



CASE NO: 2010-SOX-00051

In the Matter of:

**EDNA D. FORDHAM,
Complainant,**

v.

**FANNIE MAE,
Respondent.**

Appearances:

For Complainant:
Thad M. Guyer
Stephani L. Ayers

For Respondent:
Damien G. Stewart
Madonna A. McGwinn

Before:
Christine L. Kirby
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A (“Act” or “SOX”) as implemented by 29 C.F.R. Part 1980. This statutory provision, in part, prohibits an employer 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 from discharging, or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders.

Procedural History

Edna Fordham (“Complainant”) filed an initial complaint on April 28, 2009, and supplemental complaints on July 27, 2009, and September 14, 2009, with the United States Department of Labor Occupational Safety and Health Administration (“OSHA”) in which she alleged that her former employer, Fannie Mae (“FM” or “Respondent”), had placed her on administrative leave and subsequently terminated her employment in retaliation for raising issues she reasonably believed violated SEC rules and regulations. Upon completion of the investigation, on July 13, 2010, the Area Director of OSHA dismissed Ms. Fordham’s complaints, finding no reasonable cause to believe Respondent violated Complainant’s rights under SOX. Complainant filed timely objections and a request for a hearing.

A hearing was held before the undersigned administrative law judge in Washington, D.C. on August 8 through 12, August 15, and August 19, 2011. All parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument, and file post-hearing briefs. At the hearing, Administrative Law Judge Exhibit 1 and Joint Exhibits (“JX”) 1 through 186 were admitted.¹ At the hearing, I granted the parties’ request to submit audio files post-hearing consisting of recorded conversations, some of which are contained in the transcripts at JX 177.² On February 13, 2012, audio files of four conversations were submitted.³ On February 17, 2009, Complainant clarified the dates of the audio files. At the hearing, I denied Respondent’s motion for a directed judgment. (Tr. 954-55).

Post-hearing briefs were received from Complainant and Respondent. I based the following findings of fact and conclusions of law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

Complainant’s Position

Complainant asserts that Respondent took adverse personnel actions against her because she engaged in SOX protected activities, i.e., she raised concerns of SOX violations to her managers, internal investigative organizations at FM and external investigative and regulatory organizations.

Respondent’s Position

¹ Joint Exhibits will be referenced as “JX” followed by the exhibit number. Within the Joint Exhibits are pages marked “EF” (Edna Fordham) or “FM” (indicating Fannie Mae). Some references will be to the specific “EF” or “FM” page number within the exhibit. References to the hearing transcript will appear as “Tr.” followed by the page number. Witnesses will be identified by their last names.

² In an order dated August 2, 2011, I granted Complainant’s motion to leave the record open to allow the parties to submit evidence regarding front pay calculations in the event that I were to rule in favor of Complainant and determine front pay should be awarded.

³ I have attached a CD containing these files to the record at JX 177, and placed JX 177 in a separate binder labeled “Vol. III, Part 2.”

Respondent asserts that Complainant never engaged in SOX protected activity. It asserts that any adverse personnel actions taken against Complainant were based upon her poor performance and attendance as an employee. It asserts that even if this tribunal were to find that Complainant demonstrated a prima facie case of retaliation, adverse personnel actions against Complainant were taken for legitimate non-retaliatory reasons.

Issues

1. Whether Complainant engaged in protected activity within the meaning of the SOX.
2. Whether Complainant suffered an adverse action(s).
3. Assuming Complainant engaged in protected activity, whether Respondent was aware of the protected activity.
4. Assuming Complainant engaged in protected activity and suffered an unfavorable personnel action, whether her activity was a contributing factor in Respondent's alleged discrimination against Complainant.
5. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel actions irrespective of Complainant having engaged in protected activity.

Stipulations

In a *Joint Pretrial Stipulation*, filed on July 29, 2011, the parties stipulated to the following:

1. Jurisdiction of this action is based upon 29 C.F.R. 1980.106(a), conferring *de novo* jurisdiction over the dismissal of Complainant's complaints by DOL-OSHA on July 13, 2010.
2. Complainant administratively exhausted her complaints with OSHA. OSHA dismissed her three complaints by letter dated July 13, 2010. Within 30 days thereof, Complainant filed her objections and request for hearing.
3. Complainant is a citizen of the United States and a resident of the State of Virginia. Fannie Mae is the Respondent, and is formally known as the Federal National Mortgage Association. Complainant's duty station was in Herndon, VA, and FM's headquarters is in the District of Columbia.
4. FM is a publicly traded corporation. It is a government-sponsored enterprise established as a federal agency in 1938, and chartered by Congress in 1968 as a private shareholder-owned company. FM was chartered to provide liquidity, stability and affordability to the U.S. housing and mortgage markets. It funds its mortgage investments primarily by issuing debt securities in the domestic and international capital markets. Because it issues these securities, it makes regular, periodic, quarterly and yearly filings with the SEC.

5. FM operates in the U.S. secondary mortgage market. Rather than making home loans directly to consumers, FM works with mortgage bankers, brokers and other primary mortgage market partners to help ensure they have funds to lend to home buyers at affordable rates. During the relevant period, FM had three complementary businesses: the Single-Family business, Multifamily Mortgage Business, and the Capital Markets group.

6. FM has subjected itself to regulation under SOX, as well as the Securities Exchange Act of 1934 as amended. FM is a publicly traded corporation, with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781. FM has agreed to be required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 o(d) and to be subject to SOX.

7. Rather than the SEC, the Federal Housing Finance Agency ("FHFA") functions as FM's primary regulator. FHFA's regulatory authority includes insuring SOX compliance pursuant to 12 C.F.R. § 1710.12.

8. FM employed Complainant from May 1, 2006, until she was notified by letter dated July 18, 2009,⁴ of her termination of employment.

9. Complainant was employed as an IT Technical Risk Specialist in the SOX Technology Department, which was responsible for monitoring and executing FM's SOX Technology Management Testing Program. This program involved the testing of IT platforms, applications, and end-user computing. Some of the applications under review by the SOX Technology Team involved applications that were deemed financially relevant. Complainant's assigned work responsibilities included defining test conditions, collecting and tracking evidence from the Technical Risk Lead's of the business group whose application, platform or EUC was being tested, responding to quality reviews of external consultants, and engaging in SOX Management testing and remediation.

10. Complainant interacted with the following FM employees, among others, during the times relevant to this action, and the indicated job titles were those held by such persons during the material times:

- (a) Patricia Black - Senior Vice President, Chief Audit Executive, formerly Vice President for Financial Controls, Washington, D.C. office;
- (b) Nancy Hall - Manager, SOX Technology Program, Herndon, VA office;
- (c) Michael Gabbay, Senior Technology Risk Analyst/Manager, Herndon, VA office;
- (d) Robert "Bob" Leonard - Director, SOX Technology Program, Washington, D.C. office;
- (e) Stephanie Bahr, Director, SOX Technology, Washington D.C. office; and

⁴ The date on the letter is July 17, 2009. *See* JX 170.

(f) Darlene Slaughter, Vice President, Director of Human Resources, Chief Diversity Officer, Washington D.C. office.

11. Deloitte & Touche LLP (“DT”) was retained approximately one month after Fannie Mae ended its relationship with KPMG LLP.
12. Upon identification of the control weaknesses that led to the restatement, Fannie Mae began the design and implementation of several remediation efforts that encompassed the Enterprise-wide control environment.
13. Complainant's job duties were in support of FM's SOX technology management testing and remediation functions.
14. One aspect of Complainant's job was to support FM's processes for review and assessment of the remediation status of deficiencies recorded in the DMS (Deficiency Management System).
15. FM is subject to the standards of the Financial Accounting Standards Board (FASB).
16. On April 29, 2009, Slaughter placed Complainant on paid administrative leave based on Complainant's alleged non-performance and unexcused absences.
17. Complainant was notified by letter dated July 18, 2009,⁵ of her termination from employment at Fannie Mae.

Summary of Evidence

Sworn Testimony of Witnesses Called by Complainant⁶

Edna Fordham, Complainant, Tr. 44-127; 234-323; 340-760

[Direct Examination] Complainant testified that she worked with a variety of companies focusing on SOX compliance for approximately nine years, prior to beginning work with FM in May of 2006. (Tr. 48-49). She was initially hired into the SOX technology department under the leadership of Robert Leonard. In March-April of 2009, her job duties were being redefined because her work had been outsourced to Price Waterhouse Cooper (“PwC”). She thinks she was being stripped of core responsibilities, although her colleagues had work assigned to them on a consistent basis during the same period. (Tr. 51). She had the same job title for her entire tenure at the company, IT risk specialist. For the first 18 months, she functioned in SOX

⁵ See previous footnote.

⁶ Given the length of the transcript in this case, I have not summarized everything that was said by the witnesses, but have focused the summary on those sections bearing on the immediate labor/whistleblower issues in this matter. However, although I have not described the testimony of each witness in its entirety, I have read and studied the transcript of the witnesses’ testimony, as well as each exhibit, *in toto*. I note that it is beyond the purview of this tribunal to determine whether violations of the federal securities laws alleged by Complainant have occurred and accordingly I have not discussed the merits of these allegations in detail.

infrastructure testing. When she transitioned to Leonard's group her duties changed and she was assisting with project management of approximately 110 financially significant applications that had a material impact on the financial statements as a whole. (Tr. 51-52). She was required to compile data, documentation, and evidence necessary for these 110 systems to be available for the external consulting group, Grant Thornton ("GT"), to come in and test. Her previous role as a tester was outsourced to GT, so she principally was assigned to update the test groups and make certain the data was available so the consulting group could have access to a repository to perform or execute their SOX 302 management certification testing. (Tr. 52). Another of her duties was to perform quality controls of GT's work. GT was contracted by Fannie Mae to perform its 302 certification testing, which ties directly into SEC filings. (Tr. 53). The deficiency management system ("DMS") was a database for tracking the remediation status of internal control deficiencies that had been identified through various sources throughout the organization. (Tr. 53-54).

Her first protected activity was reporting internally to the management at FM, as well as externally to regulators, concerns around the issue of remediation and insufficient documentation to support remediation status, such as with the collateral management hedging application ("CMH"), which was responsible for accounting for \$308 billion of eligible assets. (Tr. 59-60). Her second protected activity was reporting concerns around insufficient documentation to support management representations of the Powerpoint presentation that Bahr, Hall, and Gabbay insisted she prepare. (Tr. 60). Her third protected activity was reporting concerns internally and externally that all significant internal control deficiencies that were known by SOX program management and all defendants in the SOX program were not accurately reflected in the filings with SEC during 2008. (*Id.*). Her fourth protected activity was reporting concerns around the 62 deficiencies related specifically to DMS that related to the period 2006 and 2007 that were not correctly reported in SEC filings, although required to be remediated. Her last protected activity was her April 27, 2009, disclosure to human resources ("HR") and the compliance department discussing the four previously described protected activities and demanding whistleblower protection. (*Id.*).

Regarding her first protected activity, reporting insufficient documentation to support remediation efforts or tied to remediation of the CMH, she was given an assignment by Hall during the period approximately November 15, 2008, through January 12, 2009. (Tr. 61). She was to research a series of deficiency management system internal control deficiencies that reported in the system itself. As a result of the assignment, she provided Hall with feedback on the disposition of several deficiencies, one of which pertained to the collateral management hedging (CMH) system. (Tr. 62). She was able to obtain preliminary information from DMS about the CMH deficiency, but it was necessary to request an internal audit report because this particular deficiency was not identified by GT, whose work papers she had access to. (Tr. 63).

Internal audit reports indicated there were deficiencies with regards to CMH for the period April through October of 2008. This concerned her because her department, SOX technology, had performed a design review indicating the system was fully SOX-compliant. (Tr. 68-69). The review was performed by Adams and approved by Gabbay. When she brought to Hall's attention that their department had indicated the system was fully SOX-compliant, it began to cause a conflict amongst the four of them. It was her opinion that the work papers she

asked to review were being deliberately withheld because they did not want her to understand why it was possible or what procedures internal audit performed to reach its conclusion, versus the procedures her own department performed to reach its contrary conclusion. She thinks it was embarrassing that the SOX department would assess a system as SOX-compliant when it was the complete opposite. (Tr. 69).

She requested the internal audit work papers in order to understand what procedures internal audit performed to arrive at their conclusion and what her department did to reach the conclusion that this system was SOX-compliant. (Tr. 70). She requested the information from Hall whose attitude was that she should just work with what she had, call a few people, and determine the remediation status. (Tr. 70-71). Complainant felt that due to the magnitude of the assets this system was responsible for accounting, they needed to perform additional procedures to get a clear understanding of what exactly internal audit had done to reach their conclusion and where did we (the SOX technology department) fall short in our own procedures that made us think this system was compliant. Hall told her they would not give her the work papers, but did not explain why. She therefore had to work with the internal audit report. (Tr. 71).

Between December 29, 2008, and January 5, 2009, she had a big discussion with Hall about the issues around hedge accounting, which was one of the core issues that contributed to the restatement. (Tr. 72). Complainant was concerned that there was insufficient documentation to account for a system designed to account for \$308 billion of assets. There were a number of risk factors, but Hall insisted she was asking too many questions and just needed to work with the internal audit report. (Tr. 73).

By reviewing the SEC filings, it was clear to her that the internal control deficiencies they were hiding and concealing in DMS amounted to, at a minimum, significant deficiencies. There were a number of internal control deficiencies that SOX program management and defendants deliberately suppressed from being published in SEC filings that they had knowledge of. (Tr. 74). She expressed her concerns to her manager (Hall) who had given her the assignment to research the deficiencies. (Tr. 75).

The controls that she observed in DMS related to 62 deficiencies that management claimed in SEC filings to have been remediated between 2006 and 2007. This was an absolutely false statement. (Tr. 76). She believed the SEC filings were misleading, especially on the issue of the restatement environment, because FM's December 2007, 10-K indicated that all of their data had been integrated into one general ledger system at that point, but, in fact, the restatement environment continued to exist. (Tr. 77). There were a lot of inconsistencies between the disclosures in the SEC filings versus the information they had access to in their department that contradicted what was reported publicly. (Tr. 78).

When she reported to Hall that the deficiencies were not accurately reported in SEC filings, Hall attempted to marginalize the whole issue by stating that management had its own way of rolling up deficiencies. After reporting to Hall, Complainant decided to wait until the actual SEC filing was issued, so the whole discussion around CMH concluded approximately January 12, 2009, at which time they determined that the system was still in production, it was still running up. (Tr. 79). The SEC filing was issued around February 27, 2009. She reviewed it

and found that FM indicated in their certifications that there was nothing wrong, everything was perfect. (Tr. 80). They did not mention CMH or all these other deficiencies that she knew amounted to at least a significant deficiency. At that point, on approximately February 20, 2009, she knew there was a serious problem, but did not talk to anyone further. She wanted to conduct her own due diligence to substantiate her beliefs. (Tr. 81). Ultimately she decided to report her concerns to the SEC on April 23, 2009. (Tr. 82-83).

Another one of her protected activities concerned a training deck that she had been assigned to prepare. The time frame was approximately March 2, 2009, through the date of her suspension around April 29, 2009. (Tr. 84-85). She was assigned by Bahr and Hall to compile information that was prepared by other individuals. (Tr. 85). She was to put together a PowerPoint presentation/training deck (hereinafter, "training deck") describing how the organization worked. The assignment did not make sense to her because they were no longer performing the work, which had been outsourced to PwC. In order to prepare the training deck, she had to obtain information from her colleagues, Adams and Russell. The problem was that they provided her with old data. (Tr. 86). They [management] did not hold her colleagues accountable for providing her with accurate data to support the representations that management was making in that PowerPoint presentation. (Tr. 87). The data that management requested she use was obsolete. (Tr. 88).

After it was clear to her that she was working in a hostile environment and deprived of resources to fulfill her obligations, she reported her problems to the human resources department ("HR"). She reported to Veith at HR, and later Slaughter, the HR director, also became involved. She also reported what she considered to be a defamatory performance evaluation that was given to her on March 4, 2009. (Tr. 89). On April 27, 2009, she sent a notification (JX 168) to HR director, Slaughter, as well as Fischman, an investigator for the compliance and ethics department. She stated that SOX program management had deliberately suppressed material information or adverse conditions involving their internal control environment systems to their regulators and that it was absolutely necessary to get someone involved with this conversation that had knowledge of IT, internal controls, and SEC requirements for SOX to understand the merits of her complaint. (Tr. 90). She also stated that she intended to report to regulators, which she had already begun to do. She made her first report to the SEC on April 23, 2009, and a subsequent report on April 26, 2009, to the Federal Housing Finance Agency. (Tr. 90-91). In the April 27, 2009, notice she requested whistleblower protection. (Tr. 91).

Hall, Bahr, and Gabbay may have had knowledge of her plans to meet with compliance and ethics. They were also aware that she had filed an EEOC complaint, as well. It was more efficient to meet with Fischman. Slaughter was clueless about SOX, and she had tried to explain to her the retaliation that she was experiencing due to disclosures that she had made to the SOX program management. (Tr. 91-92). Fischman was also investigating her EEOC complaint, and issued a separate report for the SOX investigation. (Tr. 92).

On March 4, 2009, she met with Bahr and Hall, received her 2008 annual performance review (JX 26) and was given a performance memo or warning letter (JX 25) by Hall stating Hall had warned her about performance issues from approximately September 2008 to March 3, 2009. (Tr. 93). Hall did not provide any documentation to support her claims, and it was evident

to Complainant that they were beginning to retaliate. During the period November through December [2008], when she was assigned the remediation project and was reporting materially adverse conditions, the SOX program management was also performing annual evaluations. She believes that based on the disclosures she made to Hall, which she believes Hall reported to Gabbay and Leonard, they made the decision to downgrade her performance unfairly and unjustifiably. (Tr. 94).

Bahr and Hall placed her on a performance development plan (JX 28), effective March 4, 2009, but because of organizational changes, they had not defined any of the goals for the entire team. (Tr. 94-95). Management did not provide her with clearly defined goals until March 31, 2009, after HR forced them to provide her with goals so she could understand the basis on which her performance development plan would be based. In the warning letter she received on March 4, 2009, they accused her of surfing on the internet, not coming to work, not being actively engaged in meetings, and a number of other false claims. Hall never provided any documentation to support her allegations. (Tr. 95). She reported her concerns to HR, but they were never resolved and it was clear that HR was turning the tables on her, and never held SOX program management accountable for providing Complainant with documentation to support the allegations. (Tr. 95-96).

After she reported to HR, they (management) began to conduct surveillance on her, and Gabbay came to her desk physically looking for her, which had never been done before. Also, she was required to give status reports four to five times a day on her projects. (Tr. 96). Gabbay, Hall, and Bahr requested status reports. (Tr. 96-97). On one particular day, Gabbay called Bahr to tell her he suspected Complainant was not in the office or had left early, without proper authorization. Prior to that time, the onsite manager, such as Gabbay or Hall, had never brought in a director 30 miles away to track down where a staff-level individual was. (Tr. 97). She told Gabbay that she left early because she came in early and had worked a complete day. All of her colleagues were gone, and she was the last person to leave on that Friday. (Tr. 98). She routinely came in between 8:30 and 9:15. Her schedule was never an issue, but it was clear to her that this was another way of retaliating against her. (Tr. 99).

The first negative action that management took against her was to give her an adverse performance review on March 4, 2009. (Tr. 100). The impact of the adverse performance review was to disqualify her for merit pay. It also disqualified her from applying for other postings within the company. Other adverse actions included the warning letter and intrusive surveillance. (Tr. 101-102). She also observed that around January 12, 2009, after her dispute with her reporting manager, that although other colleagues were assigned new assignments for the year, she was deliberately left off the work assignment list. From January 12, 2009, to the end of February she had nothing to do because they were removing her from all critical access to information due to her protected activities. (Tr. 103). She complained to Hall and to HR.

On April 29, 2009, she was working, and received a surprise visit from Slaughter, advising her that they were putting her on administrative leave with pay for alleged unexcused absences. Slaughter said it was only around the issue of unexcused absences and had nothing to do with performance or conduct. (Tr. 104).

On April 15, 2009, Bahr and Slaughter arranged a surprise meeting with Complainant at Bahr's office and accused her of not meeting deadlines. (*Id.*). They also brought up the issue of attendance and Bahr brought up one occurrence in which Complainant acknowledged that she was ten minutes late. They did not bring up the other approximately nine instances of alleged unexcused absences. She offered to provide doctor's excuses to substantiate her medical appointments, but they refused the information. (Tr. 105). The company ignored her request to provide information regarding her payroll and personnel records to use in her OSHA investigation. She contacted OSHA on April 28, 2009, complaining of retaliation and a hostile work environment. She met with the OSHA investigator on May 8, 2009. (Tr. 106). OSHA notified FM of a formal SOX whistleblower complaint. On July 18, 2009, she was notified by mail that her employment with FM was terminated. The letter cited performance issues, conduct issues, and allegations of unexcused absences. (Tr. 107).

With regard to the PowerPoint presentation assignment (training deck), Hall would not hold her staff accountable for providing Complainant with the correct data. (Tr. 109). She brought this to Slaughter's attention on April 15, 2009. She accused Bahr of willfully withholding information to try to cause her to fail. She had observed the same thing with Gabbay. (Tr. 110). Bahr was attempting to tell her that her work was incorrect, when it was clear to her that Bahr did not know what they were doing in the department. She was the new player on the team, while Complainant had been in that department for at least a year or thirteen months. (Tr. 111). After raising her concerns to Hall and her protected activities, all of her information was filtered, and Hall was deliberately blocking access to pertinent information necessary to complete the (training deck) project correctly.

She contacted Fischman prior to March 26, 2009, because she knew Fischman was an attorney and would understand SOX and those elements of her complaint. (Tr. 112). She also thought she was being discriminated against because of her gender and race, and believed, because she was the only black professional, it was a culture shock for Bahr to have to deal with her directly. Up until the time of her protected activities, she had a very respectful relationship with her managers. Things changed significantly after raising her SOX concerns. (Tr. 113).

After she notified Fischman of her intent to report her concerns to regulators, Complainant sent Fischman a copy of the (Leonard) accountability survey she had prepared as an example of her protected activity (JX 167). In the accountability survey, she cited insufficient documentation around IT applications within the SOX technology program. (Tr. 114). She had an appointment scheduled to meet with investigations on April 30, 2009, but she was not able to attend, because she was suspended on April 29, 2009. (Tr. 116). She believes she was placed on administrative leave so she would not have access to any information to provide to regulators. (Tr. 117). After it became clear to her that they were retaliating, she printed out her time sheets and leave balance reports and e-mails where she communicated to management that she would be out of the office. (Tr. 118-119).

Due to her termination, she lost income and insurance benefits and has suffered harm to her professional reputation. (Tr. 120). She is in default on her mortgage and faces constant threats of foreclosure. Her credit is ruined. (Tr. 122). Due to stress, she has developed diabetes. She has experienced anxiety symptoms and fluctuations in her weight, which caused her to have

a weight loss procedure performed. She also had concerns about stress induced alopecia. (Tr. 123).

Her 2007 year-end performance review (JX 5) was primarily positive. (Tr. 235). For her 2008 mid-year performance review (JX 18), she met with Hall and it was a very favorable meeting. There were no concerns expressed about attendance, conduct, performance or anything. (Tr. 236).

The memorandum of concern, presented to her on March 4, 2009, (JX 25), stated that during the last six months she had been advised of unsatisfactory performance and the need for improvement. That was not an accurate statement. She never had any discussions with Hall in the last six months of 2008 about her performance, not one time. (Tr. 238). The topics of meeting attendance and participation and acceptance of responsibility were never discussed with her by Hall in 2008. (Tr. 239). There was never an instance where she refused to show up at meetings or refused to participate. (Tr. 241). Her participation level at meetings was consistent with that of her colleagues. (Tr. 244). The idea that she would refuse to provide data to consultants, who are contractually obligated to complete testing as prescribed by the SEC, is ludicrous. (Tr. 246). Although she raised concerns about Hall's technical competence as a manager, no one ever talked to her about this. (Tr. 246-247). Her 2008 year-end performance review (JX 26) communicated to her an agenda of retaliation and was baseless. (Tr. 248). Hall never provided her with documentation to support her claims, even though Complainant saw her printing off information and sending it to Vieth at HR. (Tr. 248- 249).

She prepared a detailed rebuttal to her 2008 performance evaluation. (Tr. 249). Management did not give her goals until Veith sent an email to Bahr and Hall telling them to give her some goals. Management was unorganized and was just giving her busy work. They knew they were not going to keep her around, so they gave her something to pretend they were trying to assign her work. (Tr. 251). Toward the end of March, she had to sign a 90-day performance plan that was just a general statement about the goals of the organization. (Tr. 252). No managers told her in March 2009, that there would be a period of assessment. (Tr. 253). She was not told she would be reviewed in thirty days. (Tr. 253). Bahr and Hall gave her general development goals (JX 28). They did not give her specific tasks related to these defined goals. (Tr. 254). They did not clearly define the project they wanted her to do. The development plan was vague and given to her so management could cover themselves. (Tr. 255). She believed Hall was retaliating against her because of the disclosures she made to Hall during the period of November 15, 2008, through January 12, 2009. (Tr. 257).

In an April 23, 2009, email to Gabbay and Hall (JX 178, EF 740) she referred to a project assigned to her by Gabbay to write policies and procedures to assist the department with application review questionnaire ("ARQ") reviews. (Tr. 262). She identified missing documentation that is required by SEC to support certain controls that management claimed were in place surrounding IT applications. (Tr. 262-263). She thinks that because she raised these concerns about insufficient documentation that had a SEC implication, management decided to terminate her. (Tr. 264). In her April 23, 2009, e-mail she was stating that she saw instances of potentially 88 financially significant applications that did not have certain types of documents. (Tr. 267). She thought this information was necessary to complete the (ARQ) task assigned to

her by Gabbay. (Tr. 268). Management tried to marginalize her concerns by stating that this information was not necessary. (Tr. 269). Gabbay marginalized her concerns and Bahr chimed in that it should not prevent her from completing the assignment. (Tr. 270).

Subsequent to her April 23, 2009, e-mail she sent the SEC several communications to substantiate her claim. (Tr. 272). She made a report of violations to FHFA on Sunday, April 26, 2009. (Tr. 275). During her conversations with HR and Ethics at FM, she stated concerns about retaliation having to do with her protected activities, but she decided they did not understand what she was saying due to lack of technical skill and expertise in this area. (Tr. 278-279). She spoke with Slaughter at HR and Fischman at the Compliance and Ethics department. If she had been able to meet with Fischman on April 30, 2009, she would have provided her with all the information she provided to the SEC. She thinks they dismissed her so they could not hear the information she wanted to communicate and restrict her access to more information that she intended to provide to FHFA and SEC. (Tr. 279). On May 4, 2009, she sent Garner at SEC an e-mail with a transcript of a recording she made without FM's permission. (Tr. 280). Her request to FM for information regarding her absences was ignored. (Tr. 282-283). She sent a report and exhibits that she prepared to the SEC to support her allegations. (Tr. 289-294). It was her opinion that FM did not make proper disclosures about all of their internal control weaknesses. (Tr. 295).

She made her first SOX complaint (JX 131) when she worked under Everson-Jones involving fraud control self assessment. (Tr. 304). In her opinion, they turned the investigation against her and never investigated the merits of the complaint regarding actual fraud risk assessment and whether they were prepared correctly. (Tr. 305). She made these observations during Q-4 of 2007. She went through a complete investigation, and the compliance department rendered an opinion that she did not have a basis for her concern. She received an overall good evaluation, but they rated her as "L-" for "leadership minus" (indicating poor leadership performance). She then raised a concern that management retaliated against her for reporting her concerns to the compliance department. (Tr. 306). The compliance department did not review whether the risk assessment itself was inaccurate or contained misrepresentations. (Tr. 307).

She left a meeting early due to a family emergency on March 10, 2009. She advised management prior to leaving that she had a family emergency. (Tr. 309). She was out of the office March 11 through 13, 2009, for the family emergency, but was not confronted about it by management. (Tr. 310). FM had an informal policy allowing employees to work at home on occasion. (Tr. 311). For the March 23, 2009, internal audit all-hands meeting, she never stated she was attending and told Hall verbally she had a prior appointment. (Tr. 312). On March 20, 2009, when she had a sinus flare-up, neither management nor HR confronted her about working from home. (Tr. 313). She was not confronted for leaving early on March 27, 2009. On April 2, 2009, Slaughter requested that she leave for the day and arranged to meet with her. (Tr. 314). From April 7 through April 10, 2009, she was out sick, but would respond to e-mail requests. No one said this was an unexcused absence. (Tr. 316). On April 13, 2009, she had a doctor appointment, and was not told she could not use leave or that it was unauthorized. She had an emergency dental procedure which is why she did not tell management the previous day. (Tr. 317). On April 17, 2009, she did not leave without notifying management. She came in early, worked through lunch, and worked through approximately 2:30 pm. (Tr. 318-319). She

explained to Gabbay on the following Monday that she had worked a complete day and was not missing in action. (Tr. 320). No one directly accused her of being unexcused. On April 22, 2009, she had a problem with brake lights that required immediate attention, and notified Gabbay. (Tr. 321). On March 4, 2009, at her performance counseling session, there was no discussion of any unauthorized absences. (Tr. 322).

[Cross Examination] She prepared the Excel spreadsheet (JX 178, in front of EF001, no Bates stamp; JX 178A)⁷ around the time she was reporting information to SEC [late April 2009]. (Tr. 342). The purpose of the spreadsheet was to summarize issues for the SEC and provide the bases for her conclusions. (Tr. 343). The spreadsheet was not prepared for the SEC, but for her own benefit. (Tr. 344). Another spreadsheet (JX 178, before EF025 and after EF 023; JX 178B) was prepared by her during the course of reviewing SEC disclosures. She suspects it was prepared during the May 2009, period. (Tr. 345). Both spreadsheets were created around the same time frame, in May of 2009, as part of her personal analysis. She did not provide the spreadsheets to the SEC or to anyone else. (Tr. 349). The purpose of the spreadsheet (JX 178B) was to compare the offering circulars to the 10-Qs and 10-Ks and evaluate the disclosures made by the SOX technology department. (Tr. 351). In the course of preparing her analysis, she reviewed the actual SEC disclosures and compared them to the system of records that SOX technology referred to as the deficiency management system (“DMS”) to evaluate what information did we [SOX technology] have knowledge of regarding our true internal control environment that was not actually disclosed in the SEC filings. (Tr. 353-354). She believed that FM did not disclose internal control deficiencies to the SEC which amounted to a significant deficiency. (Tr. 354). FM falsely reported it had not observed any more access control deficiencies, which was not accurate. (Tr. 354-355).

Between November 15, 2009, and January 12, 2009, she discussed deficiencies and remediation status with Hall. (Tr. 356-357). She asked Hall why she had to research the status of deficiencies that were no longer supposed to exist because according to the SEC disclosures, they had already been remediated. (Tr. 357-358). Hall told her there were deficiencies and asked her to look at the current status of the remediation efforts. Claimant believed that the deficiencies she was asked to research should not have existed and that FM had hidden or suppressed the deficiencies from its SEC filings. She believed FM was backtracking and trying to cover itself. (Tr. 360). Deloitte also knew that the deficiencies existed. (Tr. 361).

In late 2008, she had one-on-one meetings with Hall in which she discussed her concerns. (Tr. 372). Her discussions with Hall were supported by e-mail communications. (Tr. 373). She did not give the document at JX 178, EF633 to FM or Hall, but she discussed its content with Hall. She did not give FM or Hall a document that disclosed an SEC violation or fraud, but she communicated her concerns to Hall verbally. (Tr. 378-379). She discussed the portfolio pooling audit report (JX 178, EF648) with Hall sometime after December 29, 2008. (Tr. 379-380). What concerned her about the audit report was that although the SOX technology department’s design review indicated everything was okay, the internal audit report dated December 19, 2008, noted adverse conditions present. Her colleague, Adams, performed a design review on August

⁷ JX 178 was prepared by Complainant and consists of several documents contained in a three-inch binder. The Bates stamp numbers of this exhibit were out of order in several parts of the binder and some of the documents did not have numbers.

31, 2008, indicating the collateral management hedging application was fully SOX-compliant. (Tr. 382).

The internal audit report dated December 19, 2008, noted adverse conditions. (*Id.*). It was distributed to a large group of people including *inter alia* Herb Allison, the president of the company. (Tr. 389-390). She believed the work papers were withheld from her, in part because Gabbay assessed this [CMH] system as fully SOX-compliant on August 31, although FM's internal audit report indicated the system was not compliant. (Tr. 390). Hall was a people manager who knew absolutely nothing technically. (Tr. 390). Based on her knowledge of the design review that was performed by Adams and approved by Gabbay on August 31, 2008, it concerned Complainant that her department said it was SOX-compliant and the internal audit department said it was not SOX-compliant. (Tr. 391). She cannot point to anything in the language of the internal audit report that said the collateral management hedging application was not SOX-compliant, but that is how she interpreted the report based on her experience. (Tr. 391-392). She believed FM was downplaying adverse conditions that were materially adverse. (Tr. 392).

On November 17, 2008, there was a conference call during which DT gave constructive comments about the collateral management hedging system, stating at that point in time that the system was not SOX-compliant. DT attached to the conference call an Excel spreadsheet (JX-178 at EF-467) which indicated the CMH system was not SOX-compliant. (Tr. 395). It is clear from the comments by DT that as of November 17, 2008, they identified failure of segregation of responsibility, a major failure in the IT world. (Tr. 400-401; JX-178 at EF-469). DT made the assessment that failure to segregate asset/hedge pairing selection and approval responsibilities could result in asset/hedge pairings inconsistent with FM management's intention. (Tr. 401). The spreadsheet indicated DT would test [the CMH] system in the fourth quarter of 2008, but that did not make sense to her because in its SEC filings, FM stated that the system was discontinued during the fourth quarter. (Tr. 406). She did not understand why DT would test something that did not exist. (*Id.*).

The Portfolio Pooling Internal Audit Report dated December 19, 2008, (JX 178 at EF 648) does not specifically reference hedge accounting which would be subject to federal accounting standard 133, but the purpose of the application is to process hedge accounting transactions. (Tr. 410). She related pooling which is in the internal audit report (JX 178 at EF 648) to hedge accounting, based in part on the title. She knew that hedge accounting was a component of the system. It is clear by the name that they have collateral management and hedge accounting. For an informed reader to understand collateral management and hedging and someone who works in accounting and understands IT applications, the name itself is self-explanatory. (Tr. 412-415).

The assignment she was given by Hall was to research the remediation status of issues identified in the Portfolio Pooling Internal Audit Report, in JX 178 at EF 648, starting with EF 651 through EF 654. It was her task to consult the individuals named [in that audit report document as having responsibility for the area] and determine the remediation status of these particular controls. (Tr. 416). She did not consider that Mr. Fay who was identified [in the DT spreadsheet at JX 178, EF 469] as the business owner of the process that's referenced, i.e., the

hedge accounting database, was a different business owner than anyone related to the internal audit report for portfolio pooling. (Tr. at 417).

Looking at the agenda and minutes for the SOX Change Control Board (“CCB”) dated July 31, 2008, (JX 16), she understood that the hedge accounting database end user computing (“EUC”) was replaced by the hedge accounting database application. (Tr. 418). She understood that FM did have an application called hedge accounting database application. (Tr. 419). Looking at JX 17, a preliminary disclosure form, she understood that there were two different applications, one being the CMH loan accounting and the second being the hedge accounting database. She agrees that the hedge accounting database application is different than the CMH loan accounting application. (Tr. 420). She agrees that the application being referred to in the DT spreadsheet (JX 178 at EF 469) is the hedge accounting database, while the application being referred to in the Portfolio Pooling Internal Audit Report (JX 178 at EF 648) is the CMH loan accounting application. (Tr. 420-421). She agrees that the CMH loan accounting system referenced in JX 17 is the same one that is being referred to in JX 178 at EF 648. (Tr. 422). She believes the hedge accounting database is a part of CMH based on what is written in the business requirement document (JX 178 at EF 666, 674).

She never provided a document to FM to support her belief that the two systems (the internal audit pooling and the hedge accounting database) were tied together, but based on her knowledge and understanding of IT and accounting, she saw enough to convince her of this. (Tr. 423-425). She reviewed several documents to arrive at the conclusion that there were some problems. (Tr. 426). She performed a lot of research which she described in a document entitled Edna Fordham Remediation Research of High Risk Financial Systems (hereinafter “research document,” located at JX 178 at EF 633-647. (Tr. 427). She did not provide the research document to FM. (Tr. 428). She created the research document after her termination from FM, but it was based on information in source documents that was available at the time she spoke to Hall [in late 2008]. (Tr. 429-430). The underlying source document was the Business Requirements Specification, Hedge Accounting Business Requirements Draft located at JX 178, EF 666-681. (Tr. 430). The source document does not reference the CMH system, but based on her own experience she believes that it supports her position and the information she communicated to the SEC. The document may not use the word “pooling,” but it describes the process of pooling. (Tr. 431). She was satisfied based on her own knowledge that she saw enough information to understand in general the intent of the design of the CMH system. (Tr. 432). The document does not use the term “CMH system.” (Tr. 432). Her discussions with Hall regarding her CMH application concerns took place between December 29, 2008, and January 12, 2009. (Tr. 433).

Prior to the end of 2008, she made other disclosures of violation of SEC rules or fraud within the fourth quarter of 2008. The disclosures concerned significant deficiencies, internal control deficiencies that were not reported in the SEC filings during that time frame. (Tr. 434). She made disclosures between November 15, 2008, and January 12, 2009, the period when her remediation project was in process. (Tr. 435). She prepared a document titled “Disclosure Controls Procedures Violations” (JX 178 at EF 226) and provided it to Hall sometime between December 29, 2008, and January 14, 2009. The document at JX 178 at EF 226 has been revised a number of times, but she provided something similar to Hall. (Tr. 439-440). The chart at EF

226 was not provided to Hall, but its substance was provided to Hall. (Tr. 441). She believed (based on JX 178 at EF 212), management did not complete the full 90 days of SOX testing [during first quarter 2008] to support the SEC certification that was filed. (Tr. 451-453). She noted this in the chart she prepared at JX 178 at EF 226. (Tr. 453). SOX technology did not test internal controls for the period February 23, 2008, through March 31, 2008. You cannot certify you tested a period when you have knowledge that the information did not exist during that time frame. (Tr. 457). The 10-Q that she referenced on EF 112 that was filed on May 6, 2008, does not specifically say that testing occurred during a specified period. However, in the 10-Q, they (FM) are basically saying their evaluation was based on information and the information they are referring to is management testing. This is not her inference, but is based on reading SEC and PCAOB (Public Company Accounting Oversight Board) guidelines on this information. She told Hall that the SEC required the management evaluation be based solely on testing. She told her this during the period she was reviewing the remediation status of various controls (between November 15, 2008, and January 12, 2009). (Tr. 466). She cannot point to a specific document to show that disclosures occurred as early as November 15, 2008, but that does not mean a document does not exist. (Tr. 467).

She cannot recall when she first engaged in protected activity by reporting a violation of an SEC rule or fraud to FM. (Tr. 474-475). Around the time frame of November 15-19, 2008, she began to make observations. (Tr. 477). She provided a snapshot of her e-mails (JX 178 at EF 686) to establish the general period she began to research DMS deficiencies, although there were other e-mails and communications which are not contained there. (Tr. 481). The first time she notified FM of the problems she reported to the SEC was during discovery when FM asked for the information. (Tr. 485-486).

She prepared an accountability survey for Bob Leonard that she provided to Fischman of FM investigations, with copies to Slaughter and Arrington on April 27, 2009. (Tr. 486-487). Prior to April 27, 2009, she had discussed this survey with HR, Veith and so forth. (Tr. 487). She discussed it with Veith around March 17, 2009. (*Id.*) She did not take any notes regarding reporting the survey to Veith. (Tr. 489). An accountability survey was an anonymous survey prepared by your peers and prepared for the managers to whom you reported. She believes anyone could determine who made certain comments on the survey due to the limited staff in the department. (Tr. 491). The surveys were not necessarily accurate or truthful and were based on personal opinion rather than facts. There was no way for FM to determine whether the survey was factual. (Tr. 492).

Joint Exhibit 27 contains the accountability survey that was prepared for her by other people. (Tr. 493). The survey was for the period January 1, 2008, through December 1, 2008. (Tr. 494). She had recommended that certain individuals complete the survey of her performance because they had direct knowledge of her performance, but Leonard overrode her list and used individuals who really did not have direct knowledge of her responsibilities. (Tr. 496). Leonard removed individuals who could favorably assess her performance, and put in individuals who did not have knowledge of her performance, so he could alter the results of the survey. (Tr. 496). Other individuals made comments that also surprised her, but that was their opinion. (Tr. 497). She had little contact with Steward who was perceived in the group as a troublemaker, and she believes Hall and Leonard were allies with Steward. So if they wanted to

sabotage someone's performance rating, they would use Steward. (Tr. 497). Steward was a technology risk lead ("TRL"). Steward participated in IRB (Internal Review Board) meetings. (Tr. 498). She would not have known at the time she filled out the accountability survey for Leonard how many other people were also filling out an accountability survey for him. (Tr. 502).

In the accountability survey she prepared for Leonard (JX 167 at FM 194), she expressed SOX concerns which would constitute a protected activity by stating Leonard's leadership represented the old leadership style and culture FM was attempting to distance itself from. (Tr. 504). That was an indirect way for her to notify FM that they had some problems. She also stated that there was insufficient documentation in the department, which is a SEC requirement to support the management testing, identifying controls to mitigate certain risks, and so forth. She thought these were key statements that would alert someone of problems. (Tr. 505). Her protected activity was in stating in the survey that there were internal control weaknesses. (Tr. 508-509). She believed the control self-assessments were too general, were not addressing the core issues that needed to be addressed, and did not provide meaningful results. (Tr. 510). If the testing of a system showed a deficiency and the control self-assessment did not, the testing would trump the control self-assessment. It was her opinion that the control self-assessments had no value because they were too general. (Tr. 515). She also stated in the survey that the department lacked critical process documentation commonly maintained in mature SOX programs. (Tr. 516). In her opinion, management was far behind on updating documents due to organizational changes, and was suppressing information because it adversely reflected on its own performance. (Tr. 517).

She thinks she provided a copy of the survey that she prepared for Leonard to Slaughter of HR sometime in April, and discussed the issue with Slaughter. (Tr. 525). She did not provide a copy of the survey to anyone prior to April of 2009. The statement in the accountability survey regarding the department lacking critical documentation of a mature SOX program was meant to be a general statement. (Tr. 526). There was no SEC rule that required FM to have a mature SOX program as of late 2008. (Tr. 527). Section 302 of the SOX Act requires evidentiary evidence to support any assertions you make in your disclosure controls and procedures under item four of the SEC filing. (Tr. 528).

She received the results of her accountability survey (JX 27) about a week prior to receiving her annual review, which was around March 4, 2009. (Tr. 534). She could figure out who wrote some of the comments on her accountability survey, but not all of them. She guessed as to who wrote the comments. (Tr. 536-539). Her colleagues could have had hidden agendas in writing negative comments because they knew the department was being outsourced and were thus trying to affect their own opportunities to remain with the company. (Tr. 540). She never verified who made the comments about her. (Tr. 543). She did not agree with the manager's comments on her survey. (Tr. 545).

On March 4, 2009, she received a memorandum of concern (JX 25), her year-end performance review (JX 26), and development goals (JX 28). (Tr. 553). She disagreed with all the negative comments made by her manager, Hall, in her year-end performance review. (Tr. 556 *et seq.*) Hall back-dated a lot of information and made it appear that it occurred during the

time-frame the evaluation was to cover. (Tr. 569-570). She thinks the negative comments were motivated by animosity and jealousy over her educational background and experience. (Tr. 572). She believes she was more qualified than Hall. (Tr. 573).

She provided rebuttal comments to her performance review. (JX 26 at FM 22-29). (Tr. 573). In her rebuttal comments, she alleged race and age discrimination as motivating factors for her negative evaluation. (Tr. 574). She filed an EEOC complaint, which was recently dismissed. (Tr. 574). She provided her rebuttal comments sometime between March 4, 2009, and March 21, 2009. (Tr. 577). In the rebuttal, she did not discuss any SOX protected activity as a basis for the retaliation and discrimination by her manager. (Tr. 577-584).

She was given a document titled development goal creation, Edna Fordham (JX 28) on March 4, 2009. She did not understand, based on that document, that management was giving her a project to do, in "Objective One," because the project was not defined. (Tr. 585). She understood that she was to provide the scope of the training to her manager for review by March 15, 2009. (Tr. 586). She began to gather resources for the project in the next couple of days. Her first discussion with Bahr about the project took place around March 6, 2009. (Tr. 587). According to the key milestone dates in the development goals, she was to complete the training project (training deck) by March 31, 2009. (Tr. 588). She recorded this conversation without Bahr's knowledge. Bahr asked her to put herself into the training deck and draw from her own knowledge. (Tr. 589). However, she had to use information from other individuals as the basis for the training deck. She agrees, in general, that the purpose of the training was to train the SOX business personnel on Bahr's team following a merger with Complainant's team, as to the type of work that Complainant's team had done previously. (Tr. 590). She provided an outline to Bahr by e-mail. (Tr. 592). There was a delay in providing the outline to Bahr because Complainant was working on her response to the performance evaluation and believed she had authorization to work on that. She made it clear to Bahr that she would have to draw on resources from other individuals who performed tasks throughout 2008. (Tr. 593).

On March 5, 2009, she sent an email to Hall with copies to Chavez of HR (JX 33) for guidance on what work she was supposed to complete while Hall was on vacation, because she did not have any work assigned. Her colleagues did have work assigned, while she had to pretend she was busy. (Tr. 594). She wrote this because the development plan (received the previous day) only had general statements, and she was looking for specifics. (Tr. 595). Hall responded that she wanted her to make necessary changes to the contact lists, follow up with Gac, and begin to draft the scope that she proposed to be included in the SOX IT training deck presentation which would be used for training business SOX team members, new TRL's, and application/business teams to provide them an overview of SOX IT testing. Hall made statements within this e-mail that were not true to cover herself because she was going on vacation. (Tr. 598-599). There was further e-mail traffic between her, Hall and Bahr on that date which disputed that Hall had given her any specific work to complete. (Tr. 600-602).

When Complainant met with Bahr on Friday, March 6, 2009, Bahr told her at a minimum what the scope of the training deck was and the intended audience. (Tr. 603). Bahr asked her to put herself into it and put an outline together of the work she had been doing previously so Complainant could explain it in the training to the group. (Tr. 604). On Monday, March 9,

2009, she provided Bahr with a four-point outline and a sample training deck (JX 34). (Tr. 604). She had called Bahr on Friday (March 6, 2009), and given her a status update. (Tr. 606). In the Friday conversation, Bahr committed to providing Complainant with some information that day, but was delayed and so that delayed Complainant's preparation of the outline. (Tr. 607). Bahr understood that Complainant was putting a couple things on hold, including amendments to the outline, to address HR concerns related to her performance review. (Tr. 609). The outline she provided to Bahr is at JX 34. (Tr. 612).

The intent of the training deck project was to reflect what was going on now, and so she had to be updated on the changes in processes. There was a lot of information which required her to contact the persons responsible for those areas to obtain updates. She had to validate the source information to insure she was not communicating incorrect information to the organization. (Tr. 617). The objective of the training deck was to explain to Bahr's group the kind of work Complainant's group had been doing before the two groups merged. (Tr. 628). On Tuesday, March 10, 2009, Bahr told her to concentrate on her outline (JX 36) and focus on her specific program and how it sources evidence and tests. Bahr wanted to meet with her at 10:00 to discuss the training deck. Later that day, she informed Bahr and Hall that she had a family emergency and would touch base the following day. (Tr. 630).

One of her family members, who lives in the South, had a car accident that initially sounded serious, so she wanted to be there. She later found out the accident was not so serious, but decided to take the rest of the week off anyway because she did not think there was anything pressing that she had to do at work, there was a lot of uncertainty about her tasks, and things were kind of slow in terms of receiving information. Also, others in the office during the same time frame had family emergencies, so she did not see how her situation differed from anyone else's and thought she should be able to take leave, if necessary. (Tr. 631-632). After she informed her manager of the emergency, her manager did not tell her that it would mess up the training deck presentation, and her manager had not told her when the training was going to be conducted, so Complainant had the sense that she still had time to work with it. (Tr. 632). She did not have actual project assignments. Actually, they listed the assignments, but the project was not ready to start at that point in time. (Tr. 633). She was not obligated to return to work when she found out the family emergency was not urgent. No one directly confronted her and told her the emergency had set the project back. They paid her for the time, so that was the end of the discussion. She was on personal leave, so she did not have to inform FM that she did not need to be out for the entire week. (Tr. 634).

On Monday, March 16, 2009, she sent a draft training deck (JX 38) to Hall. On March 17, 2009, Hall provided her with a handwritten outline that Hall had prepared. (Tr. 634). Hall was simply defining in greater detail what she thought was important. (Tr. 636). She did not draft the slides that she provided on March 9, 2009 (in JX 34), but she compiled them. The originality came in how she chose to present the information within the training deck. (Tr. 638-639). She did not create any of the slides that she provided to her managers on March 16, 2009, (in JX 38). She used other sources, and did not edit the slides because she did not have time. (Tr. 639). Her focus was just on collecting information. Hall told her not to reinvent the wheel, but to work with what she had. She was getting different instructions from Bahr. (Tr. 640). Because Hall told her not to reinvent anything, Complainant interpreted this to mean she was to

use the staff and its resources, and send out e-mails to her colleagues to work on updating the current processes. Hall and Bahr gave her contradictory instructions and had different concepts of what the content should be. (Tr. 641).

Bahr had a general simple concept. Hall insisted Complainant use specific information from her staff, so Complainant only followed her directive. (Tr. 643). On March 18, 2009, Hall provided her with scope and approach documents for the fourth quarter of 2008. (Tr. 643). The scope and approach had changed significantly, so the information in the document was dated. She had to communicate with people in the organization to get a clear picture of how things had changed since December. (Tr. 644). She had previously been involved in updating the scope and approach document in 2008 and it was referenced on her performance review, so she knew what was involved in updating it. (Tr. 646). She did not reach out to any external sources to update the document (in March 2009), but she dealt with her colleague, Adams, who was in the same office with her as of March 18, 2009. (Tr. 647). She also reached out to Miller, who sent her the information he had available. She might have also reached out to Crews for information. (Tr. 649).

On March 19, 2009, she sent Bahr and Hall another version of the training deck (JX 40). She had not created any slides at that point. (Tr. 650). She edited some of the slides. (Tr. 651-655). Some of the slides contained old information because management did not require the subject matter experts to provide her with necessary information. (Tr. 657-658). She requested information from Hall and her staff, but Hall did not request her staff update the information, so it remained static. (Tr. 658). Hall, in order to frustrate the process and make Complainant look bad, did not hold her staff accountable for providing Complainant with the information. Hall blocked access to the information and deliberately exploited the situation and did not require her staff to provide Complainant with necessary information. (Tr. 659). Hall and Bahr asked her to use information that was available in the department, not in Complainant's head. (Tr. 661).

On Friday, March 20, 2009, she sent an e-mail to Hall stating she would be working from home due to a sinus flair up (JX 41). (Tr. 662). Hall responded by asking if Complainant would be able to provide the final document for review today. Complainant responded that she was requesting the additional information that Bahr had requested yesterday, which was not included in the scope document which is the primary document that she was asked to use for the slide presentation (JX 41). (Tr. 663). Bahr then responded to Complainant telling her that the information she had requested was not any different than the requests she had made in the past, that Complainant was not to use the scope document as her primary source for the training, and that the scope document is only one document to pull information from. (Tr. 664).

The scope document was the document Hall had forwarded to Complainant and it was the primary document from which she started the project. She told Bahr that Hall specifically told her to use the scope document and she was getting conflicting information. Bahr responded that she had talked to Hall and neither of them recalled limiting the sources of information. (Tr. 665). She only used the scope document as one of several sources of information. At the end of the day on March 20, 2009, she provided Hall with another version of the training deck. (Tr. 667). Some of the slide decks she provided to her manager were presentations she pulled from

websites outside the organization, just to get some examples of how to present information in the business community. (Tr. 671-672).

She believes she made a genuine effort to accomplish what [Bahr and Hall] asked her to do, but they deliberately tried to cause conflict and confusion as part of the retaliation that she alleged concerning her work assignments and so forth. (Tr. 676). After she challenged her performance evaluation, every assignment became complicated and very difficult for some unknown reason. (Tr. 676). She sent an e-mail [to her managers] with a spreadsheet listing the documents she utilized and the deficiencies she felt needed to be addressed in order for her to utilize the information and put it in the training deck presentation. (Tr. 677). They deliberately set her up to fail by allowing Hall's staff to give her outdated information and asking her to update it when that was not a part of her normal responsibilities at that point in time. (Tr. 678). As an effort to block her progress, Hall did not require her staff to give Complainant what she needed. (Tr. 679).

On Friday, March 20, 2009, she provided Hall with a training deck that Complainant stated was 60% complete (JX 43). On Monday, March 23, 2009, she sent Hall an e-mail (JX 44) stating that she (Complainant) needed to ask some questions of Russell and Adams. (Tr. 681). She had asked them previously, but was not getting what she needed so she thought it would be helpful to have Hall meet with Russell and Adams to agree as to what information they could provide to Complainant. (Tr. 682). Hall responded by stating that she would set up a meeting with Russell, Adams, and Complainant to discuss changes to the scope documents and allow Complainant to update the deck (JX 44).

On Tuesday, March 24, 2009, Complainant sent Bahr an e-mail (JX 45) stating that since she was relying heavily on the scope document for the training deck, she did not think it advisable to release the slides until Hall had reviewed the scope document and provided her management approval. This was written after Hall and Bahr had told her not to rely on the scope document as her primary source. (Tr. 687). Bahr responded to Complainant that very limited changes would be coming to the 2009 control framework, Complainant should just leave placeholders for the information, and that Bahr was not as concerned about a final approved scope document, and that she never heard back from Complainant as to whether she (Bahr) had the most recent version of the training deck (JX 45). (Tr. 688).

On Saturday, March 28, 2009, Complainant wrote an e-mail to Bahr and Hall (JX 55) stating that Bahr was painstakingly avoiding holding Hall accountable for her work on which Complainant had to rely, while attempting to falsely give the impression that Complainant was not able to meet both of their expectations. Complainant could not recall which documents she was referring to that she had to rely on. (Tr. 689).

On Monday, March 30, 2009, she provided a draft training deck to Gabbay with a copy to Bahr and Hall (JX 126 at FM 702-774). (Tr. 690-691). Bahr provided her with feedback on the deck (JX 126, at FM 702, *et seq.*) (Tr. 692). She interpreted Bahr's comments as legitimate, requiring additional research to bring it up to her expectation. (Tr. 695). On Friday, March 27, 2009, Bahr had sent her an email (JX 54) stating that she wanted to review with Complainant the comments that she (Bahr) had provided the night before. (Tr. 695). She thinks Bahr had

provided the comments to her around March 26, 2009, after Complainant had already left the office, but she cannot specifically remember the date. (Tr. 696-697). She recalls that on the morning of March 27, 2009, Bahr asked to meet with her and call her at 11:30 (JX 54). Complainant's manager (Hall) then sent Bahr an e-mail stating that Complainant was gone. (Tr. 699). Complainant thinks she informed Hall that she was going to leave before 11:13 a.m. on March 27, 2009, but does recall notifying HR, at a minimum. (Tr. 699). She recalls telling someone that she planned to leave because they had reached an impasse and in her opinion they were deliberately coming up every day with a new issue about why her work was not correct. It was clear to her that they were just playing games with her and she would never meet the objective. (Tr. 700). She reached out to Slaughter at HR at that point and requested that they have a meeting to get everything on the table, so HR could hear her side of the story. She told Slaughter she would like to have an opportunity to speak with her. (Tr. 700-701). She had already spoken with HR and investigations at this point about her concerns of retaliation. (Tr. 701).

She interpreted the comments Bahr made about changes to the slide deck and its order as just games that were being played by Hall and Bahr. (Tr. 707). She believes that she organized the presentation the way Hall had requested, but what she was requesting was out of the ordinary, so she needed clarification before she could carry forward with the changes. (Tr. 709).

On Thursday, April 23, 2009, she sent an e-mail to Russell, Adams, and Crews with copies to Gabbay and Bahr which was a follow-up to the morning's staff meeting and gaps in the SOX program that included a table (JX 178 at EF 742). (Tr. 710). She was stating that a lot of the documentation that was in place specifically for the infrastructure environment that was available and that they used quite frequently was now not being utilized at all and/or not updated. (Tr. 713-714). The reason she requested the information is, because of the organizational changes that were in effect at that time, it was necessary to get the most updated frameworks. (Tr. 715).

She had a meeting scheduled with Fischman for April 30, 2009. She was on paid administrative leave at that time. There was no reason she could not have kept that appointment. (Tr. 719).

[Redirect Examination] Looking at her performance evaluation (JX 26), she took issue with Hall's comments regarding work she performed before Hall took over as her manager. (Tr. 721-723). With regard to goal 1.2, Hall blindly, without reading or understanding the goal and realizing that it pertained to the TIO environment, just wrote an adverse comment, inappropriately. (Tr. 725). She made her assessment for each goal initially. Then Hall followed with her assessment. After the evaluation was signed, then she provided her response at the end of the evaluation (JX 26 at FM 22). (Tr. 727-728). There were several goals that did not relate to Hall's department directly, and yet she provided feedback and inappropriate responses. (Tr. 729). With regard to goal 1.8, she disagreed with Hall's assessment. Hall took something insignificant and blew it out of proportion. No one had ever brought to her attention that there was a problem with the document she was to update. (Tr. 730). She felt she was being unfairly evaluated in relation to Russell and Adams. (Tr. 731). Her job really did not require a high level of interacting in-person with TRL's and the business user. (Tr. 733).

The slide deck was the first PowerPoint presentation she had been assigned to work on. (Tr. 734). She was a technical tester of systems and now they were trying to use her as an administrative clerk to prepare PowerPoint presentations. She saw it as busy work. She does not think they had a justification for giving her an adverse performance evaluation, so they had to create tasks and assignments that she could not achieve within only a relatively short period of time from March 4, 2009, to April 24, 2009. In less than six to eight weeks they had to create a perception that she was unable to accomplish anything correctly under any circumstances. (Tr. 735).

There were differences between the training deck drafts she provided to management on March 16 and 19, 2009 (JX 38, JX 40). (Tr. 736). She added more slides. She had never been subjected to this level of scrutiny of her work before. (Tr. 737). The staff was questioning Hall's frequent absences. (Tr. 738). Hall was a people manager who never provided any technical leadership. (Tr. 738). She brought her complaints about Hall to Bahr and others' attention, but they did not consider the substance of her complaints against Hall. She is not aware of whether anyone checked Hall's time or badge records. (Tr. 739). No one talked to her on March 27, 2009, about violating the hour policy. She was unaware that Black told her managers they should not talk to Complainant by e-mail. (Tr. 740). After receiving her performance evaluation, she contacted HR almost immediately. (Tr. 741).

The portfolio pooling report was essentially the same as hedging. (Tr. 742). In reference to JX 178 at EF 384, there was no dispute that CMH was not SOX-compliant. (Tr. 744). The hedge accounting database was also not SOX-compliant. (Tr. 745). Looking at JX 178 at EF 661, this is a document that she prepared as part of her analysis to understand the issues and concerns she was raising. She created it around February of 2009. She discussed the contents of the document with her reporting manager (Hall) because she had assigned her the project to research the status of the deficiency.

[Recross Examination] Looking at JX 178 at EF 384, the spreadsheet that went with that e-mail had a greater number of columns than are printed. She requested the work papers to support the internal audit reports so she could understand the procedures that were being performed and understand how her department had reached its conclusions versus those of internal audit. (Tr. 757). Her assignment was to determine the status of deficiencies. (Tr. 748). She needed to understand how they arrived at their test results to establish whether the steps were appropriate. (Tr. 758). She requested the work papers so she could have access to the test plans, which is what you would do in every instance when you are looking at deficiency. (Tr. 759).

Wendy Fischman, Investigator, FM Compliance and Ethic Investigations, Tr. 127-227

[Direct Examination] She is employed by FM as an investigator in the compliance and ethics department, and has been employed just under five years. (Tr. 128). Her office is responsible for investigation of potential violations or alleged violations of FM's code of conduct and FM policies. (Tr. 129) It is not the job of her office to determine whether there has been a statutory or SOX violation. (Tr. 130). The FM code of conduct prohibits retaliation against whistleblowers. The code of conduct and the non-retaliation policy prohibit retaliation against

employees who allege they are being discriminated against. (Tr. 131). Reporting a potential violation of law would be protected activity under FM policy. (Tr. 132). They do an inquiry to determine whether, based on the facts presented by the employee, they believe there is a viable allegation. (Tr. 133). In cases in which they determine that they might be aware of an allegation that could potentially have an impact on FM's financial reporting obligations, they would notify DT. (Tr. 138). She contacted DT regarding the Complainant, because she had received an e-mail (JX 168) from Complainant in which Complainant articulated some concern that related to a potential violation of SOX. (Tr. 139).

With regard to her SOX issues, Complainant e-mailed her directly (JX 168, April 27, 2009, e-mail, "SOX e-mail"). She had been actively investigating another matter involving Complainant concerning alleged retaliation and discrimination. The dates are documented. She had interviewed the Complainant before receiving the SOX e-mail. (Tr. 141).

She had received some company-wide SOX training relating to obligations under SOX. (Tr. 142). At the time she received Complainant's SOX e-mail, she was not aware of the reasonable belief requirement, nor had she conducted an investigation based on the concept. (Tr. 143). If an employee has made a good faith escalation of an issue, and turns out to have been wrong, they would consider the escalation to be protected activity. (Tr. 144). They were not able to conduct an investigation of Complainant's SOX violation concerns, because they did not have sufficient information from her. (Tr. 144). They closed the case because she had not stated sufficient facts to raise a viable allegation. (*Id.*). The prior interviews she conducted with Complainant concerned her EEO issues and retaliation concerns. Complainant never raised anything in any of those discussions that related in any way to SOX. (Tr. 145). Complainant never raised any red flag that there was a potential SOX violation in the [EEO/retaliation] investigation she conducted. (*Id.*).

With regard to the SOX e-mail that she discussed with DT, ultimately they decided that it was not a viable complaint. (Tr. 145). Complainant never attended the interview and they were not able to get any further information from her. (Tr. 146). For a viable allegation, they would need Complainant to present certain facts such as what retaliatory conduct she alleged she suffered and what were the issues she had raised that would entitle her to whistleblower protection. (Tr. 147). She never inquired with the SEC or FHFA as to whether Complainant had filed SOX violation complaints. (Tr. 148). She never attempted to obtain information from the Department of Labor. (Tr. 149).

She has two investigative files concerning Complainant, one on the matter involving allegations that she raised regarding discrimination and retaliation (EEO claim) and one for the SOX allegation claim. (Tr. 150-152). The matter regarding discrimination and retaliation had to do primarily with race. (Tr. 155). She recalls Complainant telling her that she was not able to get documents needed to prepare a PowerPoint presentation, but does not recall that it had anything to do with SOX internal controls. (Tr. 158). She looked at Complainant's concerns that management was retaliating against her and setting her up for failure based on Complainant's EEO case (claim of racial discrimination and retaliation). (Tr. 158). She recalls interviewing supervisors who said that the information Complainant requested was not needed to

complete the assignment and that Complainant had been told to leave placeholders for the missing information, which seemed reasonable. (Tr. 159-160).

She was not sure why Complainant sent her the Bob Leonard accountability survey on April 27, 2009 (JX 167), but told Complainant in a prior email on the same day that they would need to interview her to discuss her specific allegations regarding the SOX concern she had raised in the initial e-mail reviewed earlier that day. (Tr. 161). An interview was scheduled to take place a couple days after the April 27, 2009, SOX e-mail. (Tr. 162-163). She does not recall specifically when she learned that Complainant had been placed on administrative leave, but she does not think she knew at the time she scheduled the interview or she would have contacted security to let them know Complainant was permitted to come to the work site and she would have had Complainant come directly to her office. (Tr. 163-165). Her understanding is that Complainant chose not to show up for the interview. (Tr. 172). After Complainant missed the interview, she attempted to reschedule it. (Tr. 174). The investigation would continue even if Complainant was placed on administrative leave. (Tr. 180). She thinks Complainant was placed on administrative leave due to unexcused absences and concerns about her performance, as well as for being insubordinate and disruptive. (Tr. 186-187).

She was aware that management was considering terminating Complainant's employment prior to receiving the SOX e-mail (JX 168). (Tr. 190). She anticipated after receiving the SOX e-mail that Complainant would allege it was due to retaliation. (*Id.*). Prior to receiving the SOX e-mail, investigations had already had conversations with HR about the fact that they were considering termination, so she knew the SOX e-mail would not be the cause for the termination. However, she could anticipate that it might appear that way to the Complainant. (Tr. 190). In her documentation of the EEO related claim (JX 132), she noted that prior to receipt of Complainant's April 27, 2009, e-mail, HR had notified investigations that management had significant concerns regarding Complainant's conduct and decided to move forward with terminating her employment. (Tr. 192). She suspected Complainant would think there was a nexus between the e-mail and the termination. (Tr. 194). It would be rational for Complainant to think that since she did not have access to the same information that they had in Investigations. (Tr. 195). She assumed Complainant had not been told that she would be terminated prior to sending the SOX e-mail. (Tr. 196).

In her closing memorandum regarding Complainant's alleged SOX violations (JX 132 at FM 1520), she did discuss whether the Leonard accountability survey contained allegations of SOX violations (FM 1523) [and determined that it did not]. (Tr. 198).

[Cross Examination] The recipient of an accountability survey would not know the identities of the individuals who supplied comments about them. (Tr. 201). After she read the Leonard accountability survey that Complainant sent her, she contacted Leonard to ask about the control self-assessments. (Tr. 202). He explained that FM had decided it was going to shift from doing actual reviews of each technology application on a routine basis, and they were going to bring the process more in line with industry practice by doing a sort of triage and figuring out the most high-risk applications and then reviewing those on a regular basis. (*Id.*). For applications that were low or medium risk, they would have the organization conduct a self-assessment on a quarterly basis. (Tr. 203). If the control self-assessment were to turn up some issue, then there

would be further review. She never had an understanding of what Complainant's objection to the use of control self-assessments was because she never had the opportunity to talk with her about it, but her sense of it was that Complainant had a difference of opinion as to what was the most effective manner of doing the assessments. (*Id.*).

When a concern is raised with the office, the first step is to try to get more information about the complaint. In this case, because so few details were provided by Complainant in writing, it was essential to meet with her to try to understand whether there was a real SOX concern. The fact that Complainant was on administrative leave did not impede the investigative process. (Tr. 206). She tried to contact Complainant through every means available, but she just refused. The fact that an employee is on administrative leave or represented by an attorney does not impede the ability to investigate issues that are raised. (Tr. 207). She tried to reach Complainant by e-mail, cell phone, home phone, and voice mail.

Prior to her receipt of the April 27, 2009, SOX e-mail, she was in the midst of an investigation into Complainant's EEO claims. She had multiple conversations with Complainant about EEO matters. Complainant never indicated in any communication that she had any allegations of SOX violations. (Tr. 210). Complainant never said there was fraud or any allegation concerning any of the statutes enumerated by SOX such as mail fraud, wire fraud, or anything like that. (*Id.*). Complainant never mentioned a potential violation of an SEC rule or FASB rule. (Tr. 211). Complainant alluded to issues but not ones that would relate to SEC rules or any of the other rules mentioned. One of Complainant's main concerns was that management was not providing her with the information she needed to complete her assignments, they were not being fair to her, and she was not getting the kind of work she wanted. That was all tied up in her EEO complaint. (*Id.*). She understood that Complainant was contending she did not receive an updated scope document in order to complete the training deck. (Tr. 213). However, she did not get any understanding from Complainant that what she was talking about was a violation of SOX. (Tr. 214).

She read Complainant's e-mail (top of JX 146) stating *inter alia* that it was not uncommon for management to hide behind professional reasons and being overly critical of employee's after charges of discrimination and retaliation had been raised and that overt racism such as burning crosses is very uncommon these days. She reviewed that e-mail in connection to the EEO investigation she was performing. (Tr. 214-215). Complainant alleged protected activity with regard to four different respondents. For Hall, Complainant alleged that she had provided some negative input into Hall's accountability survey. For Bahr, she claimed Bahr had some sort of derivative motive to retaliate based on the comments in Hall's accountability survey. The same was true for Gabbay. For Leonard, she cannot recall specifically what Complainant alleged. None of the retaliation was alleged to have been related to anything about SOX in any way. (Tr. 215-216). She reported Complainant's (April 27, 2009) SOX allegation to DT and to the chief audit executive and stated it would be included in a quarterly report to the audit committee. (Tr. 217). Complainant informed her that she was recording conversations with her managers in connection with her EEO complaint. (Tr. 219-220).

[Redirect Examination] She does not know the rules regarding access to the contents of an accountability survey. (Tr. 224). She thinks she scheduled the April 30, 2009, interview on

April 28, 2009. (Tr. 225). Normally when an employee is on administrative leave, one of the questions investigators always ask them is whether they are aware of any documents that would support their contentions. If so, they are able to retrieve those documents for the employee. (Tr. 226).

Jackie Wagner, General Auditor, Tr. 324-340

She is no longer employed at FM. She worked at FM from approximately March of 2008 to July of 2009 in the position of general auditor. (Tr. 324-325). She was responsible for overseeing the audit plan and reporting results to senior management and the audit committee of the board. Patricia Black reported to her. (Tr. 325). Black was responsible for some of the audit work and for SOX. Black's title was VP and audit. She (Wagner) was a senior vice president. Bahr reported to Black. Hall reported to Bahr. (Tr. 326). When she joined the company, SOX was not part of internal audit, and when Black transferred into the group there was discussion about SOX transferring into the group and being under Black. (Tr. 326). She recalls that there were two groups addressing SOX. One was on the financial side and one was the IT controls. The IT controls were under Leonard, and the rest under Black. What happened was, they brought the two together into internal auditing. (Tr. 327). The SOX group was responsible for testing key controls. (Tr. 328). The purpose of the tests would be to determine if controls were operating or not. (Tr. 331). The SOX team would collect information. It would be reviewed. Any questionable items would be reviewed. The external auditors would then come into the process. If anything arose, it went to a disclosure committee. The decisions were then made as to whether or not it was reportable to the SEC. If it was a material weakness, it would be reported. (Tr. 332).

She is familiar with JX 116, a request for termination for Edna Fordham, as a document that was sent to her, though she does not remember the exact time-frame. (Tr. 334-337). She does not recall asking any questions about what disciplinary actions had been taken prior to receiving JX 116. She did not terminate Complainant's employment. (Tr. 338).

[Cross Examination] While she was at FM, she recalls discussions about Complainant's performance, and about completing a project for a training program, as well as some difficulty with attendance. (Tr. 339).

Robert Leonard, Director of SOX Technology, Tr. 762-849

[Direct Examination] He is employed at FM as the Director of Applications Development. He has served in that position for almost 24 years, working as a director since 2000. There was a two-and-a-half year hiatus where he worked on technology risk control, and that is when he met Complainant. (Tr. 762). The FM SOX program was initiated in 2005. The objective was to stand up a SOX technology program aligned to the overarching SOX program. (Tr. 763). There were two complementary pieces of the SOX program, the business SOX program and the technology SOX program. From a technology perspective, his charter was to develop a control framework that would allow FM to certify its alignment or compliance with its controls. (Tr. 765-766). They set out to establish a control framework that would govern IT assets, both applications and infrastructure. The work they did would be used to support 302 and

404 certifications. (Tr. 766). There were two separate organizations in the SOX technology program, the SOX remediation team and the SOX testing team. (Tr. 768). The SOX technology program evolved into a technology risk and controls program. (Tr. 769). They collaborated with outside consulting companies such as GT and PwC.

The first round of testing was conducted in 2005, and 2006 was a remediation year. (Tr. 769-770). The role of his organization was to conduct testing, report on the findings, and manage the resolution of those particular findings. (Tr. 771). Asset owners were given notice of testing timelines and evidence windows whereby they would submit evidence pertaining to the controls. They would subsequently deliver the evidence along with a preliminary disclosure form and a risk control self-assessment. (Tr. 772-772). There was no option for the asset owner to opt out of testing. (Tr. 773). All high-risk assets or financial reporting assets were tested every quarter, but they would do risk control self-assessments for all applications. (Tr. 776). By introducing the risk control self-assessment, it would keep attention and focus on the control environment and program, even for those who were not necessarily participating from a risk-based approach. Self-disclosure was a complement to testing, as it is not a requirement or cost effective to test everything. (Tr. 777). The risk-based approach to testing was introduced in 2008. (*Id.*). The risk control self-assessment was to be done every quarter, regardless of whether an asset was in or out of the scope for testing. (Tr. 778). Whereas before testing of the assets was taking place on a hundred percent basis, Mr. Vasquez decided that it was not sustainable to do that much testing, so they would test only the financial reporting and high-risk assets every quarter and test a percentage of the other assets. (Tr. 779). The non-financial reporting assets would be tested at a minimum once every two years, so every asset would be tested at least once every two years. (Tr. 780).

In 2008, a decision was made to merge the application testing team, referred to as GACC testing (general application computer controls) and infrastructure testing, referred to as GCC testing. A decision was made to merge the two teams for efficiency. At that time, he was told he would receive Complainant and two other individuals to help support the function that was being transferred to him. (Tr. 784). Mid-way through the second quarter of 2008, it was decided that individuals who had been directly reporting to him would begin reporting to Hall. Hall was to take over day to day operational management responsibilities for the SOX testing program. Gabbay remained a direct report to him, serving as a subject matter expert to the program. So Hall took over managerial responsibilities, such as managing people and Gabbay reported on the technical side. (Tr. 785-786). The three individuals who came over to the organization, including Complainant, were aligned with one of the individuals who had already been working in the GACC space. They were to be given a two to three month transition window to acquire the necessary skills to be effective. (Tr. 786-787). They came over around February of 2008. They were to collaborate with internal clients of the organization who were the business users. They were to engage with the clients by making sure the clients were aware of test timelines, requesting evidence, messaging, communicating, and collaborating. (Tr. 788).

In late 2008, there was a decision to transition the SOX technology organization into Black's organization, an audit organization that was being headed by Wagner. (Tr. 792). His counterpart from the business perspective was Bahr. He was responsible for testing the SOX technology assets, while Bahr was responsible for testing the business processes. Bahr reported

to Black, who reported to Wagner. (Tr. 793). The transition started around mid-November of 2008, and he left the organization in February 2009. (Tr. 794-795).

The transition coincided with their year-end calibration and ranking of employees. (Tr. 802). By mid-year 2008, Complainant was meeting performance expectations. By the time of the mid-year 2008 performance review, Complainant had been reporting to Hall for about two months. He thought it would be in the best interests of the organization to solicit feedback and participate in those mid-year evaluations with Hall since he had as much involvement with those rated employees as Hall during that time period. (Tr. 803). For each of the individuals for whom he conducted mid-year 2008 evaluations, he solicited feedback from organizational peers and folks outside the organization. His message to each of the three new folks who joined the organization (including Complainant) was that the first part of 2008 would be a transition period, but that starting in the third quarter, the expectations and the bar would be raised. (Tr. 804).

Sometime in the third quarter (2008), Hall had expressed concerns to him about the quality of some of Complainant's deliverables. He asked her to follow up directly with HR. (Tr. 805). He knows that Hall met with HR. (Tr. 806). He got the sense that there was not marked improvement, but cannot recall specifics. (Tr. 807). In October or early November, Complainant requested some training. In order to be approved, the individual requesting training had to be performing at a meets-expectations level. (*Id.*). He inquired as to whether they should proceed with the formal training and was advised to go ahead and approve it. At that time he would have deferred to Hall to say how Complainant was performing. He knows there were some concerns regarding Complainant's tardiness to meetings. (Tr. 809). That was the feedback he shared with Complainant mid-year, among other things. (Tr. 810).

[Cross Examination] The control framework consisted of a set of preventive control descriptions and detective controls. The preventive controls that were embedded in the control framework were access management, change management, and logging and monitoring. They represented the technology controls that they were looking to confirm and/or validate on a quarterly basis. (Tr. 810-811).

It was his expectation that members of his team, such as Complainant, would be interacting with the technology risk leads ("TRL's"). (Tr. 816). His primary focus was making sure that employees such as Complainant, technology risk specialists, were set in context with the TRL counterparts that represented the technology organizations, making sure the TRL's were aware of their obligations pertaining to quarterly testing cycles, making sure the TRL's were aware of evidence time frames and test execution windows, and as a finding was disclosed from GT, making sure the TRL's knew they had 48 hours to turn around, answering any questions, facilitating conversations with the actual testing of GT, and ultimately seeing the finding through closure, i.e., risk ranking, pre- and post- compensating control, and subsequently handing the finding off to Bahr and her team. (Tr. 817). There were three independent sets of eyes that saw the result of the test finding before it came back to FM. (Tr. 817-818). After a finding came back to FM, the TRL and the account representative, i.e., a technology risk specialist, such as Complainant, were notified. (Tr. 818). The account manager would collaborate with the TRL over the finding and whether to challenge it. It was the asset owner's right to proceed with an appeal if they disagreed with the finding. The information related to the appeal would be

presented at a weekly forum called an internal review board (“IRB”). (Tr. 820). The technology risk specialists were expected to participate at the IRB meetings and had an equal say with regard to the appeal. (Tr. 821).

His perspective, which he shared with Complainant during her mid-year 2008 performance review, was that he expected her to be more involved in the IRB meetings in the third-quarter. (Tr. 822). He did not notice any increased participation by Complainant in the third-quarter IRB meetings, which he discussed with Hall. (*Id.*). At the mid-year performance review he spoke to Complainant about some of the feedback he had received from her peers. He explained to Complainant that her “on-track” mid-year review was hinging upon the fact that this was a transition period. (Tr. 823). There were concerns that had been brought to his attention, but he was going to give her the benefit of the doubt to give her time to acquire skills to make her more effective. (Tr. 824). He had solicited feedback from Complainant’s peers (JX 19). (Tr. 825). Some of her peers provided adverse comments to include comments that she was marginally involved in meetings with staff, IRB and TRL leads and should be a more visible contributor during meetings. (Tr. 825-829). The comment on meetings was consistent with his own observations of Complainant for the first half of 2008. (Tr. 829).

The IRB meeting would make findings as to whether deficiencies were high, medium, or low risk. They would then look at compensating controls. They would determine if the compensating control had been tested and if it was relevant to the finding in mitigating risks. (Tr. 831-832). His responsibility was to try to establish that the test finding as it pertained to that technology asset was unique to the asset and that there was something in the way of a compensating control that would mitigate the risks associated with the finding. When deficiencies or findings were made, they were logged into a database, the deficiency management system (“DMS”) (JX 178 at EF 384-385). (Tr. 834-835). They would monitor the status of remediation over time. (Tr. 838). Employees such as Complainant would gather evidence related to the remediation status. (Tr. 839). If the deficiency was identified by internal audit, he would not expect one of his technology risk specialists to need to review the internal audit work papers with respect to the audit. (Tr. 840).

[Redirect Examination] He was Complainant’s direct supervisor from February through the first week of June of 2008. He did not participate in giving Complainant a coaching memo. (Tr. 844-845). He observed Complainant’s performance at IRB meetings in the second half of 2008 on a weekly basis during the test cycles. (Tr. 848).

Leslie Arrington, Vice President of Compliance and Ethics Investigations, Tr. 855-919

[Direct Examination] She is employed at FM as the vice president for Investigations. She is a lawyer by trade, but does not act in that capacity at FM. She knows that Complainant raised some allegations with the Investigations Office, but she never met Complainant. (Tr. 855-856). In reference to Joint Exhibit 131, it is a decision issued by the investigations group. It indicates that on October 5, 2007, Complainant contacted FM Ethics and raised concerns that the 2006 and 2007 ESM (Enterprise Systems Management), RCSA (risk and control self-assessment) certifications were not properly supported. (Tr. 859-860). Complainant then complained that she was being retaliated against for raising that concern, by receiving an unfair

performance review. (Tr. 861). Investigations did not believe Complainant had a SOX related concern at the time. Complainant raised concerns about RCSAs and when they talked to her and suggested she discuss her concerns with management, she did so and then informed Investigations that she was fully satisfied that her concerns were addressed. So, she saw Complainant's claim as a personnel retaliation claim. Complainant did not raise SOX concerns. (Tr. 862).

When someone comes to Investigations and claims that there is a gap in controls at FM or a SOX violation, she does a couple things right away. She contacts the external auditor, internal audit department, and, the legal department. (Tr. 866). Pursuant to Investigations' procedure, three groups always get notification: human resources, the legal department, and management. (Tr. 868). In order to find retaliation, one of the elements is that there must be notice on behalf of the alleged retaliators that the person engaged in protected activity. They did not find that element in Complainant's 2007 case. (Tr. 871).

With regard to Joint Exhibit 168, Complainant raised some concerns that she claimed were pursuant to SOX. (Tr. 889). With regard to Joint Exhibit 132, it does not appear that Complainant's April 27, 2009, e-mail (JX 168) was investigated as a retaliation complaint. (Tr. 892). Following the April 27, 2009, e-mail from Complainant, Investigations was unable to have any further dialogue with her, so they could not ascertain the full scope of her concerns. (Tr. 894). Being placed on paid administrative leave is not necessarily an adverse action. (Tr. 895-897). She does not know why Complainant was placed on administrative leave and was not involved in that decision. (Tr. 899).

Anytime someone uses the word "SOX" they immediately place a call to FM's external auditor to inform them. That is their process. (*Id.*). Investigations had been informed of the decision to terminate Complainant's employment prior to April 27, 2009. (Tr. 903).

[Cross Examination] Joint Exhibit 33 is an Investigations' decision issued on September 23, 2009. At the time Complainant sent her April 27, 2009, e-mail, Investigations was still reviewing her other allegations. They were looking at allegations Complainant had raised on March 5, 2009. (Tr. 906). The allegations they were reviewing were that Hall had retaliated against Complainant by issuing her a poor performance review for 2008. They were also reviewing allegations against Hall, Bahr, and Gabbay that they had refused to provide Complainant with materials necessary to perform her assigned tasks. Complainant also alleged that Hall and Leonard had discriminated against her based on her race by issuing her the lower performance review and that Hall had discriminated against her due to her race by issuing her the MOC. Finally she claimed Leonard discriminated against her by changing her job duties and revising the list of contributors that she submitted for her 2008 accountability survey. So they were looking at both retaliation and race discrimination allegations. (Tr. 908).

When they received Complainant's April 27, 2009, e-mail, they opened a new case because it raised different concerns than Complainant had raised before. When someone raises entirely new concerns that had absolutely nothing to do with the prior matter they were looking into, they open a new matter and investigate that separately. That is what Complainant did on April 27, 2009. (Tr. 909). With respect to the decision at JX 133 (Complainant's March

allegations), Investigations did have an opportunity to interview Complainant. Complainant did not provide any information or statements that would suggest any of the retaliation she was complaining about was connected to any SOX protected activity. (Tr. 910). Complainant never raised the issue of SOX, because if she had, they would have followed their protocol of notifications and things they had to do. (Tr. 911). The first time Complainant used the word “SOX” was with respect to the April 27, 2009, e-mail. (*Id.*).

When a complainant uses the word “SOX,” whether Investigations thinks it is a viable allegation or not, they contact DT. However, even if the complainant does not use the word “SOX,” but alleges financial misstatements or significant control gaps that would expose FM to risk, they would also report that to DT as well. (Tr. 913). They would report any accounting or control issues. Anytime someone uses the word “SOX,” even if it is not close to a SOX violation, they report it to DT. (*Id.*).

[Redirect Examination] She does not recall what material Complainant claimed was withheld. (Tr. 917). They could not ascertain whether the information she was alleging was withheld in the April 27, 2009, e-mail was the same as she alleged she had been denied previously, because Complainant would not talk to them. (Tr. 918).

Sworn Testimony of Witnesses Called by Respondent

Robin Steward, Technology Risk Lead, Tr. 956-979

[Direct Examination] She has been employed at FM for ten years. During the period 2008-2009 she worked as a technology risk lead. (Tr. 956-957). Complainant was her point of contact in access management, for requesting evidence, and for questions and clarifications with regards to evidence requests. (Tr. 957-958). She observed Complainant’s participation at an IRB meeting. It seemed to her that Complainant was not participating and was surfing the internet during the meeting. (Tr. 960). She did not feel that Complainant was as engaged in the meeting as other team members. (Tr. 962). After the meeting she spoke to Complainant’s manager, told her what she had observed and questioned the appropriateness of Complainant’s behavior in such a forum. (Tr. 962-963). Hall thanked her and said she would look into it. In the four to five meetings she attended, Complainant’s level of participation remained the same. She did not participate as much as other members of the SOX team. (Tr. 963).

On the occasions she went to Complainant with questions or for clarification, Complainant was not able to answer some of her questions and she had to go to other team members for answers. (Tr. 964). She did not get the information she needed from Complainant, so she had to look elsewhere. (Tr. 965).

[Cross Examination] The meetings she attended with Complainant took place between February and December of 2008. (Tr. 965). There was one occasion where they had requested information that could not have been centrally sourced, which means TRLs do not touch the evidence. Her question to Complainant was why they should be getting the same evidence that’s being centrally sourced, and Complainant’s response was they needed to just give her the information and she would get back to them with an additional answer. She does not recall the

specific nature of the information. (Tr. 968). She believes that Complainant should have known the information was centrally sourced. She then went to someone else to get the answer. The answer was that it was centrally sourced and so they did not need to supply the evidence again. (Tr. 970). She never confronted Complainant about her behavior at meetings. (Tr. 975).

[Redirect Examination] She did not understand why Complainant asked her for information that was centrally sourced since the documentation was already available to Complainant. (Tr. 978).

[Recross Examination] When she asked Complainant why she did not go to the central source for the information, Complainant responded that she would have to get back to her because she was not sure. (Tr. 978).

Nancy Hall, Manager, SOX Technology Program, Tr. 980-1209

She has been employed at FM for five years. (Tr. 980). She first met Complainant in 2007. She was working for Leonard on the SOX IT team, managing the program management office for SOX IT. Three employees came over to her team, including Complainant. Complainant did not report to her at first. (Tr. 984). Complainant began reporting to her around August 2008. She does not recall sitting in on Complainant's mid-year 2008 performance review. (Tr. 985).

The program was divided between applications and platforms. Her part of the team, which Complainant supported, was managing the testing of the applications. Complainant supported Adams in that effort. (*Id.*). Complainant had to reach out to application owners and get evidence from them so the team could conduct the testing. Complainant was responsible for tracking the evidence that came in, making sure it was the right evidence, and then posting it to a SharePoint site. The consulting firm, GT, did the actual testing. (Tr. 986).

The Independent Review Board ("IRB") was set up so deficiencies or findings [by GT] could be evaluated by a group of people, members of the SOX team as well as the application owners, and their management, to designate and agree upon the risk ranking of the deficiency. (Tr. 987). The ranking was based on the dollar amount that went through the application and whether there was a business compensating control in place. (Tr. 988). Complainant's position was as a technical risk specialist. She was expected to participate in IRB meetings. She did not participate very often. (Tr. 990). Some of the people who attended IRB meetings asked Hall why Complainant was surfing the Internet during meetings and not participating. Robin Steward came to her with that question, as well as some of the SOX team members such as Miller and Shaikh. (Tr. 991). She observed Complainant perusing Internet sites during more than one meeting. She talked to Complainant in the late fall of 2008 about her level of participation in meetings, and Complainant said she would do better. (Tr. 992). Complainant said that other people also brought computers to meetings and looked at the Internet. Hall told her it was okay during a break or before a meeting, but that during the meeting, Complainant was not to look at the Internet. She told Leonard about the conversation with Complainant, and he told her to continue to manage. (Tr. 993).

In 2008, she spoke to Chavez and Vieth of HR about issues with Complainant's performance, attendance at meetings, and participation at meetings. She told HR about conversations she had with Complainant concerning her manner of communicating. Complainant would sometimes send e-mails that were inappropriate, the tone was inappropriate and not professional. Complainant sent such e-mails to Adams who was supervising her, GT, and Gabbay. (Tr. 993- 994). Adams forwarded her the e-mail from Complainant that was not productive. GT also came to her after they received an unprofessional e-mail. (Tr. 995).

On October 22, 2008, Complainant requested excusal from any meetings for the remainder of the week so she could complete a SOX IT management testing document (JX 21). (Tr. 996). On the same day, Complainant sent her a draft of the document (JX 22). It did not meet her expectations because it referenced the wrong quarter. (Tr. 998-999). Also, the applications and EUC's were not accurate, although the information was available to Complainant. (Tr. 999).

She reviewed the comments contained in a 2008 accountability survey for Complainant (JX 27). She reviewed the comments in the survey prior to completing Complainant's annual performance evaluation for 2008. (Tr. 1000). The overall ranking for "all but self" was 3.63. Based on direction from management, that put Complainant's performance below the 25th percentile of performers at FM. (Tr. 1001). Joint Exhibit 125 at FM 547 contains the table that contained management's directive as to ranking. (Tr. 1003-1004). Complainant had provided a list of people whom she desired to evaluate her. Leonard reviewed the list because Complainant had spent the majority of the year working for his team. He decided some of the people would not be able to provide evaluation of Complainant's work. (Tr. 1005). She reviewed the comments on Complainant's accountability survey. Several comments stated Complainant should participate more in meetings. There was also an issue with her timeliness to meetings. (Tr. 1006). She observed Complainant often arrived late to meetings, which was disruptive. Another employee, Adams, also arrived late for meetings and she had a conversation with him. Adams' performance rating for 2008 was SI, R-, L- [significant improvement needed, results minus, leadership minus] (JX 30). It was a very poor rating. In comparison to Complainant's rating of FM- [fully-meets, minus], Adams' rating was harsher. (Tr. 1008).

The CEO put out a message on December 12, 2008, (JX 1) in which he explained the new rating system, and stated that 20 percent of employees would receive an FM- or SI rating for 2008. (Tr. 1009). The company was moving to a mandatory ratings system because they were trying to improve the company and move to a performance-based management model. She complied with the directive in rating employees under her supervision. The executive committee also put out a note (JX 2) highlighting the fact that FM was becoming more rigorous in its ratings. (Tr. 1010).

She authored Complainant's 2008 year-end performance review (JX 26). (Tr. 1011). She understood that expectations would increase for Complainant for the second half of 2008, based on discussions with Leonard. (Tr. 1013). Her comment to the effect that TRL's noted they did not have much quality interaction with Complainant was based on feedback she received from TRL's. Two TRL's who provided such feedback were Steward and Gac. (Tr. 1014). With regard to goal 1.2 being "not on course," she felt that Complainant had not followed

through with projects. (Tr. 1016). She also had problems with Adams' performance who was rated as an SI for 2008 and terminated for performance issues. (Tr. 1017). With regard to goal 1.4, Complainant's peers commented that her education and knowledge were not carried over into her regular work routine, quality of work, and participation in meetings. She had heard such feedback from Complainant's peers throughout the year. (Tr. 1018). With regard to goal 1.5, she did not believe Complainant had made the effort to build a relationship with TRL's, which was an important part of her role. With regard to goal 1.7, Complainant did not complete the scope and approach document, which then had to be completed by Hall and Adams. (Tr. 1019).

In early March of 2009, she met with Complainant and gave her the 2008 performance review (JX 26) and a memorandum of concern ("MOC") (JX 25). She talked to Chavez at HR prior to giving Complainant the MOC. (Tr. 1020). Chavez reviewed it and provided guidance that it needed to accompany the evaluation. In 2008, she had conversations with Complainant about being late to meetings and being more involved in meetings. Complainant's supervisor, Adams, had also spoken to her about the scope and approach document being unsatisfactory. She often had one-on-one conversations with Complainant, approximately every two weeks. (Tr. 1021-1022).

In the MOC, she referred to an example about EUC testing in which Complainant demonstrated reluctance to accept new responsibilities. This concerned end-of-year testing that the team was to manage. Hall assigned the task to Complainant who responded that she did not have enough information to complete the task. She set up a meeting time to discuss it with Complainant, but before they could meet, Complainant sent several e-mails to GT saying they had not set it up properly and she could not complete the task. Eventually, Miller agreed to manage the effort and have Complainant assist him, so they could get it done. They were on a timeline, and Complainant was not able to perform. (Tr. 1024-1025). She and Adams thought the assignment would be a good opportunity for Complainant to learn and get more involved. (Tr. 1026). The information Complainant said she needed to complete the testing had already been gathered by the SOX business team, so all Complainant had to do was test it. (Tr. 1027). The project was completed in January 2009. (Tr. 1028).

Often when she, Adams, or Leonard asked Complainant to work on something, there was an immediate push-back of her stating she did not have enough information. Complainant would then send out unprofessional e-mails directed to GT, Adams, or Hall. While Complainant was allowed to ask for more information, it was expected that someone at her level would gather the information and complete the task in a professional manner. That was not happening. (Tr. 1029). Most of the documentation was stored on a SharePoint site where everybody on the team had access to it. However, Complainant was not accessing the SharePoint site to gather the information she needed, she was requesting it from others. (Tr. 1030).

When she presented the 2008 year-end evaluation to Complainant, Complainant immediately turned her chair toward Bahr and refused to address Hall any longer, claiming that Hall was not a good manager. This was Hall's first meeting with Bahr who had just taken over as Hall's manager. Complainant's tone was harsh and her voice elevated. (Tr. 1032). Hall felt threatened. (Tr. 1031). Complainant was also given a development plan at the time of her performance evaluation (JX 28). Bahr reviewed the development plan and development goals

with Complainant at the meeting. (Tr. 1034). Hall authored the development plan. The first objective, to own or lead a small project to completion, had key milestone dates. (Tr. 1035). Complainant was to prepare training to provide the business SOX team with an understanding of what the SOX technology team did. (Tr. 1036). The purpose of the training deck was to give the SOX business team an understanding of the SOX technology team's controls since the two teams had merged in late 2008 to early 2009 into internal audit. The training was to explain how the SOX technology team controls were different, define how the SOX technology team collected evidence, what evidence it used for each of the controls, and just an overall view of its approach to testing. At the March 3, 2009, performance evaluation meeting, Bahr explained to Complainant what the project was to involve. (Tr. 1036-1037).

To prepare the training, it would be helpful to have some documentation that had already been created like the control framework, but it was not necessary for the high level that they were looking for. Complainant was not told that she needed to use any particular documents to complete the training, but was told there was documentation available for her to look at that the SOX IT team had already put together. (Tr. 1038). The purpose of this development plan was for her to show that she could own and lead a small project. It was expected that she would independently run the project and gather whatever she needed. (Tr. 1039).

On March 5, 2009, she received an e-mail from Complainant, with copies to Bahr and Chavez (HR) (JX 33) stating *inter alia* that Complainant wanted to know what she was to work on the following week while Hall was on vacation, since Complainant did not have any work assigned and did not want to have to pretend she was busy. Hall was confused, because Complainant had been assigned the work outlined in the development plan at her performance evaluation meeting, with dates for specific deliverables. (Tr. 1042-1044). She responded to Complainant that they had discussed the training plan the previous day, and Complainant was to work on preparing an outline of the training plan and begin defining the scope of the training (JX 33). (Tr. 1044). She had not told Complainant to pretend to act busy, but this was an example of the type of unprofessional e-mail that she had received previously from Complainant, containing items that were not accurate. (Tr. 1045). Complainant responded with another e-mail dated March 5, 2009, stating that the development goal was just a general statement, that she had not had any specific work assigned, and since Hall was planning for her vacation, assigning work to Complainant was not a priority (JX 33). (Tr. 1046). She was not concerned about Complainant making such statements to HR, since she had already had communications with HR about Complainant before. She was concerned about the reaction of her new manager, Bahr. (Tr. 1047-1048).

She had instructed Complainant to prepare an outline by Tuesday [March 10, 2009], but Complainant failed to do so. (Tr. 1048). On March 9, 2010, Complainant sent an e-mail to her and Bahr stating that it was the first draft of the training (JX 34). The attached training presentation was not what she had in mind for the training deck and was not useful for the purpose they had planned. (Tr. 1049). When she returned to the office on March 10, 2009, there were some e-mail communications in which Bahr was trying to set up a meeting with Complainant on that day to discuss the training. Complainant responded to Bahr and Hall that she had a family emergency and would touch base the following day (JX 36). Complainant left the office without getting Hall's prior approval to leave. (Tr. 1050-1051). Hall had a meeting

scheduled with Complainant on the following morning, March 11, 2009. After Complainant failed to show for the one-on-one meeting that morning [March 11, 2009], Hall e-mailed Complainant to find out why she did not attend (JX 37). Complainant responded that she had a family emergency and would be out of the office the remainder of the week (JX 37). Complainant had not called Hall that morning to inform her that she would be out of the office that day. Hall expected employees to inform her if they were going to be out of the office. (Tr. 1052). Complainant did not communicate for the remainder of the week and did not inform Hall that the family emergency turned out not to be as serious as she originally thought. (Tr. 1054).

On Monday, March 16, 2009, Complainant sent Hall, with a copy to Bahr, a copy of a second draft of the training deck (JX 38). (Tr. 1055). It did not meet her expectations for a training presentation. The title was not even correct, and the document was something that had already been created, and Complainant just resubmitted it as the training material. It did not appear that Complainant had put any effort into the document. This was the only work that Complainant was assigned to complete at the time. (Tr. 1056). She met with Complainant to discuss the two versions and hand-wrote an outline which she gave to Complainant to show her what she had in mind for the training (JX 38 at FM 809). (Tr. 1057). Complainant was beyond the March 15, 2009, deadline contained in the development plan to draft the scope of the training. On March 18, 2009, Hall gave Complainant a copy of the fourth quarter application scope document and platform scope document to help her in drafting the training materials (JX 39). (Tr. 1058). The control framework was included and the general approach to testing. She did not tell Complainant that she was to rely on these two documents as her sole source of information, and Complainant could have used last year's version to prepare the summary of what SOX testing does. Complainant had worked on last year's version. Not much changes in the scope and approach document from quarter to quarter, mostly just the applications that are included for testing change. (Tr. 1059). To the extent that there were some changes, it was not the sort of information they were looking to have included in the training deck, and should not have affected the training completion. The deck was just to be a high-level of here is what we test. (Tr. 1060-1061).

On Thursday, March 19, 2009, Complainant sent Hall and Bahr a third version of the training deck (JX 40). (Tr. 1061). It was not the type of document they needed and they were at the point where they really needed the training document. She was getting concerned that Complainant would not be able to complete the task, and felt like they had given her more guidance than they had expected to have to give. (Tr. 1062). Complainant was not meeting her expectations. She did not see the project moving forward. The document did not reflect the guidance she had given Complainant in the hand-written March 17, 2009, outline. She expected someone at Complainant's level to have advanced the project beyond this point at that point in time. (Tr. 1064).

On Friday, March 20, 2009, Complainant sent her a note that she would be working from home that day due to a slight sinus flair-up (JX 41). Hall asked if Complainant would be able to provide the final document for review that day (JX 41). (Tr. 1064). She had a previous conversation with Complainant about providing a completed project by the end of the day on March 20, 2009, and Complainant had said she would get it done.

On March 20, 2009, after asking Complainant if she would provide the final document for review, Complainant responded that she had sent an e-mail requesting the additional information that Bahr had requested the previous day. Complainant further stated that the information was not included in the scope document which was the primary document she was asked to use for the presentation (JX 41). (Tr. 1065-1066). She had not told Complainant to use the scope document as her primary document to complete the presentation. (Tr. 1066). Much of the presentation was just to be based on Complainant's own knowledge of what she had performed day-to-day in the program and the use of any documentation was just to fill in any gaps. (Tr. 1066-1067). She was surprised that Complainant wanted to have Adams and Russell review the sections of the scope document, because Complainant had also worked in the same area. Bahr responded to Complainant that Complainant had not been told to use the scope document as the primary source for the training, and that her own experience should provide a good baseline (JX 41). Bahr also stated that they had targeted completion of the document for today and inquired as to how far Complainant was able to get since their meeting the day before. (Tr. 1068). Complainant told Bahr that Hall had specifically told her to use the scope document. That was not a true statement. Hall had suggested Complainant use it as one of many documents that was available for her to use. Hall expressed her concerns to Bahr that Complainant would not have the training complete, and that perhaps someone else should be assigned to complete it. (Tr. 1069). At some point she had a discussion with Gabbay about providing Complainant with additional documents to use, and so Gabbay provided some information to Complainant that had already been written and would be a good reference (JX 42). (Tr. 1070).

Later in the day on Friday, March 20, 2009, Complainant provided the fourth version of her training outline (to Hall and Bahr) (JX 43). Complainant stated that it was 60 percent complete. That did not meet expectations. (Tr. 1071). The document contained errors and was too long, with 52 slides. (Tr. 1072). The document provided by Complainant was not useful for training the business SOX team.

On Monday, March 23, 2009, Complainant sent another slide presentation (JX 44), stating that there were still questions she had to ask of Russell and Adams. These individuals were in the same office location as Complainant, and their cubicles were within two rows of Complainant's. Hall set up a meeting for Hall, Complainant, Russell, and Adams to meet and review the scope and approach document with Complainant to clarify whatever issues she had. (Tr. 1075-1076). Hall organized the meeting on March 23, 2009, because she wanted to get the project done and felt like it would only happen if she organized it for Complainant. (Tr. 1076). They reviewed the scope and approach documents with Complainant. There were some grammatical errors and formatting issues that needed to be updated, but they should not have impeded in any way Complainant's ability to bring the training presentation to conclusion. (Tr. 1077). She let Complainant know that it should not impact the training, and she asked Russell and Adams to make updates. (Tr. 1078). After the March 23, 2009, meeting, Hall offered to meet with Complainant again the following morning to review the proposed 2009 Control Framework changes (JX 44). (Tr. 1078).

On Tuesday, March 24, 2009, Russell sent an e-mail to Complainant and others on the team notifying them of what controls would be in scope and out of scope for 2009 (JX 45). Following that e-mail, Complainant sent an e-mail to Bahr apologizing for the delay in the slide

deck and stating that since she was relying heavily on the scope document for the training deck, she did not think it advisable to release the slides until Hall had reviewed the scope document and provided her management approval (JX 45). (Tr. 1079). After reading Complainant's e-mail to Bahr, Hall expected that Complainant would have put in placeholders for any missing information, but proceeded with the training deck. (Tr. 1080). Hall felt that Complainant was trying to give the impression to Bahr that she could not complete the training deck because of Hall, when, in fact, that was not the case. The training did not need to rely heavily on the scope and approach document, and a change to controls should have simply been indicated with a "TBD" (to be determined) notation. It should not have impeded Complainant from completing the training, but she was making it look like this one change would have not allowed her to finish the project. Hall met with Bahr and let her know that she had reiterated to Complainant that she did not have to rely on the scope and approach document, but could use other documents and her own knowledge to finish the project, and that the change to the framework should not impact finalizing the training. (Tr. 1081-1082).

Hall had tried to do what she could to help Complainant succeed in the task by setting up meetings, organizing other documentation to be available, pointing her in the right direction to Gabbay and some other documents that would help her, and writing the outline, when that task had been assigned to Complainant. Hall felt like she was managing the project at this point. (Tr. 1082).

On March 24, 2009, Complainant sent an e-mail to Hall with a copy to HR, requesting supporting documentation to support the statements in Complainant's 2008 year-end performance review. She further stated that she wanted to have her attorney review the information (JX 46). (Tr. 1083). Upon reading this, Hall believed that Complainant was going to sue her, though she did not understand what Complainant would sue her for. (Tr. 1084). Hall spoke with HR to express her concerns about receiving such e-mails.

On the morning of March 23, 2009, Hall sent an e-mail to Complainant and two others asking why they did not attend an all-hands meeting that day (JX 47). On March 24, 2009, Hall sent another e-mail to Complainant again asking why she had not attended the meeting and stating that she had not heard back from Complainant (JX 47). Complainant had not provided any notice in advance to Hall that she would not be attending the meeting. (Tr. 1085). On March 24, 2009, Complainant responded that she did not attend because she had a meeting with investigations (JX 47). Hall did not understand why Complainant would be meeting with investigations, and no one in investigations had contacted her about any matter they were looking into. (Tr. 1086). Hall responded to Complainant's email by stating that she expected notification if a member of the team planned to miss a meeting (JX 47). (Tr. 1086). Two minutes later, Complainant responded by changing the subject line on the e-mail and asking when Hall would send her the documentation to support her evaluation. (*Id.*). Hall then reached out to HR because she was concerned that anything she sent to Complainant was being used or replied to negatively. Hall felt nervous about continuing to manage Complainant because when she tried to follow up with Complainant about her work, her correspondence would get forwarded to HR and investigations. (Tr. 1087). She responded to Complainant's email by stating that she was waiting to hear back from Joni [Veith of HR] (JX 48). (Tr. 1088).

Complainant then sent an e-mail to Veith four minutes later asking Veith if that was true and stating that she is aware that it is not necessary to hire an attorney to request documentation to support the false claims made against her in her evaluation (JX 48). Upon reading this, Hall felt like Complainant was threatening to sue her, though she was not sure why. At that point, Complainant had not mentioned any SOX violations, un-remediated internal control deficiencies that should have been disclosed in any financial statements, any SEC rule violations in the SOX program, any fraud by FM, or that FM continued to do hedge accounting even though it represented in its financial statement that the practice had ended in fourth quarter 2008. Complainant had not mentioned anything related to hedge accounting in any meeting with Hall. (Tr. 1089).

On Thursday, March 26, 2009, Hall met one-on-one with Complainant to discuss her Performance Development Plan and Goals for 2009. Following the meeting, Complainant sent an e-mail to Hall with a copy to Veith (JX 49). (Tr. 1090). The e-mail did not accurately summarize the discussions that took place at the meeting. Complainant inaccurately wrote that management did not have any concrete work planned out as far as 90 days. Complainant did have work that she was supposed to be completing per her development plan, but she had not completed the first task of that plan. (*Id.*). On March 26, 2009, after Bahr had offered to meet with Complainant to discuss Complainant's concerns with her 2009 performance goals, Complainant sent an email to Bahr stating that a meeting was not necessary. In the e-mail, Complainant told Bahr that Hall made false allegations in her performance evaluation, that she should not be on a performance development plan and that Hall deliberately falsified and/or distorted Complainant's 2008 performance evaluation. Complainant stated that Hall was continuing to retaliate against her since March 4, 2009, when Complainant's complaint of discrimination and retaliation was brought to her attention (JX 50). (Tr. 1091-1092). Hall was very surprised upon reading Complainant's e-mail, because she did not know that she had been accused of discrimination and retaliation. No one from investigations had contacted her at this point. At a later date when she spoke to Fischman of investigations she learned that she had been accused of race, age, and gender discrimination, but she did not know anything about a complaint having to do with SOX. (Tr. 1094).

Later on March 26, 2009, Complainant sent an e-mail to Bahr and Hall with copies to Veith and Fischman stating *inter alia* that the slide presentation was arranged in the order of the primary source document she used which was the scope document. She stated that the outline provided by Hall was not in logical order. Complainant told Bahr that if she was having difficulty accepting her word, she should feel free to consult with some of Complainant's other white male colleagues and that it was clear Bahr was evaluating her work with an obvious degree of undeserved bias, although Complainant has been working in the department longer than Bahr. She noted in a post script to investigations that they should note this as another example of retaliation (JX 51). Upon reading this, Hall was surprised, shocked and nervous about sending any communication to Complainant. Hall felt that she was just trying to manage work and was not able to send or say anything without it being turned extremely negative and resulting in accusations. (Tr. 1096). Sometime after this e-mail, Hall was removed from managing Complainant because it became unbearable to her and she did not feel she could be effective as Complainant's manager. Hall spoke with HR and Bahr and explained that she could no longer be effective because she could not comfortably communicate with Complainant, without being

attacked. (Tr. 1097). She received guidance not to respond to such e-mails from the Complainant with this type of language. (Tr. 1098).

On March 27, 2009, at 10:40, Complainant sent an email to Hall with copies to Bahr and Veith (JX 53). In the e-mail, Complainant stated that it was clear they had reached an impasse regarding the slide deck. She stated the questions Bahr raised related to Hall's work, the scope document was the principle document for the control framework, and if Bahr believed it was inadequate, the focus should be on the scope document, before attempting to prepare a training deck using its content. She further stated that there were HR/Investigation issues between them which need to be resolved before she could move forward with the training deck, and in the meantime she planned to take the remainder of the day off. Upon reading this e-mail, Hall felt like she had made it very clear to Complainant that she did not only need to use the scope document, and other documents would suffice to be used to finalize the training deck. (Tr. 1100). Claimant did not seek her permission prior to leaving the office. (Tr. 1101).

Twelve minutes after the Complainant's e-mail, Bahr responded to Complainant stating that she would like to review the comments she provided to Complainant last night and could call her at 11:30 (JX 53). Hall then sent an e-mail to Bahr informing her at 11:13 that the Complainant was gone (JX 54). Shortly thereafter, Hall was instructed by Black, her second line supervisor, to refrain from back and forth with Complainant by e-mail and that management was seeking assistance from HR (JX 54). (Tr. 1103).

On Saturday, March 28, 2009, Complainant sent an e-mail to Bahr and Hall with copies to Veith, Black, and Fischman stating *inter alia* that it is not uncommon for management to hide behind professional reasons and being overly critical of an employee's performance after charges of discrimination and retaliation have been raised. She stated that overt racism such as racial slurs and burning crosses were very uncommon these days, and that discrimination is concealed by undermining an employee's performance through their work. She accused Bahr of painstakingly avoiding holding Hall accountable for her work on which Complainant must rely for the presentation, while attempting to falsely give the impression that Complainant cannot meet expectations. She stated that Leonard and Bahr were both protecting Hall's incompetence. She stated that the slide deck was just a "cut and paste" job and she cannot help it if the underlying sources are unreliable. She ended by stating that she did not have time to play games or allow them to waste her time (JX 55). (Tr. 1104-1105). Upon reading this, Hall was concerned about what was being said about her and uncomfortable to be at work and have to interact with Complainant. (Tr. 1106). She was not aware that Complainant was tape recording conversations. The slide presentation was not a cut and paste job. Shortly after this e-mail there was a meeting with her, Bahr, and HR in which it was decided that Hall would no longer manage Complainant and that Gabbay would take over management of Complainant on the training deck project. (Tr. 1109-1110).

The training deck was not a "make work" project, but was needed. They thought it would be a good project for Complainant because she had the knowledge and background for it and could succeed. Ultimately, Hall completed the project within a day. The training presentation was used. (Tr. 1111-1112).

She was not consulted in any way on the decisions to place Complainant on administrative leave or to terminate Complainant's employment. She does not recall ever being consulted on a termination memorandum. At no point in managing Complainant, did Complainant ever indicate that she was making any disclosures of any violations of SOX, or any violations of SEC rules.

At the end of 2008 [December], a member of DT requested test control worksheets. He asked for six test control worksheets with the work papers. Hall asked Complainant to just gather up that information, which was available on SharePoint. Complainant told Hall she had reviewed the documents rather than just gather them and she made some notes about them. Complainant commented that GT should not change test results, which was something everybody already knew. Complainant thus made a statement that was not necessarily accurate. She had done a review, not realizing that they already do the review as part of the SOX process. (Tr. 1115-1116). Hall informed Complainant that they were closed deficiencies, that DT had already reviewed the deficiencies and the worksheets and papers, and that it was just a matter of providing the documents to DT. Complainant had made some comments that were not really valid. The comments did not have anything to do with missing documentation. (Tr. 1116-1117). It was Hall's understanding that Complainant was not making a complaint in December 2008. Complainant had been asked to do a task, she had done extra work, but it was not accurate. She had noted some considerations such as a control self-assessment, that had actually been changed throughout the year, so it was not actually a correction that needed to be made. (Tr. 1119). She did not have any understanding around December 2008 that Complainant was raising any concerns about SOX or any internal control deficiencies. (Tr. 1120).

[Cross Examination] With regard to the last point, Complainant made a notation stating that the term control self-assessment should not be used, but another term, and that was actually not true. What she was saying is that GT should not make the change, but FM should make the change. That is normal standard practice. (Tr. 1122). She does not recall discussing it with Complainant. (Tr. 1123). Until she delivered Complainant's 2008 year-end performance evaluation she had a civil relationship with Complainant and they could discuss issues in a civil manner. (Tr. 1124-1125).

In 2008, Complainant said she needed more documentation to complete the EUC assignment. (Tr. 1126). At the time, Hall set up a meeting so Complainant could better understand what she had to do. (Tr. 1127). Complainant was correct in that she would eventually need the evidence, but she requested it before she fully understood the assignment and what she needed. Hall met with Complainant, talked about what she needed to gather, and then they were able to go and get the information. She does not believe Complainant understood what she needed to complete the task. (Tr. 1127- 1128). What happened was they presented the assignment to Complainant. Before they were able to meet, Complainant began sending e-mails out about what she needed, what people were not going to be able to provide her. Hall met with Complainant and they decided what information she needed and started gathering it. Then Complainant had a lot of questions about how to actually conduct the testing. Hall told her to follow-up with Miller, who had also done testing. Complainant did so and then concluded she was more comfortable if Miller did the testing and she assisted. (Tr. 1129-1130).

She had a meeting with Complainant during this time period [2008] about being on time for meetings, in which their voices were raised. She told Complainant that such behavior was disrespectful and other people were noticing. Complainant said everyone on the team was late for meetings, and questioned why Hall was talking to her about it. Hall responded that she had conversations with everyone who was late for meetings. (Tr. 1131). Often in one-on-one meetings when she would point out a management concern to Complainant, Complainant would immediately raise her voice and not be comfortable with receiving any feedback. (Tr. 1132). Before March 2009, Complainant would elevate her voice when provided with feedback. She would criticize what other employees were doing such as coming to meetings late or surfing the Internet, but she did not criticize FM's practices and the way it was doing business. (Tr. 1134).

She drafted the memorandum of concern (MOC) at Joint Exhibit 25 and discussed it with HR. (Tr. 1135). When she drafts something like an evaluation and gives an example of something that is lacking in someone's performance, that does not mean that it is the only example. (Tr. 1138). With regard to Complainant's reluctance to accept new responsibilities as discussed in the MOC, in addition to the EUC (end user computing) example, Complainant also had not completed an assignment to update the scope and approach document. (Tr. 1139-1341). Complainant told Adams she did not know how to do it, so he worked with her and eventually took over the document and completed it. Complainant said she needed information, but Adams said that he had provided it to her. (Tr. 1141). She does not recall ever hearing Complainant use the term "SEC." (Tr. 1142). She has looked at FM's filings with the SEC as part of her job. (Tr. 1143). The team was told to look at the SEC filings around March or April of 2010. (Tr. 1145). In the MOC, when she stated that Complainant pushed back on a task because she was not provided all the details to complete the assignment, she meant that if Complainant did not receive an assignment that was packaged neatly, it was expected that a level 4 would be able to find the information and move on. That was her expectation. (Tr. 1147).

She prepared a chronology to assist her in preparing employees' evaluations, to remind her of accomplishments or issues throughout the year (JX 125 at FM 555 to 562). (Tr. 1149). She did not typically write down her feelings in the chronology. (Tr. 1151). For March 4, 2009, she noted that Complainant accused her of being political. (*Id.*). She does not recall when she heard that Complainant was tape recording their conversations. Crews told her about it. (Tr. 1153). The chronology was just her notes. Sometimes she would go back and try to clarify what she had written previously. (Tr. 1155). She felt threatened by Claimant's threats to sue her and the accusations that she was discriminating and comparing her behavior to burning crosses. She felt very threatened by those statements. (Tr. 1157). She does not recall how she found out that Complainant was placed on administrative leave. The timeline is fuzzy after she stopped managing Complainant. (Tr. 1160). She created a table of when Complainant was out of the office in 2009 (JX 125 at FM 562). (Tr. 1163). The table just contained her notes and was not meant to be a formal record. She just jotted down notes. (Tr. 1166). The transition from Leonard to Bahr happened at the end of 2008. (Tr. 1177). She first discussed Complainant's performance with HR in fall or winter of 2008. (Tr. 1178).

With regard to the PowerPoint presentation that Complainant was to prepare, she was to put in placeholders or TBD's (to be determined) if there was some information that was missing

or she was unsure about, but it was not to hold up the whole project. (Tr. 1179). She finished the project herself in March or April of 2009. (Tr. 1180).

She would not feel comfortable working with Complainant again, but she would do her best. (Tr. 1180). Prior to coming to FM in 2006, she prepared a company for a SOX IT audit. She reviewed IT controls and applications and provided guidance on preparing for the auditor's review. (Tr. 1183).

HR sent her a template to prepare the MOC. (Tr. 1185). FM's hours are 8:30 to 5:30. (Tr. 1186). Her policy as a manager was that employees were to let her know when they would be coming and going. She would work with employees to adjust their schedules, if necessary. If someone came in early and wanted to leave early, she would allow that, provided there was nothing on their calendar. She would need to approve the employee's schedule and changes. (Tr. 1188). Whether an employee had to wait for her approval before coming in late would depend on the circumstances. If there was a meeting and they were going to be late, they would need to wait for her answer to understand if they could miss the meeting. (Tr. 1189-1190). She gave another employee a rating of SI, (does not meet expectations) in part because of his attendance. (Tr. 1191). She does not recall reviewing FM's disciplinary policies. She consulted with HR on disciplinary matters. (Tr. 1192).

She spoke to Bahr regarding Complainant's termination before April 29, 2009. She inquired about the status of Complainant's employment sometime in April. (Tr. 1198-1199).

[Redirect Examination] The final training deck had less than 30 slides, but she does not recall the exact number. (Tr. 1201). As a manager, she was willing to work with employees who needed modified work schedules. She made it clear to employees that they needed to communicate, not change their schedule on a daily basis. If something came up, she was willing to work with people, but had to be communicated with prior to the person being out. (Tr. 1203-1204). Complainant did not adequately communicate with her about her schedule. Complainant would often send e-mails saying she was not coming in or was leaving early, without waiting to give Hall an opportunity to respond. Often Complainant missed meetings and did not communicate that she was going to be out. (Tr. 1204). On March 27, 2009, Complainant did not give her an opportunity to weigh in on whether or not leaving early that day was appropriate. It was not appropriate given the work. (Tr. 1206). Since Bahr wanted to meet with Complainant on March 27, 2009, to discuss the training deck, it was not appropriate for Complainant to leave early. (Tr. 1207).

[Recross Examination] She did not discuss the work schedule policy with Gabbay.

Darlene Slaughter, Vice President, Director of Human Resources, Tr. 1210-1295

She has worked at FM for 17 years. She has served in HR as the business partner director. (Tr. 1211). It was her role to work with senior leaders in the organization on strategies that support the business from a human resources standpoint. Veith was a member of her team. (Tr. 1212). Veith's role was to work with managers and employees on employee relations issues. (Tr. 1213).

When Herb Allison took over as CEO around late 2008, he wanted to reassess performance standards, change the standards, and raise the bar so all employees were expected to operate at a higher level of performance. They began to manage performance closely to increase the standard of accountability. They had to put goals in place for people to work towards. Allison communicated his expectations in messages from the CEO. (Tr. 1213-1214). Under the new standards, 70% of the employees would fall in the FM (fully meets expectations) category, 10% in the SE (significantly exceeds expectations) category, and 20% in the FM- (not fully meeting expectations) and SI (significant improvement needed) categories. (Tr. 1216). FM did not have a step disciplinary policy at that time.

Employees who received an FM- or SI rating were required to be placed on a development plan indicating how they were to improve their performance and results. (Tr. 1217). Managers were to closely monitor the employees on development plans so they would know whether performance was improving or not. The expectation was that the employee would either improve or be terminated. (Tr. 1219). FM's business hours were 8:30 to 5:00. Managers had some discretion to give approval for variations in schedule. (Tr. 1220).

She became familiar with Complainant in 2009. Complainant was an exempt employee, meaning she was paid a salary and required to work a minimum of seven and a half hours daily. (Tr. 1221). Such an employee could come in early and leave early, if approved by the manager in advance. (Tr. 1222). If an exempt employee left early without authorization, they would still get paid. (Tr. 1223). Around March 2009, Veith informed her that there were some concerns around Complainant's performance review and that she had stated she felt she was being discriminated against and not treated fairly. Complainant complained that she was being treated differently because she was an African American female. Slaughter thought that it might be helpful, since she is also an African American female, to speak to Complainant, hear her perspective, and see if she could support and help her in that situation. (Tr. 1225). She telephoned Complainant who was very distraught. (Tr. 1226). On the call, Complainant explained that the performance review was not fair and that she had been treated differently because she was an African American female. (Tr. 1227). She complained about the work she was required to do, the way she was being asked to produce work, and not being able to come and go. She felt her manager did not provide her with information in order to set her up to fail. She felt she was being set up for failure because she was black. (Tr. 1228). At the end of the call, she told Complainant she should go home for the rest of the day because she was upset and that they would set up a time to meet. (Tr. 1229).

At that time, she had a conversation with Veith and also called Fischman in the investigative department. Whenever an employee raises a discrimination charge, HR calls investigations. (Tr. 1230-1231). When a discrimination claim is made, HR is responsible for continuing to manage the performance, but investigations will handle the discrimination part of the claim. (Tr. 1232). Veith was handling the performance management issues. (Tr. 1233). At the time, Complainant was sending e-mails about performance management. The tone of her e-mails was very sharp, pointed, and threatening. The e-mails were disruptive. The e-mails were not threatening from the manager's side. (Tr. 1234). Complainant was claiming she needed documentation from the managers to complete her work, but the managers said she did not need

the documentation she was asking for in order to complete her work. She was working on a training document. (Tr. 1235).

Joint Exhibit 28 is the development plan for Complainant. (Tr. 1237). The training project she discussed with Complainant was the one contained in the development plan. (Tr. 1238). She set up a meeting with Complainant. Complainant said she was not going to come to D.C. to meet with Slaughter. Slaughter then told her that was not acceptable and she was going to clear her calendar to make time to meet with Complainant. (Tr. 1240-1241). Complainant came to her office for a meeting. (Tr. 1243). She wanted to help Complainant figure out the best way to approach her concerns, because the e-mails with their strong tone were not helpful. She wanted to help Complainant make the situation better, manage the stress, and help her figure out the best way to communicate with her managers. (Tr. 1245). Slaughter told Complainant that her door was open if she ever needed to talk and that she would help Complainant work through a solution. (Tr. 1247).

During the meeting, Complainant said the basis for her treatment was that she was black, over age 40, and female. (Tr. 1247). She said there were documents she needed in order to validate the training document, and her managers would not give her the information. She said her managers said the information was not necessary, but she felt they were just withholding information because they did not know how to do their jobs and did not want her to succeed. (Tr. 1248-1249). Other than race, age, and sex (“EEO”) reasons, Complainant did not make any statement that her managers were violating any law or legal requirement. Complainant never accused anyone of committing fraud. (Tr. 1249). She asked Complainant to stop sending the e-mails because the tone was causing a lot of angst and it would make it easier to get through to a solution without having the barrage of e-mails. (Tr. 1250). She wanted to help Complainant manage her day-to-day situation, but Complainant was perfectly free to continue to work with investigations. (Tr. 1250). She did not know that Complainant recorded their conversation. (Tr. 1251).

Sometime after the meeting with Complainant, she spoke to Bahr to get an understanding of what work Complainant was being asked to do. She learned that Complainant was responsible for producing a training document around the SOX technology. (Tr. 1252-1253). She recalls that in the conversation with Complainant, Complainant said she had put together a training deck of around 72 pages. She told Complainant that seemed long for a training deck and Complainant said she needed to cut it down to about 25 pages. Complainant said she needed the information she had requested in order to cut the presentation down. (Tr. 1254). Bahr’s position was that Complainant did not need the documents in order to cut the training deck down. (Tr. 1255). When she spoke with Bahr, Complainant had already missed a deadline for the completion of work. It was past March 31, 2009. (Tr. 1256). She and Bahr felt it was necessary to have another meeting to sit down with Bahr and Complainant and have Slaughter facilitate the conversation to see where they were with the project. (Tr. 1256-1257).

The meeting took place (on April 15, 2009) with Bahr, Slaughter, and Complainant. Bahr began by discussing what she had been asking for concerning the training deck and what was necessary, and where Complainant was in the process of completing it. (Tr. 1257-1258). Complainant felt that documents were not being provided that she needed to complete the

assignment, and Bahr told her that she did not need those particular documents. (Tr. 1259). Prior to beginning the meeting, Bahr had discussed with Slaughter that she wanted to take the assignment away from Complainant so that it could be completed, because they needed the training. (Tr. 1260). The assignment was not a "make work" project. It was taken away from Complainant because it was not complete and the unit needed the work. (Tr. 1261). At the meeting Complainant was informed that the assignment would be given to someone else. They then discussed other projects that Complainant was to work on. Complainant's reaction to having the assignment removed was "fine." (Tr. 1262). It was her opinion that Complainant had not been successful in meeting the requirement of her development plan and she discussed this with Bahr. (Tr. 1263).

During the meeting, when a question was asked of Complainant, she had a defense or response to everything. She explained to Complainant that it would be very difficult to get a resolution because she was not listening or allowing other people to state their opinion without jumping on what they were saying. (Tr. 1264). Complainant would talk over Bahr and not really listen or believe what she was being told. At some point the conversation turned to the amount of time Complainant was in the office. (Tr. 1265). They discussed that the manager has the right to tell an employee when to come to work, how to do the work, and what is expected to get the work done, and that if the employee is not there, it impacts the performance. Complainant felt the times she was out of the office, were not during times when work was due, so it should not matter. Slaughter stated that it did matter and was important for her to come to work. (Tr. 1266).

At the meeting, they discussed the ARQ project and Complainant thought it would take a couple hours to get it done, and could be complete within eight hours. She said she would produce it by Monday of the following week, which she thinks was April 20, 2009. (Tr. 1268). At that point Gabbay was her manager and would be managing her on the ARQ project. Sometime in between Slaughter's initial meeting with Complainant and the meeting with Bahr and Complainant, Complainant's manager had been changed from Hall to Gabbay. (Tr. 1269). Complainant seemed happy with that. At the meeting they discussed that Complainant needed to come to work, be at work, and keep her managers informed. Complainant was told that if she did not complete her projects, at some point they would discuss termination. (Tr. 1270).

After the meeting (April 17, 2009), she received a message that Complainant was not in the office. It was the end of the week and Gabbay and Bahr were looking for her to check the status of her project. (Tr. 1271). It was a Friday and Bahr and Gabbay wanted to know the status of the project that was due Monday. On Monday, Complainant sent an e-mail explaining that she had left early on Friday to do some work from home. Slaughter then sent Complainant an e-mail that it was not acceptable for her to leave without checking in with her manager. (Tr. 1272). Slaughter thought it was unacceptable that Complainant had an assignment with a due date, was not delivering, not in the office, and not communicating. (Tr. 1273). Gabbay and Bahr's reaction was that this behavior was unacceptable, they could not get work done like that, and could not continue to work that way. (Tr. 1273-1274). Sometime after this incident, she began to discuss termination with Complainant's managers. (Tr. 1275). She spoke with Bahr about the process for termination and the documentation that Bahr had to put together. Bahr was

to document the case for termination based on performance and attendance. (Tr. 1276-1277). As an HR professional, she felt there were adequate reasons for termination. (Tr. 1277).

The conversation with Bahr regarding termination took place around April 20, 2009. (Tr. 1278). It then took a couple days to prepare the termination document, and a meeting was scheduled to terminate Complainant's employment. The meeting was scheduled for April 29, 2009, but the document was actually completed at an earlier date. They were originally going to meet with Complainant on April 24, 2009, but something happened, and the meeting had to be rescheduled for April 29, 2009. (Tr. 1279-1280). Slaughter and Veith went to Complainant's office on April 29, 2009, and explained that they had made the decision to terminate her employment, but were going to put her on administrative leave while they went back and looked at all of the dates for the times out of office to reconfirm the dates and times. In fairness, they would put her on administrative leave and follow up with her at a later date. (Tr. 1280). Slaughter explained to Complainant that she was free to continue her conversations with the investigative group, she was still on the payroll, and just not required to come into the office. (Tr. 1283). Complainant's employment was ultimately terminated. There was a delay because Slaughter was transitioning to another position and there was a big organizational restructuring at that time. (Tr. 1287-1288).

She met with Complainant on April 29, 2009, and on April 27, 2009, there was an e-mail from Complainant in which she stated she was filing a SOX complaint against her managers and the company. (Tr. 1288). She was copied on the e-mail, and she called Investigations to report it. The SOX complaint would continue to be investigated by Investigations. The decision to terminate Complainant's employment had been made prior to receiving the April 27, 2009, e-mail. (Tr. 1289).

[Cross Examination] [At this point in the hearing, Complaint's counsel proposed foregoing cross examination and admitting the deposition of Slaughter as an exhibit (JX 186).]

[Deposition Testimony]⁸ She does not recall the exact date of her one-on-one meeting with Complainant, but it was probably around April 2, 2009. The meeting with Bahr and Complainant together at Bahr's office took place around April 15, 2009. Sometime around April 15-17, 2009, she met with Bahr one-on-one to discuss termination of Complainant because Complainant was not producing. If an employee raised SOX concerns, HR would turn it over to investigations to look into.

FM's "employment-at-will" policy states that FM has the right to terminate any employee based on its determination that the employee could be terminated at any given point in time. There are no steps that need to be taken prior to executing the termination. However, HR does counsel management to give employees some counseling and notes to provide fairness and give the employee an opportunity to turn their performance around before termination. There are circumstances where FM does not go through any sort of a notice process or written memorandum before termination is executed.

⁸ I have only summarized relevant points of the deposition testimony that were not discussed in or consistent with the direct examination.

As of April 1, 2009, she had a discussion with Bahr and Black about their performance concerns with Complainant. The concerns were that she was not producing, not delivering on the goals, as well as time out of the office. On April 13, 2009, she received an e-mail from Bahr stating that Bahr was following up on the voice mail she left on Friday and wanted advice on next steps for Complainant. She stated that they continued to make no progress on the training deck and she wanted to know if she could assign it to another team member. Complainant was also two and a half weeks behind on her second assignment.

Her last face-to-face interaction with Complainant was sometime around April 24, 2009. She and Veith went to Complainant's workstation and then met with her in the conference room. She informed Complainant that she was being placed on administrative leave. She told Complainant the decision had been made to terminate her employment, but they wanted to review the records before making the final decision. She told Complainant that the reasons for termination were her not performing and getting things done and from an attendance standpoint, her time off. She does not recall specifically what she said.

If Leonard had received his accountability survey, he would only have seen a roll-up of the numbers and data, but no specific information by any individual who had given a statement. He would not have been aware that Complainant had made any written commentary.

Michael Gabbay, Senior Technology Risk Analyst/Manager, Tr. 1297-1563

[Direct Examination] Complainant worked in his group, the SOX technology group, during the 2008/2009 period. (Tr. 1297). They had two separate organizations. His organization was focused primarily on application controls, and Complainant's organization was focused on infrastructure and platform controls. The two groups worked hand-in-hand and would conduct joint meetings. He was reporting to Robert Leonard, and then there was a transition period where he reported to Bahr. In 2008, his group and Complainant's group merged into one SOX technology group. (Tr. 1298). They were responsible for the assessment of application controls, as well as infrastructure controls, and covered all technology controls from a SOX perspective. (Tr. 1299). They used independent contractors to actually execute the testing. They also had external auditors, DT, who would also do a comprehensive review of all testing to determine if it was complete. (Tr. 1305).

The control framework was a document that was their "bible" that prescribed all the different controls management felt were necessary to be tested. That document identified the type of risk they were trying to assess, the test steps that would be executed. It also indicated whether it was applicable for an application only, applications and platforms, or platform only. The document was static at the time, but has changed over time, as recently they have gone through an exercise to optimize their controls. (Tr. 1306).

Prior to the beginning of each test phase, they would decide the scope of what they were going to test. They would have already identified what assets overall were SOX relevant, but would then further narrow that down and apply a risk based approach. High risk assets were always tested. Non-high risk assets would be tested periodically, about every two years. (Tr. 1307). Once the scope of testing was defined, they would review it with their third party testers,

GT, and get into very specific discussions around what evidence they needed to perform the tests. (Tr. 1308). Then, on a weekly basis, they would report to management on the status of testing completed, deficiencies, and any issues. If GT found a deficiency it would be considered a “preliminary finding.” GT would discuss the preliminary findings with members of his team who would examine how the finding was reached and challenge it to determine if it was valid. After the team was comfortable with the finding, they would then sit down with the application or platform owner, discuss the finding, and talk about how to remediate it. Complainant was a member of the team who would get the feedback from GT and discuss the findings. The role of the technology risk specialist, like Complainant, was to challenge the preliminary finding and verify that it was valid and that GT considered everything that needed to be considered. (Tr. 1310). Not all preliminary findings would be SOX relevant. It was dependent upon whether the deficiency could affect their financials. The Independent Review Board (“IRB”) would meet to discuss the testing and deficiencies. (Tr. 1312).

He attended the IRB meetings, as did the Complainant. The Complainant was non-participatory and disengaged at the meetings. At the meetings, it was typical for attendees to bring laptops so they could go through the deficiencies and look at the work papers and evidence. During several occasions he observed Complainant surfing the internet while they were having discussions and not participating. (Tr. 1313). They encouraged people to be engaged, even if it was not their specific area, because they wanted a very solid conclusion they would feel comfortable giving to DT or FHFA or whoever wanted to look at the work papers. There was really no engagement at all from Complainant. (Tr. 1314).

He talked to Leonard and Hall stating that Complainant’s behavior at the meetings was a problem. Hall decided that people would no longer be allowed to bring laptops to the meetings because it was a problem if Complainant was not going to engage in the meetings and just surf the internet. (Tr. 1314).

The conclusions of the IRB would ultimately be put into a data base called the deficiency management system (“DMS”). It was an official record. Reports to management, DT, and FHFA would come from that system. (Tr. 1316). Every deficiency would have a risk level associated with it. If it could impact financial reporting it would be considered high risk. (Tr. 1317). Not all deficiencies identified in the DMS would be reflected in the financial statements. The requirement from a SOX perspective is to report anything that is material or significant. The majority of identified deficiencies are not material or significant because they can’t result in a misstatement in the financial report or the likelihood is so low as to be considered insignificant. (Tr. 1320).

In late 2008 or early 2009 the technology risk group merged with the internal audit team. Bahr came in as their director, working with Leonard. Ultimately Leonard left and went to a different part of the organization. Bahr became the permanent director, and they all reported up ultimately to the chief audit executive. At the beginning of the transition, he reported to Leonard, but at the end he reported to Bahr. (Tr. 1321). Complainant came over during that transition.

He worked on two projects with Complainant in 2009, a training deck for the SOX technology program and a procedure concerning an application risk questionnaire (“ARQ”). The purpose of the training deck was to communicate to the SOX business group what the SOX technology group did. It was supposed to be a high-level, general overview about the nature of the testing, and not so detailed as to be prescriptive for an individual to take the information and execute any type of testing. It was not supposed to be very detailed at all. At some point, he was asked to oversee the development of Complainant’s work product and was overwhelmed by the number of pages, because it was about 72-76 pages in length. (Tr. 1323). He asked to sit down and reorganize it so that it had some sort of a flow, some sort of an outline structure so they could get the end product. Bahr asked him to manage this. He noted some obvious errors in the name of the organization and the focus of Complainant’s draft. (Tr. 1324). There were also problems with the flow of the document and its disjointed nature. Earlier, he had provided Complainant with some samples of presentations that he had done in the past and she had simply cut and pasted that information in without any additional analysis. So it appeared that it was just a merger of different documents with no real approach and structure, and it was unclear what information it was trying to get across (JX 57). (Tr. 1325).

When he reviewed the draft document (JX 57), he did not think it was acceptable because it was too long, very disjointed, and contained more information than the audience needed. He provided feedback to Complainant describing his concerns with the draft (JX 58). (Tr. 1326). He then received an e-mail response back from Complainant that he considered to be threatening in nature (JX 59). He later received another e-mail that was more threatening. In her e-mail (dated April 1, 2009), Complainant seemed to accuse him of just saying whatever Bahr wanted him to say. His intent was to just put some structure around the document before moving forward. (Tr. 1328). He had some meetings with Complainant at which she seemed receptive to his suggestions, but later she would not make the changes that they had agreed to. (Tr. 1329). Joint Exhibit 72 is the e-mail [dated April 2, 2009] he considered threatening because Complainant said she had concerns of racism and discriminatory management practices. He was shocked because he had dealt with Complainant in a professional manner and was providing constructive feedback on a work product, and so he was confused by her accusations of racism and discrimination. (Tr. 1330). Prior to this project, he did not have a day-to-day relationship with Complainant, who worked for Hall. Their relationship was cordial and professional. After that e-mail, he made sure he was acting in the utmost professional manner and documenting information exchanges back and forth. (Tr. 1331). Complainant had not notified him prior to April 2, 2009, of any violations of SOX, violation of SEC rules, fraudulent activities, or deficiencies that should have been reported on financial statements. Following the April 2, 2009, e-mail, Complainant came back with another draft that was re-worked a little, and ultimately the task was removed from her. (Tr. 1332).

Complainant expressed concern that there were two documents being drafted around the application and platform scope and approach that she needed to have completed so that she could complete her training deck. In his opinion, these documents were not needed to complete the training deck. The scope and approach documents would be more appropriate for somebody on their own team, but not for the audience for whom the training was intended. The training was not to get into that level of detail. (Tr. 1333). The scope and approach documents do change from time to time. There were two scope and approach documents in existence at the time

Complainant was working on the training deck, one for platforms and one for applications. These were in draft form, however they were complete enough that Complainant could have completed the training deck. The level of information she needed was completely available at that point. The scope and approach documents are very prescriptive and meant for the actual tester. (Tr. 1335-1336).

Complainant sent an e-mail (JX 84) containing a spreadsheet in which she specified why the scope documents were incomplete. Upon reviewing it, he was a little shocked because he was expecting her to say that they had not accessed a particular area, specific type of control, or approach. However, most of her issues were around format and the remaining issues were about why the two documents did not match up, which did not make sense to him because they should not have matched up given that they were talking about different kinds of information. (Tr. 1337-1338). Upon reviewing Complainant's spreadsheet, he went through it and added a column for his comments in which he addressed each of Complainant's concerns (JX 84 at FM 1163-1171). (Tr. 1339-1343). After going through each of the issues and finding that Complainant's concerns had to do with format issues rather than content or something that would go against their audit practice, he began to wonder if Complainant was just trying to deflect the work because she did not want to do it. (Tr. 1343). Nothing she referenced in the spreadsheet would have prevented Complainant from completing the training presentation. (Tr. 1344). Also, she referenced a section in the application document that did not totally synchronize against a section in the platform document. That made no sense because the documents were referring to different things. Someone with her background should have understood that there are certain tests that are platform specific and others that are application specific, so you cannot always test the same thing for both sides. With her background from TIO and the platform testing world, that should have been apparent to her. (Tr. 1346). The analysis that Complainant provided did not seem to support any reason why she could not get the training deck done. (Tr. 1348). At some point thereafter, he talked to Bahr about removing the task from Complainant so they could get it completed. (Tr. 1349).

Joint Exhibit 95 relates to the Application Risk Questionnaire ("ARQ") project that Complainant was to work on. The ARQ was a new process they were implementing at FM. It was introduced by the technology risk organization, a different group than his, to manage overall risk within the technology area. They did not just focus on SOX, but more of a general risk area. (Tr.1350). The ARQ would go out to asset owners prior to implementing a change into production. Depending on the answers to about 20 questions, it would be determined if the change would impact the financial reporting process. The job of his team was to then further assess the change and determine what type of control impact it would have from a SOX perspective. (Tr. 1351). He assigned Complainant the task of putting together a simple process describing the steps they should take upon receiving the ARQ form, a decision tree. (Tr. 1354). Its purpose was to provide consistency in their approach. He thought the project would take one to two weeks, three at most. (Tr. 1355). She never completed the task. (Tr. 1356).

Joint Exhibit 95 contains Complainant's comments and his feedback. (Tr. 1357). At an earlier meeting prior to the e-mail, he had explained to Complainant that when she got to section four of FM's standard template for standards and procedures, titled "risks," it was not the risk of SOX controls, but rather the risk of not implementing the ARQ procedure. So, if they did not

have the ARQ procedure in place, the risk would be inconsistency. (Tr. 1358-1360). He thought she understood this as he had walked her through the document. (Tr. 1361).

In the e-mail (JX 95 at FM 517) when Complainant stated "Please refer to Section 5," his comment back to her was that the control objectives and activities had all been documented and published since the inception of the SOX technology program and were located on the Share Point site that she had access to. It appeared that she did not think they had control objectives and control activities when, in fact, since the beginning of the program, they had those. Based on her background in the organization, she should have known this. (Tr. 1362). All of that information was vetted. As they did the transition, everybody was given access to the share point sites, including Claimant. (Tr. 1363).

He was not expecting Complainant to fill out the procedure template as part of her assignment. He explained to her at the beginning that ultimately those sections would be completed. He just wanted her to prepare a process flow of what it would be when they got the ARQ to the point in time to deliver their conclusion. (Tr. 1364).

With regard to Complainant's comment (JX 95 at FM 518; JX 155) that FM's SOX testing methodology does not test at a sufficient level to gain the assurance that it needs for system specific IT application controls, which have a direct impact on the financial statements, he understood her to be saying that she did not feel that FM's testing methodology considered change management, when in fact, it does. (Tr. 1365-1366). As a technology risk specialist, Complainant would have been involved in the review process and understood that they do put this information together because they would as a team, prior to meeting with DT, have to put the information together themselves. (Tr. 1367). He thinks she was stating that they needed system specific IT application controls. (Tr. 1373). In his response to her, he was advising Complainant that the information in her statement was not pertinent to developing the process, the procedures of the ARQ, which was her task. The purpose of the decision tree was to determine what level of review needed to be taken, not the details. (Tr. 1374).

With regard to the table that Complainant submitted at Joint Exhibit 95, FM 519, he was confused by it because there were inaccuracies and conflicts within the matrix. (Tr. 1377). He was confused because the control framework is the risk control matrix. So even though they did not have a document called a risk control matrix, the effectiveness of the program was not lessened. (Tr. 1378-1379). He would never have expected a technical risk specialist like Complainant to have intimated that there was no documentation of a risk control matrix for those domains. (Tr. 1379). It would be surprising for an individual within the organization to not be aware of the control framework. (Tr. 1380). In reference to Complainant's statement that 85% IT changes are being made to financial applications which have a direct impact on IT application controls and financial systems, he was not concerned. He did not understand it to be a gap in the SOX program. Not having been at the team meeting, he had no frame of reference for her comments. He did not understand her to be identifying a gap in the SOX program. (Tr. 1381). Claimant never clarified any of the information in the e-mail. (Tr. 1385).

With regard to Complainant's e-mail dated April 2, 2009, at JX 63, he was shocked and taken aback by the statements she was making. He thought he was providing constructive feedback in a professional manner. (Tr. 1385)

With regard to the ARQ project, Claimant gave him a draft prior to leaving FM that was somewhat adequate (JX 96). It was a starting point. (Tr. 1386). He had asked Complainant to meet with the team that was managing the overall ARQ process. (Tr. 1187). He thought it would be a good starting point for her to get a better understanding of the process. She was to meet with Saber Martin. He does not know if she ever did so. Initially a meeting was scheduled with Complainant and Martin. He was added to the invite list, but had a conflicting meeting and asked Complainant to go ahead with the meeting without him (JX 75). However, she left that day for a doctor's appointment and expected him to meet with Martin on her behalf. He did not feel like that was his role as he was not the owner of the project. He did meet with Martin so they could make some progress. (Tr. 1388-1389). He had specifically told Complainant to schedule the meeting with Martin when she was available. (Tr. 1390).

With regard to Joint Exhibit 79, on April 9, 2009, Hall wrote an e-mail to him and Bahr stating, "Let's discuss the next steps with the training deck. Based on this version, I don't feel she's heading in the right direction." He responded with a recommendation that they remove Complainant from the training deck and ARQ projects because she was not making any significant effort to complete either project. (Tr. 1390-1391). He was frustrated that Complainant did not have a sense of accountability and ownership and that she was expecting him to go to meetings when they were her meetings. It should have been a fairly simple task and had turned into multiple weeks' worth of back and forth. (Tr. 1392). On April 8, 2009, Complainant sent him an email stating that she would be out sick for the remainder of the week (JX 77). In the e-mail she reminded him that they had a meeting scheduled with Martin at 10 a.m. the next day related to ARQ. She had scheduled a meeting knowing that she was going to be out of the office. (Tr. 1393).

With regard to Joint Exhibit 83, e-mails dated Monday, April 13, 2009, Complainant was providing a status, and he told her that they still needed to meet with Bahr. She then responded that she had a doctor's appointment that morning. He had the sense that every time they would try to set up a status meeting, she would make herself unavailable. He was getting frustrated about the lack of movement. (Tr. 1393).

On (April 20, 2009), the same day as he received a draft ARQ flow diagram (JX 96), he sent Complainant a note in the afternoon to see how things were going with the updates to the ARQ process document. Complainant responded (JX 105) that she had been tied up with a phone call from investigations and had contacted Slaughter to make sure she could address the call. (Tr. 1394). She also stated she had been on the phone with EEOC. When he read this he was confused as to why she was telling him this and thought back to some of the earlier emails where she had threatened to sue him. He felt maybe this was another threat. She never provided any details of the EEOC investigation. He did not know what she was referring to. (Tr. 1395).

He was not part of any decision making that led to Complainant's termination from the company. Since he was not her HR manager, it would not have been appropriate for him to be

involved. No one ever asked his opinion about terminating Complainant's employment. Nor was he involved in the decision to place her on administrative leave. Complainant never indicated to him that individuals at FM were engaging in fraudulent activities. She never advised him that individuals, either deliberately or inadvertently, were violating any SEC rule or regulation. She never advised him that the company was guilty of SOX violations. (Tr. 1396-1397).

[Cross Examination] Complainant never reported directly to him from an HR perspective. He never had any personnel authority over Complainant. (Tr. 1415). At the time Complainant worked with him on the training deck and ARQ projects, he was her project manager, not her supervisor. (Tr. 1416).

The intent of the training deck was to provide the SOX business counterparts and internal audit with an understanding of what SOX technology did. (Tr. 1430).

He would characterize Complainant as non-participative at IRB meetings. (Tr. 1457). She would answer if called upon. FM had core business hours. If people needed a different work schedule, that was up to their manager. (Tr. 1460).

He was the project manager for the training deck that Complainant was to complete. He would review drafts, answer questions about what should or shouldn't be included or about supporting documentation, and was a potential source for her to come to. (Tr. 1465). He was responsible for delivering the product to Bahr. It was a legitimate project and not a "make work" project. (Tr. 1466).

He was also the project manager for the ARQ project that Complainant was to complete. She was the only person working on that. (Tr. 1474). Neither the training deck nor ARQ project was completed in the expected time frame due to Complainant's failure to meet expectations. (Tr. 1474-1475).

The purpose of the training deck was to explain, "here's what we're doing, here's who we are and here's why we do what we do." (Tr. 1477). It was not to give the progress of the actual testing that was being performed. It was more of an overview. (Tr. 1478). It was to explain "here's what we are, here's who we are." It's not so much here's where we're going and necessarily where we came from as much as it was we're an organization of this number of individuals and we organize based on application and platform and these are the controls that we test. (Tr. 1478-1479).

Complainant indicated she needed the platform and application scope documents to be complete to prepare the training deck. Complainant gave him a table (JX 84) explaining the problems with the scope documents. (Tr. 1486). In the beginning before he was involved in the training deck, he provided Complainant with some background information about the organization and controls, to include about 30 slides. He would have expected that given the nature of the documents she was trying to produce and for the audience, that there was certain information in those documents that may have been too detailed that needed either to be reworded or eliminated in their entirety. (Tr. 1493-1494). He received a draft from Complainant

which contained 72 slides. He sent her an e-mail stating that 72 pages was excessive, given the audience. He also told her the document was disjointed and did not flow properly. (Tr. 1496-1497).

The first step in the ARQ project would be to assess the real risk level of the change that's being made. They would have to decide whether or not they needed a full control design review or something less. (Tr. 1506). He recommended that Complainant talk to Saber Martin to get a better understanding of the overall ARQ process and how they would hand off the ARQ documents to them. He directed her to establish the meeting. (Tr. 1508). He met with Martin and sent Complainant an e-mail describing the meeting. (Tr. 1510).

He did not agree with Complainant that there were severe gaps which needed to be addressed by SOX technology before she could complete the ARQ project. He thinks she may have been referring to the scope and approach document in her e-mail of April 23, 2009 (JX 95 at FM 517). He believes the gaps she was referring to concerned the level of documentation the application teams had for their systems design. He thinks she was pursuing detailed documentation around system design and development documents, and at that time such information was irrelevant to the completion of the ARQ project. (Tr. 1515-1516). He does not recall telling Complainant that she was incorrect in her contention that risks were not documented for IT application controls to which 85 percent of IT changes related. (Tr. 1518). He does not recall rebutting Complainant's assertion that SOX testing methodology does not test at a sufficient level to gain the assurance it needs for system specific IT application controls which have a direct impact on financial statements. (Tr. 1519). In regard to the table sent in an e-mail by Complainant on April 23, 2009 (JX 155), he did not discuss with Complainant her assertion that documentation was missing which could impact SOX. Complainant's conclusions appeared erroneous because there was confusion on her part around the risk control matrix and control framework. He told her that her conclusions were irrelevant to the ARQ process, but he did not tell her the conclusions were wrong. (Tr. 1521).

In an e-mail on April 15, 2009, (JX 86), he informed Bahr that this was what he was expecting to see in reference to a status report on the ARQ project that he received from the Complainant on April 14, 2009. (Tr. 1527). He felt like it was a good start. (Tr. 1528).

With regard to JX 110, on April 20, 2009, he had a conversation with Complainant at a pretty high level (regarding the ARQ project). Later they met with Bahr and discussed the project at a much more detailed level. (Tr. 1530).

He never offered an opinion as to whether Complainant's employment should be terminated. He had no input into the decision to place her on administrative leave. Nor did he have any advance notice that she would be placed on administrative leave. (Tr. 1531).

[Redirect Examination] Team meetings were different than IRB meetings. They were not formal where people would individually need to respond, but it was expected that members of the team would participate. (Tr. 1536). The IRB meetings were more formal with an agenda and included individuals outside of the team. He generally attended the team meetings in person and observed Complainant's participation level. Complainant rarely participated at team

meetings. (Tr. 1537). She was also very non-participatory at IRB meetings, and he witnessed her surfing the Internet while they were having discussions. (Tr. 1538).

With regard to his role as project manager for the training deck and ARQ projects, his responsibilities were to manage the tasks and make sure progress was being made for delivery of the product in a timely manner. He was not responsible for actual hands-on executing of the work. (Tr. 1540). He was to serve as a resource and help put Complainant in contact with individuals she needed to go to for reference. (Tr. 1541).

Complainant provided him with a 72 page draft of the training deck. Bahr had reviewed each slide and provided comments to Complainant. He had a chance to review Bahr's comments prior to his own review. He agreed with Bahr's comments and informed the Complainant of such. He wanted Complainant to review his comments on the draft presentation in conjunction with Bahr's comments to simplify the presentation, structure it, and put it into some sort of logical flow. (Tr. 1543-1544).

Between April 15, 2009, when he told Bahr that Complainant had provided what he was expecting to see (on the ARQ project) and the April 20, 2009, meeting with Bahr and Complainant, several days had passed, and he was not seeing any real progress being made to get to the next level. (Tr. 1551).

[Recross Examination] He felt that Complainant did not want to do the work to complete the training deck. He did not understand why she could not finish the training deck due to the scope and approach documents when the training deck was to be at a much higher level than the information contained in the scope and approach documents. (Tr. 1554). He and Bahr were not asking Complainant to do more work in their comments to her draft training deck. Rather, they were asking her to trim down the information. The analysis she did comparing the two scope and approach documents was unnecessary, and in her own words, the majority of the issues she had were formatting issues. (Tr. 1555-1556).

He saw Complainant surfing the Internet on at least three occasions and saw her surfing Yahoo, looking at celebrity news, a church site, and a personal dating site. (Tr. 1560).

[Redirect Examination] IRB meetings were formal in that they had an agenda. However, during the meetings, anybody could have joined in the conversation, so in that sense he called them "informal" meetings. (Tr. 1563).

Misbahuddin Syed, Information Security Manager, Tr. 1564-1597

He has been employed at FM for seven years. During the period 2007 to 2008, he served as a senior tech risk specialist and was the team lead. In 2008, he became a manager in the risk management group. Complainant was a part of his team. (Tr. 1565). She tested computer controls for SOX. She tested platform controls. He managed Complainant for six months. She was hard to work with, and he had to be really, really careful about what he asked from her. At times she would send e-mails that did not accurately reflect what she had been asked. Later, when things had been clarified to her, she would not send out an e-mail clarifying her previous

inaccuracies. (Tr. 1566-1567). Joint Exhibit 8 is an example of this where she had claimed she could not get the information she needed, but the individual had, in fact, given her the information she needed and additional information was available to her on a website. (Tr. 1570). Joint Exhibit 9 is an example of where Complainant promised to provide documentation by a certain date, but failed to do so. (Tr. 1572).

On one occasion he told his team that work hours were from 8:30 to 5:00, but if they had special circumstances where they had to leave early or come in late, they should let him know and he gave a three or four examples of special circumstances, to include having to drop off a child. He then received an e-mail from Complainant accusing him of having a discriminatory policy because he said people with kids could come late or leave early (JX 127). She said she had spoken to HR. He then talked to Complainant and explained that he was referring to having to drop off a child as just one example of a special situation, and it was not meant to be the only example of a special situation. She then laughed and said it was fine, but never sent out an e-mail clarifying her misunderstanding of what he had said. (Tr. 1574-1575).

He had some attendance issues with Complainant, but never took action because he did not have enough evidence. (Tr. 1576). He managed Complainant from the end of November 2007 to March or April of 2008, when she moved to the SOX testing team. His team was responsible for platform SOX testing and restatement SOX testing. (Tr. 1578). After the transition, Complainant reported to Hall. In Fall of 2008, Hall asked him how his experience was managing Complainant. He said he had to be really careful about assigning work to her and making sure she understood, and to be careful about deadlines, i.e., if documents were not documented, then Complainant would balk and claim that she did not know the deadline. (Tr. 1580-1581).

[Cross Examination] Compliance and ethics called him in regard to an investigation regarding Complainant's 2007 performance review. (Tr. 1583). He spoke to Hall in the Fall of 2008. (Tr. 1587). He does not recall discussing the special work hours/child care issue with Hall. (Tr. 1589). He does not recall discussing Complainant's concerns with her 2007 evaluation with Hall. (Tr. 1590). He did not know the details of the investigation concerning the 2007 performance evaluation and does not recall discussing it with Hall. (Tr. 1591). He does not know what the RCSA issue was and does not recall ever discussing it with Hall. (Tr. 1591).

[Redirect Examination] He only told Hall about his own experiences and interactions with Complainant. He did not mention the investigation by compliance and ethics because he was not familiar with it. (Tr. 1594). He did not complete Complainant's 2007 performance review, but he presented it to her, she agreed to everything, and then left and everything was fine. (Tr. 1595). A few days later, she became upset when she was told her compensation would not increase due to the rating in the evaluation and said she would talk to compliance and ethics. He does not know anything about an RCSA issue. He told Hall that Complainant was upset with her compensation. (Tr. 1596).

[Recross Examination] At FM anyone who believes their management has not given them a proper performance review can raise a concern with the ethics and compliance department. (Tr. 1597).

Stephanie Bahr, Director, SOX Technology, Tr. 1602-1882

[Direct Examination] She is currently the chief risk officer for operational risk at FM. She has been employed at FM for six years. (Tr. 1603). At the end of 2008, she was the director of internal controls with a primary focus on the business process controls that were SOX relevant. (Tr. 1604). Her group was very specific to performing design reviews of controls and supporting the testing of the controls. Actual control execution was done by the business areas and the technology areas. Her team's responsibility was to make sure the controls they were executing actually mitigated the risk of their process. They would test those controls on a phase approach throughout the year. (Tr. 1606). SOX testing supports the 404 attestation, which is performed annually. (Tr. 1611). In 2008-2009, FM was over testing in a lot of areas. (Tr. 1612).

There is a big difference between a deficiency and a material weakness. (Tr. 1613). Deficiencies are ranked. Highs would be material weaknesses. Mediums are considered significant deficiencies. Significant deficiencies must be disclosed to your external auditor and audit committee. Lows do not rise to the level which need to be reported to the audit committee or in an SEC filing. (Tr. 1614).

After Allison became the CEO, there were changes in performance management at FM. Historically FM's culture did not support having tough conversations about performance. Allison wanted to move the company into a performance based operation. (Tr. 1618). Allison put out a message (JX 1) that there was going to be a change in performance management with a bell tier for rating employees. (Tr. 1619). They were to raise the bar and hold people accountable for the work that needed to get done. (Tr. 1621). The executive committee also discuss the performance management changes (JX 2). The new system would have a wider distribution of ratings and managers were to be more rigorous in assessing their team's strengths and weaknesses. (Tr. 1623). At the end of 2008, there were a couple of data points she would use to do an assessment. One would be their day-to-day performance. Another would be the leadership criteria. Then, there were also accountability surveys prepared by peers and managers to consider. Employees would be compared. (Tr. 1626).

In 2008, Complainant worked for Leonard. He worked with his managers on their ratings. When she took over Leonard's group around February 2009, Complainant became part of her direct chain. (Tr. 1628). The first time she had any interaction with Complainant was when she joined Hall in delivering Complainant her 2008 performance review (JX 26) on March 4, 2009. (Tr. 1630). She had no input into the performance review. She read the memo of concern (JX 25), but had no input into it. She did have input into the development goals (JX 28). (Tr. 1630). The purpose of development goals is to provide very discreet targeted feedback and activities for people who have been identified as under performers. She thought that since Complainant seemed to have a passion for training based on her accountability survey, that they would give her something to work on that she enjoyed doing, i.e., preparing a training. She thought it would be helpful for the business team to understand more about what it was that the SOX technology team was testing, i.e., what the controls were meant to do, how they were collected, and the sort of evidence that was supporting the controls. (Tr. 1633). Given Complainant's experience, she thought it would be a good opportunity for her with the two years

of experience she had in the SOX testing program to put down on paper and help facilitate knowledge sharing between the two groups. (Tr. 1635).

She expected Complainant as an exempt employee to be able to work independently to complete her work. It was expected that Complainant could be given an assignment and figure out what needed to be done, come up with a plan and execute it with minimal help from the managers. (Tr. 1637-1638). The action steps (JX 28) were the specific steps they were looking for Complainant to complete to meet the development goal. Complainant was to manage the technology SOX training pilot project from start to finish. With regard to defining milestones, Complainant was to set the milestones so they could make sure the project was on track. Complainant was to provide status reports to her managers, resolve issues, bring any problems to managers' attention, and complete the project on time. (Tr. 1639) At the time, she thought that Complainant might be the one to present the training to the business team. (Tr. 1640). Success measures would be the completion of the project within the time limits and budget. Manager support as set forth in the development plan described how managers would help Complainant achieve success. (Tr. 1641). The manager support included reviewing outlines, not drafting them or doing the detailed work. (Tr. 1642). Key milestones were that a final outline would be completed by March 15, 2009, and the project would be complete by March 31, 2009. (Tr. 1643). There was urgency to the assignment in that it needed to be completed so that personnel could be trained before they started doing the first quarter filings in May. She felt the milestone dates were reasonable. (Tr. 1644).

One purpose of the development plan was to give short-term goals so they could start to measure progress. The benefit of the training project was that it was quick and would allow her to begin evaluating Complainant's performance based on the development plan. (Tr. 1646). Also, given that the project was based on Complainant's knowledge and experience in the group, it afforded Complainant the ability to tell Bahr what she had been doing for the last year. (Tr. 1647).

Objective Two of the development plan, increased engagement in team meetings, was geared toward making sure Complainant was engaging with the team. She wanted people to be participating, engaged, and proactive. (Tr. 1648). It was important to her that people were pitching in and doing work. If things were slow for an employee, she expected them to step in and help others on the team. There was a lot of work to do at that time. (Tr. 1649).

Objective Three, demonstrate flexibility to quickly engage in new tasks determined by changing environment, was for Complainant to show that she could be flexible and dynamic and refocus energy as necessary. (Tr. 1652). Her understanding was that in the past, when Complainant was asked to do something, there was immediate push back as to why she could not do something, and they wanted her to figure out what needed to be done and then report back on any road blocks or issues. As far as the comment in the development plan about respectful and professional manner, there had been comments made about the tone in some of Complainant's e-mails. She wanted Complainant to resolve any road blocks on her own, and only if that did not work, come to management. (Tr. 1653). She wanted Complainant to find solutions to problems. (Tr. 1654). Her understanding was that the training deck would be the only thing that Complainant was working on at the time it was assigned, and that it would be a full-time effort. (Tr. 1655).

She met with Hall and Complainant to deliver Complainant's performance review and development goals. Hall started to walk through the performance evaluation document and talk about the comments. She did not get very far before Complainant cut Hall off with a very raised tone of voice and yelled at Hall that the evaluation was not true, Hall did not know what she was doing, and Hall was a terrible manager. The Complainant was yelling. Bahr tried to jump in and lead the conversation by telling Complainant that she had an opportunity to respond and to talk about the development goals and project. She tried to end the meeting positively. (Tr. 1656). In her opinion Complainant was unprofessional in her comments to Hall. She tried to change the focus of the conversation to how they could make progress and focus on what they could do to improve things.

She discussed the first development goal with Complainant and told her it had been identified for her based on her experience and fondness for training. She felt it would be a good opportunity for Complainant to be able to share her knowledge with the team, and Complainant agreed. (Tr. 1658). Complainant had a basic understanding of what they were looking for in the project, and she was given a copy of the development goals. She was given the performance evaluation, memo of concern and development plan. (Tr. 1659). Later that night she received an e-mail (JX 32) from Complainant stating that she was upset with her performance review and felt like she was being discriminated against based on race, age, and sex. The e-mail was sent to HR and she was copied on it. She was surprised and thought they were serious allegations. (Tr. 1661).

After receiving the e-mail (JX 32) she spoke to Hall about the allegations including the allegation that Hall told the staff to pretend to be busy and had been lying to management about the work they were completing on a daily basis. (Tr. 1663). Hall said she had never asked anyone to pretend to be busy and thought that perhaps when she told Complainant not to surf the Internet, Complainant had interpreted that to mean that she should pretend to be busy, but that she was, in fact, telling her to be busy. She did not have any context for either side, but wanted to make sure she was following up with Hall on some of the things that were talked about. (Tr. 1664). In the development goals, they had told Complainant to come forward and say when she needed things to do. That seemed to conflict with her claim of being told to pretend she was busy. (Tr. 1665).

She was shocked at the allegation of racial discrimination because that is something that they take very seriously. She was not sure about the comment that because Hall was put in a position for which she was not technically qualified, Hall had resorted to unethical practices to attempt to discredit Complainant's performance as unprofessional. This comment was confusing because it was unclear why if Complainant thought Hall was not qualified, that would impact Complainant's performance. Since Complainant had brought that up at the performance evaluation meeting, it could not have influenced what Hall had written in the performance evaluation. (Tr. 1666-1667). She forwarded the e-mail containing the allegation of racial discrimination to Veith at HR and to her (Bahr's) boss. She then followed up with HR to see what her next steps were, because in these types of situations, they let HR and investigations handle discrimination allegations. She stayed focused on getting the task at hand done. (Tr. 1667).

On Thursday, March 5, 2009, the morning after the performance review meeting, Complainant sent the e-mail at JX 33, FM 81 to Hall and copied Bahr and Chavez of HR, stating that she wanted to know what she should be working on because she had no work assigned and had to pretend to be busy. Bahr was surprised because they had specifically gone over the training plan the day before. She had talked to Complainant the day before about the training plan and Complainant had agreed that it would be a good opportunity. (Tr. 1669). Hall responded to the e-mail by telling Complainant to begin drafting the scope of what should be included in the SOX IT Training Presentation (JX 33, FM 81). This was the project they had gone over the day before at the meeting when they discussed the development goals. (Tr. 1670). Preparing the outline was part of the development plan.

Complainant then responded to Hall's e-mail by stating that she had no idea what Hall was referring to as the SOX IT Training, as they had not met for the entire week to discuss anything other than the performance review (JX 33, FM 80). Bahr was confused by this e-mail because they had the conversation with Complainant the day before and provided Complainant with the development goals document. (Tr. 1671). Hall responded by e-mail to Complainant telling her to refer to item one on the Development Goal form that she had been provided the day before (JX 33, FM 80). Complainant then responded to Hall in an e-mail stating that the development goal is just a general statement and she has not had any specific work assigned. Complainant further stated that assigning work to her was not a priority for Hall and she doubted if Bahr would know what Hall was referring to (JX 33, FM 79). (Tr. 1673). This was confusing to Bahr because she had personally talked to Complainant about the assignment the previous day. Bahr then responded to Complainant in an e-mail stating that she would be happy to revisit their conversation of the previous day and she could meet anytime after 2:00 (JX 33, FM 79). (Tr. 1673).

Bahr then had a meeting with Complainant after the exchange of e-mails. (Tr. 1674). She told Complainant about her expectations for the target audience, gave her examples of types of things that should be included, and asked her to prepare an outline to review and confirm the scope of the materials. It seemed to Bahr like Complainant had not internalized that she was being asked to do something. She also did not feel like the tone of Complainant's communications was professional and appropriate. (Tr. 1675). However, she felt like the conversation went well, and that Complainant understood what the next steps were. (Tr. 1676). Complainant raised no concerns about using PowerPoint and she expected that Complainant had a basic familiarity. (Tr. 1677). The project was not a "cut and paste job." (Tr. 1679). The audience had a basic understanding of how the technology controls were in place and operation, but they needed a high level view of what type of things they look at in order to do testing, and a bit more detail on controls. She needed someone to be able to use their knowledge and experience to identify which of those pieces would be relevant for the audience. The audience would be the team members on the business side of the SOX team. They just needed some information on how the technology piece fit in with them. (Tr. 1679). At the conclusion of the meeting, Bahr thought Complainant would start pulling together the outline and they would continue to have a dialogue about content. She was not aware that Complainant secretly taped their conversation. (Tr. 1680).

It was difficult to get the project off the ground. Initially, they set a date for a day or two after the meeting for Complainant to come back with a draft outline. However, when she

followed up with Complainant, Complainant told her that she had been using the time to respond to her performance review. Since Bahr did not want to get involved with the HR piece of what was going on, they set another date for a couple days in the future for Complainant to present the outline. However, Complainant kept failing to meet dates and not produce an outline. When she asked Complainant for the outline, Complainant said she was not going to do an outline, but proceed to giving Bahr a training deck. However, what Complainant gave her (JX 34, dated Monday, March 9, 2009, at 3:10 p.m.) was nothing like what they had discussed. (Tr. 1681). Joint Exhibit 34 (that Complainant gave her as a draft) did not appear relevant to either the work that Complainant had been doing or the work that Bahr's unit did. It did not even have anything to do with FM. (Tr. 1683-1685). It was 100 or some odd pages of something that was not helpful. The things discussed in the document had nothing to do with FM. (Tr. 1685). She did not feel that Complainant was meeting the objectives set forth in her development goal because she was still trying to get an outline. It looked to Bahr like Complainant had realized she had something due so she did a search on the Internet, found a couple things that talked about controls, and merged them together and sent it to Bahr. There was nothing in the document that was specific to Complainant's work for the past year. (Tr. 1687).

The areas that Complainant identified as needing to be enhanced (JX 33 at FM 198) were the areas that she had been asked to focus on. So clearly they needed to be enhanced because that is what Complainant had been asked to do. However, the draft she provided did not include these areas. (Tr. 1688). That morning (Monday, March 9, 2009, at 10:59), Bahr had sent an e-mail (JX 35, FM 84) to Complainant inquiring about the status of the outline that she had asked Complainant for by COB the previous Friday. Complainant responded by e-mail stating that she had used Thursday and Friday to work on her response to the performance review and that she would work on the training after lunch. Bahr then asked Complainant to provide a draft that evening of what Complainant was going to put together after lunch. Later that day, Complainant sent her the e-mail and draft training document at JX 33. (Tr. 1690-1691). The draft training document in lieu of an outline was not acceptable to Bahr because she had asked for an outline and thought it was a critical part of making sure the project was headed down the right path. She was concerned about wasting time. (Tr. 1691). She wanted Complainant to follow the process set forth in the development plan so she could evaluate Complainant's performance in meeting the objective. (Tr. 1692).

Bahr responded to Complainant's (March 9, 2009) e-mail and draft document (JX 34) with an e-mail dated Tuesday, March 10, 2009, (JX 36) telling Complainant to concentrate on the four bullet points in Complainant's e-mail. She then tried to schedule a meeting with Complainant later that day. She had not seen any progress. Complainant had provided a couple of bullets that sort of restated what Bahr had been asking for, but nothing that blew that out to an outline or content or progress. Complainant was not making progress toward her development goal. (Tr. 1693). At 12:30 p.m. on Tuesday, March 10, 2009, Complainant sent Bahr an e-mail stating that she had a family emergency and would touch base the next day (JX 36, FM 85). (Tr. 1694). The next day (Wednesday, March 11, 2009) in response to an e-mail from Hall asking Complainant why she did not appear at their meeting that had been scheduled for 8:00 that morning, Complainant responded to Hall with a copy to Bahr stating that she would be out of the office for the remainder of the week due to a family emergency (JX 37). (Tr. 1694). Complainant never informed Bahr that there was no need for her to be out for the length of time she took. (Tr. 1695). Complainant did not meet the first key milestone deadline of March 15,

2009. They still did not have an agreed upon outline. Complainant had sent four bullet points the previous week before she left to be out of the office. When she returned to the office, they still did not have an agreed upon content or outline. However, they received another version of the presentation on Monday, March 16, 2009 at 1:38 p.m. (JX 38-A). The new version still was not meeting the objective of what Bahr had been looking for and asking for. It appeared to be something that was designed for a different group. It looked like a bunch of different stuff pulled together, and that Complainant had not read through the materials. (Tr. 1698).

After receiving the new version, Bahr and Hall talked and decided that Hall would put together an outline of the specific topics that they wanted to see. The next day (Tuesday, March 17, 2009), Bahr, Hall, and Complainant met to go through Hall's outline with Complainant (JX 38-B). (Tr. 1700). She was surprised that when they gave the outline to Complainant she made a comment to the effect of, "Well, this would have been helpful to have all along." (Tr. 1701). They told Complainant that the outline was what they were expecting her to prepare all along and continued to reiterate that they wanted to see her in the document, i.e., wanted her to use her own experience and knowledge. Bahr felt Complainant was not meeting her performance goal, was underperforming, and not doing the tasks she had been asked to do. (Tr. 1702).

The scope and approach document was a document put together quarterly by the SOX technology team to discuss the scope of application and platform testing for that quarter, as well as the sample size and those sorts of things. On Wednesday, March 18, 2009, Hall presented the fourth quarter 2008 scope and approach documents to Complainant (JX 39). Bahr assumed this document contained information that would help push along the process to start working on the training materials. (Tr. 1704). On Thursday, March 19, 2009 at 9:20 a.m., Complainant presented another version of the training deck to Bahr and Hall (JX 40). At 8:52 a.m., that morning, Bahr had asked Hall and Complainant if they could meet later that day to review the status of the training deck (JX 40). At this point, Bahr felt like she was in micro-managing mode. (Tr. 1705). She had never experienced the kind of under-performance being demonstrated by Complainant. The new version of the training deck (JX 40) appeared to be very similar to the previous version (JX 38-A). The name of the organization was still incorrect. Around this time, Bahr began engaging heavily with HR. She had been in communication around this time with Veith and Slaughter of HR, keeping them apprised of whether Complainant was meeting the objectives in the development goal. Bahr had concluded that Complainant was not meeting the expectation of anything they asked her to do and that Complainant's prior experience was not coming through. (Tr. 1707-1708).

On Friday, March 20, 2009, at 7:46 a.m., Complainant informed Hall by e-mail that she would be working from home due to a slight sinus flair up (JX 41). In an e-mail response at 7:50 a.m., Hall inquired as to whether Complainant would be able to provide the final document for review that day (JX 41). (Tr. 1708). At 7:59 a.m., Complainant responded *inter alia* in an e-mail to Hall with a copy to Bahr [that she had just requested the additional information that Bahr requested yesterday, and the information was not in the scope and approach document, which was the primary document that Complainant was asked to use for the slide presentation] (JX 41, FM 88-89). When she read this, Bahr was confused because no one had ever told Complainant to only use the scope document. Her assumption was that Complainant already had the personal knowledge to do the project. Bahr did not believe she had requested additional information. Therefore, she followed up with an e-mail asking Complainant what additional information she

was referring to. She was also confused that Complainant said she was asked to use the scope document as her primary document. (Tr. 1709). Bahr had not read the scope document and certainly would not have told someone that they should use it. She expected the majority of information to come from the Complainant's brain. (Tr. 1710). Bahr responded in an e-mail to Complainant at 4:02 p.m. that day (March 20) stating that she had spoken to Hall and neither of them remembered placing any limitation on the sources of information. She further told Complainant to use any sources, including her own experience to finish the document. Bahr also asked Complainant to clarify what information she had asked for the previous day that was different than what she had previously requested. Finally she asked Complainant to let her know the status of the document (JX 41). (Tr. 1710-1711).

At 5:56 p.m. on March 20, 2009, Complainant sent Hall and Bahr another version of the training deck (JX 43). A lot of it appeared to be the same slides that they had previously seen. The name of the group was still incorrect. She was discouraged because Complainant did not even have the title of the document right. (Tr. 1711). By March 20, 2009, she had already had discussions with HR. She did not know the timing, but at some point HR was working on the investigation into Complainant's allegations of racial discrimination. Her focus with HR was to discuss that Complainant was not meeting the expectations set out in her performance goal. She was looking to HR for guidance as to what action to take. (Tr. 1712). She was told to keep managing through the process and giving feedback. She discussed with HR how long this should go on, because they were not getting anything done or moving forward. She thinks HR wanted to see how it turned out and they were a little bit passive. They had not yet reached March 31, 2009. (Tr. 1713). Based on what she had seen, Complainant had not managed the project. It was a constant outreach by either Hall or Bahr. It was a pull for her to try to get information about where they were with the project. (Tr. 1714). Then there was perhaps one more iteration, and she went through it and made slide by slide handwritten comments.

Joint Exhibit 126 at FM 702-774 contains her handwritten comments. Joint Exhibit 126 at FM 693-701 contains the notes that she was keeping about discussions with Complainant and her performance to help her manage the process. (Tr. 1715). The notes documented conversations, meetings, and interactions with Complainant during the time period March 4 through April 21, 2009. She stopped at April 21, 2009, because at that point they had agreed to move forward with the termination. She does not recall if she started taking notes on March 4, or if it was a couple days later when she thought she needed to make sure she had a clear record. (Tr. 1716). Joint Exhibit 126, FM 702-774 is a copy of the comments she made on the training deck and left on Complainant's chair. Joint Exhibit 126, FM 775-907 contains a string of e-mails she printed off. She put this information together to share with investigations concerning the Complainant's allegations that Bahr was racially discriminating against her. She put Joint Exhibit 126 together in response to being notified that she was being investigated for discrimination based on race, age, and sex. (Tr. 1718). She stopped taking notes on April 21, 2009, because a decision had been made at that point. Either late in the week before [Tuesday, April 21, 2009] or in that week, she had sat down with Slaughter, because in the interim there had been fits and starts with things not getting done. In the meantime, e-mails were being sent to management threatening to sue them and stating they were discriminating. Around this time she sat down with Slaughter to go through all the documentation to support Bahr's request for termination. (Tr. 1719).

She decided to terminate Complainant's employment because she had not met any of the expectations not only of her development goals, but of another project she was given after they took away the training deck project. Complainant was not providing any value or doing any work for the team. Therefore she was pushing hard on HR to move forward with termination. She had been doing so for probably a week or so. The training deck project was taken away from Complainant because every time somebody gave her comments on it, it got ugly. They could not give Complainant constructive feedback on anything. After she left the handwritten slide comments on Complainant's chair, she immediately received a response stating that Bahr was discriminating against her and withholding information. It took a lot of time to go through all the slides and give detailed feedback. Bahr felt she was being constructive in her feedback, and the response she received was that she was discriminating and would be reported to investigations. (Tr. 1720-1721). They went through the same thing with Gabbay. Hall had been pulled from managing Complainant on the project on the advice of HR. (Tr. 1721).

She put Gabbay in charge of managing the project to sort of give Complainant a fresh start. Gabbay first took over managing the training deck. When he agreed with Bahr's comments on the slides, he in turn received an e-mail from Complainant stating that he was discriminating against her and would be reported to investigations. At some point, Complainant was assigned the ARQ project. She was not successful with it. (Tr. 1722).

On Thursday, April 9, 2008, she received an e-mail from Gabbay recommending that Bahr remove Complainant from the training deck and ARQ projects (JX 79). Gabbay stated *inter alia* that Complainant was unable to produce any original work of her own. (Tr. 1724). She had requested that Gabbay keep her apprised of Complainant's progress, because she had concerns based on the lack of progress on the training deck. (Tr. 1725).

On Monday, April 13, 2009, she sent an e-mail to Slaughter with copies to Veith and Black (JX 81) asking Slaughter to advise on the appropriate next steps for Complainant. She wanted to know if she could assign the project to someone else because it needed to be completed. Also she stated that Complainant was two and a half weeks behind on her second assignment. (Tr. 1726). She had given Complainant detailed comments on the slides and they were never addressed. She wanted HR to tell her if she had gone through enough iterations and enough management and assessments to move forward with termination. (Tr. 1727).

Since Complainant was off the training deck and focused on the ARQ project which should not have taken long, she tried to involve Complainant in another initiative, the automated controls project. Complainant told her she had experience with this, so she thought it would be a good fit. (Tr. 1728). However, that was just kicking off at the end of April. (Tr. 1728).

The driver behind her decision to terminate Complainant's employment was her performance. Also, when they would try to have conversations about deliverables, something would come up so Complainant was not there to do the work. The work was not getting done. It got to the point where they could not give Complainant feedback on anything without getting a response back threatening to sue. She did the same with Bahr, Hall, and Gabbay. By April 13, 2009, she had been thinking about termination, but does not recall if she had made the decision. That is why she was seeking guidance from HR. (Tr. 1729). Hall did not have any input into the decision to terminate Complainant's employment. Hall was no longer managing Complainant at

that point. She discussed the decision with her manager, Black, to get her assessment. (Tr. 1730). Black thought they should move forward with termination. Around mid-April she was keeping Black apprised and Black had been copied on some of the e-mails. (Tr. 1731).

Joint Exhibit 55 contains a [Saturday, March 28, 2009] e-mail response she received from Complainant when she suggested they meet (on Friday, March, 27, 2009) to discuss the [handwritten] comments Bahr had provided on the slides the night before. On Friday, March 27, 2009 at 10:40 a.m., Complainant sent an e-mail to Hall with copies to Bahr and Veith, stating *inter alia* that they had reached an impasse regarding the slide deck and she could not move forward before HR/Investigation issues were resolved between them. Complainant further stated that she was taking the rest of the day off (JX 55). When she read this, Bahr sent an e-mail to Complainant at 10:52 a.m. stating that she wanted to meet with Complainant and would call her at 11:30 (JX 55, FM 101). The next morning (March 28, 2009) Bahr received the e-mail (JX 55, FM 101) [stating *inter alia* that management was hiding behind professional reasons due to charges of discrimination and retaliation, that over racism such as slurs and burning crosses is uncommon these days, and therefore management was trying to undermine her performance through her work. She further stated that Bahr was painstakingly avoiding holding Hall accountable for work upon which Complainant must rely, that the slide deck is a “cut and paste job,” and that Complainant does not have time to play games with either Hall or Bahr or allow them to waste her time]. (Tr. 1731-1732). Bahr had left very detailed comments for Complainant on the slides and expected that those would be worked through. For Complainant to say they were at an impasse and go home was unacceptable. (Tr. 1733). It was upsetting to her that she had taken the time to go page by page and provide feedback and then have her behavior equated to burning a cross. (Tr. 1733). She was unaware of any actions that had been taken that related to Complainant’s race and Complainant never gave an example of something that occurred that was related to race. (Tr. 1734).

On Thursday, April 2, 2009, she received an e-mail from Complainant that brought her to tears (JX 63). It was upsetting to her that she had been trying to help Complainant and give her feedback and Complainant responded by accusing her of being a racist and discriminating. In the e-mail, Complainant accused her *inter alia* of refusing to take responsibility for her own work and threatened to sue her personally. She did not understand why Complainant was threatening to sue her because she was giving Complainant feedback on her work product, which was her job as a manager. (Tr. 1734). She was frustrated with HR’s guidance to have someone else manage Complainant, because no matter who gave Complainant feedback on her work, that person was going to get these sorts of e-mails. She was concerned about having any conversations with Complainant at this point. (Tr. 1735). Complainant had missed all of the milestones at this point and still nothing was getting done. Complainant had not met the goals in her development plan. (Tr. 1736).

On Friday (April 17, 2009), she spoke with Gabbay who stated that Complainant had left a couple hours earlier and missed a meeting for the ARQ project. She then sent an e-mail to Complainant at 3:21 p.m., asking Complainant to confirm whether she was still in the office as she had not been authorized to leave early (JX 97). On Monday, April 20, 2009, Complainant sent her an e-mail stating she had come in early on Friday, scheduled a lunch break in order to drive home in order to make her last scheduled call for ARQ. However, Bahr’s understanding was that the call was missed. It appeared to her that there was a pattern of Complainant coming

and going, or not coming. She had been discussing the attendance issue with HR. So this was another instance of Complainant leaving early without anybody knowing. She wanted to discuss it with HR because she felt like they had enough to proceed with action at this point. (Tr. 1737).

In addition to Complainant's performance, the decision to terminate her was influenced by Complainant's behavior, such as making allegations in almost every communication, which was not professional. Also, Complainant's behavior limited her ability to perform because she was behaving in a manner such that she was not coming to work. She was also blaming other people for things that were not relevant to what she was doing. Bahr concluded that termination was appropriate around the April 1 through April 3, 2009, time frame, because that was when the initial milestones had all been missed and they started getting really nasty e-mails between then and the April 10 through 14 time frame. (Tr. 1738).

Joint Exhibit 95 at FM 518 contains an e-mail she received from Complainant on Thursday, April 23, 2009. In the e-mail it looked to her like Complainant was pulling together information about the level of documentation existing for the in-scope system, system design, and the control framework. (Tr. 1739). They had a team meeting where Bahr had asked the team to pull together a risk control matrix for the technology controls so she could line up the risks with the controls and see which controls are mitigating which risks. All of that information already existed in the control framework document, but she just as a personal preference wanted to see it laid out in a different way. So they had talked about creating those documents. They would not have been at the application level because they had 15 controls that were basically the same throughout each application. To do a risk control matrix for each application would not make sense because they would all look the same, so they did not need to do that 85 times for 85 applications. So what was confusing to her about Complainant's table (JX 95, FM 519) was that she knew they did not have risk and control matrix information because she had just asked for it, and she would not have expected to get it for applications and platforms. Everything else seemed to be a yes. On the interface side, the interface controls were covered more on the business process side through manual reconciliations that were being done when two systems talk to each other. So looking at the table, it appeared to her that Complainant was spending time doing something that was not relevant to anything she was supposed to be doing. (Tr. 1740-1741). All of the information, the controls and what they were supposed to be mitigating was documented in the IT framework. What she had asked the team to do was take that information and present it in a different format she was more used to seeing so she could better understand why they were testing the controls and whether they had any duplication of effort. What the table does not say to her is that they are missing controls. It seems purely a documentation reference. So it does not mean they did not have controls because they did not have a risk control matrix. It means the controls were not documented in the form of a risk control matrix. This was not a concern to her. The IT SOX team had the document called the IT framework control objective activities. She was just asking for the information in a different format.

She had already made the decision to terminate Complainant's employment prior to receiving this April 23, 2009, e-mail. She had provided a job termination request to Slaughter on April 21 or 22, 2009. (Tr. 1743). She met with Slaughter in a long meeting to go through all of the documentation she had pulled together. Slaughter felt like the termination should be for Code of Conduct attendance policy violations. Bahr suggested the termination be for both attendance and performance, because she felt strongly about the performance issues. Some of

the performance issues were brought on by the fact that Complainant was not at work often. (Tr. 1744). To Bahr, the issue was about performance and she had the documentation to support termination based on performance. Slaughter felt strongly that Code of Conduct should be the basis for the termination, and Bahr conceded as long as they were able to move forward with the termination. (Tr. 1745).

Bahr prepared a termination memo and thought the termination would be executed on April 24, 2009. At that point, she believed they were moving forward with termination and her part was done. Later, she found out that instead of terminating Complainant, HR had placed her on paid administrative leave. When she inquired about this with HR, Slaughter told her that she was gathering more information. After that, she would follow up occasionally with Slaughter, and would inquire as to when the termination would move forward. She found out sometime in the summer that Complainant had been officially terminated. She had no input into the timing of the termination. (Tr. 1745-1746).

Joint Exhibit 16 is an agenda and minutes for the SOX team's control board. The board considered which technology applications and EUC's would be considered SOX relevant. If something is SOX relevant, it gets a financial reporting (FR) designation. If a new application or technology asset was being introduced, the board would assess whether it would be considered for financial reporting. (Tr. 1746). Once it had a FR designation, it would be subject to the suite of SOX technology controls and periodic testing. In the late first quarter or early second quarter of 2008, FM elected to implement hedge accounting. (Tr. 1747) In October or November of 2008, FM discontinued hedge accounting. The internal audit report on portfolio pooling talks about a collateral management and hedging ("CMH") application. There is a difference between the collateral management hedging application ("CMH") and the collateral management hedging loan accounting application ("CMHLA"). CMH is not financial reporting related, so is not related to SOX, but CMHLA is related to financial reporting. However, neither application had any connection to hedge accounting. (Tr. 1751-1752). There is no relationship between hedge accounting and pooling from the portfolio. (Tr. 1752).

Complainant never told Bahr that she suspected fraud of any kind was going on at FM. Complainant never informed Bahr that FM did not have controls in place as required by the SEC or that she had any such concerns. She never informed Bahr that there was a violation of the law aside from her EEO complaints. (Tr. 1753-1754).

[Cross Examination] Joint Exhibit 126, FM 693-701, contains a chronology that she prepared regarding conversations and interactions with Complainant. With the exception of the first few entries, it was updated daily or every other day. (Tr. 1756). The last entry was April 21, 2009, because at that point she had met with Slaughter and finalized her termination request memo. (Tr. 1757). She does not know if the draft termination memo had been made on April 21, 2009, and believes she sent a draft to Slaughter on April 22, 2009. That was the time period in which they finalized the conclusion to terminate, and she thought they were terminating on April 24, 2009. (Tr. 1758). She did not use the termination in her chronology.

She spoke with Slaughter and discussed termination for performance versus Code of Conduct. She drafted the memo and thinks she sent it to Slaughter on April 22, 2009, and thought the termination would be executed on April 24, 2009. (Tr. 1761). Slaughter made the

initial draft of the termination letter and put it together with the Code of Conduct pieces and sent it to Bahr for review. Bahr then reviewed it, made comments, and sent it back to Slaughter on April 22, 2009. (Tr. 1762). She recalls sending on April 22, 2009, a draft of the termination request letter, so that was done prior to receiving the April 23, 2009, e-mail (JX 94) from Complainant. (Tr. 1765). She does not recall meeting with Slaughter after April 24, 2009, to discuss the termination or review a draft termination memo. (Tr. 1768). She does not recall Slaughter ever filling her in on legal's concerns. (Tr. 1769). Joint Exhibit 116 is the last version of the termination letter she recalls seeing.

She had already decided by April 13, 2009, (JX 81), based on the lack of production against the development goal, that termination was the most likely scenario for Complainant. (Tr. 1770). Joint Exhibit 81 does not reference termination, but she was seeking guidance from HR on the appropriate step, one of which in her mind was termination. (Tr. 1771). She sought guidance from HR about whether she could reassign the project because it was one of the things in her development plan, which was feeding into the decision about whether she needed to be terminated. (Tr. 1772). She did not specifically mention termination in her e-mail, though she was thinking about it. (Tr. 1774). Between April 13, 2009, and April 24, 2009, she had conversations with Slaughter regarding termination, but does not recall if she sent an e-mail with that specific term. (Tr. 1775).

Her only conversation with HR concerning administrative leave was that Slaughter or Veith told her that they had communicated to Complainant that if she continued with e-mails to management with threats of suing and allegations, they would put her on administrative leave or send her home for the day. She had no conversation about the administrative leave Complainant was put on at the end of April. (Tr. 1775). On April 3, 2009, Complainant met with HR, and that is when they told her she would be put on administrative leave if she continued with the accusatory e-mails (JX 126, FM 698). (Tr. 1777). She does not recall seeing JX 168, the April 27, 2009, e-mail from Complainant to Fischman, with a copy to Slaughter, previously. (Tr. 1779). She does not recall if Complainant continued to send accusatory e-mails between April 3 and April 27, 2009. (Tr. 1779).

She believed Complainant would be terminated on April 24, 2009. She was surprised that Complainant was placed on administrative leave. (Tr. 1781). She did not agree with assigning a new manager to Complainant because it does not seem fair to a manager if every time someone makes an allegation, the employee is moved to a new manager. She was disappointed in the guidance to assign Complainant to a new manager. (Tr. 1785). She did not believe that would get to the root cause of the problem. (Tr. 1786).

She was micro-managing Complainant's project because she wanted to stay involved based on the nature of the relationship and what she had witnessed in the first engagement with Hall and Complainant. She was new to the team and doing talent assessments on everyone. (Tr. 1787). She first asked HR to provide guidance on or about March 4, 2009. (Tr. 1788). She repeatedly asked HR for guidance because over a period of time things continued to happen. (Tr. 1789). She did not feel that HR always responded promptly. (Tr. 1790). Hall felt like she was being retaliated against for providing performance feedback. Bahr made the decision to involve HR. (Tr. 1791). Gabbay became involved after HR had already been contacted. (Tr. 1793).

Her responsibility to help people improve their performance was part of her job as a people manager. She thinks that Allison was saying that when compared against peers, you're always going to have higher performers and lower performers. (Tr. 1797). Complainant's rating for 2008 was based on how her performance was calibrated within the team. (Tr. 1798). They had new standards by which they were holding people accountable. Allison was vocal about making sure they were holding people to the right standard and raising the bar. By following that, more people were going to fall in the FM minus and SI categories. She does not have direct knowledge of Complainant's 2008 performance review. She has no context to know if Complainant would have been an FM minus before or after Allison took over. (Tr. 1800). Based on the documents she reviewed and the discussions she had with Leonard, she had no reason to dispute that Complainant's performance for 2008 was an FM minus. (Tr. 1801).

She thought Complainant might be the person to make the training deck presentation. (Tr. 1803). Complainant missed a number of meetings. When they met with the internal audit team to discuss the automated controls project, Complainant was not very participatory. She did not document this or discuss it with Complainant. (Tr. 1804).

The day after she received her performance review Complainant said she did not have any work assigned. (Tr. 1804). However, Complainant did have work assigned. She is unaware if Complainant had other work assigned to her prior to March 4 or 5, 2009. (Tr. 1805). She does not recall what projects Complainant's peers were working on. Another person on the team was also on a performance development plan. (Tr. 1809). Hall told Bahr that when she asked Complainant to work on EUC testing, Complainant said she did not have enough information and wanted someone else's help. (Tr. 1812). At the time Complainant sent her e-mail at JX 32 (on March 4, 2009 to Lee of HR), FM had been current for almost two years, so she did not take Complainant's statements in her e-mail as having anything to do with the restatement. When Complainant referred to "current state" she did not perceive that as having anything to do with FM's previous issues in financial reporting because they were in a good place at that point. What was confusing was that she was complaining about Hall's management practices, i.e., racial discrimination and leaving early. She did not see any correlation between that and the severe credit problems that led to conservatorship. (Tr. 1815).

As she reviewed the draft training deck, she was not seeing progress toward what she ultimately wanted to have as a finished product. She did notice things being added and moved around. Complainant submitted drafts on March 9, 16, 19, 20, and 23, 2009. (Tr. 1817-1819). Complainant never did an outline that fully fleshed out what she was going to be talking about in the document. (Tr. 1819). She did refer to the four points that Complainant raised as an outline (JX 36).

She recalls that Complainant started commenting that she had been told to use the scope and approach document as her primary document. (Tr. 1821). The scope and approach documents were stored on the share point site. She thinks the group was in the process of updating the document for the first quarter of 2009, but Bahr asked them to stop because she did not find them to be of value. They simply restated information that was available elsewhere. (Tr. 1823). Ninety percent of the scope and approach document would not change from quarter to quarter and what gets inserted is the list of actual assessments you are going to test that quarter. That same information is contained in the test work papers, and the scope that's agreed

to with the testing contractor. (Tr. 1824). She does not recall when she gave the instruction to stop preparing the scope and approach document. She does not know why Hall sent Complainant the fourth quarter 2008 scope and approach document. (Tr. 1825). She did not tell Hall to tell Complainant that the scope and approach document was not useful, but she told Complainant to use any sources, including her own experience. (Tr. 1827). She does not think she told Complainant on March 20, 2009, that being 60 percent complete was not acceptable. (Tr. 1827). She had no problem with Complainant meeting with Russell and Adams to discuss changes to the scope and approach document. (Tr. 1828). They had been discussing proposed changes with the whole team in weekly meetings, and the changes were not dramatic changes. They were not anything that would hold up production of the entire training document. (Tr. 1830-1831). She told Complainant in JX 45 to leave placeholders because they were very limited changes. (Tr. 1832). She told Complainant that the scope and approach document was not the primary source of information, but she did not tell her that it was a waste of time. (Tr. 1833). She does not recall talking to Hall about updating the scope and approach document. She knew what changes they had been discussing and was not as concerned about whether they got into the scope document as much as whether they were being communicated to the testing partner. (Tr. 1835). She asked Hall about what the hold-up was in the scope and approach document that was preventing Complainant from making progress. She did not believe any of the changes would preclude Complainant from doing her thing. (Tr. 1836).

She never received a request from Complainant for a development plan. (Tr. 1838). She does not believe that jobs or titles had changed when the team moved into internal audit. The job descriptions did not change. They were still supporting the technology program. (Tr. 1839).

Complainant said she was not going to acknowledge receipt of her performance review until the investigation was completed. The reference to investigation (JX 35) had to do with Complainant's allegation of racial discrimination and whatever else was in her e-mail. Bahr assumed that since Complainant was going to wait until investigations contacted her to respond to the performance review, that Claimant would therefore begin working on her project immediately. (Tr. 1840). With regard to Complainant's March 26, 2009, e-mail at JX 50, she did not know what Complainant was alleging that she was being retaliated against for. (Tr. 1843).

Complainant was assigned to an automated control assignment. The project was not completed until after Complainant left the team. (Tr. 1844). Complainant was not deficient on that project. With respect to the ARQ project, Complainant was not making progress on developing the ARQ document and she was not incorporating the feedback that Bahr and Gabbay provided. (Tr. 1848). She reviewed the table that Complainant prepared and sent in an e-mail on April 23, 2009 (JX 95). Her decision to seek termination was based in part on Complainant's performance on the ARQ project. (Tr. 1849).

She received an e-mail from Gabbay on April 15, 2009, (JX 86) in regard to the ARQ project. She interpreted the mail as saying, "This is what I am expecting to see her do based on what she has described below." Joint Exhibit 96 looks like a process by which the technology owners would complete the ARQ. (Tr. 1850).

Material weaknesses are required to be disclosed in the 10-Q and 10-K. There is a difference between quantitative and qualitative materiality. (Tr. 1858). There is a difference between a significant deficiency and a material weakness. (Tr. 1860). Based on SEC guidelines, FM needed to have a process in place to evaluate its internal controls. (Tr. 1865).

[Redirect Examination] Complainant never raised any concerns that FM did not have a process in place to evaluate its internal controls that relate to the SEC guidelines that would assure that its financial statements were complete and accurate. She was unaware of Complainant raising any concerns about internal controls that were intended to defend FM's financial statements. (Tr. 1867-1868). She did not think any of Complainant's communications addressed material weaknesses that should be assessed for disclosure. What was included in the e-mails was commentary about documentation that wasn't available. In some cases, it was documentation she had asked to be prepared, so she knew it was not available. However having something documented from a program perspective is very different than saying the controls were not being executed. At no time did anyone tell her that controls were not being executed. (Tr. 1869). There is a difference between a material weakness and a deficiency and a process they go through to determine such. (Tr. 1870-1876).

On April 24, 2009, she received an e-mail from Slaughter stating that Legal was on-board (JX 115). This meant that Legal had approved moving forward with the termination. (Tr. 1877). The attached document with the reference date of April 22, referred to the date of a draft of the termination memo. That is when the draft began. (Tr. 1878). She had no interaction with Complainant prior to March 4, 2009, but based on what she observed after March 4, 2009, she would have equated Complainant's performance to an SI rating. (Tr. 1879).

The scope of the assignment in "Objective One" of the development goals was not just to complete the training materials, but to manage the process and set milestones, meet dates, provide status, pull together the communication plan, i.e., the whole process. Complainant was not meeting the expectations of this project. (Tr. 1880-1881).

Documentary Evidence

At the hearing, I admitted Joint Exhibits 1 through 186. I also granted the parties' request to submit audio files post-hearing consisting of conversations that the Complainant recorded without the knowledge of Respondent. Although I have reviewed each exhibit in great detail, in the interest of judicial efficiency, I will not summarize each exhibit, but will reference an exhibit as necessary in the findings and discussion which follow.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Specific Findings

May 1, 2006 Complainant begins employment at FM as an IT Technical Risk Specialist in the SOX Technology Department. (Joint Pretrial Stipulation).

February 26, 2007 Complainant receives her 2006 Year-End Performance Review with overall ratings of “R, L and FM” [results, leadership, fully-meets expectations]. (JX 3). I find that this was a positive performance review.

July 31, 2007 Complainant receives her 2007 Mid-Year Performance Review indicating she is “on course.” (JX 4). I find that this was a positive performance review.

October 5, 2007 Complainant contacts FM Compliance and Ethics Department alleging the 2006 and 2007 ESM Risk and Controls Self-Assessment certifications were not properly supported. The matter is referred to FM Compliance and Ethics Investigations for review. Investigations suggests Complainant discuss concerns with her management team. She agrees to do so, and subsequently states to Investigations that she is satisfied with management’s resolution of these issues. (JX 131).

November - December 2007 An Accountability Survey for Complainant is completed by an anonymous manager for the period January 1 through November 18, 2007, on an unspecified date. Comments indicate Complainant should ask more questions to ensure she is on point with exactly what is needed and that she should work on her communication skills when interacting with her peers. Comments indicate Complainant has delivered on results, but should work within the time line of the project, without scope-creep, and she should be more flexible. (JX 6). I find that the survey contained negative comments regarding Complainant’s performance.

January 28, 2008 Complainant receives her 2007 Year-End Performance Review with overall ratings of R, L-, and FM [results, leadership-minus, fully-meets expectations]. Comments indicate Complainant needs to work on communication and teaming and that she has had a few miscommunications with team members. Though miscommunications were easily cleared up once parties met face to face, they can be avoided by taking a few of the courses FM has to offer. (JX 131; JX 5). After receiving the review, Complainant alleges to HR (who subsequently reports to the Ethics and Compliance Investigations Department) that she received the L- rating because her manager was retaliating against her for raising RCSA concerns in October 2007. (JX 131). I find that the rating of L- was a negative rating.

February 2008 FM makes a decision to merge the application testing team and infrastructure testing. Complainant begins reporting to Leonard. (Tr. 784-788).

May 6, 2008 The Compliance and Ethics Investigations Department issues a decision finding that evidence supported Complainant’s L- rating and there was no indication that it was retaliatory. Investigators found no evidence that the management team responsible for finalizing the review knew of her complaint before completing the review, and team members corroborated that Complainant had communication difficulties such as trouble controlling her emotions, sending “angry” e-mail messages, and interpreting any contrary comments or actions as personal slights. Her tone was described by co-workers as off-putting, blunt, challenging, disrespectful, and belligerent. (JX 131).

July 2, 2008 Leonard seeks mid-year feedback for Complainant’s Mid-Year 2008 Performance Review from her team members. He receives some favorable comments from Miller, Russell,

and Adams. He receives unfavorable comments from Adams, Miller, and Shaikh. Shaikh states that Complainant's participation during team discussions could be more consistent, her attendance at team meetings could be more consistent, and response times to requests could be more timely. Miller suggests they get Complainant more technically involved and give her more ownership of documentation and the opportunity to run the evidence space to broaden her knowledge. Adams states *inter alia* that Complainant appears marginally involved in meetings, should be a more visible contributor during meetings, should request work when there is downtime, and should improve verbal and written communication skills to be less abrasive. (JX 19).

around July-October 2008 (date unclear) Complainant receives her 2008 Mid-Year Performance Review which indicates she is "on course." (JX 18). However, I find she is told by Leonard who prepared the review, that he had considered the first half of 2008 as a "transition period" due to the transfer to his group, and rated accordingly, but that for the second half of the year, expectations and the bar would be raised. (Tr. 804). He tells Complainant there are some concerns with her tardiness to meetings and he expects her to be more involved in IRB meetings in the third quarter. He shares with her the feedback he received from her peers (see July 2, 2008, above) and tells her he gave her the benefit of the doubt to give her time to acquire skills to be more effective. (Tr. 804, 809, 822-829).

August 8, 2008 Adams sends an e-mail to Complainant, with copies to Hall and Leonard, praising her for closing out a review of evidence. (JX 19).

around July/August 2008 Complainant begins reporting to Hall who becomes her manager in place of Leonard. (Tr. 984-985).

Fall 2008 Steward, Miller, and Shaikh complain to Hall that Complainant is surfing the Internet during IRB meetings with TRL's and not participating. Gabbay makes similar complaints to Leonard and Hall. Hall also observes such behavior. Hall verbally counsels Complainant regarding attendance problems, surfing the Internet, lack of participation at meetings, and e-mails that are unprofessional and inappropriate in tone. Hall tells Leonard about the conversation with Complainant, and he advises her to speak to HR. Hall speaks to Chavez at HR about her concerns with Complainant's performance, attendance, and participation at meetings. Adams and GT complain to Hall about e-mails from Complainant which have an inappropriate tone and are not professional. Due to the complaints about Internet surfing, Hall decides that people will no longer be allowed to bring laptop computers to meetings. Syed, Complainant's former supervisor, tells Hall that she needs to be careful about deadlines with Complainant and make sure they are well-documented, or Complainant will claim she did not know about them. Hall expresses concerns to Leonard about the quality of Complainant's work. Hall verbally counsels Complainant about not being on time for meetings. She tells Complainant such behavior is disrespectful and people are noticing. Complainant states that others have also been late, and Hall tells her that she is counseling all who are late for meetings. Sometime during the third quarter of 2008, Hall expresses concerns to Leonard about the quality of some of Complainant's deliverables. Leonard tells Hall to work with HR. (Tr. 805-806, 962-963; 990-995; 1131, 1313-1314; 1560, 1580-1581).

October 22, 2008 Complainant requests excusal from any meetings for the remainder of the week so she can focus on completing the 4th Quarter Testing Scope Document. Complainant submits a draft of the document which Hall finds unsatisfactory because it references the wrong quarter and the applications and EUC's are not accurate. (JX 21, 22; Tr. 998-999).

November 20, 2008 Hall speaks to Gaither of HR to discuss her concern that Complainant wants to submit for ACE training reimbursement, but is not performing strongly and will likely receive an FM- performance rating. Hall seeks information on the policy for ACE reimbursement. Hall expresses concerns regarding Complainant's failure to follow through on projects like updating the scope document, not being engaged, and showing up late to meetings. Gaither sends an e-mail to Hall, attaching a sample memorandum of concern for attendance and tardiness and a sample performance counseling memo. (JX 125, FM 555; Tr. 1149; JX 128).

around November 2008 - January 2009 Hall assigns Complainant an assignment of gathering documentation for DT to support remediation efforts regarding the status of some internal control deficiencies.

There is a conflict in testimony regarding what occurred with respect to this assignment. Complainant testified that she verbally told Hall there was insufficient documentation to support the remediation status of some of the internal control deficiencies, and requested Hall provide an internal audit report so she could better understand why SOX technology found the CMH system fully SOX-compliant while the internal audit reports indicated there were deficiencies with regard to this system. Complainant testified that Hall told her the audit report was unnecessary to complete the assignment, and Hall's attitude was that Complainant should just work with what she had, call a few people, and determine the remediation status. Complainant testified that between December 29, 2008, and January 5, 2009, she spoke to Hall and related her concerns that there were internal control deficiencies, but Hall attempted to marginalize the issue by stating that management had its own way of rolling up deficiencies. After speaking to Hall, Complainant decided to drop the issue around January 12, 2009, and wait until the actual SEC filing was issued before researching and pursuing it further with anyone at FM. Complainant testified that in late February 2009, after conducting her own research, she believed there was a serious problem, but did not talk to anyone at FM further, because she wanted to conduct her own due diligence to substantiate her beliefs. She reported her concerns to the SEC on April 23, 2009, without FM's knowledge.

Hall testified that at the end of December 2008, a member of DT requested test control worksheets. Hall asked Complainant to gather up the information which was available on SharePoint. Hall testified that rather than just gather the information, Complainant made some notes about it and commented that the internal auditor should not change it. Hall stated that they already knew that the internal auditor should not change information, so although Complainant went beyond what she was tasked to do, the comments she provided were not relevant. It appeared to Hall that Complainant had done a review, not realizing that they already did the review as part of the SOX process. Hall asked Complainant if she pulled the documentation, because they were closed deficiencies. DT had already reviewed the deficiencies and work papers, so it was just a matter of gathering the documentation and providing it to them. Complainant had specifically noted that the term "control self-assessment" was referenced,

rather than a “control design review.” Since that had been changed throughout the year, it was not a correction that had to be made, but Complainant noted it as something she thought should be changed in the test control worksheet. It did not impact the results of the testing, and they were low ranking deficiencies. She did not perceive that Complainant was raising any concerns about SOX or internal controls deficiencies.

I find that the record contains no substantive documentation showing that Complainant sent any documentation of her perceived violations of internal control procedures to Hall. Complainant’s testimony regarding the documentation she provided to Hall was internally inconsistent. She initially said she provided Hall with documentation outlining her concerns, but later changed her testimony and stated she did not provide Hall with the documentation, but discussed its content. Complainant provided a “snapshot” of her e-mails for the period December 2, 2008, through December 29, 2008, to this tribunal as evidence that she informed Hall of SOX violations, but the snapshot merely lists the general subject matter of the e-mail communications, and does not contain their contents. Although at a later unspecified date, Complainant prepared a document for her own use, detailing what she believed to be *Disclosure Controls Procedures Violations*, per her testimony, she did not provide Hall or anyone at FM with this document until discovery for the matter before this tribunal, when FM asked for the information in discovery. I find that Complainant did not provide Hall or anyone else at FM with the substance of this document until discovery for the matter before this tribunal.

I further find after reviewing the record and transcript, that around late December 2008, Complainant verbally told Hall there were some problems with the documentation supporting the remediation status of some internal control deficiencies. I find that Hall dismissed Complainant’s concerns as not valid or relevant to Complainant’s assignment. I find that Complainant was not assigned an unachievable task. I find that Hall did not discuss Complainant’s concerns with anyone else at FM. I also find that Complainant did not have discussions with anyone other than Hall regarding her concerns about the remediation status of internal control deficiencies. I find that on April 23, 2009, Complainant filed a complaint with the SEC expressing her concerns, and FM became aware of the general nature of her reported concerns on April 27, 2009, when Complainant sent an e-mail to Fischman and Slaughter stating that she had decided to report concerns to the FHFA and SEC. (Tr. 59-82; 356-361; 372-382; 423-430; 433-441; 466-467; 477-486; 1113-1122; JX 178, EF 686; JX 178, EF 226; JX 178, EF 760).

around December 1, 2008 Complainant electronically submits input for the *2008 Accountability Survey for Managers for Robert E. Leonard* (due date, December 1, 2008). (JX 167). I find that Complainant’s input was submitted anonymously to Leonard’s manager, Barton, by electronic means. There is no direct evidence that Barton or Leonard ever received or read Complainant’s input, but I find that there is sufficient circumstantial evidence to find that under normal procedures, Barton and Leonard would have received a report containing the anonymous survey input sometime around December 2008. I find that neither Barton nor Leonard knew which comments were made by Complainant and took no action to discover who had made the comments.

In her comments on the survey, Complainant states *inter alia* that she pointed out two key weaknesses in the SOX program involving the Control Self-Assessments they were performing, i.e., that they did not provide any organizational value because they were too general and needed to be system specific. She states in her comments that she also pointed out the department lacks critical process documentation which is commonly maintained in mature SOX programs, but does not elaborate. She states in the survey that neither of her concerns has been sufficiently addressed.

I find that Complainant did not provide copies or the substance of her survey input to anyone (other than Barton and Leonard) at FM until April 27, 2009. On April 27, 2009, Complainant sent copies of her survey input to Slaughter and Fischman, as an attachment to an e-mail. Complainant testified that she discussed the issues contained in the Leonard Accountability Survey with Slaughter and Veith between March 4, 2009, and April 27, 2009 and with Investigations on an unspecified date. I do not find this testimony credible. In testimony, Slaughter denied that any such conversation took place. Veith did not testify. Investigators testified that no such discussions occurred. After reviewing the transcripts and tapes of the conversations that Complainant had with Slaughter and Veith and recorded without their knowledge and the testimony and records of investigators, I find no mention of the survey or issues contained therein during those discussions. Complainant did not state or imply in those conversations that she was being retaliated against for protected activity or refer to any protected activity or SOX violation allegations, but rather attributed her alleged discrimination and retaliation to her race, sex, and age. I therefore find that Complainant's memory as to the content of those conversations is unreliable and she did not verbally discuss the accountability survey with anyone at FM at any time or provide copies of her input (either electronically or otherwise) to anyone other than Barton and Leonard prior to April 27, 2009. (Tr. 114; 486-489; 505-509; 525-526; Tr. 1225-1228, 1249, JX 177; JX 186).

Also around December 1, 2008, an *Accountability Survey for Individual Contributors for Edna D. Fordham* is prepared by six of her peers/internal customers, two of her managers, and herself. (JX 27). On the survey, Complainant is given an overall rating of 5.0 by herself, 3.8 by all, and a rating of 3.63 by "all but self." Complainant consistently gives herself ratings of 5 (the highest possible) for every category, but the ratings by "all but self" are as follows: consistently and reliably delivers results-3.29; readily assumes responsibility and accountability-3.29; provides necessary information to others to meet business needs-3.57; actively speaks up when there is a concern-4.14; builds productive relationships across FM-3.2; uses fact based decision-making vs. politics to get things done-3.67; treats people with respect regardless of level-3.57; seizes opportunities to develop own skills and abilities-4.57; knows and performs job well-3.29; and demonstrates integrity in all dealings-3.71.

The survey contains several negative comments by Complainant's anonymous peers/internal customers and managers such as: she has not demonstrated a willingness to be accountable for taking on additional work to meet additional demands or revised deadlines; below average performance with regard to ability to provide technical feedback; seems very concerned with training opportunities outside her current role which appears to interfere with her ability to focus on supporting the team and tasks at hand; her passions (for volunteerism and furthering her education) are not carried over into her regular work routine based upon work

product output and regular observations of being disengaged in meetings; consistently inconsistent in demonstrating her former Big 4 experiences, abilities, and understandings of SOX technology auditing; due to lack of demonstrated insight, I would not be comfortable in relying on her to maintain and ensure an organization's SOX compliance; needs to be more proactively engaged with the testing processes; she should start engaging in the team's activities on a regular basis without waiting for something to be assigned; does not take initiative to take on responsibilities; waits to be assigned tasks; needs to stop being late to meetings, and when in meetings, surfing the internet and not participating in the conversation as it has been noticed by outside participants and is a disruption; should do a better job of bringing the knowledge/training to her job responsibilities on the team. I find that Hall reviewed this accountability survey prior to preparing Complainant's 2008 Year End Performance Evaluation and relied, in part, on the negative comments contained therein to prepare Complainant's Performance Evaluation for Year-End 2008. (Tr. 1000).

December 4, 2008 Hall verbally counsels Complainant on her negative tone in e-mails and requests she tone down their disrespectful nature. Complainant disagrees that she is being disrespectful. (JX 125, FM 556).

December 12, 2008 Herb Allison, FM's CEO, distributes his "Friday Message" to the company explaining that he and the Executive Committee have decided to strengthen the performance evaluation process (for End of Year 2008 Evaluations). Greater weight will be given to how employees perform relative to their peers. He expects 20 percent of employees will receive FM- or SI ratings. This is a new standard aimed at moving to a performance-driven culture focused on constant improvement. (JX 1).

December 19, 2008 FM's Executive Committee puts out a note to the company reiterating Allison's guidance with regard to the new performance evaluation system. It provides a chart indicating that Level 4 Employees who receive a score of 4.5526 or less will rank in the bottom 25th percentile. The Committee mandates that the new approach to ratings be followed by all people managers. (JX 2; JX 125, FM 546-547).

I find that Hall was aware of Allison's and the Executive Committee's guidance when she prepared Complainant's Performance Evaluation for Year-End 2008, and followed the guidance in determining how to rank Complainant's performance in relation to that of her peers. I find that Complainant's score placed her in the bottom twenty-fifth percentile of employees.

Complainant informs Hall at 12:41 p.m. that she is taking a half day of vacation for the remainder of the day. (JX 127, FM 633).

around December 29, 2008 Hall assigns Complainant a project of helping to complete testing on 9 EUCs. Complainant tells Hall that she is being asked to do too much, cannot do the assignment without more information, and does not feel she should be responsible for this assignment. Hall meets with Complainant to discuss her negative attitude about the assignment and the information she needs to complete the task. Hall informs Complainant that the information Complainant requested has already been gathered. Hall tells Complainant that she needs to engage with TRL's to complete the task. Complainant seeks help from Miller who then

completes the testing with Complainant assisting him. (Tr. 1024-1028; 1115-1120; 1126-1131; JX 178, EF 686; JX 125, FM 555).

Wed., January 7, 2009 Hall verbally counsels Complainant about being late to meetings and push-back on assignments. Hall tells Complainant if she does not want any assignments unless they are perfectly bundled, then she is not performing as a Level 4 employee. Complainant denies pushing-back and says she is capable of gathering information. Hall and Complainant agree to try to work better together. (JX 125, FM 557).

Mon., January 12, 2009 Complainant informs Hall by e-mail at 8:47 a.m., that she has a dental appointment at 12:30 and will be charging personal leave. (JX 127, FM 640).

I find that FM's core work hours while Complainant was employed there were 8:30 a.m. to 5:00 p.m., and that managers had discretion to approve variations in this schedule. I further find that Hall's policy as a manager was that employees whom she managed were to inform her if they needed a change to their normal schedule due to special circumstances and seek her approval, prior to making a change to their own schedule. I find that Complainant's normal work hours were 8:30 to 5:30. (Tr. 1186-1190, 1220).

I find that on January 12, 2009, Complainant did not seek prior approval to report late for work and did not inform Hall of her dental appointment until after the start of her normal workday.

Wed., January 14, 2009 Complainant informs Hall by e-mail at 9:49 p.m., that her tooth came off again and she will request a temporary and schedule additional procedures for the following week. (JX 127, FM 641).

Thur., January 15, 2009 Complainant informs Hall at 8:38 a.m. that she will be arriving at the office shortly and is not able to schedule a dental appointment until the next day. I find that Complainant did inform Hall the evening before that she had a dental problem requiring attention. (JX 127, FM 643).

Tues., January 27, 2009 Complainant informs Hall at 10:49 a.m. that she is going to take the day off. I find that Complainant did not inform Hall that she would not be coming to the office or request leave until well after the start of her normal workday. (JX 127, FM 644).

Wed., January 28, 2009 Complainant informs Hall at 6:44 a.m. that she cannot make it to work due to ice on the roads. (JX 127, FM 646). I find that Complainant did inform Hall prior to the start of the work day that she would not be able to make it to the office due to the weather.

Tues., February 3, 2009 Complainant informs Hall at 8:14 a.m. that she has a plumber coming to her home between 8:00 and 12:00, but that she brought things home to work on. I find that Complainant did not seek prior approval to work at home and did not inform Hall of her intent to do so until sixteen minutes before she was due at work. (JX 127, FM 648).

Fri., February 6, 2009 Complainant informs Hall at 7:38 a.m. that she will need to take sick leave for today and yesterday. I find that Complainant did not inform Hall of her intent to take sick leave for February 5, 2009, until the morning of February 6, 2009. I find that Complainant sought approval prior to taking sick leave on February 6, 2009. (JX 127, FM 649).

Mon., February 9, 2009 Complainant informs Hall at 7:28 a.m. that she plans to take another day off to recuperate. I find that Complainant sought approval prior to taking sick leave on February 9, 2009. (JX 127, FM 650).

Thur., February 12, 2009 Complainant informs Hall at 11:24 that she wants to work at home because she left her prescription at home, and she does not believe a meeting is necessary regarding the work book. At 12:14 Hall inquires as to whether Complainant has left yet. I find that Complainant did not receive approval from Hall prior to leaving the office early to work at home. (JX 127, FM 651).

Tues., February 17, 2009 Hall counsels Complainant on attendance and tardiness. (JX 125, FM 557). I find that this counseling was warranted based on the Complainant's failure on various date between January 12 and February 12, 2009, to seek approval prior to making adjustments to her work schedule.

Tues., February 24, 2009 Complainant informs Hall that she has some leave days carried over that she would like to take off. She originally requested Monday through Wednesday off, but now will need time off through Friday. I find that Complainant properly sought approval to take leave from February 23 to February 27, 2009. (JX 127, FM 655).

Wed., March 4, 2009 Hall and Bahr meet with Complainant and give her a Memorandum of Concern (JX 25), a 2008 Year End Performance Review (JX 26), and Development Goals with key milestone dates (JX 28). This is Bahr's first interaction with Complainant. The Performance Review was written by Hall. Bahr, Gabbay, and Leonard did not participate in preparing the Performance Review or provide input. Hall reviewed the *2008 Accountability Survey for Individual Contributors for Edna D. Fordham* prior to writing the review. The Development Goals were written by Hall, in consultation with Bahr. The Memorandum of Concern was written by Hall with assistance from HR. Bahr, Gabbay, and Leonard did not participate in preparing the Memorandum of Concern or provide input. When Hall presents the evaluation to Complainant, Complainant becomes upset. Complainant cuts Hall off and yells at her that the evaluation is not true, Hall does not know what she is doing, and she is a terrible manager. Bahr intercedes and tries to change the focus of the conversation to a discussion of how they can make progress and improve things. She discusses the Development Goals with Complainant in detail, and explains that the first development goal, Technology SOX Training pilot project, will be a good opportunity for Complainant to share her knowledge with the team. (Tr. 93, 100, 585, 1011, 1020-1022, 1032-1037, 1656-1661; JX 125, JX 126).

At 4:38 p.m., Complainant sends an e-mail to Lee of HR, with copies to Bahr and Black, requesting a meeting to discuss her evaluation. She asserts that Hall has used the evaluation as an opportunity for retaliation because Complainant began holding her accountable for assigning her work and refused to pretend to be busy, as instructed by Hall. She further asserts that she has

been deliberately overlooked and racially discriminated against since joining the department. She states that because Hall has been put in a position for which she is not technically qualified, she has resorted to unethical practices to attempt to discredit Complainant's performance as a professional. (JX 32). Bahr forwards the e-mail to Veith of HR. (Tr. 1667). I find that this e-mail does not state or imply any concerns of potential SOX violations.

Around March 4, 2009, one of Complainant's co-workers also receives an unfavorable performance evaluation. Adams received a rating of SI, R-, L-, and is later terminated on an unknown date. (JX 30; Tr. 1007-1008, 1017).

Thurs., March 5, 2009 At an unspecified time, Complainant contacts the FM Ethics Office to raise concerns about the MOC and Performance Review. Complainant alleges that Hall retaliated against her. The matter is referred to FM Ethics and Compliance Investigations for review. (JX 133).

Complainant sends an e-mail to Hall, with copies to Bahr and Chavez, stating *inter alia* that she is concerned about not having any work assigned and having to pretend she is busy, and would like to know what work she is to complete while Hall is on vacation. Hall responds that Complainant is, among other things, to begin defining the scope that she proposes be included in the SOX IT training presentation and prepare an outline defining her proposed scope for the training documentation, which will be reviewed when Hall returns on Tuesday. Complainant responds to Hall, stating that she has no idea what Hall is referring to as the SOX IT training. Hall responds to Complainant telling her to refer to item number one on the Development Goals she was given the day before, and to request further clarification from Bahr, while Hall is out. Complainant responds that the development goal is just a general statement and she does not have any specific work assigned. She states that Hall has been busy planning her vacation and assigning work to Complainant has not been a priority. Bahr then sends Complainant an e-mail stating that she will be happy to revisit their conversation of yesterday in more detail and further discuss the scope, audience, etc. for the training project. Complainant responds by saying thanks. (JX 33). I find that Objective One of the Development Goals Complainant was given on March 4, 2009, (JX 28) describes a SOX Technology training pilot project that Complainant is to lead and complete. I find that JX 28 states key milestone dates for this training project that Complainant is expected to meet and Complainant is aware of these dates on March 4, 2009.

Bahr and Complainant meet at 2:00 in the afternoon. Complainant surreptitiously records the conversation. Bahr explains what she would like to see in the training deck. Bahr tells Complainant the target audience will consist of team members on the business side of the SOX team, as well as new TRL's who have a basic understanding of how the technology controls are in place and operation, but who need a high level overview of what type of things they look at in order to do testing and controls. Complainant is to explain to the business side of the SOX team what work Complainant's group had been doing before the two groups merged. Bahr states she then wants to leverage the training into an even broader training for the company. She asks for a proposed outline from Complainant by close of business on Friday, March 6, 2009. (JX 126, Tr. 603-609, 617-628, 1674-1680; EFA.16 Meeting with Stephanie Bahr.wav file).

I find that on this date, Complainant understood the purpose of the training project, as it was explained to her by Bahr at their 2:00 meeting, described above. I find that Complainant confirmed this understanding of the purpose of the training in her testimony. I further find that Complainant was not told that the purpose of the training was to represent the status of FM's remediation efforts and I find that she was not told that she had to make any specific representations as to the status of FM's remediation efforts either on March 5, 2009, or any subsequent date.

Fri., March 6, 2009 Complainant does not provide an outline on March 6, 2009, as she was instructed to do the day before. (JX 126).

Mon., March 9, 2009 At 10:59 a.m., Bahr sends Complainant an e-mail inquiring as to the status of the outline for the IT training that they had discussed on the prior Thursday, and reiterates that she had asked for an outline by close of business on Friday. Complainant responds by e-mail at 11:13, stating that she thought she could use Thursday and Friday to work on her response to her Performance Review, and will work on the IT training after lunch. Bahr responds at 11:53 that she must have misunderstood, because she thought Complainant was waiting to respond to the Performance Review, and she asks Complainant to send her tonight what she puts together this afternoon, and would like to meet at 9:00 the next morning to discuss it. Complainant responds to Bahr at 12:38 stating that instead of preparing an outline she plans to give Bahr a draft of the slide presentation tonight. (JX 35). At 3:10 p.m. Complainant sends Bahr, with a copy to Hall, the first draft of the IT Training. In her e-mail Complainant states there are four areas they will need to enhance. There is disagreement in the testimony as to whether these four points constituted an outline, as Complainant was assigned to complete. I find that these four points in the 3:10 p.m., e-mail did not constitute an outline. (JX 34). I further find that Complainant never provided her managers with an outline, as instructed.

The draft presentation accompanying the e-mail consists of 108 pages of two PowerPoint presentations that Complainant found on the Internet. (JX 34) The draft presentation does not relate to FM or the work of Bahr's team, though it discusses risk assessment techniques. Bahr and Hall are unsatisfied with the first draft of the IT training deck, and do not believe at that point in time that Complainant is meeting objective one of the Performance Goals. (Tr. 1049, 1681-1687; JX 126). Complainant believes the training project assignment is just "busy work" and more suitable for an administrative clerk rather than a technical tester of systems. Bahr and Hall believe the project is necessary and valuable training. (Tr. 734-735, 1111-1112, 1679). I find that the training project was not "busy work," but was needed by FM to train its employees.

Tues., March 10, 2009 At 8:49 a.m., Bahr sends an e-mail to Complainant, telling her to concentrate on the four areas she identified in her e-mail of the previous day, and to focus on their specific program, control framework, and how they source evidence and test. She tells Complainant she will come over before the 10:00 team meeting to discuss further. Bahr is unable to meet with Complainant before the 10:00 meeting. Complainant arrives at the 10:00 meeting at 10:30, after Bahr asks Hall to send Complainant a note to find out if she is coming. Complainant sits in the back of the room and does not participate. She leaves the meeting early. At 11:39, Bahr sends Complainant an e-mail apologizing for not making it to see her before the 10:00 meeting and asking to meet at 1:30. At 12:32 p.m., Complaint responds to Bahr by e-mail

stating she has a family emergency she must attend to and will touch base tomorrow. (JX 36, JX 126). I find that Complainant was tardy for a scheduled meeting and then left the office without seeking prior approval from her manager.

Wed., March 11, 2009 At 8:32 Hall sends Complainant an e-mail asking why Complainant missed the 8:00 meeting that was scheduled for that morning, and asking when it can be rescheduled later that day. At 9:36 Complainant responds by e-mail to Hall, with a copy to Bahr, stating that she has a family emergency and expects to be out of the office the remainder of the week. (JX 37). I find that Complainant did not inform her manager prior to missing the previously scheduled 8:00 meeting. I further find that Complainant did not inform her manager that she would be out of the office on March 11, 2009, (and thereafter), until well after the start of her normal work day, and in response to an e-mail from her manager.

Complainant finds out the family emergency is not as serious as she initially thought, but decides to take the rest of the week off anyway, because she does not believe there is anything pressing to do at work, there is uncertainty about her tasks, and she is receiving information slowly. Since her manager does not tell her that her family emergency will “mess up” the training deck presentation, she believes she has time to work on the project. She does not believe she is obligated to return to work. Since no one directly confronts her and tells her the family emergency has set the project back and since they authorized her leave, she believes that is the “end of discussion.” She is on personal leave, so she does not believe she has to inform FM that she does not need to be out the entire week. (Tr. 631-634).

I find that Complainant received approval to be on leave from March 11 through 13, 2009, because her manager accepted her word that she needed to be out to assist with a family emergency. I find that Hall’s approval of this leave was based upon Complainant’s representation that she had a family emergency, and that upon discovering that the emergency was not as serious as initially thought and did not require her to be out of the office, Complainant had a responsibility to inform her manager of such. I further find that Complainant’s rationale that she had nothing pressing to do at work and that there was uncertainty about her tasks is not supported by the evidence of record. I find that Complainant did have specific work to do and was aware that she had deadlines to meet.

Mon., March 16, 2009 Complainant returns to work. At 1:38 p.m. Complainant provides a second draft of the training deck to Bahr and Hall. (JX 38). Hall is unsatisfied with the second draft because it combines two presentations that were previously prepared by other people in conjunction with other projects, the title is incorrect, and Complainant has not edited the materials to meet the requirements of the current project. Bahr is not satisfied because Complainant has missed the March 15, 2009, milestone set forth in the Performance Goals, and they still do not have an agreed upon outline. The draft consists of a presentation that was prepared for another group, and Complainant has not tailored it to meet the objectives of the project. (Tr. 1055-1056, 1698).

Tues., March 17, 2009 Bahr and Hall meet with Complainant to discuss the second draft. Bahr tells Complainant that the second draft does not look like what they had talked about and she has not included critical content. Hall gives Complainant a handwritten outline that she prepared to

guide Complainant in preparing the presentation. Bahr and Hall tell Complainant that the outline is not comprehensive and Complainant is to draw on her own knowledge and experience. At this point, Bahr believes Complainant is not meeting her performance goal and not doing the tasks she has been assigned. (JX 125, JX 126, JX 177, Tr. 1055-1058, 1698-1702). During the meeting, which Complainant surreptitiously records, Bahr and Hall do not tell her that she is to rely on the Scope and Approach document or that it is to be her primary source, though they do discuss that the Scope and Approach document may contain helpful information such as evidence collection, test preparation, standards, and reporting process. (JX 177).

At an unspecified time, while speaking at her desk, Complainant tells Hall that she wrote the scope document, so she is very familiar with the contents. Complainant records this conversation surreptitiously. (EFA.15 Hall at my desk .wav file)

After the meeting, Bahr comes by Complainant's desk, tells her she would like to put her on an automated controls project, and tells Complainant to complete the training deck by Friday, March 20, 2009. (JX 177, JX 126).

Wed., March 18, 2009 At 9:03 a.m., Hall sends Complainant the 2008 SOX Fourth Quarter Scope and Approach documents for Applications and Platforms. The document lists Complainant as the owner of the document. (JX 39).

At 3:27 p.m., Complainant has a phone conversation with Veith of HR, which she surreptitiously records. Veith is new to the HR group and asks Complainant for some background history on her situation. Complainant inquires as to the deadline for submitting comments to her performance review. She expresses concern that Bahr is not a neutral party and is taking sides with Hall, and that Bahr and Hall are trying to corner her. Complainant does not mention or imply anything having to do with allegations of SOX violations. Complainant tells Veith the March 20, 2009, deadline for the training deck completion is doable. (JX 177).

Thur., March 19, 2009 At 8:52 a.m., Bahr asks if Hall and Complainant are available to meet to make sure the training is still on track for the deadline the next day. At 9:20 a.m., Complainant sends a third draft of the training deck to Bahr and Hall. Bahr and Hall meet with Complainant in Bahr's office and tell her what she needs to add to the training deck. (JX 40, JX 125, JX 126).

Fri., March 20, 2009 At 7:46 a.m., Complainant sends an e-mail to Hall stating that she will be working at home today due to a slight sinus flair up. I find that Complainant sought approval prior to adjusting her schedule. Hall responds at 7:50 a.m., asking if Complainant will be able to provide the final document for review today. Complainant responds to Hall, with a copy to Bahr, at 7:59 a.m., stating she just sent an e-mail requesting the additional information Bahr requested yesterday and the information is not included in the scope document, which is the primary document she was asked to use for the slide presentation. Complainant states she will update the presentation when she receives the information. At 2:50 p.m., Bahr sends an e-mail to Complainant and Hall stating that she does not believe the information she requested yesterday is any different than the requests she has made in the past. She further tells Complainant that she has not been told to use the scope document as the primary source for the training. She asks for specifics on what information Complainant feels she needs that is missing. Bahr states that she

and Hall will be available in the afternoon to discuss any of Complainant's questions, and that they have targeted today for completion. She asks how far Complainant has been able to get since yesterday. Finally, Bahr states she would like Complainant to wrap up this project so she can move on to other projects.

At 3:48 p.m., Complainant responds to Bahr, stating that Bahr needs to speak to Hall who told Complainant to use the scope document, and the information Bahr requested yesterday is not in the scope document. At 4:02, Bahr responds that she has spoken with Hall and neither of them recall limiting the sources of information. While she does recall stating that the scope document was a good source of information and contained some content that had not yet made it into the training document, Complainant should use any sources relevant, including her own experience to finish the document. Bahr asks Complainant to clarify what information she asked for yesterday that is different than what she had previously requested, and asks for a status update on the document. Complainant does not respond further to Bahr or explain what specific information she needs.

I find that Complainant did not clarify what information was missing in the scope and approach documents that she needed in order to complete the training presentation. I also find that Complainant was not told by Bahr or Hall that she had to rely on information contained in the scope and approach documents to complete the training presentation, and that she could have completed the training presentation without these documents. I further find that Complainant was specifically told that she did not need to rely on the scope and approach documents to complete the training presentation.

At 5:56 p.m., Complainant sends Bahr and Hall a fourth draft of the training deck, containing 51 slides. In her accompanying e-mail, Complainant states that the document is about 60% complete and she will provide a final copy by the end of the weekend. (JX 41, JX 126; JX 43). I find that Complainant did not complete the training project on March 20, 2009, as she was instructed to do by Bahr on March 17, 2009. I further find that Complainant did not explain to her managers what information she was missing that would not allow her to complete the training project. I find that the training project was not an unachievable task, as Complainant asserts in her brief.

around March 21, 2009 At an unspecified date, Complainant submits a written rebuttal to her performance evaluation. (JX 26, Tr. 249, 577). In her rebuttal, Complainant alleges, *inter alia*, that Hall's negative comments are unsupported and that Hall's motivation for the negative review is racial discrimination and retaliation. She also asserts that Hall is discriminating against her based on age and sex. Complainant states that the evaluation contains racial stereotypes. She asserts that Hall does not understand Complainant's daily responsibilities. She also asserts that in addition to Hall, Adams and Leonard have also racially discriminated against her. She asserts that Leonard and Hall racially discriminated against her and retaliated for comments that Complainant made in Leonard's Accountability Survey. She states that Hall should not have provided comments on some of her assignments because they did not fall in the rating period or were performed for other supervisors. She further states that Hall deliberately distorted the importance of a task in order to conceal the fact of her retaliation. Complainant questions the professional qualifications of her peers and supervisors, stating that she has superior

qualifications. She states that Leonard encouraged Hall to racially discriminate against her because of comments she made in accountability surveys regarding particular white members of the team (she does not specify who these team members are, what surveys she is referring to, or the nature of the comments in the unspecified surveys).

Mon., March 23, 2009 At 7:22, Complainant sends a fifth draft of the training deck to Hall and Bahr. In her accompanying e-mail, she states that there are some questions she needs to ask of Russell and Adams regarding testing. She states that she thought the scope document was updated when she prepared the training deck, but since that was not the case, she needs to validate the information. Hall responds at 12:48 p.m., stating that she has reviewed the scope document and highlighted areas that need to be updated and will set up a meeting with Russell, Adams, and Complainant so she can get the updates and update the training deck. At 3:41 p.m., Complainant responds to Hall and Bahr, stating that because the scope document has some obsolete information, she does not want to submit anything to Bahr yet. Hall responds at 4:06 p.m., asking Complainant if she is available to meet the next morning. (JX 44).

Complainant does not attend the mandatory Internal Audit all-hands meeting. Hall sends Complainant an e-mail inquiring as to why Complainant did not attend the meeting. I find that Complainant did not seek approval from her manager prior to missing the all-hands meeting. At 5:30 p.m., Bahr e-mails Complainant inquiring as to whether she has received the most recent version of the training deck. (JX 126, JX 47, JX 125).

Tues., March 24, 2009 At 7:24 a.m., Russell sends an e-mail to Hall, Complainant and Crews, describing changes to the scope document for 2009.

At 7:39 a.m., Hall sends an e-mail to Complainant stating that Complainant has not responded to her e-mail of the day before as to why she did not attend the all-hands meeting.

At 8:49 a.m., Complainant sends an e-mail to Bahr, explaining that the Control Framework has not been finalized. She states that historically the scope document must be reviewed and approved by Hall prior to releasing it, and since Complainant is relying heavily on the scope document for the training deck, she does not think it advisable to release the slides until Hall reviews and approves the scope document.

At 9:02 a.m., Complainant sends Hall an e-mail with a copy to Veith, stating that she is requesting the supporting documentation for her performance evaluation, and wants specific details around the allegations, so her attorney can review them. At 9:21 a.m., Complainant responds to Hall's 7:39 e-mail, stating that she did not respond to her e-mail of March 23, 2009, because she was in a meeting with Investigations. Complainant states she had only tentatively agreed to attend the all-hands meeting. Hall responds at 9:52 a.m., stating that she expects notification if a team member plans to miss a meeting. At 9:54 a.m., Complainant responds to Hall by changing the subject on the e-mail to "Performance Evaluation" and asking Hall when she plans to provide the documentation to support Complainant's performance evaluation.

At 2:27 p.m., Bahr responds to Complainant's 8:49 e-mail, stating that the changes to the 2009 control framework will be very limited and that Complainant can leave placeholders for the

information. She states that she is less concerned about final approval of the scope document than that the information is consistent with the proposed changes that Complainant received from Adams and Russell. Bahr also states that she never heard back from Complainant from the day before as to whether Bahr has the most recent version of the training deck. Complainant responds that the document has not changed since Monday morning.

At an unspecified time, Bahr meets with Complainant, Hall, and Richardson to discuss the automated controls project which Complainant has also been assigned.

At 4:30 p.m., Bahr stops by Complainant's desk to talk about her projects, but Complainant is gone. (JX 45, 46, 47, 126). I find that Complainant left the office early without receiving prior approval from her manager.

Wed., March 25, 2009 Complainant works from home in the morning and comes to the office for meetings on automated controls. (JX 126).

Thurs., March 26, 2009 Complainant refuses to complete her goals for 2009 because she believes they are influenced by her 2008 performance evaluation which she is disputing. Bahr schedules a 2:00 meeting with Complainant to discuss her concerns. Complainant initially agrees to meet, but then declines and sends Bahr an e-mail at 12:58 p.m., suggesting that Bahr review the disputed areas of the performance evaluation. She states that Hall is continuing to discriminate against her since March 4, 2009, when she learned of Complainant's complaint of discrimination and retaliation. (See March 4, 2009, above).

At 5:37 p.m., Bahr sends an e-mail to Complainant telling her that she left detailed comments on her chair this afternoon and is sorry she missed her. She provides several specific comments regarding what Complainant needs to do to improve the training document. She states that she will be available to discuss it tomorrow and would like to get the project wrapped up ASAP.

At 6:32 p.m., Complainant sends an e-mail to Bahr and Hall, with copies to Fischman and Veith, stating that the slide presentation was arranged in the order of the primary source document she used which was the scope document. She faults Hall for failing to provide an outline in logical order and says that she followed the logical flow set forth in the table of contents of the scope document. Complainant tells Bahr that if she is having difficulty accepting her word, she should feel free to consult with her white male colleagues, and that it is clear Bahr is evaluating her work with an obvious degree of undeserved bias, even though Complainant has worked in the department longer than Bahr. She adds a post-script to Investigations telling them to note this as another example of retaliation. (JX 49, 50, 51, 125, 126).

Fri., March 27, 2009 At 9:41 a.m., Bahr sends an e-mail to Veith, with copies to Hall and Black, requesting immediate assistance in defining the next step. Veith responds that she will follow up later in the day.

At 10:40 a.m., Complainant sends an e-mail to Hall, with copies to Bahr and Veith, stating that it is clear they have reached an impasse regarding the slide deck, and criticizing Hall for failing to

review the scope document. She states that she is unable to start the ARQ project since Gabbay is out of the office, and she has completed her work on the automated control definition. She states that it is clear that there are HR/investigations issues between them that need to be resolved before she can move forward with the slide training deck. In the meantime, she tells Hall that she is taking the remaining portion of the day off. I find that Complainant left the office early without seeking or receiving authorization from her manager.

At 10:42 a.m., Bahr e-mails her supervisor, Black, asking if she should tell Complainant to wait and they are trying to meet. Black responds with, "Yes, she can't behave like this. Do I need to call her?" Bahr responds to Black stating that Complainant had previously been told not to use only the scope document and that Complainant does have work to do, because she has not responded to the detailed comments regarding the training deck that Bahr left for her on her chair the previous evening. At 10:52, Bahr sends an e-mail to Complainant and Hall, with copies to Veith and Black, stating that she would like to review the comments she provided last night and will call Complainant at 11:30. Hall responds with an e-mail to Bahr at 11:13, stating that Complainant is gone. At 11:16, Bahr sends an e-mail to Hall, with a copy to Black, stating that she is supposed to meet with HR in the afternoon, and she wants HR to confirm if it is a violation of the hour policy to take vacation without prior approval. At 11:18, Black advises Bahr and Hall to refrain from back and forth with Complainant on e-mail and says she has spoken with HR and is awaiting HR guidance. At 11:19, Black sends an e-mail to Slaughter requesting support and feedback to get through this "very volatile" situation. Slaughter responds that she has spoken with Veith and is about to step in because the behavior is being totally disruptive. She will speak with Investigations and keep Black posted on next steps. (JX 52, 53, 54, 56).

Sat. March 28, 2009 At 10:45 a.m., Complainant sends an e-mail to Bahr and Hall with copies to Veith, Black and Fischman, stating *inter alia* that it is not uncommon for management to hide behind professional reasons and be overly critical of an employee's performance, after charges of discrimination and retaliation have been raised. She states overt racism (i.e., racial slurs, burning crosses) is very uncommon these days. Therefore, attempting to undermine an employee's performance through their work is a practical means of concealing discrimination and retaliation. She accuses Bahr of painstakingly avoiding holding Hall accountable for work on which Complainant must rely for the training deck presentation, while attempting to falsely give the impression that Complainant is not able to meet expectations. She says the slide deck is just a "cut and paste" job, but if the underlying sources are unreliable because Hall failed to do her job, there is little Complainant can do. She tells Bahr to make Hall correct the underlying documents before they can discuss completing the slide deck. Finally she says she does not have the time to play games with either Bahr or Hall and allow them to waste her time. (JX 55).

between March 26 & March 30, 2009 Hall is removed from managing Complainant on the training deck project and Gabbay is assigned to be the project manager, in place of Hall. (Tr. 1096-1097, 1323-1325, 1721-1722, JX 177)

Mon., March 30, 2009 At 9:03 a.m., Black sends an e-mail to Slaughter telling her that another e-mail came in over the weekend and she would like to confirm that someone from HR is going to speak to Complainant today. (JX 56).

At 2:27 p.m., Complainant sends Gabbay a draft of the training deck. She states that she has also given him a copy of Bahr's comments and Hall's outline. She asks Gabbay to review the training deck and determine if any of the information looks remotely familiar to him. (JX 57).

Wed., April 1, 2009 At 8:47 a.m., Gabbay sends an e-mail to Complainant containing his detailed comments regarding the training deck draft that Complainant sent him on March 30, 2009. He comments *inter alia* that the size is excessive, information is outdated, flow is disjointed, slides are too wordy, and the information is repetitive. He recommends that Complainant stick to the (March 17, 2009) outline provided by Hall as a starting point. (JX 58).

At 11:54, Complainant sends an e-mail response to Gabbay, with copies to Bahr and Hall, in which she responds to his comments. She states that she has problems with the reviews performed by Hall, Gabbay and Bahr, and they have not adequately addressed the content of the presentation. She states that she is willing to take responsibility for errors, changes, or misunderstandings on her part, but must be able to rely on everyone involved in this process and their work. She further states that she cannot move forward until appropriate comments are documented in writing for the remaining 50% of the presentation. (JX 59).

At 12:00 p.m., Complainant forwards a copy of her 11:54 e-mail to Slaughter, with copies to Veith and Black, stating that she is forwarding the e-mail for documentation purposes, and that she raised the concern of retaliation last week regarding how her work is being reviewed. She says that she provided Gabbay a copy of the slide presentation for review and he did not perform a review at all, but just copied Bahr's responses. She states she cannot complete her work on time without appropriate and timely feedback, and cannot complete her work if it is being reviewed with bias. She asks that Slaughter raise this concern to Black. She states that all are equally responsible for working as a team, and it is counter-productive if managers will not take responsibility for their work. Finally, she states it is her position she is being harassed through the review of her work and is working in a hostile work environment. (JX 66).

In this 12:00 e-mail, as well as in her testimony and argument presented to this tribunal, Complainant asserts that she was subjected to "intrusive surveillance" by her managers. I find that this characterization of management's activities is inaccurate. While the record does establish that on several occasions Complainant's managers (Hall, Bahr, and Gabbay) tried to locate her by either e-mail communications or visits to her desk, required her to provide status reports on pending assignments, and questioned her absences from meetings and the office, I do not find that management did so in an unreasonable manner or engaged in activity that exceeded the scope of appropriate management activity. I find that management's activities did not constitute "intrusive surveillance." I also note that in argument Complainant does not define the term or reference any authority to support her assertion that she was subjected to "intrusive surveillance."

At 12:56 p.m., Black sends an e-mail to Slaughter stating that she is planning no action until Slaughter speaks with Complainant on Friday, and that Slaughter should please confirm and advise. (JX 66).

At 1:03 p.m., Complainant forwards a copy of Gabbay's 8:47 e-mail to Slaughter, with a copy to Black, stating that she has no problem making cosmetic changes, but the review should have focused on the content which is in logical order based on the documents she used as her basis. (JX 61).

At 1:04 p.m., Gabbay responds to Complainant's 11:54 e-mail, with copies to Bahr and Hall, stating that after reviewing the deck and reading the comments she provided him by Hall and Bahr, it seems they are drawing similar conclusions. He thinks given the volume of information provided and the audience and intent of the training, his first concern is around the overall organization/flow and number of slides. Once the organization/flow issue is resolved, he can then focus on the details of the content, but it is hard to follow and convey feedback on content when there is repetition and a somewhat disjointed flow. He further states that he does not understand why the comments provided are insufficient to make revisions to the deck, and he would expect such a presentation to require multiple revisions. (JX 62).

At 1:19 p.m., Complainant responds to Gabbay's 1:04 e-mail, with copies to Bahr, Hall, and Slaughter, stating that the information provided was given to her by Hall, and she specifically requested the most recent and updated documents. She states that at some point we all have to share responsibility in this project. (JX 62).

At 1:22 p.m., Complainant sends an e-mail to Bahr, with copies to Slaughter and Black, stating that until she receives updated documents from Hall, she will not be able to move forward. She further states she is expressing concern regarding the fact that there are different performance standards for certain individuals in the department. (JX 62).

At 1:59 p.m., Complainant sends an e-mail to Bahr, with copies to Hall and Gabbay, stating that she needs to receive an updated scope document from Hall to make appropriate corrections, as it appears a few more things have been changed. She states that once she gets these documents she will be happy to incorporate the changes, and that the domains follow the order outlined in the framework. She inquires whether Bahr is suggesting another order for the slides. (JX 64).

At 2:00 p.m., Bahr responds to Complainant's 1:59 e-mail, with copies to Hall and Gabbay, stating that she would like to meet tomorrow at 11:00 to review her (handwritten, March 26, 2009) comments. There are changes that can be made now and she would like to make sure they are on the same page. (JX 64).

At 2:05 p.m., Complainant responds to Bahr's 2:00 e-mail, with copies to Hall and Gabbay, stating that she agrees a few minor changes can be made, but she is attempting to make efficient use of her time. She states that since there were no specific issues cited for slides 43-76, she is not certain what the issue is, and that the order presented follows the control framework. (JX 126, FM 879).

At 2:06 p.m., Bahr sends an e-mail to Black, stating that she invited Complainant to discuss her comments again, the same ones she wanted to discuss on Friday, March 27, 2009,

and Complainant declined the meeting, although Bahr has reiterated the importance of meeting. (JX 64).

At 2:09 p.m., Bahr responds by e-mail to Complainant's 2:05 e-mail, with copies to Hall and Gabbay, stating that the order she would like Complainant to follow is the order in the outline that Hall provided. For slides 43-76, she is looking for Complainant's input on a different way to present it so the number of slides can be cut down. She reiterates that she wants to meet tomorrow to ensure they are on the same page, as they cannot adequately cover it in e-mail. She states Complainant and Gabbay can call her the next day at her desk at 11:00. (JX 126, FM 879).

At 2:17 p.m., Complainant sends an e-mail to Hall, with a copy to Bahr, stating she would like to obtain the most recent versions of the IT Control Framework 2009 and Scope Document. (JX 65).

At 3:10 p.m., Hall sends an e-mail to Complainant, with a copy to Bahr, attaching the 2009 Scope and Approach Documents for Applications and Platforms, and states that Jack sent the latest Control Framework. (JX 65).

At 3:15, Slaughter responds to Complainant's 12:00 e-mail, with copies to Veith and Black, stating that they will discuss the comments in her e-mail when they meet on Friday. (JX 67).

At 3:16 p.m., Complainant responds to Slaughter by e-mail to Slaughter, with copies to Veith and Black, thanking her and stating that "they" seem to be responsive all of a sudden, and she assumes Black must have called. (JX 67).

At 3:41 p.m., Complainant sends an e-mail to Hall and Russell, with a copy to Bahr, stating that she noticed the Platform Scope Document does not include an appendix for evidence similar to application, but that they had discussed the evidence differences for platform. She also states for the Control Framework, the evidence is not sufficiently documented, such as differences between centralized systems versus open systems and differences in evidence for processes versus platform systems. She says she can improvise for the slide deck, but these gaps need to be closed, and requests advice on how she should capture this information. (JX 65).

At 4:11 p.m., Hall sends an e-mail to Russell, with copies to Bahr and Complainant, stating that last week she met with Russell, Adams, and Complainant to discuss the scope and approach edits, so that Complainant could ask questions and request additional detail if necessary for the training materials. At the meeting, Russell mentioned the document he created associates evidence with tests/control activities. Hall asks Russell to send the evidence document to Complainant. (JX 65).

At 4:12 p.m., Hall sends an e-mail to Adams, with copies to Bahr and Complainant, stating that that last week she met with Russell, Adams, and Complainant to discuss the scope and approach edits, so that Complainant could ask questions and request additional detail if necessary for the training materials. At the meeting, Adams mentioned he had a document that

associates the evidence with tests/control activities. Hall asks Adams to send the evidence document to Complainant. (JX 70).

At 4:42, Russell responds by e-mail to Hall and Complainant, with copies to Bahr and himself, attaching the Final Evidence Request, and Computer Operations Evidence Requests. He states that as suggested they should select two or three examples of evidence from the attached documents, and explains the difference between UNIX and AS400 is that UNIX is service and AS400 is viewed as centralized systems. (JX 65).

Thur., April 2, 2009 At 7:25 a.m., Adams responds to Hall's 4:12 p.m. e-mail of April 1, 2009, and states that he will resend the document to Complainant.

At 8:00 a.m., Hall sends an e-mail to Complainant stating that slides 17-19 are for a format example, and that Complainant needs to update the content based on changes to Control activities for 2009. (JX 70).

At 9:53 a.m., Complainant responds to Hall's 8:00 a.m. e-mail, telling her that Hall and Adams are responsible for updating the information, rather than Complainant. (JX 70).

Slaughter requests that Complainant meet with her the following day. At 10:04 a.m., Complaint responds that she has no plans to visit Slaughter in D.C., and it might be easier to discuss the issues by phone. At 10:07, Slaughter responds that she would like Complainant to come to D.C. to meet with her and they can continue to talk by phone after the meeting. At 10:14, Complainant agrees to meet Slaughter the next day, April 3, 2009, at 10:00. (JX 69).

At 10:11 a.m., Complainant sends an e-mail to Slaughter stating that she is working in a hostile work environment. She claims *inter alia* that: Management is refusing to hold certain individuals accountable for their work, while claiming her work is incorrect; Bahr and Hall are retaliating against her through her work; Hall, Gabbay, and Bahr did not perform an adequate review of their own work prior to Bahr insisting she use their work; management attacked and marginalized her review comments regarding problems with their review of her work; they have cultural issues in the department; they have a diversity issue in the department; Bahr is unwilling to hold her managers accountable for their work; Hall is failing to execute her responsibilities as a manger by reviewing the scope documents; Gabbay agreed with Bahr without performing his own due diligence; management has not adequately reviewed the scope document; Bahr and Hall are new and do not understand the work or respect the knowledge of the work force; management does not respect the knowledge of a mature work force and feel personally threatened and insecure; Hall is afraid to hold team members accountable for their work; Complainant should not have to review the work of those with pay grades above hers, especially since she has been unfairly placed on a development plan. She also proposes the following solutions: stop the harassment or management will be sued; Slaughter meet with Black to discuss Complainant's concerns, and tell her any communications can be used in court; document review should be in writing; Gabbay should review Hall's work and sign and date when it is complete; Bahr should perform a review of the scope documents; management take cultural and diversity training. (JX 68).

At 10:39 a.m., Complainant sends an e-mail to Bahr, Hall, and Gabbay, with copies to herself, stating that she is making comments regarding the 2009 scope documents. She then states that she is using this document to express concerns of racism and discriminatory management practices. She states that there are different performance standards for certain individuals, they are unwilling to take responsibility for their own work, and are impeding her progress. She states she will continue to raise concerns to HR and Investigations until the issues are resolved, and if she has to take legal action against FM, she has every intent of suing them personally. She then explains that she reviewed the scope documents for applications and platforms, comparing both documents for consistency, accuracy, and completeness and found at least 100 errors for the combined documents, though she does not specify these. She then states the following work problems: Hall, Gabbay, and Bahr did not perform an adequate review of their own work prior to Bahr insisting she use their work; the scope document contains old information and has inconsistencies in formatting; Bahr is unwilling to hold her managers accountable for their work by covering for them and accusing Complainant's work of being the problem; Hall is failing as manager by not performing sufficient review of the scope document; Gabbay has agreed with Bahr without performing his own due diligence; an adequate scope document review has not been performed by all levels of management; Bahr and Hall are both new to the work environment and need to respect the knowledge of their work force; management does not respect the knowledge of a mature work force and feels personally threatened and insecure; Complainant should not have to review the work of those with pay grades above hers. Complainant then states the following discriminatory practices issues: cultural issues in the department, with management reinforcing the old culture; diversity issues with management appearing more comfortable with certain individuals; Bahr is unwilling to hold managers accountable and is covering up for them; Hall is failing as a manager by not performing a review of the scope documents; Gabbay agreed with Bahr's positions without performing his own due diligence, he does not have the ability to be objective and do what is right, and is just going along to get along; management team does not respect knowledge of a mature work force and feels personally threatened and insecure. She then states the following proposed solutions: document reviews be done in writing; Hall complete a detailed review; Gabbay perform a second level review of Hall's work, signing and dating when it is complete; Bahr perform a review of the scope documents to ensure Hall and Gabbay's reviews are adequate; management take cultural and diversity training and read the corporate retaliation policy. (JX 63).

At 10:40, Complainant sends the same e-mail to Hall, Gabbay, and Bahr, but includes an attachment. (JX 72). The attachment contains an Excel spreadsheet in which Complainant lists scope document issues for platforms and applications. She points out several formatting inconsistencies between the two scope documents, i.e., different numbering systems, inconsistent paragraphs, heading inconsistencies, justification inconsistencies, font inconsistencies, and inconsistencies in the general manner in which data is presented. I find that neither the e-mail nor spreadsheet attachment specifies or implies any allegations of potential SOX violations or fraud or indicate that Complainant has concerns about such issues.

At 10:53, Complainant sends an e-mail to Hall, with copies to Bahr and Gabbay, stating that she should find attached the excel version of her review notes. (JX 71). The spreadsheet is not contained in the joint exhibit presented to this tribunal. Complainant suggests that Hall go

through the document line by line with her team to work out the kinks, and states that she will not be responsible for reviewing the work of Hall and her staff.

At an unspecified time, Bahr cancels the 11:00 meeting with Complainant that she had scheduled in her 2:09 p.m. e-mail of the previous day. At an unspecified time, Slaughter sends Complainant home for the remainder of the day. (JX 126, Tr. 1229)

Fri., April 3, 2009 Complainant meets with Slaughter at Slaughter's office. Complainant records the meeting without Slaughter's knowledge. Slaughter explains to Complainant that she wants to help her put together a strategy for dealing with her situation, because the way she is handling it right now, with her e-mails, is unhelpful and disruptive, and Complainant still has a job to get done. Complainant expresses her concern that management is deliberately hindering her ability to do her job and is retaliating and discriminating against her based on her race and sex. I find she does not specifically mention or imply anything having to do with allegations of SOX violations, fraud, or anything of a similar nature. Slaughter tells Complainant she needs to stop with the e-mails, call her if she gets frustrated or angry, and document her concerns in a notebook rather than with e-mails. Slaughter tells Complainant she can go home for the remainder of the day. She warns Complainant that if she comes in Monday and things get heated or at some time in the future things get heated, she may be put on administrative leave until they can resolve the situation. At the end of the meeting, Complainant thanks Slaughter and says it was a productive meeting and she appreciates the feedback. (JX 177).

Tues., April 7, 2009 At 7:50 a.m., Complainant sends an e-mail to Hall, with copies to Bahr and Gabbay, stating that she is calling in sick due to sinus problems, and provides updates on her assignments. (JX 73). I find that Complainant properly sought approval from her manager prior to taking leave on this day.

Wed., April 8, 2009 At 8:04, Complainant sends an e-mail to Martin, with a copy to Gabbay, stating that there will be a slight change this morning and Gabbay will sit in on the 10:00 meeting instead of her. At 8:07 Gabbay responds that he has a conflict for 10:00 and asks Complainant to reschedule for a time when she is available. Complainant agrees to do so. (JX 75).

At 8:46 p.m., Complainant sends Hall, with a copy to Bahr, a new version of the training deck. (JX 79).

At 8:59 p.m., Complainant sends an e-mail to Hall, Gabbay, and Richardson, with a copy to Bahr, stating that she will be out the remainder of the week due to a physician's mandate. I find that Complainant properly informed her manager of her need for sick leave. She reminds Gabbay that they have a meeting with Martin at 10:00 the following day. She tells Hall that she sent her an update of the format for the slide deck and still needs to validate the mapping for the controls. (JX 77).

At an unspecified time, Hall and Complainant have a one-on-one meeting and discuss the status of Complainant's projects. Complainant records the conversation, but it contains many indiscernible areas. Complainant states that she is waiting on information from Adams regarding

mapping, and that she is willing to do the work for him, but it will take more time. Hall states that she does not think the work Complainant is suggesting is necessary, and Complainant disagrees. Complainant indicates that she is in the process of condensing the number of slides for the training deck. Complainant inquires as to whether there is any new work in the pipeline and they discuss some possible testing. Complainant states that she will be leaving after the meeting for a medical appointment. (JX 177).

Following the meeting, at 9:00 a.m., Complainant sends Hall an e-mail summary of the meeting. She states *inter alia* that she requested Hall review Adams' and Russell's work for accuracy and that she would be relying on her review for the scope document. She states that she will consult the TCWs to complete the missing mapping for Production Application since Adams' information was incomplete and outdated.

Hall responds with an e-mail to Complainant at 9:32 a.m., stating that she needs to clarify statements in Complainant's e-mail and provides her own summary. She states *inter alia* that Complainant needs to complete her three current assignments before receiving additional work. She states that she explained to Complainant that Adams and Russell reviewed Complainant's comments and made changes they felt were appropriate. She has reviewed the documents and will send them to Complainant, but reiterates that these were not the only sources to be used for the training materials. (JX 74).

Thurs. April 9, 2009 Complainant is out of the office due to sinus problems.

At 6:59 a.m., Complainant sends an e-mail to Hall adding further clarifications to her summary of the prior day's meeting. She discusses the assignment of new projects, states she was unaware that receiving a new project is contingent upon her completing her three current projects, and states that the projects do not keep her busy 100% of the time due to their various stages. She suggests Hall use a Professional Management System. She also states that the Scope and Framework are the two primary documents she utilized 98% of the time, though she understood other documents could be used, but that the share point materials are outdated. (JX 78).

At 8:06 a.m., Hall forwards a copy of the new version of the training deck that she was sent the previous evening to Gabbay and Bahr, and requests that they discuss next steps with the training deck as she does not feel Complainant is heading in the right direction based on the new version. (JX 79).

At 8:25 a.m., Gabbay sends an e-mail to Hall and Bahr stating he would like to remove Complainant from the training deck and ARQ projects because she has not demonstrated significant effort to complete either project. He states the training deck is three weeks past due and that Complainant has fallen back on trivial formatting issues with 2 reference documents, demonstrating that she does not understand the subject matter. He states that Complainant is two and a half weeks past due on her first task on the ARQ project.

At 3:00 p.m., Bahr responds to Gabbay and Hall that she agrees but needs to speak to HR about her next step, and inquires whether there are other projects that can be assigned to

Complainant. She inquires as to whether Gabbay's being out of the office for three days could be used as an excuse for delay. (JX 79).

At 3:06 p.m., Gabbay responds to Bahr and Hall stating that Complainant's task for ARQ was to meet with Martin, with or without him, and that he provided Complainant with documents to use as a model. He states that all Complainant has done is collect a process document and report status, but there has been no original work from her. He states that Complainant does not seem able to produce original work of her own, and the training document is an excellent example of this. (JX 79).

Fri., April 10, 2009 Complainant is out of the office due to sinus problems.

At 1:54 p.m., Bahr sends Black a copy of the latest version of the training deck (the version sent to Hall on April 8, 2009). Bahr states that Complainant is still not following the outline at all, and she plans to call Slaughter that afternoon. (JX 80).

Gabbay sends Complainant a request to meet on Monday morning at 10:30 to discuss her current assignments. (JX 126).

Sun., April 12, 2009 At 8:30 p.m., Complainant sends an e-mail to Gabbay, with copies to Hall and Bahr. She attaches a copy of her status report for April 7, 2009. She states that she does not have any additional comments to add since she was on sick leave. She offers to provide management with copies of her medical excuses for sick leave. (JX 126, FM 900).

Mon., April 13, 2009 At 8:03 a.m., Gabbay sends an e-mail to Complainant, thanking her for the update she sent the evening before, and telling her he would still like to meet that morning with Complainant and Bahr to discuss where they are with open items and completion dates. (JX 82).

At 9:38 a.m., Complainant responds to Gabbay, with copies to Bahr and Hall, that she has a doctor's appointment at 10:00 and plans to return to the office afterwards. I find that Complainant did not seek approval or inform her managers of a medical appointment that day until over an hour after the time she was required to report to work. With regard to the ARQ project, Complainant tells Gabbay that she has not received any memos regarding the meeting that he had with Martin on April 9, 2009. She states that the meeting with Martin could not have been scheduled on April 4, 6, or 7, 2009, because Gabbay was on vacation. I find that she does not comment on the fact that the meeting on April 8, 2009, was cancelled due to her having a medical appointment or that she rescheduled the meeting when she was out of the office again on April 9, 2009. With regard to the training deck project, she states that she is waiting on the scope document to be approved and reviewed by management, and she submitted an example of the control activities in a new format and is awaiting comments. (JX 82).

At 9:31 a.m., Bahr sends an e-mail to Slaughter, with copies to Veith and Black, stating that to follow up on the voice mail she left on Friday, she would like advice on appropriate next steps for Complainant. She states they continue to make no progress on the training deck, and it needs to be completed soon for the training to be meaningful. She inquires as to whether she can

reassign it to another team member, and does not want Complainant to think she did not have a chance, although she has been given multiple opportunities and not delivered. She states that Complainant is two and a half weeks behind on her second assignment. (JX 81).

At 9:43 a.m., Slaughter responds that she will call Bahr in thirty minutes. (JX 81).

At 12:41 p.m., Complainant sends an e-mail to Gabbay, Hall, Bahr, and herself, stating that she had an emergency dental procedure, and will not be returning to the office. She states that her greatest hold-up has been not receiving information from management and that it would be helpful if Gabbay and Hall reviewed her comments on the scope document. (JX 82).

At 12:47 p.m., Gabbay responds by e-mail to Complainant, with copies to Hall and Bahr, stating that he has completed the review of her comments to the scope/approach documents, and would like to meet to discuss in more detail the status of her assignments. (JX 83).

At 2:16 p.m., Complainant responds to Gabbay's 12:47 e-mail, by e-mail, stating there is no problem, and Gabbay should forward the results of his meeting with Martin to her. She also instructs Gabbay that he is to put his responses to her comments in a template she provided. (JX 83).

At 3:08 p.m., Gabbay sends his response to Complainant's comments on the scope and approach documents to Bahr and Hall, in the template provided by Complainant. (JX 84). Gabbay determines that the majority of Complainant's issues with the scope documents are format issues and the remaining issues concern why the two documents do not match up. (Tr. 1337-1343). The documents related to two different kinds of information, so it is logical that they did not track with each other. I find that Complainant in her e-mail and template did not raise issues having to do with the substantive content of the documents or that stated or implied that FM was committing a SOX violation or engaging in any sort of fraudulent activity. I find that the issues she raised related to format issues and differences in the way information was presented in the two documents.

At an unspecified time, Bahr meets with Slaughter in person, and Gabbay and Hall participate by phone. Black attends part of the meeting. Bahr discusses her comments on the training deck and provides Slaughter with her chronology document of events having to do with Complainant. They decide to reassign the training deck project to Hall. Bahr and Hall discuss meeting with Complainant on Tuesday to communicate the decision. (JX 126).

Tues., April 14, 2009 Slaughter is unable to meet with Bahr and Complainant, so the meeting is scheduled for Wednesday, April 15, 2009, at 1:00.

At 8:19 a.m., Gabbay sends an e-mail to Complainant, with copies to Hall and Bahr, describing his meeting with Martin regarding the ARQ project. He assigns Complainant the task of preparing a workflow/decision tree using a swim lane process flow format. He tells her to provide an updated list of deliverables and due dates by 3:00. (JX 85).

Complainant is late for the team meeting. I find that this tardiness was not approved by her manager prior to the meeting. She acknowledges this at her meeting the next day with Bahr and Slaughter. (JX 177).

between April 1 & 14, 2009 I find that between April 1 and 14, 2009, Bahr began considering that termination of Complainant's employment would be appropriate. (Tr. 1738, 1770; JX 126). I also find that by April 1, 2009, Complainant had not met the key milestone dates for Objective One as set forth in the Development Goals she was given on March 4, 2009. Specifically, I find that Complainant did not define the scope of the training and provide it to management by March 15, 2009, and she did not complete the training by March 31, 2009.

Wed., April 15, 2009 Bahr and Slaughter meet with Complainant in Bahr's office. Complainant records the meeting without their knowledge. Bahr tells Complainant that she is taking the training deck project away from her because they have not been making progress the last few weeks and she is transferring the project to Hall. Complainant disputes that she has not been making progress and attributes any delay to Hall and Gabbay's failure to provide her with updated information. They agree that Complainant will focus on the ARQ and automated control projects. They discuss Complainant's attendance issues and that Complainant has been out of the office. Complainant acknowledges being late to a meeting the day before and having to be paged by Hall, but states that other absences have been due to unexpected sick leave. Slaughter emphasizes the importance of Complainant being present. Slaughter tells Complainant that Bahr has a right, as the leader of the organization, to tell Complainant what she wants her to do. Slaughter tells Complainant that if she does not complete her projects, they at some point will be having a "different conversation" (implying termination). At the end of the meeting, Complainant apologizes to Bahr for not being respectful to her and states that Bahr has inherited issues which existed prior to her arrival. I find that during this conversation, Complainant neither specifically mentioned nor implied that she was making any allegation of SOX or fraud violations or indicated that she had done so at anytime previously. At no time did Complainant state or imply that she was being discriminated or retaliated against due to protected activity. (JX 177; Tr. 104-105, 1257-1270).

Around April 15, 2009, the training project is reassigned to Hall who completes the project sometime in April 2009. (Tr. 43).

Thurs., April 16, 2009 Complainant exchanges some e-mails regarding the ARQ project. (JX 89).

Fri., April 17, 2009 At 3:21 p.m., Bahr sends an e-mail to Complainant, with a copy to Slaughter, asking if she is still in the office, because Bahr spoke with Gabbay who thinks Complainant may have left the office several hours ago. Bahr asks Complainant to confirm whether she is still in the office as she does not believe Complainant was authorized to leave early. (JX 90).

I find that Complainant left the office early, without informing her manager or seeking prior approval.

At 3:56 p.m., Bahr sends an e-mail to Hall and Bahr asking if they have heard from Complainant because she has not responded to Bahr's earlier e-mail. Gabbay responds that they have not heard from Complainant. (JX 91).

Sat., April 18, 2009 At 8:41 a.m., Gabbay sends an e-mail to Bahr stating that he has not heard back from Complainant and was going to send her a more assertive e-mail asking about her whereabouts the day before. (JX 92).

At 12:53 p.m., Bahr responds to Gabbay stating she has not heard anything either, and to just leave it. She spoke with Slaughter on April 17, 2009, and they decided they would see what Complainant's response was, before moving forward. (JX 92).

Complainant prepares an Interoffice Memorandum addressed to Slaughter. The subject is Complainant's response to the meeting with Director Bahr on April 15, 2009. In the memorandum, Complainant states *inter alia* that Bahr made false/defamatory statements during the meeting, with which Complainant disagrees. She states that she was not responsible for the delay of the slide deck, and that Bahr and the management team deliberately hindered her ability to meet the goal by failing to provide her with requested information. She states the meeting on April 15, 2009, was a bullying tactic by Bahr and an act of retaliation, and Bahr's purpose was to confuse Slaughter as to her true motives for holding the meeting and the issues surrounding her work. She states that Bahr is retaliating against her because she filed a formal discrimination complaint against management, and included Bahr as a party based on specific retaliatory actions by Bahr. She states that Bahr made false representations during the meeting. I find that Complainant does not specifically allege or imply that she is making or has previously made any allegations of SOX allegations, fraud, or any other similar allegations or that management is retaliating against her, or has retaliated against her in the past, for any SOX protected activity. She does specifically state, however, that she construes Bahr's comments that Complainant does not adapt to change well, as a comment on her age, i.e., that she is discriminating against Complainant based on age. I find that the formal discrimination complainants she was referring to were the complaints she made to Investigations and HR on March 4-5, 2009, to the effect that she was being discriminated against based on race, sex, and age. (JX 93).

Mon., April 20, 2009 At 8:15 a.m., Bahr sends an e-mail to Hall and Gabbay stating that she is coming to Herndon, and asking them to let her know if they hear from Complainant, because she did not hear from her over the weekend. (JX 98).

At an unspecified time, Gabbay comes to Complainant's desk to speak with her. Complainant surreptitiously records the conversation. Gabbay speaks with Complainant about her leaving early on Friday and asks if she informed Hall or Bahr that she was leaving early. Complainant states she is about to send an e-mail explaining the situation and that she came in early and left early. Gabbay tells her she needs to let people know beforehand if there is a change to the schedule. Complainant states that they have had a flexible schedule and wants to know what the difference is. She says it was a Friday, she came in early, worked during her lunch break, and continued to work at home, so she does not see a problem. Gabbay states they want people around when they need them, he was looking for her, and that Bahr's policy is that

they work normal business hours. Complainant states that Bahr needs to communicate her policy. (EFA.11-04-20 Gabbay re absence wav file).

At 9:03 a.m., Gabbay sends an e-mail to Bahr and Hall, stating that Complainant is going to send an e-mail to explain. He states that Complainant said she felt she could leave early Friday because she came in early. He told her that leaving at 1:00 only gave her six hours in the office, and that a schedule adjustment should be cleared with management first. Complainant felt that they have a very flexible work schedule and that it should not have been an issue. Gabbay suggests they make people commit to a specific work schedule and that changes be cleared in advance. (JX 98).

At 9:05 a.m., Complainant sends an e-mail to Bahr and Gabbay, with a copy to Slaughter, explaining that she left early on Friday because she came in early, and that she had scheduled her lunch break late in order to drive home and make her last scheduled call for ARQ. She states that she only had another 30 minutes to work after the call. She states that they had always had a flexible and liberal schedule, but if they prefer specific hours, they should communicate their policy, and she will govern herself accordingly. (JX 97).

At 9:05 a.m., Hall responds to Gabbay and Bahr by e-mail, stating that everybody who works for her does have a set schedule and if they are going to stray from it, they let her know. That has always been the case. (JX 98).

At 9:06 a.m., Gabbay responds by e-mail to Hall and Bahr, asking, "What about [Complainant]?" (JX 98).

At 9:10 a.m., Gabbay sends an e-mail to Bahr, with a copy to Hall, stating that he will hold off on responding to Complainant's e-mail, and they can talk to her when Bahr arrives. He states that Hall confirmed that Complainant's agreed upon work schedule is 8:30 to 5:30. Bahr responds at 9:11, that she will try to get in touch with Slaughter. (JX 97). Gabbay responds at 9:11 a.m., saying okay.

At 9:18 a.m., Gabbay sends an e-mail to Bahr stating that additionally, Complainant had cancelled the call on Friday, and that Complainant had said she had 30 minutes to work after the call, but Bahr had sent her a note at 2:30. (JX 99).

At 9:18 a.m., Slaughter sends an e-mail to Complainant, Bahr and Gabbay, in response to Complainant's 9:05 e-mail, telling Complainant that her explanation is not acceptable, and that even with a flexible schedule she must communicate with her manager before leaving, and if working from home, she should be available to respond to e-mails. (JX 100).

At 9:32 a.m., Complainant responds to Slaughter, Bahr, and Gabbay, telling Slaughter that she understands her point. However, because they have had a very informal schedule, she did not perceive leaving early as being a problem. She states that she responded to e-mails on Friday for the duration of the time that she had remaining to work, and Bahr and Gabbay's e-mails must have been sent after that time. (JX 101). I found above that Hall's schedule policy was that people were to work their core business hours, but they could seek prior approval if they

needed to adjust their hours for special situations. I find that Complainant did not seek prior approval prior to adjusting her hours.

At 9:45 a.m., Gabbay sends an e-mail to Slaughter and Bahr, with a copy to Hall, telling Slaughter that they do not have a flexible policy in the office that allows people to adjust their schedule to only work six hours, and that Hall has a set schedule for the team. He states that Complainant did not provide notice to him or Hall before leaving. Slaughter responds by stating that is very helpful. (JX 101).

At 10:16 a.m., Complainant sends an e-mail to Gabbay, with a copy to Hall, containing ARQ procedures and supporting documents. (JX 96).

At 10:41 a.m., Gabbay sends Complainant a procedure framework and template that she is to follow. (JX 102).

At 10:48 a.m., Complainant responds to Gabbay that she has a few “TBD’s” that she needs him to provide information for. At 10:49, Gabbay responds to Complainant that it’s fine, and they need to get the process itself defined first and then they can fill in the gaps of the template. (JX 104).

At 12:00 p.m., Gabbay and Bahr meet with Complainant to discuss the ARQ project. Gabbay and Bahr explain what Complainant needs to expand upon in the document. They agree that Complainant will provide an updated draft by close of business. (JX 126).

At 4:54 p.m., Gabbay sends an e-mail to Complainant wanting to know how she is coming with the updates to the ARQ process document. (JX 105).

At 5:10 p.m., Complainant responds by e-mail to Gabbay, with copies to Bahr and Slaughter, stating that she has been tied up with a phone call from Investigations for a couple hours today, and contacted Slaughter first to make sure she could address the call. She states that EEOC also called her today, as well. She says she will pick up on the [ARQ] document again tomorrow, and is taking her time, because she noticed that a lot of the standards have changed recently, so she is familiarizing herself with those changes. (JX 105).

At 5:39 p.m., Gabbay responds by e-mail to Complainant, with copies to Bahr and Slaughter, directing Complainant to focus on the changes that they discussed today. He states he did not intend for her to review all the technology standards that are being referenced at this time, but only to include them in the supporting documents section, and that the current task is to define the process they will follow to review the ARQs. When the actual reviews are performed, the reviewer will need to reference the technology standards that apply. He also tells her that in the future, if she is not able to meet an agreed upon deadline, she is to let him know, in advance. He states that he would like to have the updates they discussed by noon Tuesday, and if there is an issue with this time, to let him know in advance. (JX 106).

Tues., April 21, 2009 At 8:47 a.m., Complainant sends an e-mail to Gabbay, with copies to Bahr and Slaughter. She states that Gabbay gave her the impression the day before that she was

on the right track, but then he noted many corrections that needed to be made, in the presence of Bahr. She states that Gabbay appeared evasive and delighted that he was not giving her the information she requested, and that she has the impression he is deliberately not sharing the information she needs to perform the project, and is setting her up for failure. She states that she will report this incident to Investigations and EEOC. (JX 107).

At 8:59 a.m., Complainant sends an e-mail to Gabbay stating that she will not be able to meet the noon deadline. (JX 158).

At 9:11 a.m., Gabbay sends an e-mail to Slaughter and Bahr, stating that he finds Complainant's e-mail to be threatening. (JX 109).

At 9:12 a.m., Gabbay responds to Complainant, asking her when she thinks she will be able to update the document for his review. (JX 158).

At 9:12 a.m., Bahr sends an e-mail to Slaughter, with a copy to Black, asking Slaughter if Complainant's 8:47 e-mail counts as one of the e-mails that Slaughter had asked Complainant not to send [at their April 15, 2009, meeting]. Bahr requests assistance from Slaughter in determining the next steps, and states that the management team cannot continue to manage through the situation while they keep receiving harassing e-mails, and that it is a disruption to the team. (JX 110).

At 12:01 p.m., Black sends an e-mail to Slaughter stating that she just tried to call her and they definitely need some guidance on the next steps. (JX 110).

I find that by close of business on April 21, 2009, Bahr had definitely decided to terminate Complainant's employment and was actively working with HR to complete the necessary documentation. She made this decision after consultation with Black and Slaughter. I find that Gabbay, Hall, and Leonard did not have input into the decision to terminate Complainant's employment and were not consulted in this regard. I find that Bahr decided to terminate Complainant's employment due to Complainant's unsatisfactory performance, specifically her failure to meet the development goals and key milestones set forth in JX 28 for Objective One. I find that after discussions with Slaughter, Bahr also decided to terminate Complainant's employment based on attendance issues, specifically tardiness, unexcused absences, and failure to seek prior approval for schedule changes. I also find that on April 21, 2009, Bahr made the last entry in her chronology of events regarding events concerning Complainant, because at that point, she had made the decision to proceed with termination. (JX 126, Tr. 1271-1278, 1715-1721, 1729-31, 1743-1745, 1756-1757).

Wed., April 22, 2009 Bahr works on a draft termination request memorandum for the termination of Complainant. (JX 115, Tr. 1743).

At 9:47 a.m., Complainant sends an e-mail to Gabbay, with a copy to Bahr, attaching her most recent update to the ARQ procedure. She states that the project could not have been completed in the time she had been allotted, and could require 40-50 hours. She proceeds to state the documentation that she needs to complete the project. She states that she is having car

problems and must take her car in for service. She does not know how long this will take. If she returns before the close of business she will continue to work on the project, if not, she will follow up tomorrow. (JX 111). I find that Complainant did not seek prior approval before taking leave for her car servicing and did not inform her manager of her car appointment until over an hour after she was to report for work. Complainant does not return to work.

At 10:06 a.m., Gabbay responds to Complainant, with a copy to Bahr, stating that he does not see any significant progress with the procedure that she attached. He states that with regard to the items she listed as being required to complete the process definition, he is not sure why this will cause any delays in defining the process. He asks her to let him know when she will be in the office so they can discuss it further. (JX 113).

Thur., April 23, 2009 At 8:42 a.m., Complainant sends an e-mail to Gabbay, with a copy to Bahr, stating that now that she is in the office, she will be happy to speak with him. She says she is incorporating many of the changes. One of the changes made was the definitions. The entire document must be completed. She further states that the most critical information she needs does not appear to exist. (JX 113).

At 8:52 a.m., Gabbay sends an e-mail to Complainant, with a copy to Bahr, scheduling a 10:30 meeting.

At 9:03 a.m., Bahr sends an e-mail to Gabbay asking him what Complainant means by “definition.” (JX 114).

At 9:51 a.m., Gabbay responds to Bahr stating that he just met with Complainant during the team meeting, and that she is trying to get into a very granular level of detail. He explained to her that she does not need to have all of the RCMs (risk control matrices) defined to identify the risk of not completing the process. Complainant mentioned she still needs to review all of the supporting procedures before she can complete the project. (JX 114).

At 12:59 p.m., Complainant sends an e-mail to Russell, Crews, and Adams, with copies to Gabbay and Bahr, stating that these are her comments to this morning’s team meeting, and she thinks they have some serious gaps that need to be addressed across the board. She provides a table explaining her rationale. (JX 155).

At 4:08 p.m., Complainant sends an e-mail to Gabbay, with a copy to Hall, stating that this is her status report as of today. She states it is evident they are missing a lot of documentation and it does not appear that work has been performed in 2008 to document IT Application Controls to support this intended procedure. She states there are severe gaps that must be addressed by SOX Technology. She states that FM’s methodology does not test at a sufficient level to gain the assurance it needs for system specific IT Application Controls which have a direct impact on the financial statements. (JX 155). I find that in this e-mail Complainant was communicating concerns related to a violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

At 5:42 p.m., Hall sends an e-mail to Fischman containing dates of IRB meetings and states that Complainant did not interact or provide input during the meetings and often acted disinterested. (JX 152).

At 8:33 p.m., Complainant faxes a complaint to the SEC Office of Investor Education and Advocacy stating *inter alia* that FM does not have Risk and Control Activities documented for its financially significant applications. No one at FM is aware of this Complaint to the SEC. (JX 178, EF 749). I find that in this fax, Complainant was communicating concerns related to a violation of a federal law or SEC rule or regulation relating to fraud against shareholders. She provides additional information to the SEC following her initial complaint, on various dates. I find that her subsequent communications with the SEC are related to her April 23, 2009, complaint. (JX 178).

Fri., April 24, 2009 At 9:14 a.m., Gabbay sends an e-mail to Complainant, with a copy to Hall, providing his point by point feedback to the 4:08 e-mail of the previous day. He tells Complainant that the issues she identified are not relevant to complete the ARQ procedures. He states that the control objectives and activities have all been documented and published since the inception of the SOX program and are on the Sharepoint site that she has access to. He tells her that the level of analysis she is performing is entirely too detailed and out of scope and she should stick to the level of detail previously discussed. (JX 95).

At 11:38 a.m., Slaughter sends Bahr a draft of the April 22, 2009, termination memorandum, and tells Bahr to look at the draft and tell her what she thinks. (JX 115).

At 2:50 p.m., Bahr responds to Slaughter that she is fine with the draft. (JX 115).

At 3:08 p.m., Slaughter sends an e-mail to Bahr stating that she is working with Legal to tighten this, and asks if Bahr is available on Monday morning. (JX 115).

At 4:52 p.m., Bahr responds that she is available, and for Slaughter to let her know what else she needs. (JX 115).

At 7:49 p.m., Slaughter responds that she has cleared her calendar for Monday morning, so they can meet and finalize the letter. Legal is on-board, but they need to tighten the memorandum a little more. (JX 115).

The *Request for Termination Memorandum* from Bahr to Wagner states that Bahr is requesting approval to terminate Complainant's employment. It states that they are working through performance and attendance issues. It further states that Complainant has repeatedly violated the company's attendance policy and sets forth a timeline of recent absences. (JX 116).

Sun., April 26, 2009 At 11:11 p.m., Complainant sends an e-mail to OFHEO⁹ attaching a complaint alleging that FM has deliberately withheld information from its board of directors and regulators regarding the true state of its IT Application environment by downplaying issues and

⁹ Complainant testified that the Federal Housing Finance Agency (FHFA) was the new name for the Office of the Federal Housing Enterprise Oversight (OFHEO).

indicating they are relying on compensating controls to support Financial Reporting Systems. No one at FM is aware of this Complaint to OFHEO. She provides additional information to OFHEO following her initial complaint, on various dates. (JX 178). I find that in this e-mail, Complainant was communicating concerns related to a violation of a federal law or SEC rule or regulation relating to fraud against shareholders. I find that her subsequent communications with the OFHEO are related to her April 26, 2009, complaint.

Mon., April 27, 2009 At 9:24 a.m., Complainant sends an e-mail to Fischman, with a copy to Slaughter, stating that based on activities involving Gabbay and Bahr last week, she has decided to report specific concerns to FHFA and SEC regarding Information Technology and Internal Controls in the SOX Technology Department. She alleges that Management of the SOX Technology Division has deliberately withheld information from FM's Board of Directors and Regulators by downplaying the actual state of FM's control environment surrounding significant IT Application Controls which have a direct impact on the Financial Statements. She states that her actions were necessary because she has exhausted the resources at FM to escalate her concerns and have them addressed properly, and she believes someone with expertise in Information Technology and Internal Controls would be better able to investigate the merits of her complaint. She requests Whistleblower protection. She tells Fischman to consider this communication as an extension of her discrimination complaint. (JX 178, EF 760). I find that in this e-mail, Complainant was communicating concerns related to a violation of a federal law or SEC rule or regulation relating to fraud against shareholders. I find that on this date, FM is on notice of Complainant's complaints to the SEC and OFHEO, though FM is not provided with the actual complaints or details thereof. I find that prior to receiving this e-mail, Fischman of Investigations was aware that HR and management were moving forward with terminating Complainant's employment and had conversations to that effect. (Tr. 168-196, 903). I also find that prior to this e-mail, Complainant had never in her verbal or e-mail communications with Investigations or HR specifically stated or implied that she had any concerns regarding SOX violations, fraud, or similar concerns. (Tr. 210-214, 862, 906-911).

At 11:36 a.m., Fischman sends an e-mail to Complainant, with copies to Slaughter and Arrington, thanking her for bringing her concerns to their attention and stating that Investigations will need to interview her to discuss her specific allegations and someone will be in touch with her shortly. At an unspecified time, Fischman's office, Compliance and Ethics Investigations, opens a case to look into Complainant's alleged SOX violations. (JX 178, EF 760, JX 132, Tr. 909).

At 12:59 p.m., Complainant sends an e-mail to Gabbay in which she attaches a draft of the ARQ process. (JX 117).

At 1:01 p.m., Gabbay responds to Complainant, thanking her, and states he will look at the draft and provide feedback by tomorrow. He asks how she is doing with the procedure document. (JX 119).

At 1:03 p.m., Complainant responds that she is working on them, but would like to review some of the Risk documentation related to IT application controls to properly define the risk associated with not performing these reviews. (JX 119).

At 1:33 p.m., Gabbay responds to Complainant, stating that since at this point not all the RCMs are fully defined, she should use the control framework as her basis to assess any risks associated with not completing the ARQ process, and gives her an example of how the document should read. (JX 119).

At 2:59 p.m., Complainant responds to Gabbay that she agrees, but there are other risks, and she will note his comments in the procedure. (JX 119).

At 3:02, p.m., Gabbay thanks Complainant. (JX 119).

At 4:04 p.m., Complainant responds to Fischman's 11:36 e-mail, with copies to Slaughter and Arrington, thanking her and stating that she should find attached a copy of Leonard's Accountability survey where she specifically documented her concerns with the SOX Program. She states her concerns were openly discussed since she transferred to the department. (JX 178, EF 760).

Tues., April 28, 2009 At 9:28 a.m., Gabbay responds to Complainant's draft of the day before, stating that she is moving in the right direction, and the level of detail for the SOX technology process needs to be more detailed. He tells her to let him know if she has any questions and they can review it today if necessary. (JX 118).

At 9:29 a.m., Complainant responds, thanking Gabbay and stating the detail will expand as she continues to work on the procedure. (JX 120).

At 9:34 a.m., Gabbay responds, telling Complainant to make notes in the document itself, so they do not have any confusion and he can understand her thought process and direction. He reiterates that in an e-mail at 9:53. (JX 120).

At 10:33 a.m., Complainant sends Gabbay an e-mail containing an example of the Change Type table she is developing. (JX 121).

At 3:16 p.m., Gabbay sends Complainant his comments and states he will stop by to discuss. (JX 121).

At 3:22 p.m., Complainant sends Gabbay an e-mail, thanking him for his feedback and stating the assumptions she is using. (JX 121).

At an unspecified time, Complainant files an initial complaint with the U.S. Department of Labor, OSHA. No one at FM is aware of this Complaint to OSHA. (She files supplemental complaints on July 27 and September 14, 2009.) I find that in this complaint, Complainant was communicating concerns related to a violation of a federal law or SEC rule or regulation relating to fraud against shareholders. I find that her subsequent communications with OSHA are related to her April 28, 2009, complaint. I find that FM became aware of the April 28, 2009, complaint sometime around May 13, 2009, when it was informed of such by OSHA.

At an unspecified time, Fischman schedules an interview with Complainant on April 30, 2009.

Wed., April 29, 2009 At 11:40 a.m., Bahr sends an e-mail to Gabbay inquiring as to whether he has heard from Complainant. He responds that he walks by every five minutes and she is not here. (JX 123).

At 1:20 p.m., Gabbay sends an e-mail to Complainant stating that he knows she had a doctor's appointment from 9:00 to 11:00, and inquiring as to whether she is planning to come into the office as it is now 1:15 and he, Bahr, and Hall have not heard from her. (JX 124).

At 1:25 p.m., Complainant responds that she left her cell phone at home while at the doctor's office, she decided to take lunch before coming to work, and plans to work late. Gabbay responds that it is no problem. (JX 124).

At 3:23 p.m., Complainant sends Gabbay an e-mail with attached ARQ procedures. (JX 122).

At an unspecified time, Veith and Slaughter meet with Complainant. Complainant surreptitiously records the conversation, but the recording has several indiscernible portions. Slaughter tells Complainant *inter alia* that they are making a decision to terminate her employment, but she wants to do more data collection to make sure what they have is sufficient and fair, so Complainant is being placed on administrative leave with pay while they review all of the documentation. Slaughter tells Complainant that the action is not based on her performance, but is based on her attendance and violation of the attendance policy. Slaughter tells Complainant that she is not being terminated at this point, but she will let her know when a final decision is made. (Tr. 104, 1279-1280, JX 177; EFA.57 Slaughter last day.wav file).

I found above that as of April 21, 2009, Bahr had made the decision to terminate Complainant's Employment and was working with HR on the necessary documentation. By April 24, 2009, or at the very latest, April 27, 2009, management (Bahr) had turned the termination action over to Slaughter for processing and was no longer actively involved. I find that Bahr was unaware that Slaughter was placing Complainant on administrative leave on April 29, 2009, and thought Complainant's employment would be terminated when Slaughter met with Complainant. Bahr initially thought that this meeting would take place on April 24, 2009, and found out at a later unspecified date that the meeting did not occur until April 29, 2009, and that Complainant was placed on administrative leave. I find that the subsequent delays in finalizing Complainant's termination were due solely to Slaughter's other work responsibilities at the time and her failure to prioritize the action involving Complainant. I find that Slaughter testified credibly that in the interim between placing Complainant on administrative leave and sending her a termination letter, Slaughter was transitioning to a new position. I find that Slaughter did not receive any additional information concerning Complainant in the interim period, but merely reviewed the documentation that had previously been prepared. (Tr. 1716-1719, 1758, 1775-1781, 1758).

Thur., April 30, 2009 Complainant misses a scheduled meeting with Fischman to discuss the SOX allegation concerns raised in her April 27, 2009, e-mail. Fischman calls Complainant's cell and home phone numbers and leaves a message for Complainant to call her. Investigations informs DT that Complainant has raised concerns of SOX violations, but has not provided sufficient details on which to base an investigation at this time. Investigations learns that Complainant was placed on administrative leave on April 29, 2009. (JX 132).

May 1 to 4, 2009 Investigations attempts to contact Complainant via e-mail and telephone. Complainant provides no further information. (JX 132, 153, 154). I find that FM did not prevent Complainant from meeting with Investigations and that she could have met with investigators despite being on administrative leave.

May 4, 2009 Complainant responds to an e-mail from Fischman telling her that she has been placed on administrative leave. She states that she believes HR's decision is an adverse action taken against her as a result of her OSHA whistleblower complaint. She states that she is seeking legal representation and does not want to discuss the matter with FM. (JX 132).

May 5, 2009 Fischman responds to Complainant's May 4, 2009, e-mail stating that Complainant still has an obligation to cooperate with the investigation and it is critical she maintain contact so they can continue to review the SOX allegations she has raised. She informs her that Complainant has not provided enough specific information about the scope of the allegations to enable them to conduct an investigation, and encourages Complainant to provide further information or it will be necessary to close the file. She informs her that investigation into the prior allegations Complainant made regarding violations of the Code of Conduct and the EEO/Non-Discrimination and Non-Retaliation policies will continue. (JX 132).

May 8, 2009 Complainant is interviewed by OSHA in regard to her previously filed complaint. (Tr. 106).

around May 13, 2009 OSHA notifies FM of Complainant's complaint. (JX 178, EF 777).

May 14, 2009 Investigations closes Complainant's SOX allegation case, finding that Complainant has provided insufficient information to support a viable allegation of potential SOX violations in the SOX Technology Department. (JX 132).

May 19, 2009 Complainant sends documentation to the SEC in support of her previously filed complaint. (JX 178, EF 781).

sometime in May 2009 Complainant testified that she requested payroll and personnel records from either FM's legal department or HR department, and that the company ignored her request and refused to cooperate with the OSHA investigation. Complainant testified that she sent a request to FM by certified mail, but does not cite to a joint exhibit containing such a letter. Upon examining the record, I find that it is unclear whether FM responded directly to Complainant, but FM did cooperate with the OSHA investigation and provide information, as requested by OSHA. (Tr. 106, JX 178 at EF 875, *et seq.*).

July 17, 2009 By letter, Slaughter informs Complainant that when they last met on April 29, 2009, she had informed Complainant that FM had determined to terminate her employment based upon unacceptable performance, conduct, and attendance issues. She told Complainant that she would double check the information and place her on administrative leave. After a delay due to her transition into a new position, she has now completed her review of the underlying documentation and found no cause to reconsider FM's earlier decision to terminate Complainant's employment. Accordingly, Complainant's employment is terminated effective July 17, 2009. (JX 170).

September 29, 2009 Investigations issues a decision in Complainant's case involving allegations that she was retaliated against because she escalated concerns about her 2008 Performance Review and other issues to management and HR personnel and allegations that she was discriminated against based on her race. Investigations finds that the evidence does not substantiate Complainant's allegations and closes its file on the matter. (JX 133).

Credibility

Complainant

After conducting a thorough review of the briefs, transcript, documentary evidence, and audio files submitted in this case, I find there are some portions of Complainant's testimony that are internally inconsistent and/or contrast with other evidence of record. I find that Complainant either remembered or perceived some events differently than the way in which the record as a whole supports that they occurred. I therefore will address the specific issues that I have with Complainant's testimony which cause me to find several portions of her testimony not credible. I incorporate the following points into my specific findings of fact, above.

1. In her testimony, Complainant stated that on various occasions prior to her April 27, 2009, e-mail, she reported to both Veith and Slaughter at HR and Fischman at Investigations that she was being retaliated against based on allegations or reports she had made to management of alleged SOX or fraud violations and that she discussed with them or provided them with the Accountability Survey that she prepared regarding Leonard. Having reviewed the testimony of Slaughter, Fischman, and Arrington, the transcripts and recordings of conversations recorded by Complainant, the Investigative reports, the complete record, and written briefs, I find that Complainant did not either specifically assert or imply to HR or Investigations, prior to her April 27, 2009, e-mail, that she was being retaliated against based on any SOX protected activity or that she had ever engaged in any SOX protected activity. Nor did she discuss or provide HR or Investigations with the Accountability Survey she prepared regarding Leonard, prior to April 27, 2009.

2. Complainant testified that she was not provided with clearly defined goals until March 31, 2009. However, the record supports that she was given specific development goals on March 4, 2009, which were discussed with her verbally and/or by e-mail on that date and on several subsequent dates prior to March 31, 2009. Complainant also testified that the work she was given, to include preparation of the training project (contained in her development goals), was "busy work" and unnecessary. However, the record supports that the projects assigned to

Complainant, including the training project, were legitimate projects that were needed and used by FM management.

3. Complainant testified that her 2007 Year-End Performance Review was primarily positive. However, upon examination, Complainant received a rating of L- and the review contained negative comments indicating that Complainant needed to work on communication and teaming and had miscommunications with team members. The record also supports that Complainant perceived this review as negative and made allegations that her manager was retaliating against her by giving her a negative review.

4. Complainant testified that on April 17, 2009, she did not leave the office early, without notifying management. However, the record, including testimony of witnesses, e-mail traffic and a recording of a conversation between Complainant and Gabbay on April 20, 2009, supports that she did leave without notifying management or requesting prior approval.

5. Complainant's testimony regarding a document she prepared entitled *Disclosure Controls Procedure Violations* was inconsistent. Complainant first testified that she prepared this document and provided it to Hall between December 29, 2008, and January 14, 2009. She then changed her testimony and testified that the document had been revised several times, but she provided something similar to Hall. When asked on cross-examination, she then testified that, in fact, the document was never provided to Hall, although she verbally discussed its content with Hall (on an unspecified date). I find that Complainant did not prepare this document or provide its contents to Hall between December 29, 2008, and January 14, 2009, but that she prepared it at some later date as she was preparing to submit complaints to the SEC, OFHEO, and OSHA, and that she did not submit this document or its contents to Hall or anyone else at FM until it was disclosed in discovery for the hearing before this tribunal.

6. Complainant testified that she was told by management, i.e., Hall, Bahr, and Gabbay that she had to rely on the scope and approach documents for applications and platforms in order to complete the PowerPoint training deck. Complainant further testified that management wanted her to misrepresent the status of FM's remediation efforts in the training presentation. After reviewing the record, I find no evidence that Hall, Bahr, or Gabbay told Complainant she had to rely on the scope and approach documents in order to complete the PowerPoint training presentation. Rather, I find that she was specifically told that she should not rely on these documents as the basis for the training. I find that Bahr and Hall did tell Complainant that these documents contained some helpful background information, and that she could consult them as one of many sources to assist her, but she was not told that she had to rely on these documents or any specific information contained therein. Complainant confirmed that she was told this in her testimony.

I also find that Complainant was not told that she was to make any specific representations as to the status of FM's remediation efforts in the training presentation. Rather, the purpose of the presentation, as explained to Complainant by Bahr in a conversation surreptitiously recorded by Complainant, was to educate the SOX Business team, which had recently combined with the SOX Technology Team, as well as TRL's, as to the type of work that the SOX Technology team had been performing, and give them a general overview of

technology controls and the types of things that the team looks at in order to complete testing and controls. Complainant confirmed that she understood this to be the purpose of the training in her own testimony.

7. Complainant testified that on March 9, 2009, she provided Bahr with an outline of the training project. After examining Complainant's own e-mail in which she stated that she was not going to provide an outline, examining the e-mail traffic, and the four bullet points that she stated, after the fact, constituted an outline, I find that Complainant did not provide an outline for the training project to management either on March 9, 2009, or thereafter.

8. Complainant testified inconsistently as to her interpretation of the handwritten comments Bahr provided her with on March 26, 2009. First, Complainant testified that she interpreted Bahr's comments as legitimate, requiring additional research to bring the slides up to her expectation. However, Complainant then changed her testimony and testified that she interpreted Bahr's comments as "just games" that were being played by Bahr and Hall.

Slaughter

After reviewing the briefs, transcript, deposition, exhibits and audio files, I find that the testimony of Slaughter was generally credible, although she could not recall some specific dates of meetings and communications and the exact content of conversations. The parties have stipulated that on April 29, 2009, Slaughter placed Complainant on paid administrative leave based on Complainant's alleged non-performance and unexcused absences. I find that Slaughter's testimony that she placed the Complainant on administrative leave in order to review documentation relating to attendance was credible and that the reason for the delay in Slaughter reviewing the documentation was due to the fact that she was transitioning to a new position, had other job responsibilities, and did not prioritize the action involving Complainant.

Other Witnesses

I found the testimony of the other witnesses to be credible and consistent, though there were some minor discrepancies in some of the witnesses' recollection of specific dates when events or e-mails occurred. However, I do not find that any of these discrepancies are significant to my analysis of this case.

Applicable Law

Congress enacted the SOX on July 30, 2002, as part of a comprehensive effort to address corporate fraud. SOX Title VIII is designated the Corporate and Criminal Fraud Accountability Act of 2002 (the Accountability Act). Section 806, the SOX's employee-protection provision, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. That provision states:

(a) Whistleblower Protection For Employees Of Publicly Traded Companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), 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 section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) 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); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

Section 806 complaints filed are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C.A. § 42121 (West Supp. 2010).¹⁰ Accordingly, to prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action.¹¹ If the complainant carries her burden of proving causation, the respondent can avoid liability by demonstrating clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.¹²

Protected Activity

¹⁰ See 18 U.S.C.A. § 1514A(b)(2)(C).

¹¹ See 18 U.S.C.A. § 1514A(b)(2).

¹² *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, slip op. at 8; (ARB July 29, 2005); *cf.* 29 C.F.R. § 1980.104(c); see 49 U.S.C.A. § 42121 (a)-(b)(2)(B)(iv).

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, (“Secretary”) has broadly defined protected activity as a report of an act that the complainant reasonably believes is a violation of the subject statute. Under SOX, 18 U.S.C. § 1514A(a)(1), an employee engages in protected activity when she provides information regarding corporate conduct which the employee believes “constitutes a violation of” at least one of six specific categories of criminal fraud or security violations set out in the Act. The employee’s belief must be subjectively and objectively reasonable. Although an employee is not required to identify the specific criminal provision, SEC rule or regulation, or applicable provision of federal law, her protected communication must nevertheless relate to one. The six categories specified by 18 U.S.C. § 1514A(a)(1) in which violation may be reported by an employee are:

1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds and Swindles [mail fraud]. This provision establishes that use of the Post Service or a private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by Wire, Radio, or Television [wire fraud]. This provision establishes that use of wire, radio, or television communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank Fraud [bank fraud]. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime punishable by not more than thirty years imprisonment.

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities Fraud [securities fraud].¹³ This provision establishes that executing a scheme or artifice a) to defraud any person in connection with any security of an issuer of a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15(d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime punishable by not more than twenty-five years imprisonment.

5. Any rule or regulation of the Securities Exchange Commission.

6. Any provision of federal law relating to fraud against shareholders.

To sustain a complaint of having engaged in SOX-protected activity, where the complainant’s asserted protected conduct involves providing information to one’s employer, the complainant need only show that he or she “reasonably believes” that the conduct complained of constitutes a violation of the laws listed at Section 1514. 18 U.S.C.A. § 1514A(a)(1). “The Act

¹³ This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

does not define ‘reasonable belief,’ but the legislative history establishes Congress’s intention in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that ‘a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.’ See generally, *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993).” S. Rep. 107-146 at 19 (May 6, 2002).” *Sylvester v. Parexel Int’l*, at 14, ARB No. 07-123, ALJ Nos. 2007-SOX-39, 2007-SOX-42 (ARB May 25, 2011).

The ARB has interpreted the concept of “reasonable belief” to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and that the belief be objectively reasonable. To satisfy the subjective component of the “reasonable belief” test, the employee must actually have believed that the conduct complained of constituted a violation of relevant law. The objective component “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Sylvester* at 14-15, citing *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009).

The reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities. *Sylvester*. at 15. The Complainant need not establish the various elements of criminal fraud to prevail on a section 806 retaliation complaint. *Id.* at 21-22. Additionally, an employee’s whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer’s conduct constitutes a violation of one of the six enumerated categories of law under Section 806. *Sylvester* at 16, citing *Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-7, slip op. at 6 (ARB Jan. 31, 2006).

In considering whether Complainant engaged in a SOX protected activity there are thus three factors to examine: 1) whether the report or action relates to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; 2) whether Complainant’s belief about the purported violation was subjectively and objectively reasonable; and 3) whether Complainant communicated her concern to either her supervisor (or other person working for the employer who has the authority to investigate, discover, or terminate misconduct); a federal regulatory or law enforcement agency; or a member or committee of Congress. 18 U.S.C. § 1514A(a)(1).

Complainant alleges ten potential instances of protected activity: 1) reporting insufficient documentation to support FM’s assertion that internal control deficiencies had been remediated; 2) reporting that deficiencies in the DMS internal controls deficiency list were not reflected in SEC disclosures available to the public; 3) reporting that significant internal control deficiencies were not disclosed in SEC filings; 4) reporting weaknesses in Control Self-Assessments and process documentation in an *Accountability Survey for the Managers for Robert E. Leonard*; 5) reporting lack of documentation to support a training presentation she had been assigned to create; 6) reporting SOX violations to the SEC on April 23, 2009, and subsequently providing documentation in support of her allegations on May 19, 2009; 7) reporting to her supervisors on April 23, 2009, that FM’s methodology does not test at a

sufficient level to gain the assurance it needs for system specific IT Applications Controls which have a direct impact on FM's financial statements; 8) reporting SOX violations to OFHEO on April 26, 2009; 9) reporting to internal FM investigators on April 27, 2009, that she had decided to report concerns to FHFA and SEC that Management of the SOX Technology Division had deliberately withheld information from FM's Board of Directors and Regulators; and 10) reporting on April 28, 2009, to OSHA that she had suffered whistleblower retaliation for making reports of SOX violations and OSHA subsequently notifying FM on May 13, 2009, of her complaint.

1) Reporting insufficient documentation to support FM's assertion that internal control deficiencies had been remediated

As discussed in my specific findings of fact above, for the period around November 2008 to January 2009, I found that in late December of 2008, Complainant verbally told Hall she believed there was insufficient documentation to support the remediation status of some internal control deficiencies. Hall acknowledged having a conversation with Complainant, but dismissed Complainant's concerns, based on her own belief that the internal control deficiencies had been remediated and/or related to low ranking deficiencies that did not impact FM's financial reports. Although Complainant did not use specific terminology such as fraud, SEC violation, or SOX violation in her discussion with Hall or communicate the reasonableness of her beliefs, she was not required to do so, and I find that she did communicate a concern related to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

I further find that Complainant subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony in this regard. With regard to objective reasonableness, I find based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed the same. Hall, in her position as a manager, was not similarly situated to Complainant, so although she may have had additional knowledge which lead her to believe that Complainant's concerns were not valid, her belief is irrelevant. Accordingly, I find that Complainant engaged in protected activity, which was communicated to FM in late December 2008.

2) Reporting that deficiencies in the DMS internal controls deficiency list were not reflected in SEC disclosures available to the public; 3) Reporting that significant internal control deficiencies were not disclosed in SEC filings.

I will discuss these two potential protected activities together since they are related. Complainant testified in an inconsistent manner as to whether she provided anyone at FM with documentation describing her concerns that FM had failed to report internal control deficiencies to the SEC or in public disclosures. Complainant testified that she told Hall in late December of 2008 that there was insufficient documentation to support the remediation status of internal control deficiencies, as discussed above. However, she further testified that she dropped the issue with Hall sometime in January 2009, because she wanted to conduct her own research into FM's SEC filings and conduct due diligence before proceeding further with her accusations. Complainant did conduct her own research starting sometime in February of 2009 and eventually

concluded that FM had not filed accurate reports with the SEC. However, she did not report her conclusions or concerns to anyone until she filed a complaint with the SEC on April 23, 2009. On April 27, 2009, she informed Fischman and Slaughter at FM that she intended to report concerns to the FHFA and SEC, i.e., that management at FM had deliberately withheld information from FM's Board of Directors and Regulators. (*See* specific findings of fact for the period around November 2008-January 2009, above).

I find that Complainant subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony. With regard to objective reasonableness, I find based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed the same. Accordingly, I find that Complainant engaged in protected activity on April 23, 2009, and this protected activity was communicated to FM on April 27, 2009.

4) Reporting weaknesses in Control Self-Assessments and process documentation in an *Accountability Survey for the Managers for Robert E. Leonard*.

As discussed in my specific findings of fact above for the period around December 1, 2008, Complainant electronically submitted an anonymous *Accountability Survey for the Managers of Robert E. Leonard*. In the survey, Complainant made comments that Control Self-Assessments did not provide organizational value because they were too general and needed to be system specific and that the department lacked critical process documentation commonly maintained in mature SOX programs. In an e-mail on April 27, 2009, Complainant sent a copy of the *Accountability Survey* to Fischman at Investigations, with a copy to Slaughter at HR, stating that it documented her concerns with the SOX program. I find that Complainant's statement that the department lacked critical process documentation commonly maintained in mature SOX programs was sufficient to communicate a concern related to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

I find that Complainant subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony. I further find that a reasonable person in the same factual circumstances and with the same training and experience as Complainant would have believed the same.

I find that although Complainant communicated her concerns sometime around December 1, 2008, and these concerns were presented to Leonard and Barton, neither Leonard nor Barton attributed the comments to Complainant, because the survey was anonymous. Although Complainant speculated that Leonard knew she had made the comments, I find insufficient evidence to support such a finding. It was not until April 27, 2009, when Complainant sent a copy of her comments to Fischman and Slaughter, that FM became aware that she had made such comments. I therefore find that FM was aware of Complainant's protected activity on April 27, 2009.

5) Reporting lack of documentation to support a PowerPoint training presentation that she had been assigned to create.

As discussed in my findings of fact above, Complainant asserted in several communications beginning on March 20, 2009, that management, i.e., Bahr, Hall, and Gabbay, refused to provide her with updated scope and approach documents, which she claimed management told her she needed to rely on in order to complete the training deck slide presentation. Complainant further asserted that management wanted her to misrepresent the status of FM's remediation efforts in the assigned training presentation. As stated in my findings of fact above, I found insufficient evidence to support Complainant's assertion that she was told she had to rely on the scope and approach documents to complete the training project. I found that she was specifically told that she should not rely on these documents as the basis for the training. I also found that Complainant was not told that she was to make any specific representations as to the status of FM's remediation efforts. Rather, the purpose of the training, as communicated to her, was to educate the SOX Business team and TRL's as to the type of work the SOX Technology team had been performing, and give them a general overview of the work. (*See* specific findings of fact above for March 5 and 20, 2009).

Furthermore, I found above that Complainant never indicated to management that the information she claimed was lacking in the scope and approach documents had anything to do with potential SOX violations, and thus I find that Complainant did not communicate a concern related to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. In fact, on March 20, 2009, Bahr asked Complainant to clarify what information she felt was missing from the scope and approach documents that she needed to complete the project. Complainant did not provide a response. On April 2, 2009, Complainant sent an e-mail to Hall, Gabbay, and Bahr, in which she attached a spreadsheet listing the issues she had with the scope and approach documents. As I found above, neither the e-mail nor the spreadsheet attachment specified or implied any allegations of potential SOX violations, but rather related to formatting issues, presentation, and non-substantive issues. (*See* findings of fact for April 2 and 13, 2009). After a review of the complete record and arguments of the parties, I find that Complainant did not engage in protected activity in reporting that she needed additional information to complete the training deck presentation.

6) Reporting SOX violations to the SEC on April 23, 2009, and subsequently providing documentation in support of her allegations on May 19, 2009.

Clearly, by filing a complaint with the SEC, Complainant was communicating a concern related to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. I find that Complainant subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony in this regard. With regard to objective reasonableness, I find based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed the same. However, I find that Complainant did not communicate her concern to FM until April 27, 2009, when she informed Fischman and Slaughter that she had decided to report specific concerns to FHFA and the SEC that FM management had withheld information from the Board of Directors and Regulators. Accordingly, I find that FM became aware of Complainant's protected activity with the SEC on April 27, 2009. On May 19, 2009, when she provided

documentation to the SEC in support of her April 23, 2009, allegations, Complainant engaged in a second protected activity with the SEC. I find that her May 19, 2009, activity was related to the claim she filed with the SEC on April 23, 2009. By May 19, 2009, FM was already aware of Complainant's protected activity with the SEC, as Complainant had informed it of such on April 27, 2009.

7) Reporting to her supervisors on April 23, 2009, that FM's methodology does not test at a sufficient level to gain the assurance it needs for system specific IT Applications Controls which have a direct impact on FM's financial statements.

As I found in my specific findings of fact above for the date April 23, 2009, in an e-mail communication to her supervisors, Complainant communicated concerns related to a violation of a federal law or SEC rule or regulation relating to fraud against shareholders. In testimony, Gabbay and Bahr confirmed that they believed Complainant to be making such allegations, although they did not believe the allegations were valid, and thought Complainant was confused.

I find that Complainant subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony. With regard to objective reasonableness, I find based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed the same. Accordingly, I find that Complainant engaged in protected activity on April 23, 2009, and this protected activity was communicated to FM on April 23, 2009.

8) Reporting SOX violations to the OFHEO on April 26, 2009.

Clearly, by filing a complaint with the OFHEO on April 26, 2009, Complainant was communicating a concern related to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. I find that Complainant subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony in this regard. With regard to objective reasonableness, I find based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed the same. However, I find that Complainant did not communicate her concern to FM until April 27, 2009, when she informed Fischman and Slaughter that she had decided to report specific concerns to the FHFA and the SEC that FM management had withheld information from the Board of Directors and Regulators. Accordingly, I find that FM became aware of Complainant's protected activity with the OFHEO on April 27, 2009.

9) Reporting to internal FM investigators on April 27, 2009, that she had decided to report concerns to FHFA and SEC that Management of the SOX Technology Division had deliberately withheld information from FM's Board of Directors and Regulators.

As stated in my specific findings of fact, on April 27, 2009, Complainant communicated a concern to Fischman and Slaughter of FM related to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. I find that Complainant

subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony in this regard. With regard to objective reasonableness, I find based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed the same. I find that FM thus became aware of Complainant's protected activity on April 27, 2009.

10) Reporting on April 28, 2009, to OSHA that she had suffered whistleblower retaliation for making reports of SOX violations and OSHA subsequently notifying FM on May 13, 2009, of her complaint.

Clearly, by filing a complaint with OSHA on April 28, 2009, Complainant was communicating a concern related to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. I find that Complainant subjectively believed that the conduct complained of constituted a violation of a federal law or SEC rule or regulation relating to fraud against shareholders, based on her testimony in this regard. With regard to objective reasonableness, I find based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed the same. However, I find that Complainant's protected activity was not communicated to FM until May 13, 2009, when it was informed by OSHA of Complainant's complaint. I find that Complainant's communications with OSHA subsequent to April 28, 2009, were related to the protected activity on April 28, 2009, that FM became aware of on May 13, 2009.

Adverse Action

The ARB recently clarified the standard of what constitutes an adverse action against SOX whistleblowers in *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5 (ARB Sept 13, 2011). The Board cited to the plain language of SOX section 806 which states that no employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." *Id.* at 15. The Board found that by explicitly proscribing non-tangible activity, the language of SOX bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. The Board found that the express statutory language of section 806 is more expansive than the Title VII provisions addressed in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006),¹⁴ and consequently demands a correspondingly broader interpretation. The Board adopted the standard of actionable adverse action set forth in *Williams v. American Airlines Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12-15 (ARB Dec. 29, 2010), i.e., that the term "adverse action" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. *Menendez* at 17. The Board nevertheless found that the *Burlington*

¹⁴ The Supreme Court's holding in *Burlington* addressed both the degree and scope of protection Title VII's anti-retaliation provision (Section 704) affords. With respect to the degree of actionable harm, the Court held that a Title VII plaintiff bringing a retaliation claim need only show the employer's challenged actions are "materially adverse" or "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

standard serves as a helpful guide for the analysis of adverse actions under SOX. *Id.* The Board also emphasized that adverse actions must be reviewed both separately and in the aggregate.

Complainant alleges that Respondent took the following eight adverse actions against her: 1) giving Complainant a lowered performance evaluation on March 4, 2009, for her end-of-year 2008 Performance Review; 2) giving Complainant a Memorandum of Concern on March 4, 2009; 3) removing Complainant from significant duties; 4) assigning Complainant unachievable tasks; 5) engaging in intrusive surveillance of Complainant; 6) placing Complainant on involuntary administrative leave; 7) failing to provide Complainant with requested payroll and personnel records for her OSHA complaint; and 8) terminating Complainant's employment.

I find that under the standard articulated in *Menendez*, the 2008 Year-End Performance Review, Memorandum of Concern, involuntary administrative leave, and termination of employment constituted adverse actions.

However, I find that the remaining alleged actions did not constitute adverse personnel actions under the standards discussed above, looking at them both separately and in the aggregate. As discussed in my findings of fact, I found that Complainant was not removed from significant duties, but rather that the duties assigned to her were of significance to the company. I found that Complainant's assertion that assignments given to her were simply "make work" duties was not supported by the evidence of record. I also found that the record does not support Complainant's assertion that she was assigned "unachievable tasks." Furthermore, I found that her characterization of management's activities as constituting "intrusive surveillance" to be inaccurate.

With regard to the failure to provide Complainant with records to support her OSHA complaint, Complainant did not cite to any authority to support why this would constitute an adverse personnel action, and I find that it does not meet the standards discussed above. Furthermore, I found that while it was unclear whether Respondent responded directly to Complainant's request for information to support her OSHA complaint, Respondent did, in fact, cooperate with the OSHA investigation by providing information directly to OSHA.

Contributing Factor

Despite having engaged in protected activity and suffered adverse personnel actions, to establish discrimination under SOX, Complainant must also prove by a preponderance of the evidence a causal connection between her protected activity and the unfavorable personnel actions.

The ARB recently clarified that a "contributing factor" is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-952, ALJ No. 2005-SOX-33, slip op. at 12 (ARB Sept. 30, 2011), citing *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Clark v. Airborne, Inc.*, ARB NO. 08-133, ALJ No. 2005-AIR-27, slip op. at 7 (ARB Sept. 30, 2010). It found that the contributing factor standard was "intended to overrule existing case law, which

required that a complainant prove that his or her protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor” in a personnel action.” *Bechtel* at 12, citing *Allen v. Stewart Enter., Inc.*, ARB No. 06-081, ALJ Nos. 2004 SOX-60, -62; slip op. at 17 (ARB July 27, 2006). Therefore a complainant need not show protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity. *Bechtel* at 12, citing *Walker v. Am. Airlines, Inc.*, ARB No. 05-28, ALJ No. 2003-AIR-17, slip op. at 18 (ARB Mar. 30, 2007).

Causation may be proven through either direct or circumstantial evidence. Thus, if a complainant shows that an employer’s reasons for its actions are pretext, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor. *Bechtel* at 12-13. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, shifting explanations for an employer’s actions, and more.¹⁵ *Bechtel* at 13, citing *Sylvester*. An ALJ must weigh the circumstantial evidence as a whole to properly gauge the context of the adverse action in question. *Bobreski* at 13-14. A complainant is not required to prove pretext as the only means of establishing the causation element of a SOX whistleblower claim. As the ARB has stated, to prevail on a complaint, the employee need not necessarily prove that the employer’s reasons for the adverse action was pretext. However, doing so provides the complainant with circumstantial evidence of the mindset of the employer, which may be sufficient to establish by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse employment decision. *Bechtel* at 13, citing *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-11, slip op. at 19 (ARB May 31, 2006).

As discussed above, I found that there were four adverse personnel actions taken with regard to Complainant: 1) a lowered 2008 Year-End Performance Review; 2) a Memorandum of Concern; 3) involuntary administrative leave; and 4) termination of employment. I will examine each action to determine whether Complainant has met her burden of establishing that her protected activity was a contributing factor in these actions.

1) 2008 Year-End Performance Review and Memorandum of Concern

I will examine the causation of these two adverse actions together since both were taken on the same date, March 4, 2009. As I found above, both the Performance Review and the Memorandum of Concern were written by Hall, with no input from Leonard, Gabbay, or Bahr. Both actions were taken subsequent to Complainant’s verbal statements to Hall in late December 2008 regarding documentation to support the remediation status of some internal control activities. I found above that Complainant’s December statements constituted protected activity.

¹⁵ Circumstantial evidence may also include evidence of motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

In her brief, Complainant does *not* argue that her December statements to Hall contributed to Hall giving her a lowered performance evaluation and a Memorandum of Concern on March 4, 2009, however, the temporal proximity of these two actions to Complainant's late December protected activity provides some circumstantial evidence of causation, and therefore I will address the issue. *See Bechtel* at 13. Examining the other types of circumstantial evidence described in *Bechtel* and *Bobreski* above, I find insufficient evidence to support that any such factors existed in this case which would support a finding of causation, e.g., inconsistent application of policies, shifting explanations, animus, etc.

In its brief, Respondent argues that there were several non-retaliatory reasons why Hall gave Complainant the lowered Performance Review and Memorandum of Concern. First, it asserts Hall was influenced by feedback from Complainant's peers who had absolutely no knowledge of her whistleblowing allegations. For example, Steward and others complained that Complainant was inattentive at meetings and surfed the Internet. Adams and Shaikh also complained about Complainant's lack of participation at meetings. Other employees and external consultants complained of Complainant's rudeness in e-mail communications. Respondent also asserts that Complainant's peers submitted negative comments on her 2008 accountability survey, which Hall considered in drafting the review and memorandum. Respondent asserts that Hall personally observed Complainant's lack of effort, inattention at meetings, attendance issues and failure to interact with TRL's, and that she had counseled Complainant about these concerns. Respondent asserts that Hall noticed stark differences between Complainant's performance and that of her peers, and that she had followed the guidance set forth by the CEO in ranking employees and placing Complainant in the lower 25th percentile among her peers. Respondent asserts that Complainant did not adequately perform an assigned task of updating the 2008 Fourth Quarter Scope and Approach document. Finally, Respondent asserts that Hall rated employees in a consistent manner, that similarly situated employees also received low performance reviews, and another employee was terminated for similar performance and attendance issues.

After examining the temporal proximity of the adverse actions to Complainant's protected activity as well as the arguments presented by Respondent, I find the preponderance of the evidence in this record establishes that Complainant's December 2008 protected activity did not contribute to her receiving a lowered 2008 Year-End Performance Evaluation and a Memorandum of Concern on March 4, 2009.

Looking at the evidence of record, Complainant's employment history prior to her late December discussion with Hall weighs significantly against her on the causation issue because: a) it documents Complainant's pre-existing performance issues in the areas of professional communications, timeliness, initiative, attendance, quality of work product, and participation at meetings, as well as Hall's discussions with HR in November, prior to the protected activity, regarding giving Complainant an FM- rating and memorandum of concern; and b) establishes a reasonable foundation unrelated to any SOX protected activity for the Performance Evaluation and Memorandum of Concern actions taken by Hall in March of 2009. Looking at the record chronologically, it establishes:

- 1) In July 2008, Complainant's peers submitted unfavorable comments to Leonard regarding her lack of participation at meetings, timeliness of her response to requests, failure to request work during downtime, and abrasive communication. When Leonard gave Complainant her mid-year 2008 Performance Review, he shared with Complainant the feedback from her peers, told her of concerns with her tardiness, and his expectation that she become more involved in meetings in the third quarter. In conjunction with the transition in leadership to Hall, Leonard had discussions with Hall regarding concerns with Complainant's performance. In the third quarter of 2008, Hall expressed concerns to Leonard about the quality of some of Complainant's deliverables. Leonard advised Hall to speak to HR.
- 2) In the Fall of 2008, Hall received complaints from Complainant's peers and TRL's that Complainant was surfing the Internet during IRB meetings and not participating. Hall also observed such behavior. Adams and GT complained to Hall about e-mails from Complainant that were unprofessional in tone. Hall verbally counseled Complainant regarding attendance problems, surfing the Internet, lack of participation in meetings, and unprofessional e-mail communications. On October 22, 2008, Hall found Complainant's draft of the Fourth Quarter Testing Scope Document to be unsatisfactory, due to inaccuracies. On November 20, 2008, Hall spoke to HR about her concerns with Complainant's performance and the likelihood that she would give Complainant an FM- performance rating. Hall specifically spoke to HR about Complainant's failure to follow through on projects like updating the scope document, not being engaged, and showing up late to meetings. HR responded by sending Hall a sample memorandum of concern for attendance and tardiness and a sample performance counseling memorandum.
- 3) Around December 1, 2008, Complainant's peers/internal customers, and two of her managers submitted an accountability survey describing Complainant's performance. The survey contained several negative comments regarding Complainant's performance, lack of participation, lack of initiative, surfing the Internet and not participating in meetings, and attendance issues. Hall received this survey input and considered it when preparing Complainant's Performance Review and Memorandum of Concern.
- 4) On December 4, 2008, Hall verbally counseled Complainant about negative and disrespectful language in e-mail communications.
- 5) On December 12, 2008, FM's CEO put out guidance explaining a new, more rigorous performance evaluation system in which employees would be rated relative to their peers, and in which 20% of employees would receive FM- or SI ratings. On December 19, 2009, FM's Executive Committee reiterated this guidance and provided a chart indicating which scores would rank in the bottom 25th percentile. The score on Complainant's accountability survey placed her in the bottom 25th percentile.
- 6) Sometime in late December 2008, Hall counseled Complainant about her attitude regarding an assignment. Hall directed Complainant to seek help from a peer, Miller, who then completed the assignment. Also, sometime in late December 2008, Hall had the discussion with Complainant described above, which I found to constitute protected activity. At the time, Hall

dismissed Complainant's concerns as not valid, based on her own knowledge of the control systems.

7) On January 7, 2009, Hall verbally counseled Complainant about being late to meetings and push-back on assignments that were not perfectly bundled. In January and February there were several instances where Complainant did not seek approval prior to changing her work schedule and/or would inform her manager of appointments and other circumstances after the start of her normal workday, when she should have already been at work. On February 17, 2009, Hall counseled Complainant on attendance and tardiness issues.

Accordingly, based upon my review of the entire record, credibility of the parties, and briefs, I find that Complainant has not established by a preponderance of the evidence that her protected activity was a contributing factor to her receiving a lowered performance evaluation and a memorandum of concern.

2) Involuntary Administrative Leave

On April 29, 2009, Complainant was placed on involuntary administrative leave by Slaughter who, as an HR professional, was assisting Bahr in terminating Complainant's employment. The decision to terminate Complainant's employment was made by Bahr, who sought procedural assistance from Slaughter. Bahr made the decision to terminate Complainant's employment on April 21, 2009. Bahr had not sought to place Complainant on administrative leave, and was not aware that Complainant had been placed on administrative leave until sometime after the fact. Slaughter placed Complainant on leave without consulting Bahr, because Slaughter wanted to have time to review the documentation, including dates and circumstances surrounding Complainant's attendance before issuing a termination letter. Bahr believed that when Slaughter met with Complainant, Complainant's employment would be terminated. Bahr believed that the termination would take place sometime around April 24, 2009.

I found that Complainant engaged in several protected activities prior to April 29, 2009 of which Bahr and/or Slaughter was aware:

- 1) On April 23, 2009, Complainant filed a complaint with the SEC. Complainant informed Slaughter on April 27, 2009, that she intended to report concerns to the SEC.
- 2) On April 27, 2009, Complainant sent a copy of the Leonard Accountability Survey to Slaughter, informing Slaughter that it documented her concerns with the SOX program.
- 3) On April 23, 2009, Complainant sent an e-mail to Bahr in which she asserted potential SOX violations.
- 4) On April 26, 2009, Complainant filed a complaint with the OFHEO. Complainant informed Slaughter on April 27, 2009, that she intended to report concerns to the FHFA.

Complainant argues that her protected activities were a contributing factor to the adverse action of placing her on involuntary administrative leave, and that FM would not have placed her on administrative leave on the date it did, but for her protected activity.

Respondent argues that Complainant did not engage in protected activity prior to April 27, 2009, and that it had legitimate, non-retaliatory reasons to terminate Complainant's employment. Respondent argues that Complainant's employment was terminated due to poor performance and attendance issues. Respondent does not address the administrative leave as a separate action, but rather as a part of the termination process.

Looking at the evidence of record, Complainant has circumstantial evidence that she was placed on administrative leave due to her protected activity based on the temporal proximity of her actions to the adverse action. In the week prior to the adverse action, Complainant did engage in protected activity, as enumerated above. It is therefore clear why Complainant, from her perspective, would believe there was a causal connection between her protected activity and the adverse action.

However, Complainant was not aware of other events and communications that had been occurring between Bahr and HR prior to April 29, 2009. Specifically, what Complainant was not aware of on April 29, 2009, and is not readily apparent until one examines all of the events leading up to April 29, 2009, is that, in fact, the decision to terminate Complainant's employment had already been made by her manager, Bahr, on April 21, 2009, prior to any of the protected activities, enumerated above. Additionally, by April 23, 2009, the date of the first relevant protected activity, Bahr had already drafted a request for termination memorandum and was actively working with Slaughter to effectuate the termination. Bahr credibly testified that she stopped maintaining a chronology of events regarding interactions with Complainant on April 21, 2009, because at that point in time, she had decided to terminate Complainant's employment. The record establishes that Bahr had, in fact, been consulting with HR regarding issues with Complainant's performance on the training project and attendance as early as March 27, 2009, and had begun contemplating termination as a possible action as early as April 1, 2009.

Accordingly, based upon my review of the entire record, credibility of the parties, and briefs, I find that Complainant has not established that her protected activity was a contributing factor to the decision to place her on administrative leave.

3) Termination of Employment

On July 17, 2009, Complainant's employment was officially terminated in a letter sent to Complainant by Slaughter. I found that after Bahr turned the termination action over to Slaughter for processing in late April 2009, she had no further active involvement with the adverse personnel action. Nor does the evidence establish that any other manager had any involvement in the personnel action between April 29, 2009 and July 17, 2009. Rather, the evidence establishes that Slaughter was solely handling the action at that point. In the interim between the initiation of administrative leave on April 29, 2009, and the July 17, 2009, termination letter, Slaughter testified credibly that she was transitioning to a new position and that the termination action did not have top priority. Once she had time to review all of the

documentation, she found no cause to reconsider FM's earlier decision to terminate Complainant's employment or to discuss it further with management. The termination letter was signed by Slaughter and does not indicate that management was either consulted or provided with a copy.

Complainant argues that her post-April 29, 2009, protected activity was a contributing factor in the decision to terminate her employment. Specifically, she asserts that in the interim between the initiation of administrative leave and termination, she engaged in additional protected activity, i.e., sending documentation to the SEC on May 19, 2009, in support of her prior claim. She also asserts that FM became aware of her April 28, 2009, complaint to OSHA on May 13, 2009, and that this protected activity motivated FM to terminate her employment.

I found above that Complainant's May 19, 2009, activity with the SEC was related to the complaint that she had already filed with the SEC on April 23, 2009, and of which FM was informed on April 27, 2009. By April 27, 2009, FM already knew that Complainant was communicating with the SEC, filing a complaint, and presumably providing the SEC with supporting evidence. I therefore do not find that the fact that Complainant provided additional information to the SEC on May 19, 2009, influenced the termination action which had already been set in motion by April 21, 2009. Furthermore, I find no evidence that Slaughter had any knowledge of Complainant's additional interaction with the SEC on May 19, 2009. Similarly, I find no evidence that Slaughter had any knowledge in May 2009 or thereafter that Complainant had filed a complaint with OSHA or that her OSHA Complaint contributed in any way to the decision to follow through with the termination of Complainant's employment. Rather, as I found above, Complainant's manager had made the decision to terminate Complainant's employment on April 21, 2009. I therefore find that the Complainant has not established that her protected activity was a contributing factor to the decision to terminate her employment.

CONCLUSION¹⁶

Complainant engaged in SOX-protected activity and suffered adverse personnel actions. However, based on the preponderance of the evidence, I find Complainant's SOX-protected activity did not contribute to the adverse actions taken against her. Accordingly, since Complainant failed to prove the requisite entitlement element of causation, her SOX employee discrimination complaint must be dismissed.

¹⁶ Since I have determined that Complainant's discrimination complaint must be dismissed because she has failed to prove that her protected activity contributed to adverse actions taken against her, I need not address whether the Respondents would have terminated her employment in the absence of her protected activity.

ORDER

The discrimination complaint of MS. EDNA D. FORDHAM against FANNIE MAE, brought under the employee protection provisions of SOX, is **DISMISSED**.

SO ORDERED

A

CHRISTINE L. KIRBY
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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