she be laid off by the Communications division. He never told Complainant of his backup plan, but he did consistently tell her that she had a job. *Id.* at 114.

Once Jewell took over as senior communicator, Jewell took Complainant’s office which was on the same floor as Asbury’s office. Asbury stated that after Jewell came aboard, he left matters such as Complainant’s officing to Jewell as he was tired of dealing with it. *Id.* at 117-119. Asbury testified that there was a shortage of office space at the time and thus Complainant was not the only person to be subjected to some inconvenience. *Id.* at 121-122. Asbury testified that after Jewell’s arrival, he did not have as much contact with Complainant although he was kept advised of her adjustment through Moncalla as well as e-mails from and occasional conversations with Complainant. He was aware that Complainant was dissatisfied with being moved from an office to a cubicle and with losing her L-code since she was no longer considered a manager. *Id.* at 125-129. Asbury testified that he consistently advised Complainant that she was overreacting to the changes and assured her that he had a “deal” with Gan to keep her in community relations. *Id.* at 131-132. When Complainant sent an e-mail to Asbury indicating that she was being forced out of the company, Asbury stated that he did not try to contact her and advise her that no one was forcing her out. Rather, Asbury testified that he felt he had done all he could do to reassure Complainant and felt there was nothing more to be done. *Id.* at 144-147. Nor did Asbury contact Gan or Jewell to see if his “deal” to keep Complainant had been violated. *Id.* at 147.

Deposition Testimony of Jean Pleasant

Pleasant has worked in the ethics department for eleven years and has been ethics director for Information Systems and Global Services, LMC for five or six of those years. Pleasant Depo. at 8-9, 26. Pleasant stated that she has been employed at LMC for forty-two years, having worked in human resources prior to ethics. *Id.* at 36. She conducts ethics awareness training, consults with employees and leaders relative to the ethics program and conducts ethics investigations. *Id.* at 10-11. Employees are encouraged to report ethics violations to their supervisors, ethics officers, human resources, or to the legal department. *Id.* at 11-12. As ethics director, Pleasant stated that she has occasionally participated in investigations when her boss

has asked her to do so, or when the subject is a direct report to her boss. *Id.* at 28. Pleasant testified that she has not participated in a SOX investigation and knows little about the Act other than it focuses on financial improprieties or shareholder issues. *Id.* at 29-30.

Pleasant testified that there have been occasions where employees have reported misconduct but the investigation revealed that there was no misconduct, which could happen where the employee making the complaint does not have all the facts. *Id.* at 15. The conduct of an ethics investigation depends on the situation but normally the subject would be interviewed and others with direct information about the issue. *Id.* at 17. Lockheed has no written policies or procedures relating to conduct of ethics investigations. *Id.* at 18. When an anonymous ethics complaint is made, then the reporting party cannot be interviewed during the investigation nor can the results be reported to such party at the conclusion of the investigation. *Id.* at 20. Pleasant agreed that the federal government is LMC's largest customer. *Id.* at 25.

Pleasant indicated that ethics complaints may be made in three ways: anonymously, confidentially or openly. *Id.* at 30. She stated that anonymous complaints are permitted to alleviate an employee's fear of retaliation. *Id.* at 30-31. Pleasant testified that, in order to prevent retaliation, the company communicates with its low-level and supervisory employees that they must be able to trust the ethics system and that even a minor slight such as not saying "good morning" could be seen as retaliation against an employee. *Id.* The company has a zero-tolerance policy against retaliation against a reporting party. *Id.* at 32. The company does not attempt to determine the identity of an anonymous reporting party. *Id.* at 33. The company is not concerned immediately with retaliation until the investigation reveals whether there has been an ethical violation. *Id.* at 35. Pleasant testified that she would not normally be concerned with potential retaliation unless the reporting employee brings up such concerns. *Id.* at 37. Pleasant stated that she would have some concern if a subject of an ethics complaint was attempting to determine the identity of the reporting employee as she would want to know the subject's purpose in such inquiries. *Id.* at 38-39. Pleasant would talk to the subject and the reporting employee in such a situation since the company wants to provide a workplace free from harassment and retaliation. *Id.* Pleasant would be particularly concerned about such inquiries by the subject where the subject was the reporting employee's direct supervisor. *Id.* at 40, 42.

Pleasant testified that she was made aware of potential ethical issues involving Wendy Owen in May of 2006 by Jan Moncallo. *Id.* at 42-43. Owen was a colleague of Pleasant's whom she had known for three or four years. Both Pleasant and Owen reported to the same supervisor. *Id.* Moncallo brought the ethics concerns about Owen to Pleasant to investigate although the information was actually from Complainant. *Id.* at 44. Moncallo sent Pleasant an e-mail expressing allegations of improper use of company funds, procurement issues for items Owen had purchased and a relationship with a customer as part of the company's Pen Pal Program with the military. *Id.* at 45; HX 4. The e-mail alleged Owen had affairs with multiple pen pals and that Owen had sent pornographic materials to pen pals in Iraq. Pleasant Depo. at 46-48; HX 4. The e-mail set out a number of other allegations including: Owen using company funds to purchase a laptop computer for one of her pen pals, using company funds to rent limousines to transport pen pals, using company funds for lodging liaisons with pen pals, and using company funds to purchase thousands of giveaway items so that Owen's pen pal could win an award. Pleasant Depo. at 53-54; HX 4. Moncallo's e-mail expressed the concern of the actual reporting parties

that Owen might retaliate against them. Pleasant testified that she told Moncallo to reassure the actual reporting parties, Complainant and Colditz, that even Pleasant would not know their identity so that she could not inadvertently advise Owen of their identities. Pleasant Depo. at 49-50. Pleasant stated that she believes she told Owen that she did not know the names of the reporting parties and that Owen should not worry about their identity due to the company's policy of non-retaliation. *Id.* at 51. Pleasant stated that she took the allegations in the e-mail very seriously, particularly since Owen was a vice president of the corporation; she therefore immediately advised her own boss, human resources, and legal. *Id.* at 55. Pleasant then asked Owen's assistant for documentation including Owen's expense reports, time card records and procurement documents. She stated that she did not see any reason to seek documents from Owen. *Id.* at 83-84. Pleasant also sought to interview the persons marked with an asterisk in the Moncallo e-mail as these individuals were thought to have direct information regarding the allegations. *Id.* at 57-58, 83; HX 4.

Pleasant authored the investigative report on Owen. Pleasant Depo. at 59; HX 9. Pleasant testified that she reviewed the expense reports and procurement documents and found no evidence that Owen had used company funds to purchase the laptop. Pleasant stated that Owen told her that she had bought the laptop with her own funds. Pleasant did not review any backup receipts for the documents. Pleasant Depo. at 59-61. Pleasant testified that she also found no documents which she found to confirm any misuse of company funds or time. *Id.* at 62-63. During interviews, Owen denied misuse of company funds while Owen's assistant, Tina Colditz, stated that Owen had made trips at company expense where she had at least one affair with a soldier she met through the Pen Pal Program. However, Pleasant testified that Colditz had no documentation to prove these allegations and the time records and expense reports that Pleasant reviewed contained no anomalies. *Id.* at 66-71. Pleasant stated that she did not interview any of the three soldiers alleged to be having affairs with Owen, including the one soldier that Owen admitted having an affair with, because the soldiers were not LMC employees. *Id.* at 72, 74, 78. Pleasant acknowledged that she had, on occasion, contacted customers to obtain permission to interview customer employees regarding ethical claims against LMC employees, but she did not feel the need to do so in this case. *Id.* at 75-76. Pleasant testified that had Owen been having affairs with multiple soldiers, it would have been viewed as "poor judgment." *Id.* at 78-79. Where Lockheed's customer is the government, allowable expenses are passed on to the government but not unallowable expenses such as alcohol. *Id.* at 85. Pleasant stated that Colditz advised her during their interview that Owen had taken a trip to Paris to meet one of her pen pals. *Id.* at 85-87. Pleasant testified that she did not consider a \$4,974.23 limousine charge on Owen's expense report to be unusual despite knowing of Colditz's allegation that Owen had traveled to Paris to meet a pen pal. Thus, Pleasant did not ask Owen for any receipt to justify the limousine charge. *Id.* at 87-88. Pleasant stated that she talked with Colditz, two other employees under Owen, and Ken Asbury during the Owen investigation but did not feel the need to speak with Complainant, even though Moncallo listed her name among those who might have information regarding Owen's conduct. *Id.* at 88-89, 94; HX 4. Pleasant testified that she is not aware of any Lockheed policy requiring employees to report ethical violations, although employees are encouraged to report them. Pleasant Depo. at 90.

Following her telephone interview with Colditz, Pleasant sent an e-mail to Cheryl Jones, another ethics department employee, in which Pleasant indicated that Colditz must be the actual

complaining party based on Colditz's allegations during their telephone interview. Pleasant indicated that she was not trying to determine the identity of the complaining party, but that it was obvious to her from Colditz's allegations during their interview. Thus, she simply advised another of her co-workers of that discovery although she stated that it really did not matter to her in her investigation. *Id.* at 103-107; HX 7. Pleasant stated that she did not know of Complainant's role as a reporting party until Moncalla told her after the investigation was completed. Pleasant Depo. at 109. Pleasant testified that she did not recall being told by Asbury that Owen had been questioning Complainant as to whether Complainant had been the reporting party. She further stated that, had she known that Owen was trying to determine Complainant's identity as a reporting party, she would have been concerned about Complainant and would have told Owen not to inquire further or she could be disciplined for such poor judgment. *Id.* at 109-110.

Pleasant stated that she believed the Pen Pal Program had been shut down due to a lack of interest on the part of the Army. She did not recall any information that the Owen investigation had anything to do with the program's demise. *Id.* at 115-116. Pleasant testified that the ethics complaint lodged against Owen was reasonable. *Id.* at 117.

Deposition Testimony of David Jewell

Jewell worked for Wendy Owen from 1999 to 2005 when he went to LMC Aeronautics. Jewell Depo. at 9. Jewell stated that he felt he had a good professional working relationship with Owen but did not have a personal friendship. *Id.* at 10. Upon transferring to LMC Aeronautics, Jewell then reported to Catherine Blades, who was not a peer of Owen as Owen was a vice president and Blade was only a director of marketing communications in Aeronautics. *Id.* at 11. Jewell indicated that he exchanged perhaps four or five e-mails with Owen during his two years at LMC Aeronautics and did not recall speaking with her until he talked with Owen about the potential position following the merger that led to LMMS. *Id.* at 11-12. Jewell stated that he really does not know the criteria for a level-five and level-six communication position other than that the level-five usually involves a smaller organization with limited media relations activity; rather it is primarily an employee communications role. *Id.* at 13. Jewell testified that he held prior positions at Lockheed with no subordinates up to having two persons working under him, for which he held an L-code. *Id.* at 13-15. Jewell stated that he had prepared strategic plans in all of his prior positions and could only recall outside consultants on strategy being used in the international arena. *Id.* at 15-16. Prior to going to Aeronautics, about sixty percent of Jewell's work was internal communications while at Aeronautics the work was all external. *Id.* at 16-17. Jewell testified that he received a Top Secret DOD SCI security clearance in March of 2008, but had not previously held a security clearance since he served in the Air Force prior to going to work for Lockheed. *Id.* at 17-18. Jewell stated that he had never worked with Judy Gan prior to coming to Mission Services in November of 2007. *Id.* at 18. Jewell stated that he had crisis management experience from two airplane accidents when he was in the Air Force and from attending five to ten crisis management training activities, two of which Owen also attended. *Id.* at 18-19.

Jewell testified that he contacted Owen about available positions when he grew unhappy with the extensive travel he did at LMC Aeronautics. *Id.* at 19. Owen told Jewell of three

possible level-six positions coming about due to the merger into LMMS. When the positions were posted on the company intranet site, Jewell stated that he applied only for the LMMS position since he did not want to live in the Washington, D.C., area, where the other two positions were located. *Id.* at 20-23. Jewell stated that he had no further contact with Owen after she told him that the jobs had been posted. *Id.* at 23. Jewell did tell Judy Gan that he had applied for the position when he saw her at the Paris Air Show and Gan indicated she thought Jewell was a good applicant. *Id.* at 23-24. Gan also told Jewell that LMMS was rapidly growing and was engaged in three or four major business acquisitions. *Id.* at 24-25. Jewell recalled telling Gan that he did not have a security clearance. Jewell stated that he may have told Complainant that the security clearance application was more complicated because his wife had been born in a foreign country and because of Jewell's extensive foreign travels with Aeronautics, but he did not believe he told Complainant that he thought it would take longer to receive a clearance. *Id.* at 27-29. Jewell stated that he received his clearance in about three months, which he understood was quite good for that process. *Id.* at 29-30.

Jewell testified that he interviewed for the LMMS position with a panel consisting of Gan, Owen and Keith Mordoff. *Id.* at 113. He stated that although he understood that he was to report to Gan, he did copy Owen on e-mails when he first arrived at LMMS as Owen had the background knowledge of that organization. *Id.* at 114-115. Jewell recalled discussing with Owen a need to improve employee communications as a number of employees were not connected to the Internet. *Id.* at 115. Jewell stated that he had spoken with Owen a couple of times about employee communications, a potential project in Kentucky and, on one occasion, about Complainant's performance. *Id.* at 117-118. Jewell testified that he first learned of Owens' ethics investigation from the February 4, 2008, e-mail from Complainant. *Id.* at 119, 132, 197-198. He stated that no one had ever advised him not to communicate with Owen regarding employees, including Complainant at Mission Services. *Id.* at 119-120.

Jewell testified that Gan told him that Complainant had the opportunity to apply for the level six position but she had not done so. Gan also indicated that the position had outgrown Complainant particularly in the media relations area, but Gan did not tell Jewell how she learned that Complainant did not have the skills in the media relations area. *Id.* at 31-32. Before going to work at Mission Services, Jewell stated that he called Owen to discuss the job and the staff. He stated that Owen indicated that Complainant had not applied for the position and had a "less-than-perfect" performance appraisal from Asbury, although Jewell indicated that Jewell should evaluate the situation for himself. *Id.* at 33-34. No one told Jewell that Complainant had filed an ethics complaint against Owen. *Id.* at 34. Jewell testified that he took the title of Communications Director at LMMS, which Complainant had previously held, and that Complainant's job then became to support him in her level-five position. *Id.* at 42.

Jewell stated that Gan told him to evaluate the office and provide her with his evaluation including what roles Complainant and the other two communications employees would fulfill. Jewell recalled that he had heard rumors of manpower reductions but does not believe that Gan ever discussed this with him. *Id.* at 43-45. Jewell stated he never reviewed any performance reports on Complainant by Asbury to determine if she had the "less-than-perfect" evaluation reported by Owen. *Id.* at 46. Jewell testified that he did speak to Asbury about Complainant and learned that Asbury felt Complainant did not have the media experience and external

communications skills necessary to help the organization grow. Asbury did indicate that he would like to keep Complainant on in some capacity although he left the exact role up to Jewell. *Id.* at 46-47. Jewell testified that the decision was up to Jewell and Gan and that it was further complicated by Complainant's indecision about resigning from the organization. *Id.* at 47-48. Jewell did learn that Dorothy Lorence, also in communications at Mission Services, was possibly interested in retiring. *Id.* at 35. Jewell stated that he had begun comparing the skills and duties to see whether the two positions held by Complainant and Lorence could be combined into one, but did not finish the evaluation because Complainant advised of her leaving in her February 4, 2008, e-mail. Lorence had offered to volunteer for early retirement to avoid having to lay-off someone but Gan and Tracy Carter advised Jewell not to permit Lorence to retire early. *Id.* at 49-52, 53-54. After Complainant left, the job functions were combined with Lorence handling those duties previously performed by Complainant. Lorence is a level-three while Complainant was a level five. Jewell testified that he had not gotten far enough along with his evaluation to decide whether a combination of the two positions would have resulted in a level-three, -four, or -five position. *Id.* at 55-57.

Jewell testified that he was aware that he had taken Complainant's old office and that Complainant was working out of a visitor's office. However, he was not concerned about this since Complainant had indicated that she was leaving the company. He stated that when Complainant advised him of the office problem in January of 2008, he immediately arranged for her to work out of a cubicle of her own since there were no manager offices currently available. *Id.* at 58-60. Jewell did not recall Moncallo ever talking with him about Complainant's office space. However, Jewell admitted that he should have paid better attention to Complainant's office problem earlier, but also pointed out that he was busy in his new job. *Id.* at 61.

Jewell stated that the day Complainant came into his office due to a problem with the visitor's office, he told her that she could work out of a cubicle and noted that he had once worked out of an office that looked "very much like a janitor's closet," so that he thought she could work out of a cubicle. When Complainant protested that she was entitled to an office as an L-code, Jewell advised her for the first time that her L-code was being removed along with her supervisory authority; the employees she formerly supervised would report directly to Jewell. *Id.* at 61-64, 74-75. Complainant was very upset over the news about the cubicle and loss of L-code and she "stormed out of the office." *Id.* at 64. This conversation occurred after Jewell had advised Complainant that she could no longer work from home but would need to work at the office. Jewell stated that he revoked Complainant's working from home because he felt Complainant had given him an ultimatum of "I'm going to work from home from now on and – because you won't give me an office." *Id.* at 66-67. Jewell admitted that he could have handled the matter better as he did not intend to revoke his previous authorization to permit Complainant to work from home on specific dates, but he did not tell her that. *Id.* at 196-197. Jewell stated that he made a file memorandum about this conversation, although he had not done so for any other interaction with Complainant previously. *Id.* at 192-195; HX 27. Jewell stated that he had one further telephone conversation with Complainant later the day that she "stormed" out of his office but that he had no further phone communication with Complainant after that date. Jewell Depo. at 82-83.

Jewell recalled speaking with Complainant three or four times about there being an ongoing lay off process. Jewell testified that Complainant seemed anxious to have the lay-off take place but that he told her it “will take as long as it takes.” *Id.* at 84-87, 135-136. Jewell did not recall telling Complainant that either she or Lorence would be laid-off although he stated that he “may have,” as those were the two positions that were being looked at. *Id.* at 85, 89, 108-109. Jewell stated that he had assigned Complainant tasks of preparing a communications plan dealing with community relations and employee communications. *Id.* at 87-88.

Jewell recalled that Complainant had sent him an e-mail before he left LMC Aeronautics stating that she would be resigning on December 14, 2009. He indicated that he never knew why she wanted to resign. *Id.* at 89. Jewell then had a conversation with Complainant wherein she told him that she was not going to resign on December 14 but rather would wait for the lay-off decision to be made. *Id.* at 89-90.

Jewell testified that he originally understood that he would be reporting to Gan rather than Owen but he did not get that clarified until late January of 2008. *Id.* at 90-91. Jewell sent Gan an e-mail on December 6, 2007, wherein he asked to clarify whether he would be reporting directly to Owen. This e-mail also inquired whether Complainant would continue to report directly to Gan or would be placed under Jewell, asking whether “there [would be] an advantage for having her under you or me for next step”; Jewell could not recall to what the “next step” referred, however. *Id.* at 91-92; HX 23. Jewell indicated that there were a number of possible changes being discussed including having a community relations person at Colorado Springs that may have included consideration of Complainant as well as Tina Colditz, but he really could not recall whether that played into the “next move.” Jewell Depo. at 94-96. Jewell stated that he never consulted Moncallo or Asbury to determine Complainant’s performance evaluations as he was waiting to finalize whether Complainant would actually be assigned under him, at which point he could access her evaluations himself. *Id.* at 97-98. Jewell testified that both Complainant and Lorence were officially assigned under him in late January of 2008. He stated that he reviewed Lorence’s evaluations in February of 2008, but never reviewed Complainant’s evaluations since she sent her e-mail of February 4, 2008. *Id.* at 99-100; HX 31; HX 65. Jewell stated that the lay-off process was only one of a number of projects on which he was working and he did not have any idea how much longer the lay-off process would have taken had Complainant not left in early February of 2008. Jewell Depo. at 101-102. Once Complainant went out on Family Medical Leave, Jewell stated that he told Moncallo to let Complainant do whatever she needed to do. *Id.* at 104-105. Jewell stated that the lay off process stopped once Complainant left the company as no one was hired to take her place. Another person was eventually added in August of 2008, as she came from another part of LMC that was added to LMMS at that time. *Id.* at 109-110. Jewell stated that when Complainant returned to work in late January, there was still plenty of work to be done with strategic planning, but he could not recall any specific assignments that he may have given to Complainant at that time. *Id.* at 111-112. Jewell testified that removal of the L-code is not a demotion and noted that, for two years at LMC Aeronautics, he did not have an L-code and did not feel he had been demoted. *Id.* at 112.

Jewell stated that Complainant worked with him to orient him to his new job and surrendered her parking space to him. *Id.* at 122-123. Jewell stated that he had started the matrix to evaluate needs and skills necessary for the lay-off process but never completed the process

since Complainant left. *Id.* at 126-127. Jewell advised Gan that with Complainant's departure, the organization's needs were being met. *Id.* at 129. Jewell testified that he did not try to force Complainant to resign and that no one had ever asked him to do so. *Id.* at 133-134.

Jewell began the evaluation of operational requirements upon arrival at LMMS as Gan had requested. *Id.* at 147-148. Jewell testified that he received advice from Human Resources as to the evaluation, which was to determine the population pool, evaluate employees based on criteria for the position, prepare a justification for a lay-off, and then send it to human resources, legal, and finally to Gan for final determination. *Id.* at 149-150; HX 35. Jewell stated that he found the population pool consisted of Complainant and Lorence and then he started the matrix for evaluation of those two against the criteria for the position. Jewell Depo. at 152-153; HX 32. Jewell testified that he had established the skills required for the position and had begun to evaluate Complainant and Lorence against those criteria by reviewing various press releases, brochures, newsletters and such information that had been prepared by each. Jewell Depo. at 154-156. Jewell stated that he had not decided on a final scoring of the two employees as of the time Complainant left the company. However, he stated that he believed the two were pretty even with a slight edge to Complainant in employee communications and to Lorence in community relations and external communications. *Id.* at 155-157. A portion of the matrix was completed by human resources including scores from each individual's last two evaluations and years of directly related experience. *Id.* at 158-159; HX 32. However, Jewell stated that he never completed the matrix because he did not have access to their evaluation reports and other personnel information until late January of 2008, by which time Jewell was involved with moving his own family to Colorado Springs and had spent some time in the hospital. Jewell Depo. at 160-161.

Jewell testified that he did eventually review the information for Lorence in mid to late February of 2008. *Id.* at 161. He also stated that he had talked with Lorence to gain a better understanding of her knowledge and understanding of communications but had been unable to do so with Complainant because she had been out on Family Medical Leave. *Id.* Jewell testified that he did not contact Complainant while on Family Medical Leave on advice from human relations to assure that Complainant had time to rest. *Id.* at 162. Thus, he did not respond to Complainant's e-mail inquiring about her status nor did he tell her he wanted to meet with her on her return so he could complete his evaluation. *Id.* at 162-163; HX 30. Jewell testified that he drafted the justification in late January of 2008 even though he had not completed the evaluation because if there were no justification for reorganization including a lay-off, there would be no need to complete the evaluation matrix. Jewell Depo. at 163-165.

Jewell stated that he and Asbury were very pleased with the work of a young and relatively inexperienced communications trainee and felt that she might be able to handle some employee communications and community relations work by herself, perhaps eliminating the need for one of the other two communications employees. *Id.* at 166-170. Jewell stated that he did not speak with Gan or Owen about the trainee taking on more of this responsibility but he had himself determined that she was capable of doing so. *Id.* at 172-173. Jewell admitted that he had pretty well decided that a lay-off was necessary for one of the two employees. *Id.* at 174-176. Jewell testified that his justification included the fact that the publishing and distribution of the employee newsletter and the community relations work pertaining to charitable donations

had been transferred to headquarters. *Id.* at 178-180. Jewell stated that he had discussed with Tracy Carter setting up a community relations position in Colorado Springs that Tina Colditz may have been interested in, but that never came about. *Id.* at 181. Jewell stated that his justification indicated that only two persons in Colorado Springs were necessary for communications: himself and the trainee. *Id.* at 182. Jewell testified that he had certainly been leaning toward cutting one position, although the final decision would have been up to Gan. *Id.* at 182-183, 189.

Deposition Testimony of Judith Gan

Gan is vice president of communications for the information systems and global services business area of LMC and works in Gaithersburg, Maryland. Gan Depo. at 5. Gan was Owen's peer for the three years that Gan served as vice president of the information systems and solutions business area beginning in 2003. Prior to that time, Gan had only minimal contact with Owen. *Id.* at 10-12. Gan stated that during the three years that she and Owen were peers reporting to Mr. Box, there would be a telephone staff conference call every morning and that they would both attend the annual conference and the air shows in Paris and Farnborough. *Id.* at 12-13. Gan and Owen would both separately support their executives at the air shows and attend a staff dinner the air shows' opening nights. Gan denied that she ever socialized with Owen. *Id.* at 13-14.

Gan testified that she had never been informed that Complainant made an ethics complaint against Owen. She first learned of that possibility when Complainant copied Gan on her e-mail resignation letter in February of 2008, but Gan stated she did not know whether that was true. *Id.* at 14-15; HX 31. Gan denied having any conversations with Jean Pleasant or Jan Moncallo about Complainant and Owen until she spoke with Pleasant following receipt of Complainant's e-mail resignation letter in February of 2008. Gan expressed surprise about such allegations against Owen and "found it incredible that any of that could be true" since she thought Owen was a solid professional. Gan Depo. at 16-18. Gan could not recall ever discussing these matters with Ken Asbury or David Jewell. *Id.* at 20-21. Gan did discuss Complainant's e-mail with her supervisor, Dennis Box. Gan recalled that Box indicated that he was aware of the allegations against Owen but that the allegations were never substantiated. *Id.* at 21. Gan testified that she never investigated or followed up on Complainant's concerns in the February 2008 e-mail, but she did call Owen to tell Owen that she did not believe any of the allegations that Complainant had made. Gan only recalled Owen stating that she was very upset over the allegations. *Id.* at 23-24.

Gan testified that non-retaliation against reporting parties is a fundamental element of the company's ethics program to insure that employees are not intimidated by fear of retaliation. *Id.* at 30. Gan stated that when she learned of Complainant's concern over lack of suitable office space she e-mailed either Jewell or Moncallo to make some suitable provision for Complainant. *Id.* at 34. Gan stated that she had a high opinion of Owen based on her observations of Owen as well as the confidence Owen had with senior management. *Id.* at 36-37. Gan had had very little interaction with Complainant prior to becoming Complainant's supervisor. *Id.* Owen advised Gan in 2008 that Owen was resigning to spend more time with her learning-disabled son. *Id.* at

38. Gan denied that the ethics complaint had anything to do with Owen's resignation. Gan continued to believe that the allegations against Owen were baseless. *Id.* at 39.

Gan became Owen's supervisor in March of 2007. *Id.* at 41. Gan testified that she first learned of the merger of LMC IS&S and LMC IT&S in late February of 2007. Mr. Box advised Gan that she had been selected as the communications vice president for the new larger organization several weeks later. *Id.* at 42-45; HX 57. Gan stated that after her appointment she spoke to Owen who was to be her new deputy and received Owen's expression of support. Gan Depo. at 46. Gan testified that she did not look at Owen's personnel file and was not notified of any discipline Owen received as a result of an ethics violation. *Id.* Gan stated that she was unaware of any bonus or salary increases that Owen had been denied. *Id.* at 48-49. Box told Gan that he expected Owen to support Gan in her new role and did not indicate to Gan that Owen had demonstrated any judgment issues. *Id.* at 49. Gan did not consider her promotion over Owen as being any type of demotion for Owen as Owen remained a vice president at her same salary. Gan simply took over as communications head of a much larger business entity following the merger. *Id.* at 52.

Gan testified that she relied upon Owen for advice as to the operations of I&TS but she also met with each of the business unit leaders and the communication leaders to familiarize herself with what was necessary to support those businesses. *Id.* at 51-54. Gan visited Asbury in Colorado on May 10, 2007, which was the first substantive meeting she had had with Asbury since taking her new position. *Id.* at 54-55. Gan testified that prior to her meeting with Asbury she had had conversations with Owen about who the various communication personnel were and what they were doing. *Id.* at 56. Complainant reported to Owen and Asbury until September of 2007 when the post-merger reorganization was complete, at which time Complainant reported to Gan. *Id.* at 57-59. At the time of the merger, each department was told to aim for a ten percent reduction in work force as two entities were being combined, which it was felt should result in some duplication of positions. In early 2008, the finance team suggested that a fifteen percent overall reduction in budgets should be sought, including the ten percent work force reduction. *Id.* at 59-60. Gan stated that she made her entire organization aware of the anticipated work force reduction. *Id.* at 60-61. Gan also met with her leadership team and the leaders of the business units to determine how to consolidate functions yet still provide service to the business units. *Id.* at 61. Owen was tasked by Gan to head up the transition of the communications department resulting from the merger. *Id.* at 62-65. Gan testified that Gan had the responsibility of achieving the 10% workforce reduction although Gan discussed this with her staff, including Owen. Gan could not recall any specific input or suggestions by Owen in this regard. *Id.* at 66-67.

Gan stated that she made a presentation to her boss, Linda Gooden, in the summer of 2007, indicating progress made towards transition and reduction in work-force. Gan specifically recalled mentioning that some consolidation had taken place with regard to enterprise-wide communications as well as having a single person, Tracy Carter, handling all charitable donation requests. Gan also reported that a reduction in two positions had already taken place through reassignment. *Id.* at 68-70. Gan testified that other than Carter and her assistant, there were no other communications people within the organization who had community relations as a sole responsibility. Gan did not believe that there was enough community relations work to justify a full-time position. Gan also stated that she had not been asked by any of the business unit

leaders, including Asbury, to create a community relations position for their business unit. *Id.* at 70-75. Gan stated that at the time of her report to Gooden, she had no specific plan on how to achieve further reductions in her work force. She indicated that after the merger, the new organization had ten business units with a communications leader at nine of the units. *Id.* at 75-76. Gan testified that the communications staffs ranged in size from one to five persons. *Id.* at 78-82. The number was determined after meeting with each unit leader and determining both the quantity and quality of persons needed in each unit. *Id.* Gan stated that she met her fifteen percent reduction goal by controlling discretionary expenses, not filling positions vacated due to attrition, and by consolidating functions at the headquarters level. *Id.* at 83-84. Gan testified that no one ever suggested to her that Owen should not be supervising Complainant. *Id.* at 85. The fifteen percent reduction was aimed at the communications budget, which includes salaries of all the communications persons within the new organization. *Id.* at 86.

Gan testified that Owen advised her that LMMS was growing rapidly and was moving into securing prime contracts on their own while previously LMMS had been a subcontractor to other LMC units. *Id.* at 88. Gan stated that Owen told her that Complainant had done well in community relations working across company lines to organize several programs and in setting-up an internal communications project to help leaders become better communicators. *Id.* at 89-90. Gan recalled that Owen mentioned some difficulty in getting donation payments made which led to some disagreement between Owen and Complainant. Prior to the merger, Owen controlled the payment of charitable donations. Gan stated that, when she took over, she consolidated this function under Tracy Carter and this issue “went away.” *Id.* at 90-91; HX 10, 11 and 12.

Gan stated that until the May, 2007, meeting in Colorado Springs, she had no contact with Complainant other than in weekly staff teleconference calls. Gan noted that Complainant was the only communications leader who missed the initial meeting at headquarters due to a family issue. Gan Depo. at 92-93. Gan testified that she met Complainant for a breakfast meeting at her hotel prior to going to the office to meet with Asbury. Gan described the meeting as cordial and primarily a social meeting to get to know Complainant. Complainant mentioned the problem with charitable donations, into which Gan indicated she would look. *Id.* at 95-97. Gan stated that Complainant brought up the issue of the reductions in work-force, which surprised Gan as she viewed this meeting as primarily social. Gan testified that since she had just met Complainant and had not yet spoken with Asbury, she could only tell Complainant that it would take some time to make such decisions and that Gan could not make any commitments to Complainant. *Id.* at 97-99. Gan did not recall telling Complainant that she might not be a good fit in the organization. *Id.* at 100.

Following breakfast, Complainant accompanied Gan to meet Asbury, but Complainant left shortly thereafter to catch a flight somewhere. *Id.* Gan stated that she had a lengthy conversation with Asbury in which Asbury described his unit’s progress toward obtaining several large pieces of new business. *Id.* at 101-103. Asbury also indicated to Gan that he was very concerned that his employees be able to understand the company’s business strategy in order to sell the company to customers. Thus, Asbury wanted strong internal communications within the company. *Id.* at 103. In discussing Complainant, Asbury indicated to Gan that he did not feel that Complainant was capable of the international external media relations and strategic communications planning that he needed to grow his business. *Id.* at 104-105. Gan recalled that

Asbury commended Complainant's community relations and some internal communications work but was disappointed in her attempt to come up with a strategic plan. *Id.* at 105-106. Gan testified that both she and Asbury determined that Complainant was not the right person to head up the unit's communications because of these shortcomings, particularly in strategic planning. *Id.* at 106-107. Asbury indicated that he felt Complainant could continue as a member of the communications team but needed the oversight and mentoring of a more senior communicator. Gan stated that she agreed with Asbury's suggestion that Complainant could "continue to play a role on the team." *Id.* at 108.

Upon her return to her office from the May, 2007, meeting in Colorado, Gan stated that she tasked Owen to work with human resources to seek a level-six communicator for Asbury's unit. She also asked Owen to advise Complainant that a level-six communicator was being sought to work above Complainant, who was a level-five communicator. *Id.* at 111-115. Gan did not recall an e-mail from Complainant indicating that she understood she was being replaced. *Id.* at 116-117; HX 13. Gan testified that she did recall a subsequent e-mail from Complainant indicating that she intended to apply for the level-six position. Gan stated that she then called Complainant and told her she would be fairly considered for the level-six position but that if she was not selected, both Gan and Asbury foresaw a continuing role for her in community relations and internal communications. Gan Depo. at 118-119; HX 15. Gan did not recall speaking with Asbury about a commitment to keeping Complainant at Mission Services and she never committed to Asbury to do so. Gan Depo. at 119-120. Gan denied being upset about Complainant's e-mail in which she advised that she was applying for her position even though the e-mail was copied to Gan's boss. *Id.* at 121-122. Gan testified that she called Complainant to let her know that the level six position was a new job and to reassure Complainant that she would still have a position dealing with community relations and internal communications. Gan stated that Complainant became upset and told Gan that she would withdraw her application for the level-six position and would leave the company at the end of August. *Id.* at 123-125; HX 16. Gan stated that she spoke personally with Asbury following the phone conversation with Complainant indicating what had transpired. Gan testified that Asbury told Gan she had handled the matter correctly. Gan Depo. at 127-130. Gan denied that she told Complainant that her performance had been only average, but did point-out to Complainant that she did not fit the more senior role into which the position had evolved. *Id.* at 131. Gan did recall telling Complainant that the supervisors she had copied on her e-mail were not involved in the matter. *Id.* at 133. Gan stated that she dismissed Complainant's suggestion that strategic planning be outsourced as Gan felt such strategic advice was a principal role of the communicator at the unit and that was exactly why a new communicator was being sought. *Id.* at 136-137. Gan noted that Complainant's performance reports showed some degradation from "exceptional" in 2004 to "high" in 2005 and "successful contributor" in 2006. *Id.* at 139. Gan stated that she first pulled Complainant's performance assessment in late 2007 in order to do her assessment at which time she first noted comments by Asbury critical of her strategic plan. *Id.* at 140-141.

Gan testified that she did not discuss Complainant's placement within the organization with Owen. Owen was on the committee which selected David Jewell as the recommended person for the level-six position which, was Asbury accepted. *Id.* at 142-143. Gan stated that she realized that Complainant did not have an active application for the level-six position, but she did nothing to follow up on this and did not discuss that with Asbury. *Id.* at 143. Gan testified that

communicators are not required to have security clearance to support even a unit dealing with primarily classified matters, but she did acknowledge that Jewell was asked to apply for and received a security clearance after he was hired for the level-six position. *Id.* at 143-145. Owen agreed with the collective assessment of the selection committee that Jewell was the best qualified choice for the level-six position. *Id.* at 146. Gan told Jewell that he should get familiar in his new job and then come up with a plan to support the organization. *Id.* at 146. Gan asked Jewell to come up with a staffing plan but he had not come up with a plan by early 2008 as he had not had the chance to develop such a plan after coming in November of 2007. *Id.* at 163-165. Gan testified that the Complainant's status was rather uncertain since Complainant had indicated that she was going to leave and then had retracted. Gan was told by Jan Moncallo that Complainant had again talked of a layoff and a severance package. *Id.* at 147-149. Gan stated that she told Jewell that should Complainant remain, that she could serve a role in community relations and internal communications. *Id.* at 151-152. Gan did tell Jewell he should come up with a plan for his department staffing, but stated that she had never seen such a plan nor ever later discussed it with Jewell. *Id.* at 153. Gan is unaware of Jewell ever advising Complainant that she would be laid off. *Id.* at 157. Gan testified that she had discussed Complainant's potential lay-off with Jewell in view of Complainant shifting plans to remain at LMC: first telling Gan she would leave the company by August of 2007, then deciding to remain until Jewell came on board, and then talking with Moncallo about a possible layoff which would give Complainant reassignment preference within Lockheed as well as a severance package and the right to apply for unemployment. *Id.* at 157-158. Gan denied having any conversations with Asbury about laying-off Complainant. *Id.* at 160. Gan recalled no conversations with Jewell about creating a community relations position for Complainant as the role would also need to include internal communications in order to justify a full-time position. *Id.* at 162. After Complainant left, her position was not filled. *Id.* at 167.

She also denied that the decision to post for the level six position was due to any perceived inadequacies on the part of Complainant. Rather, Gan testified that she and Asbury determined that a more senior position was called for and that posting such a new position was normal practice within the company to assure highly qualified applicants. *Id.* at 168-170. Gan denied that she ever discouraged Complainant from applying for the level six position. *Id.* at 170. Gan testified that Complainant was the lead communicator for LMMS prior to the merger and then was acting lead communicator until Jewell was hired. *Id.* at 171. Gan had no direct contact with Complainant once Jewell arrived but understood that Complainant continued to function in the community relations and internal communications role. *Id.* at 171-173. Gan stated that once Jewell arrived, Complainant's title would have remained as level five manager which she believed was a manager. *Id.* at 173. Gan testified that she told Jewell to have the people who had been reporting to Complainant report to Jewell; she thus removed Complainant's L-code, though her position and salary were unchanged. *Id.* at 173-174. Gan stated that Complainant's job responsibilities were assumed by the other members of the communications team at LMMS after Complainant left although several months thereafter an additional person was added due to another reorganization resulting in a larger business unit than before. *Id.* at 175-177.

Gan testified that she never had any conversations with anyone regarding why Complainant took family medical leave. *Id.* at 183. Gan did not recall anyone bringing up Complainant's concerns about her being "in limbo" other than her own conversation with

Complainant in July of 2007. *Id.* at 185-186. Gan testified that Asbury never told her that Complainant felt Gan had been rude and condescending to Complainant. *Id.* at 191-192. Gan stated that she did not feel she had a “deal” with Asbury to retain Complainant and that Complainant’s position with the company would have depended on Jewell’s staffing plan and recommendation. *Id.* at 192. Gan was not aware of any communication between Owen and Jewell regarding Jewell’s new assignment. *Id.* at 194. Complainant received a Comet award in 2007 but Gan stated that Complainant was not one of the primary contributors to the project. Thus, Complainant was not selected to attend the annual corporate communication conference as preference was given to the primary contributors and persons who had not attended the conference previously. *Id.* at 196-198. Gan testified that, at the time of trial, she still believed that the allegations in the ethics complaints against Owen were incredible. *Id.* at 201.

CONCLUSIONS OF LAW

The Act states in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), 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 sections 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 -- (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).

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

Thus, in order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent, it is necessary for Complainant to prove by a preponderance of the evidence that: 1) Complainant was an employee of a covered employer; 2) Complainant engaged in protected activity as defined by the Act; 3) Respondent had actual or constructive knowledge of the protected activity; 4) Respondent thereafter took adverse action against Complainant; 5) the protected activity was a contributing factor in Respondent’s decision to take the adverse

action. *Bechtel v. Competitive Technologies, Inc.*, ARB No. 06-010, ALJ No. 2005-SOX-33, slip op. at 4-5 (ARB Mar. 26, 2008). If Complainant shows these elements by a preponderance of the evidence, her claim is defeated nonetheless if Respondent produces clear and convincing evidence of a non-discriminatory motive for the adverse action. *Id.* at 5.

Here, there is no question that the Complainant worked for Respondent, a corporation governed by Sections 12 and 15(d) of the Securities Exchange Act.

Protected Activity

The Act protects a narrow and well-defined range of whistleblower activity. Complainant, like any employee seeking the Act's whistleblower protections, must establish that she engaged in conduct meeting two requirements. She first must have had a reasonable belief that Respondent had committed fraud, per the laws and regulations that the Act enumerates. 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1). Then, acting on that reasonable belief, she must have reported "definitively and specifically" to, in this case, her supervisors that Respondent had committed any of the covered fraudulent acts. *Platone v. United States DOL*, 548 F.3d 322 (4th Cir., 2008), *cert. denied*, (No. 16, 2009).⁴

The "reasonable belief" prong involves both subjective and objective components. *Melendez v. Exxon Chemicals Americas*, BRB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 20 (ARB July 14, 2000). The objective component examines the reasonableness of the belief based on "the knowledge available to a reasonable [person] in the circumstances with the complainant's experience and training." *Id.* Complainant thus need not show that Respondent actually violated one of the laws or regulations that the Act enumerates. *Id.* at 19-20. Instead, she must show that she reasonably believed Respondent violated such a law or regulation. *Id.* The subjective component requires that Complainant actually have formed the belief at the time of her reporting. *Id.* at 20.

Several pertinent legal provisions and cases flesh-out the "reasonable belief" prong. To be reasonable, the belief must have been about a presently existing violation, given the provision's present tense: ". . . any conduct which [the complainant] reasonably believes constitute a violation of [the relevant laws]." 18 U.S.C. § 1514A9A(a)(1); *see also Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340-41 (4th Cir. 2006). Speculation that a violation might occur in the future is not, therefore, a reasonable belief. *See Jordan*, 458 F.3d at 340-41.

Nixon v. Stewart & Stevenson Services, Inc., ARB No. 05-066, ALJ No. 2005-SOX-1 (ARB Sept. 28, 2007), dealt primarily with when the complainant must formulate a "reasonable belief." The *Nixon* complainant was the environmental manager for a federal defense contractor. He alleged, *inter alia*, that he engaged in protected activity because his employer had committed mail fraud under 18 U.S.C. § 1341 by sending letters to a state commission falsely asserting that

⁴ The Act protects reporting to "(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)." 18 U.S.C. § 1514A (a)(1). Complainant alleges only that she reported to Asbury, one of her supervisors, and to Moncallo, Human Resources vice president.

it was immune from environmental penalties. The ALJ denied the claim, however, granting the employer's motion for summary decision on two grounds. First, the complainant failed to show that the letters were part of a "scheme or artifice to defraud, or for obtaining money or property," as required by 18 U.S.C. § 1341. Second, complainant failed to show that he had considered his employer's conduct to be mail fraud prior to his alleged protected activity and subsequent termination. On appeal, the ARB affirmed, but reasoned that the ALJ had partly erred. The ALJ had partly erred by requiring the complainant to establish an actual violation of law. The ARB affirmed the outcome, however, because the complainant failed to show that he had considered and communicated the possibility of mail fraud to his employer prior to his termination. Rather, the first mention of the mail fraud statute was during a conference call with the ALJ.

Other cases illustrate, furthermore, that the "reasonable belief" must relate closely to the crimes listed in the statute. In *Levi v. Anheuser Bush Companies, Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-27 and 108, 2007-SOX-55 (ARB Apr. 30, 2008), the complainant had written letters making general claims of poor business decision-making by his employer, tolerance of racial discrimination, and raising concerns over workplace safety, but not addressing any of the categories of fraud and securities violations covered by the Act. The ARB held that to bring himself under the protection of the Act, the complainant must cite information directly relating to the listed categories of fraud or securities violations, citing 18 U.S.C. § 1514A(a); 29 C.F.R. §§ 1980.104(b), 1980.109(a).

Similarly, in *Stojicevic v. Arizona-American Water*, ARB No. 05-081, ALJ No. 2004-SOX-73 (ARB Oct. 30, 2007), the complainant argued that the scope of protected activity under SOX encompassed his allegations that his employer made misrepresentations to its shareholders by failing to communicate his complaints of mismanagement and violations of the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i), along with local regulations. The ARB rejected this argument, writing:

Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX. To bring himself under the protection of the act, an employee's complaint must be directly related to the listed categories of fraud or securities violations. 18 U.S.C. § 1514A(a); 29 C.F.R. §§ 1980.104(b), 1980.109(a). A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.

At most in this case, Stojicevic demonstrated that [respondent's] poor management could adversely affect its financial condition. Accordingly, since Stojicevic did not demonstrate that [respondent] defrauded, or attempted to defraud, its investors, or

violated any rule or regulation of the SEC, he has not shown that he engaged in protected activity under the SOX.

Slip op. at 13-14 (citations omitted) (footnote omitted) (quoting *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-20, 36, slip op. at 14 (ARB June 2, 2006)).

As for the “definitively and specifically” prong, *Platone v. United States Department of Labor*, 548 F.3d 322 (4th Cir. 2008), neatly articulates the rule. In *Platone*, the complainant alleged that her employer, an airline, had concealed records of a “scheme to compensate pilots in the hopes of gaining union contract concessions.” *Id.* at 324. The ALJ, ARB, and Fourth Circuit all agreed, if only in *dictum*, that the complainant had been reasonable in her belief that this scheme was fraudulent. *Id.* at 324, 326-27. The ARB and Fourth Circuit held, however, that the complainant had “failed to make a proper allegation of fraud” to her employer, doing so only after she had been fired. *Id.* at 326. Claimant had alerted her employer “to an internal billing issue” that laid-bare facts that could support a claim of fraud, but this was not enough: “a billing discrepancy, without more, does not equal fraud, and [complainant] failed to identify to [her employer] why she believed the actions related to discrepancies would violate securities laws and constitute a fraud.” *Id.* at 326-27.

More recently, *Lewandowski v. Viacom Inc., et al.*, ARB No. 08-026, ALJ No. 2007-SOX-88 (ARB Oct. 30, 2009), illustrated how the “reasonable belief” and the “definitively and specifically” prongs operate together. In *Lewandowski*, the complainant worked for Paramount Pictures, Viacom’s subsidiary. *Id.* at 2. She “was responsible for reading books and attending theater productions and then advising Paramount executives through memos on the desirability of developing those books and plays into motion pictures.” *Id.* Over time, she became concerned that her supervisor had been leaking her memos to competitors. *Id.* The complainant thus alerted Paramount’s executives via an e-mail, who initially expressed shared concern, but ultimately terminated her employment. *Id.* at 3-5. The complainant brought a SOX claim, alleging that she engaged in protected activity because her supervisor’s disclosures of her confidential memos constituted wire fraud and fraud against shareholders. *Id.* at 8. The complainant’s sole evidence supporting her allegations was her e-mail to Paramount’s executives. *Id.* at 8. The court concluded, however, that complainant’s e-mail failed to satisfy both the “reasonable belief” and “definitively and specifically” prongs for her wire and shareholder fraud claims. *Id.* at 9-10. The complainant’s e-mail failed the “reasonable belief” prong because it did not mention fraud. *Id.* at 9. The complainant instead cited “breach of Viacom’s Business Conduct Statement and . . . disloyalty” as the objects of her whistleblowing. *Id.* The complainant additionally claimed, apparently *post hoc*, that her supervisor’s conduct would harm the value of Viacom’s stock, thereby harming its shareholders; the court found this argument “too attenuated.” *Id.* The e-mail furthermore failed the “definitively and specifically” prong because it failed to discuss any of the legal elements underlying the claims of wire and shareholder fraud. *Id.*

Mail and Wire Fraud

According to the above case law, the protected activity inquiry involves the legal elements of the violations that Complainant has alleged. A discussion of the legal requirements for establishing claims of mail fraud and wire fraud appears below, as a result.

Mail Fraud

Mail fraud finds its definition and criminal prohibition in 18 U.S.C. § 1341. The statute reads, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

To allege a violation of the mail fraud statute, it is thus “necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud.” *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004) (citations omitted). “Each separate use of the mail in furtherance of a scheme or artifice to defraud constitutes a separate crime under this section.” *U.S. v. Blankenship*, 746 F.2d 233 (5th Cir. 1984) (citations omitted), *rehearing denied* 750 F.2d 69.

The statute employs a broad definition of “scheme or artifice to defraud.” The phrase “scheme or artifice to defraud,” indeed, is measured by a nontechnical standard, condemning conduct which fails to conform to standards of moral uprightness, fundamental honesty, and fair play. *Blachly v. U. S.*, 380 F.2d 665, 671 (5th Cir. 1967). Not all conduct that strikes a court as sharp dealing or unethical conduct, however, is a “scheme or artifice to defraud.” *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, (7th Cir. 1989)(citing *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir.1987)), *vacated on other grounds*, 484 U.S. 807 (1987); *also United States v. Dial*, 757 F.2d 163, 170 (7th Cir.1985)). The word “scheme,” rather, connotes some degree of planning; thus, it must be proved that the defendant acted with the intent to defraud. *DeMier v. U. S.*, 616 F.2d 366 (8th Cir. 1980); *see also, United States v. Pintar*, 630 F.2d 1270 (8th Cir. 1980). A “scheme to defraud” as would constitute an element of mail fraud, must seek to deprive government of services or funds through fraudulent or deceptive means, such as material misrepresentation, concealment, and breach of duty to disclose information or taking of bribes or kickbacks. *United States v. Pintar*, 630 F.2d 1270, 1279-80 (8th Cir. 1980).

The “use of the United States mails in furtherance of the scheme” element is similarly expansive. The statute punishes whether one uses the mail directly or one acts through innocent agents or otherwise. *United States v. Reese*, 96 F. Supp. 913, 916 (E.D. Pa.1951). One need only mail or cause to be mailed some matter or thing for the purpose of executing the scheme to defraud. *United States v. Jordan*, 626 F.2d 928, 930 (D.C. Cir. 1980). A defendant need not him/herself actually mail anything; a mere reasonable anticipation that mail will be used suffices. *United States v. Davidson*, 760 F.2d 97, 99 (6th Cir. 1985). In this vein, it suffices to establish that mailing is a sender’s regular business practice. *United States v. McClellan*, 868 F.2d 210, 216 (7th Cir. 1989), *rehearing denied*. Also, the mail need not be sent between co-conspirators, *United States v. Gann*, 718 F.2d 1502, 1504 (10th Cir. 1983), *certiorari denied* 469 U.S. 863, nor between perpetrator and victim, *United States v. International Term Papers, Inc.*, 477 F.2d 1277, 1279 (1st Cir. 1973). Even self-addressed mail suffices. *United States v. Guest*, 74 F.2d 730 (2d Cir. 1935), *certiorari denied* 295 U.S. 742. As to content, the mails need not be used as an essential element of a fraudulent scheme; it is sufficient that mailing be incident to an essential part of scheme. *U.S. v. Hollis*, 971 F.2d 1441, 1448 (10th Cir. 1992)(citing *Schmuck v. United States*, 489 U.S. 705, 709-11 (1989)), *certiorari denied* 507 U.S. 985. It furthermore is not required that false representations themselves be transmitted by mail. *United States v. Talbott*, 590 F.2d 192, 195 (6th Cir. 1978); *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981).

The “specific intent to defraud or deceive” element is also broad. This element requires that the defendant willingly and knowingly devised the fraudulent scheme or artifice involving the use of the mails. *United States v. Jordan*, 626 F.2d 928, 930 (D.C. Cir. 1980).

Wire Fraud

Wire fraud finds its definition and criminal prohibition in 18 U.S.C. § 1341. The statute reads, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Since the requisite elements of “scheme to defraud” under section 1343 (wire fraud) and section 1341 (mail fraud) are identical, the two statutes are to be read in *pari materia* and cases construing mail fraud apply to wire fraud as well. *United States v. Lemire*, 720 F.2d 1327, 1335 (D.C. Cir. 1983), *certiorari denied* 467 U.S. 1226; *United States v. Donahue*, 539 F.2d 1131, 1135 (8th Cir. 1976).

“All that is needed to substantiate a wire fraud violation is a scheme to defraud, discussed *supra* regarding mail fraud, and at least one jurisdictional wire communication made in furtherance of that scheme.” *Banco de Desarrollo Agropecuario, S.A. v. Gibbs*, 640 F. Supp.

1168, 1175 (S.D. Fla. 1986) (citation omitted). Telephone calls may qualify as jurisdictional wire communications. *Id.* Faxes may also qualify as jurisdictional wire communications. *United States v. Robertson*, 493 F.3d 1322, 1331 (11th Cir. 2007), *certiorari denied* 128 S.Ct. 1295 (evidence that defendant had a fax machine and that he had sent fraudulent purchase orders sufficient to infer that defendant had sent the purchase orders by fax, despite there being no direct evidence on point). E-mails may furthermore qualify as jurisdictional wire communications. *United States v. Ring*, 628 F.Supp.2d 195, 217-218 (D.C. Dist. 2009)(interstate e-mail between congressman's chief of staff and lobbyist and a bank transfer to the congressman's wife sufficient to sustain fraud allegations against chief of staff even though lobbyist initiated e-mail contact). The jurisdictional wire communication element can be inferred from circumstantial evidence, *Robertson*, 493 F.3d at 1331 (evidence that defendant had a fax machine sufficient to establish that he used it); *United States v. Stalnaker*, 571 F.3d 428, 437 (5th Cir. 2009) (evidence of a customary business practice involving wire communication sufficient to establish that wire communication occurred). It may further be established by evidence that the defendant had reason to know wire communications would be made, even when not intended. *Viriden v. Graphics One*, 623 F.Supp. 1417, 1422 (C.D. Cal. 1985).

Analysis

In sum, to establish that she engaged in protected activity based on mail or wire fraud, Complainant must show by a preponderance of the evidence that she (1) reasonably believed that her supervisor, Owen, had committed violations of Sections 1341 or 1343, and (2) that she communicated that belief "definitively and specifically." In order for her belief to be reasonable and her communication to be "definitive and specific," Claimant must have expressed observations involving the elements of mail and/or wire fraud: that (1) Owen formed a scheme or artifice to defraud; (2) Owen used the United States mails or caused a use of the United States mails [or sent or caused to be sent wire communications] in furtherance of the scheme; and (3) Owen did so with the specific intent to deceive or defraud. *Miller*, 358 F.3d at 620; *Lemire*, 720 F.2d 1327 at 1335; *Donahue*, 539 F.2d at 1135.

Here, Complainant's claims of mail and wire fraud hinge primarily on her communications with Kenneth Asbury and Janice Moncallo, both vice presidents at LMC. Complainant testified that, prior to complaining to Asbury and Moncallo, she became concerned that Owen's actions were fraudulent and illegal with respect to using company funds for a laptop, hotel, limousine and travel expenses which may then have been passed along to the customer, the government. She additionally testified that in her experience all costs incurred by Respondent's employees, including public relations costs, were billed back to the government. She stated that she believed that all business trips and other expenses incurred by Respondent's employees in managing the Pen Pal Program with the U.S. Army would have been billed to the Army. With this in mind, Complainant testified that she spoke at some point to Asbury about the laptop computer. Asbury testified, however, that he could not recall receiving information about Owen from Complainant, only from Tina Colditz. He nonetheless also testified that company policy permits employees to address ethics complaints through their supervisor, through the ethics chain, through human resources, or directly to the company legal counsel.

Complainant accordingly contacted Moncallo. Complainant testified that she told Moncallo she felt Owen's actions constituted fraud and were illegal. Moncallo's testimony in response is essential. Moncallo testified that she and Complainant had three or four discussions in May of 2006 regarding concerns Complainant had about Owen. These concerns included Owen purchasing a laptop computer for a soldier with whom Owen was having a personal relationship and Owen sending inappropriate items overseas. Moncallo stated that generally employee travel expenses and purchases of equipment such as laptop computers is billed to the government as the government is Lockheed's primary customer. Moncallo did not know whether pen pal expenses were billed by the company back to the government. Moncallo testified that Complainant did not use the words "fraud" or "illegal," but Complainant was concerned that Owen's actions could be an embarrassment for the company and could be a misuse of company funds. Moncallo further testified that Complainant was concerned about company policy and potential embarrassment but never mentioned to Moncallo anything pertaining to violating any laws, including SOX or SEC regulations. She also testified that Complainant did not mention any impact on shareholders or investors. Moncallo nevertheless recognized that some of Owen's actions of which Complainant complained involved misuse of company funds and could be considered as fraud and illegal.

Complainant establishes that she engaged in protected activity since she satisfies both the "reasonable belief" and "definitive and specific" prongs under a preponderance standard in view of these facts. As to the "reasonable belief" prong, Complainant testified that she grew concerned that Owen made purchases with company funds that would ultimately be billed to the government, which lead her to complain to Asbury and Moncallo in 2006, well before the series of events leading to her alleged constructive discharge on February 4, 2008. Complainant had reason to believe that such actions were taken in the furtherance of a "scheme or artifice to defraud" because, as she testified, she had been aware of Owens' alleged and undisputed systematic use of the Pen Pal Program to recruit new paramours. She additionally reasonably believed that Owen had used company funds to lavish these paramours with gifts given her conversations with Colditz. She also reasonably believed, even were she actually incorrectly in doing so, that these costs were passed onto the United States Government, given her knowledge that Respondent's standard business practice was to bill its costs to its customers. Woven into the story of Complainant's reporting to Asbury and Moncallo are undisputed facts that would satisfy the mail and wire communication elements of mail or wire fraud if proven: Owens' mailing of letters to solicit prospective paramours; Owens' mailing of gifts to the same paramours; and her presumed billing—whether via physical mail or electronic means of communication—of those items to the United States Government as part of the Pen Pal Program. A reasonable belief in Owen's intent to have taken these actions as part of a "scheme to defraud" flows naturally from their description. As Colditz testified and apparently communicated to Complainant, for example, Owen allegedly and undisputedly sent sex toys concealed in a Cheez-It box to a soldier in Iraq who she had romantically recruited through the Pen Pal Program. TR at 64. Such things do not often, if ever, occur accidentally; it is likewise difficult to imagine any purpose such actions might serve, other than to further Owen's scheme to use the Pen Pal program to recruit paramours and lavish them with gifts. Complainant thus satisfies the "reasonable belief" prong under mail and wire fraud theories.

As to the “definitive and specific” prong, Complainant testified to specifically using the words “fraud” and “illegal” in her complaints to Asbury and Moncallo. Asbury and Moncallo dispute this, which tarnishes Complainant’s assertions, but only somewhat since I find no major credibility flaw in Complainant’s version of events. Moncallo testified, more importantly, that no matter how Complainant literally described Owen’s conduct, she understood Complainant to have described possibly fraudulent and illegal conduct. Moncallo understood the implications of Complainant’s complaint well enough, in fact, to order Pleasant to initiate an internal ethics investigation. I thus conclude that a preponderance of the evidence shows that Complainant “definitively and specifically” communicated to at least Moncallo her “reasonable belief” that Owen had engaged in fraudulent conduct. As a result, Complainant satisfies the “definitively and specifically” prong. She therefore also establishes that she engaged in protected activity under SOX when she complained of Owen’s conduct to Moncallo.

Complainant fails to establish protected activity under a general shareholder fraud theory on the basis of loss of shareholder value, however. As in *Lewandowski*, I find Complainant’s speculation that LMC’s share value would decline as a result of Owen’s conduct, were it to become public knowledge, to be “too attenuated.” 2007-SOX-88 at 9. The “mere possibility” of a decline in shareholder value is simply not enough to establish protected activity. *Id.* I observe further that similar incidents at Boeing Aircraft, which Complainant vaguely cites to support her theory, did not actually result in a loss of shareholder value.⁵ While Complainant establishes protected activity on the basis of mail and wire fraud, she does not do so on the basis of general shareholder fraud involving a loss in shareholder value.

Constructive Discharge

The theory of “constructive discharge” has evolved in the Title VII and whistleblower context to take account of situations in which an employer, “rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily.” *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996) (internal citations omitted). Establishing a constructive discharge claim requires the showing of an even more offensive and severe work environment than is needed to prove a hostile work environment. *Berkman* (ARB Feb. 29, 2000); *Brown v. Kinney Shoe Corp.*, 237 F. 3d 556, 566 (5th Cir. 2001). To demonstrate that he was constructively discharged, a complainant must show that his employer created working conditions so intolerable that a reasonable employee would feel compelled to resign. *Williams*, 376 F.3d at 480 (quoting *Hasan v. U.S. Dept. of Labor*, 298 F.3d 914, 916 (10th Cir. 2002)); *see also Talbert v. Washington Public Power Supply System*, 1993-ERA-35 (ARB Sept. 27, 1996). In other words, the working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to

⁵ There have been two recent scandals involving Boeing Aircraft, a rival to LMC in terms of obtaining government contracts. In March of 2005, Boeing CEO Harry Stonecipher was terminated for his conduct in having an affair with another Boeing executive. *See* www.washingtonpost.com/wp-dyn/articles/A13173-2005Mar7.html. Stonecipher had taken over as CEO when his predecessor, Phil Condit, quit in December of 2003, in the wake of a scandal arising from the CFO being terminated for his involvement in the hiring by Boeing of a former Pentagon official who had secretly steered contracts to Boeing. *See* www.nytimes.com/2003/12/01/business/01WIRE-BOEING.html?hp. A review of Boeing’s stock prices before, during and after these two incidents reveal no significant drop in trading prices. In fact, Boeing stock continually rose during both periods. *See* <http://finance.yahoo.com> for the historical price information.

resign, such that the resignation is effectively involuntary. *Johnson v. Old Dominion Security*, 1985 CAA 3 to 5 (Sec’y May 29, 1991). Such an environment may be established by evidence of a pattern of abuse, threats of imminent discharge, and marked lack of response by supervisors to the complainant’s concerns. *Taylor v. Hamilton Recreation and Hamilton Manpower Services*, 1987 STA 13 (Sec’y Dec. 7, 1988). If the resignation was not a constructive discharge, then a complainant is not eligible for post-resignation damages, pay, and reinstatement. *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343 (10th Cir. 1986).

To demonstrate that she was constructively discharged, Complainant must show that her employer created working conditions so intolerable that a reasonable employee would feel compelled to resign. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004), the U.S. Supreme Court rejected a Third Circuit decision under Title VII that a constructive discharge, if proven, constitutes a tangible employment action that renders an employer strictly liable, subject to an affirmative defense. Justice Ginsburg wrote:

. . . to establish “constructive discharge,” the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. In so ruling today, we follow the path marked by our 1998 decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742, and *Faragher v. Boca Raton*, 524 U.S. 775.

Pennsylvania State Police v. Suders, *supra* at 134.

In a footnote to the decision in *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), the ARB clarified the standard which it had enunciated in *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 34-35 (ARB Jan. 30, 2004), *aff’d sub nom Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005), based on the subsequent ruling in *Belt v. United States Dept. of Labor*, 2006 WL 197385 (6th Cir. Jan. 25, 2006). The ARB had stated in *Sasse* that “[t]o prevail on a hostile work environment claim, the complainant must establish that the conduct complained of was extremely serious or serious and pervasive.” The ARB agreed with the Sixth Circuit in the *Belt* decision that “the more precise articulation of the standard is whether the objectionable conduct was sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, rather than whether the

conduct was ‘extremely serious or serious and pervasive.’” (Citation and quotation marks omitted).

Thereafter, in *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), the ARB cited the Supreme Court’s ruling that a Title VII plaintiff must show that a reasonable employee or job applicant would find the employer’s action “materially adverse,” i.e., “the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” USDOL/OALJ Reporter at 10-11, quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (June 22, 2006). See *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006) (applying the Supreme Court’s standard from *White* in a SOX case). Since the instant case arose in the Tenth Circuit, it is also appropriate to consider the expansive definition of adverse action found in *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004), in which the court held that the fact that the unlawful personnel action turned out to be inconsequential goes to damages, not liability, although the standard does not encompass mere inconvenience or alteration of job responsibilities. *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (ALJ Dec. 9, 2004).

In *Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int’l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), the ARB retreated from the “tangible consequence” standard for evaluating actionable adverse employment actions. Rather, the ARB stated that the correct standard, as clarified by the Supreme Court in *Burlington Northern Ry. Co.*, 548 U.S. at 57 (2006), is whether the actions were “materially adverse”: that is, “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” Slip op. at 12, quoting *Burlington*. The ARB noted that it had already applied this standard to AIR21 cases and that it is also appropriate to apply it to cases arising under SOX and the environmental acts.

In this case, accordingly, the actions complained of by Complainant must be examined to determine whether these actions were “materially adverse” such that a reasonable worker would be dissuaded from making a whistleblower complaint thus justifying Complainant’s resignation due to the abusive working environment.

It is evident here that Owen exerted influence over Gan and that she used that influence to retaliate against Complainant. Although Complainant had expressed her satisfaction with the ethics complaint process in September of 2006, her satisfaction turned to disappointment by December of 2006, when she felt compelled to reveal to Owen that she played at least some role in her ethics investigation. Although Owen expressed her “understanding” of Complainant’s ethics complaint against her, Complainant suspected that Owen was insincere. TR at 262-265. Complainant continued to report directly to Owen for several months thereafter until she began to report to Gan with Owen being Gan’s Deputy under the reorganization. *Id.* at 266-268. Complainant testified that Gan immediately took an inexplicably aggressive tone with her and, after their initial face-to-face meeting, Gan set out to bring-in another person to fill Complainant’s position, explaining that Complainant was not qualified to continue as Director of Communications in the larger business entity that had been created by reorganization. *Id.* at 270-271. Complainant then received a phone call from Owen on June 12, 2007, in which Owen

advised Complainant that her job was being advertised on the internet and that Complainant had better get her resume together. *Id.* at 274-275; 375-376; 413-414. When Complainant applied for this job on July 12, 2007, Gan called Complainant and told her she was not qualified for the higher level position, claiming that Complainant had performed poorly throughout her career with Respondent. *Id.* at 281-282. Moncallo testified that it was normal for new supervisors to consult with old supervisors regarding employees and their prior performance. However, Moncallo expressed surprise that Gan would have consulted Owen about her opinion of Complainant's performance given the ethics complaint made by Complainant against Owen, but Moncallo testified that she never spoke to Gan about this. *Id.* at 148-150. Thus, it is not surprising that Gan testified that she had never heard of Complainant's ethics complaint against Owen until she read the resignation e-mail of Complainant on February 4, 2008. Further, Gan testified that she did not believe that any such ethics complaints against Owen were true. Gan Depo. at 14-18; 23-24. Accordingly, Gan relied upon her Deputy, Owen, of whom she had a high opinion. *Id.* at 36-37; 51-54. Under these circumstances, it seems obvious that Owen contributed heavily to Gan's opinion that Complainant needed to be replaced as Director of Communications.

During the summer of 2007, Jewell was selected by a committee including Owen to replace Complainant as Director of Communications. Complainant knew that Jewell had a good relationship with Owen and was regarded as Owen's "Golden Boy." TR at 287. Indeed, Jewell was advised of the opening by Owen who was also on the selection committee. Jewell Depo. at 20-23; 113. Jewell testified that he sought Owen's advice regarding his new position and the employees under his supervision. Jewell recalled that Owen, not surprisingly, advised Jewell that Complainant had received less than perfect evaluations in the past. *Id.* at 33-34. Upon Jewell's arrival, Complainant was forced to give up her title of Director of Communications as well as her executive office and supervision of four other employees. TR at 287-289; 295-296. Complainant was not given a new office but rather was told to work at home and use a visitor's office (which also served as a general storage area for canned goods and office supplies) on those occasions when she needed to work in the office. *Id.* at 289-296. She was denied permission to attend the annual communications conference, which she had routinely attended, even though she was one of five communicators scheduled to receive a company award, the Comet Award, at the conference. *Id.* at 293-294. Complainant was told shortly after Jewell's arrival that she was one of two employees being considered for a layoff. *Id.* at 297. Complainant stated that she was not told whether she would continue to have a job, and if so, what her job would be. *Id.* at 302-304.

On January 3, 2008, Complainant was told by Jewell to come to work at the office. When she arrived, she found someone else using the visitor's office so she again spoke with Jewell about getting her a permanent office. Jewell told Complainant that he was looking for a cubicle for her. When Complainant told Jewell that she was entitled to an office rather than a cubicle due to her L-code, Jewell advised her that he was revoking her L-code and that she was only entitled to a cubicle. Complainant left the office in tears. *Id.* at 304-308. On January 7, 2008, Complainant filed for Family Medical Leave on the advice of her psychiatrist and family doctor due to the stress and uncertainty regarding her job situation. *Id.* at 311-312; HX 29. On June 18, 2008, Complainant e-mailed Moncallo and Jewell seeking guidance as to whether she was to be laid-off but received no definitive response. TR at 312; HX 30. Thereafter, Complainant sought legal

advice, filed a complaint with OSHA, and gave notice of her “forced termination” by e-mail on February 4, 2008. TR at 313-314; HX 31.

I find that the overall combination of actions that Respondent took with regards to Complainant following her ethics complaint against Owen created an abusive and “materially adverse” work environment such that Complainant’s resignation was a reasonable response to the actions of her employer. In reaching this finding, I rely on the totality of the circumstances, but most especially the hiring of Jewell as Director of Communications, the resistance of Gan to Complainant’s even filing an application for the “new” position, the refusal to furnish an adequate office space, the insistence that Complainant work in an only sometimes-available visitor’s office that doubled as a supply closet, the removal of her L-code, the requirement that she surrender her parking space to Jewell, the refusal to allow Complainant to attend a ceremony at which she was to receive an award, and the persistent uncertainty regarding whether she would retain employment with the company, and, if so, what that employment might be. A reasonable person such as Complainant would see resignation as her only option under these circumstances.

Protected Activity as a Contributing Factor in Complainant’s Constructive Discharge

The next question is whether Complainant’s protected activity in reporting Owen’s alleged conduct played a contributing factor in her subsequent constructive discharge. There can be no doubt that it did, at least in part. Owen clearly “poisoned” the opinions of Gan and Jewell regarding Complainant’s qualifications and quality of work. Both Gan and Jewell thought highly of Owen, relied upon her to assist in evaluation of employees, including Complainant, and neither knew of the ethics complaint made by Complainant against Owen. Complainant’s situation is mirrored by Colditz’s, who assisted in the investigation against Owen. Colditz was similarly treated very differently after the Owen investigation by new supervisors who were apparently likewise influenced by Owen. Colditz Depo. at 811-16; 94-96; 111-112. Respondent argues that since neither Gan nor Jewell knew of the ethics complaint, then Respondent cannot be found responsible. However, this very situation has been addressed by the Tenth Circuit in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d 476 (10th Cir. 2006). The Court held that discriminatory intent need not be held by the manager who takes an unfavorable personnel action where that manager relies on the biased report of another manager. *Id.* at 485. *See also Frazier v. Merit Systems Protection Board*, 672 F. 2d 150 (D.C. Cir. 1982). The undersigned finds that to be the situation in this case, where Gan and Jewell relied on the biased and discriminatory reports of Owen against Complainant. The undersigned thus finds that these actions against Complainant were “materially adverse” such that a reasonable worker would be dissuaded by such actions on the part of her employer from making a whistleblower complaint.

Further, I find that Respondent may not prevail on the affirmative defense—even assuming it were available, given that several actions against Complainant, including the removal of her L-Code, qualify as “official”—set forth in the *Suders* decision, *supra*. Although Respondent had installed a readily accessible and effective policy for reporting and resolving complaints, Respondent cannot show that Complainant unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. Indeed, Complainant repeatedly reported the actions of Owen to her superiors—Moncallo, Asbury and Jewell—but to no avail. Complainant reported Owen’s initial phone calls seeking the identity of the whistleblower to

both Moncallo and Asbury. TR at 266. Moncallo could not recall whether she reported this to anyone. *Id.* at 147-148. Asbury testified that he called Pleasant since she had been the ethics investigator. Asbury Depo. at 95-97. Pleasant testified that she could not recall such a report from anyone so she never spoke with Owen to advise Owen to refrain from seeking the identity of the whistleblower. Pleasant Depo. at 109-116. Complainant told Asbury of Owen's phone call telling Complainant that her job was being advertised. TR at 275-276; HX 13. Asbury testified that he called Gan to ask Gan to remove Owen from the job selection process. Asbury Depo. at 108-109. However, Owen was clearly not removed from the process as Owen was one of the three committee members that interviewed and recommended Jewell for the job. Complainant told both Moncallo and Asbury of Gan's phone call advising Complainant to withdraw her application for the new position. Moncallo advised Complainant to file another ethics complaint against Gan but Complainant refused citing the problems that the Owen complaint had engendered. TR at 282-283; HX 16. Moncallo testified that in the ensuing months, Complainant told Moncallo that she feared losing her job, but Moncallo could get no reassurance from Gan about Complainant's job security. TR at 150-152; 193-194. In fact, Moncallo testified that although she originally assured Complainant that she would continue to have a job, she later began to advise Complainant to wait for a lay-off so that she could draw unemployment. *Id.* at 160-161. While Asbury testified that he had a "deal" with Gan to retain Complainant in some capacity, Gan denied any such deal. Asbury Depo. at 113-114; Gan Depo. at 192. Asbury further testified that he also had a "backup plan" if his "deal" with Gan fell through, such that he would add Complainant to his own staff in some capacity. Unfortunately, Asbury never reassured Complainant by telling her of his backup plan. Asbury Depo. at 113-114.

Complainant evidently advised her superiors many times—in accords with Respondent's procedure—of her complaints and of the resulting retaliation wrought by Owen through her influence on Gan and Jewell. However, Respondent never took the appropriate steps to assure that Owen could not influence employment actions against Complainant. Respondent's actions in this matter appear to be aimed primarily at protection of the company, and perhaps to some extent its vice president, at the expense of a *bona fide* whistleblower who had simply followed the company's policy to report suspect activities within the company. The initial investigation appears very superficial in view of the investigator's acceptance of Owen's explanations without any further investigation or follow-up. It seems apparent that Respondent perceived too great a risk that widespread and detrimental public exposure of Owen's sensational alleged behavior would result were it to have contacted soldiers to verify the allegations against her. Nonetheless, Respondent's investigator undoubtedly should have requested appropriate documentation from Owen regarding the suspect expenditures on expense vouchers, rather than simply accepting Owen on her word. *See* Pleasant Depo. at 83. While the shroud of secrecy regarding the Owen investigation is, to some extent, understandable in terms of seeking to protect the company's image, it is totally unacceptable that Respondent chose to maintain this secrecy at the expense of Complainant. Owen should not only have been prevented from exerting any influence over Complainant once Complainant advised Asbury Respondent of Owen's attempts to identify her as the whistleblower, but Respondent further should have taken all necessary steps to see that Owen could not retaliate against Complainant even if that meant telling other employees of Owen's conduct in such a manner that widespread dissemination could not be avoided.

In sum, a desire for secrecy or discretion is no excuse for allowing the retaliation against Complainant to have occurred. While both Asbury and Moncallo made some effort to afford Complainant protection against Owen's discriminatory and retaliatory influence, neither did enough. The reports by Complainant should have been sufficient to compel either Moncallo or Asbury to disclose Owen's cause for bias and the possibility of retaliation against Complainant to Gan, Jewell, and other high ranking officials who could and should have taken the necessary steps to prevent the combination of discriminatory employment actions against Complainant that transpired. In view of the failure to protect Complainant from such discriminatory acts, Respondent must be held liable for Complainant's constructive discharge.

Damages

Remedies under the SOX can include reinstatement, back pay with interest, compensatory damages, and attorney's fees. *See* 18 U.S.C.A. § 1514A(c)(2)(A)-(C), which states:

(c) REMEDIES-

(1) IN GENERAL- An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES- Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

See also 29 C.F.R. § 1980.109(b). Complainant seeks various forms of relief to remedy Respondent's violations of the Act.

Reinstatement

At the time of the hearing, Complainant was working at a new job and did not wish reinstatement. However, by the time the post hearing briefs were filed, Complainant had quit her employment with ITT Systems. Complainant filed an affidavit in which she stated that she found the new position at ITT Systems to involve much higher levels of stress and time demands than had her former position with Respondent. Complainant further averred that her emotional state following her constructive discharge from Respondent had not significantly improved and that she continued to suffer from depression and lack of self-esteem. *See* Attachment 2 to

Complainant's Final Brief. However, Complainant still contends reinstatement is not appropriate and filed with her Final Brief a report and calculation of future earning losses prepared by economist Jane H. Lillydahl, Ph.D. to support a claim of front pay rather than reinstatement. *See* Attachment 1 to Complainant's Final Brief. Although offered the opportunity to depose both Complainant and Dr. Lillydahl, Respondent refused, contending that Complainant is not entitled to front pay or any damages. Complainant offered several reasons why Complainant should receive front pay rather than reinstatement. Complainant contended that her relationship with Respondent is "pervaded by hostility;" that she has suffered emotional distress while employed by Respondent; and that there is no position to which she can be reinstated. *See* Complainant's Final Brief at 43.

When a complainant does not seek reinstatement, the ALJ should inquire as to why. If there is such hostility between the parties that reinstatement would not be wise because of the irreparable damage to the employment relationship, the ALJ may decide not to order reinstatement, and may order front pay. If, however, the complainant gives no strong reason for not returning to her former position, reinstatement should be ordered. If reinstatement is ordered, the respondent's back pay liability terminates upon the tendering of a *bona fide* offer of reinstatement, even if the complainant declines the offer. *See Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Oct. 31, 1994). *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995).

Although reinstatement is the presumptive remedy in wrongful discharge cases under the whistleblower statutes, there are circumstances in which alternative remedies may be appropriate. Front-pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship," *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996), slip op. at 9, or where reinstatement otherwise is not possible. *See, e.g., Doyle v. Hydro Nuclear Servs., Inc.*, No. 89-ERA-22 (ARB Sept. 6, 1996) (reinstatement impractical because company no longer engaged workers in the job classification occupied by complainant, and had no positions for which complainant qualified); *Blackburn v. Metric Constructors, Inc.*, No. 86-ERA-4 (Sec'y Oct. 30, 1991) (Secretary reversed earlier reinstatement orders based on evidence developed on remand that company's electricians were terminated at conclusion of project with no expectation of continued employment); *cf. Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1449 (11th Cir. 1985), *cert. denied*, 474 U.S. 1005 (where the Eleventh Circuit found that reinstatement, not front pay, was appropriate remedy where there was no evidence that "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy")."

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), *aff'd sub nom. Hobby v. USDOL*, No. 01 10916 (11th Cir. Sept. 30, 2002) (unpublished), the ARB detailed the reasons why reinstatement is the presumptive remedy in wrongful discharge cases, but acknowledged that certain circumstances dictate alternative remedies such as front pay. In *Hobby*, the ARB noted:

Although reinstatement is primarily a "make-whole" remedy for a prevailing complainant in a discrimination case, intended to return the complainant to the position that he or she would have occupied

but for the unlawful discrimination, reinstatement also serves as an important deterrent to other discriminatory acts that might be committed by the offending respondent. As the Supreme Court observed in a leading Title VII case, courts have “not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975) (emphasis added).

...

Quite simply, reinstatement is important not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective. *See Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982) (in a case under Age Discrimination in Employment Act, observing that “reinstatement is an effective deterrent to preventing employer retaliation against employees”).

Hobby, supra at 7-8.

Complainant alleges that her employment relationship with Respondent was “pervaded by hostility.” While the undersigned has found that the relationship between Complainant and Mr. Jewell and Ms. Gan was indeed “poisoned” by the actions of Ms. Owen, the actions by Jewell and Gan were taken in ignorance of Complainant’s valid ethics complaint against Owen and Owen’s unlawful discriminatory motive against Complainant. However, Owen is no longer employed by Respondent. Gan Depo. at 36-37. Further, neither Complainant nor Mr. Asbury appears to have any significant hostility toward each other except that Complainant felt Asbury should have moved more quickly toward resolution of her job status. TR at 388-391; 414-415. Indeed, had Asbury advised Complainant of his “back up plan” to have her work directly on Asbury’s staff, perhaps Complainant would not have felt compelled to resign when she did. The court in *Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322, 1339-40 (1999) addressed the hostility issue thusly:

[T]he presence of some hostility between parties, which is attendant to many lawsuits, should not normally preclude a plaintiff from receiving reinstatement. Defendants found liable of intentional discrimination may not profit from their conduct by preventing former employees unlawfully terminated from returning to work on the grounds that there is hostility between the parties. *See Allen[v. Autauga County Bd. of Ed.]*, 685 F.2d at 1306 (observing that “[u]nless we are willing to withhold full relief from

all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement”); *see also EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1462 (7th Cir.1992) (noting that “if ‘hostility common to litigation’ would justify a denial of reinstatement, reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff”) . . . To deny reinstatement on these grounds is to assist a defendant in obtaining his discriminatory goals. *See Jackson v. City of Albuquerque*, 890 F.2d 225, 235 (10th Cir.1989) (overruling denial of reinstatement based on the discriminating employer’s hostility for the prevailing plaintiff).

Farley, supra at 1339-40.

In *Jones v. E G & G Defense Materials, Inc.*, 1995-CAA-3 (ARB Dec. 24, 1998), the ARB observed that “[i]n rare instances, front pay may be used as a substitute for reinstatement where there is ‘irreparable animosity between the parties,’ *Blum v. Witco Chem. Corp.* 829 F.2d 367, 374 (3d Cir. 1987), and ‘a productive and amicable working relationship would be impossible.’ *EEOC v. Prudential Federal Sav. and Loan Ass’n*, 763 F.2d 1166, 1172 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985).” *Jones*, 1995- CAA-3 at 10. In this matter, the undersigned does not find such animosity or hostility to exist so as to justify subverting the preferred reinstatement remedy.

Complainant has next argued that she suffered emotional distress during her employment at Respondent and thus apparently that she would be unable to resume her position with Respondent. Where a complainant is not physically able to be reinstated, front-pay may be used as a substitute. *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000). However, Complainant has not submitted a single medical report or record in support of any medical inability to perform her job. *See* Respondent’s Post-Hearing Brief at 36-37. Accordingly, there is no basis in this record upon which to conclude that Complainant should be awarded front-pay rather than reinstatement due to medical inability to perform her job.

Finally, Complainant contends that there is no longer a comparable position within the company to which Complainant can be reinstated. While the testimony indicates that Complainant’s exact position has been eliminated by way of a lay-off, the testimony of Gan and Asbury confirm that there are other positions available for Complainant. Gan Depo. at 175-177; Asbury Depo. at 113-114. Indeed, Asbury repeatedly stated that there was a position for Complainant within the company, including Asbury’s “backup plan” of putting Complainant on his own staff. Asbury Depo. at 114. Once again, this matter is similar to that in *Hobby, supra*, where Respondent had also gone through some organizational changes. The ARB noted that reinstatement does not require placement in the exact position, stating:

While the remedies section of the ERA whistleblower provision states that the Secretary “shall . . . reinstate the [prevailing]

complainant to his former position[,]” (42 U.S.C. §5851(b)(2)(B)), this text has been construed to mean reinstatement to the same or a *similar* position to the job that was formerly held. *See, e.g., Agbe v. Texas Southern Univ.*, ALJ No. 97-ERA-13 (ALJ Jan. 23, 1998), *adopted*, ARB No. 98-072 (ARB July 27, 1999) (“If Complainant’s former position no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions, and benefits.”); *DeFord v. TVA*, No. 81-ERA-1 (Sec’y Mar. 4, 1981), *aff’d*, *DeFord v. Sec’y of Labor*, 700 F.2d 281 (6th Cir. 1983) (ordering reinstatement to same or similar position acceptable to complainant). Stated simply, the reinstatement language of the ERA whistleblower protection section does not require that a prevailing complainant be reinstated to the precise position formerly occupied, only to a comparable position; to view the statutory text otherwise would allow an employer to evade reinstatement merely by abolishing or reconfiguring the particular position that a discharged complainant had occupied.

Hobby, supra at 13. The undersigned finds that the fact that Complainant’s particular job position was eliminated does not prevent her reinstatement to a comparable position within Respondent. Accordingly, the undersigned finds that Complainant should be reinstated to a comparable position to that which she occupied at the time of her employment with Respondent.

Health, pension and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory layoff until reinstatement or declination, and these compensable damages include medical expenses incurred because of termination of medical benefits, such as insurance premiums. *Creekmore v. ABB Power Sys. Energy Serv., Inc.*, 1993-ERA-24 (Dep. Sec’y Feb. 14, 1996).

Complainant is hereby awarded back-pay, with interest until paid, and restoration of the terms, conditions, and privileges associated with her employment. *See* 29 C.F.R. § 1980.109(b). Restoration of employment is effective immediately. *See* 29 C.F.R. § 1980.109(c). Respondent shall reimburse Complainant for all medical expenses incurred because of termination of medical benefits, including but not limited to health care premiums. The amount of the back-pay award shall be reduced by the total amount of wages received by Complainant during her interim employment since the time of her constructive discharge.

Compensatory Damages

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation under 29 C.F.R. § 1980.109(b). The testimony of medical or psychiatric experts is not strictly necessary. *Thomas v. Arizona Public Service Co.*, 1989-ERA-19 (Sec’y Sept. 17, 1993). However, damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the

employee. *Id.* In *Kalkunte v. DVI Financial Services, Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009), the ARB affirmed the ALJ's award of \$22,000 for "pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation that she suffered." The ARB noted that although damage to credit may not be legally compensable, the balance of the award was supported by the evidence and was within the ALJ's discretion.

In *Mahony v. Keyspan Corp.*, No. 06CV00554 (E.D.N.Y. Mar. 12, 2007) (case below 2004-SOX-24), the defendant sought to have the plaintiff's request for reputational damages stricken on the ground that "special damages" under SOX do not include reputational damages, citing in support *Murray v. TXU Corp.*, 03 CV 0888, 2005 U.S. Dist. LEXIS 10945 *8 (N.D.Tex.2005). The court stated that it disagreed with the *Murray* court's interpretation. Rather, the court found that § 1514A(c)(2)(C) comprises an illustrative list of the types of special damages that may be recovered rather than an exhaustive list. The court indicated that it agreed with the reasoning of the court in *Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1332 (S.D.Fla.2004), where the court held that the SOX whistleblower provision includes damages for loss of reputation.

In *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), the ARB found that the ALJ properly found that the case law governing non-economic damages provides that a determination on such damages is a subjective one, based on the facts and circumstances of each claim. Thus, the ARB affirmed the ALJ's award of \$100,000.00 in compensatory, non-economic damages where, even though the Complainant's testimony was not supported by medical evidence, it was unrefuted and corroborated by his wife, both of whom were found to be credible witnesses by the ALJ. The ARB found that the record supported the ALJ's finding that the termination of the Complainant's employment caused emotional harm and damage to his reputation. Similarly, in *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit affirmed a compensatory damages award of \$50,000 for mental anguish, as supported by substantial evidence, where the Complainant credibly testified that he struggled to support his wife and two infant children while he looked for a new full-time job following his termination by the respondent. He had been forced to sell both of the family's modest cars and deplete their meager savings to make ends meet. He testified that this ordeal caused him pain and suffering.

Complainant has testified that she suffered from depression and loss of self-esteem during and following her employment and constructive discharge from Respondent. Although no medical evidence has been presented in support, Complainant's son testified in confirmation of Complainant's emotional distress and depression with the resulting effects on both the family and their economic situation. Moncallo, Asbury, and Colditz all confirmed the Complainant's distress over what the undersigned has found to be unlawful discriminatory employment actions while in Respondent's employ. Accordingly, I find Complainant's testimony regarding her emotional pain and suffering, mental anguish, embarrassment, and humiliation to be generally credible. In line with awards made in similar cases, I hereby award Complainant the sum of \$75,000.00 as non-economic compensatory damages.

Attorney Fees and Costs

Complainant has prevailed under the Act and such success carries with it an award of attorney's fees and costs to Complainant's counsel. 29 C.F.R. § 1980.109(b). Thirty (30) days is hereby allowed to Complainant's counsel for the submission of an application for attorney's fees and costs. A service sheet showing that service has been made upon all the parties, including Complainant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record,

1. Respondent shall compensate Andrea Brown for all back pay, plus interest less amounts received by Complainant for subsequent employment, and shall restore the terms, conditions, and privileges associated with her employment, effective immediately.
2. Respondent shall reimburse Andrea Brown for all medical expenses incurred because of termination of medical benefits, including but not limited to health care premiums.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California

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

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

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