

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 30 June 2014

Case Number: 2012-SOX-00025

In the Matter of:

**ROBERT S. QUAST,
Complainant,**

v.

**MIDAMERICAN ENERGY COMPANY,
Respondent.**

Appearances:

For Complainant:
Harley C. Erbe, Esquire

For Respondent:
Patricia A. Konopka, Esquire

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 and under the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall street Reform and consumer Protection Act of 2010, 12 U.S.C. § 5567 (“CFPA”). The SOX 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

On August 22, 2011, Mr. Robert Quast (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that his employer, MidAmerican Energy Company (“MEC” or “Respondent”) terminated him in retaliation for sending letters to Mr. Warren Buffett (“Buffett”), Chairman and CEO of Respondent’s parent company, regarding alleged securities fraud committed by David Sokol (“Sokol”), the former Chairman of MidAmerican Energy Holdings Company (“MEHC”) and/or for contact with the Department of Justice (“DOJ”) or Federal Bureau of Investigation (“FBI”) regarding the alleged fraud.

On April 23, 2012, OSHA dismissed the complaint: OSHA dismissed Complainant’s CFPA complaint because the adverse action alleged in the complaint occurred prior to CFPA’s enactment on July 21, 2011, and therefore OSHA lacked jurisdiction to investigate the complaint.¹ Complainant’s SOX complaint was dismissed because OSHA found that Respondent terminated Complainant’s employment for a legitimate, non-retaliatory reason. On May 24, 2012, Complainant filed objections to OSHA’s decision and requested a hearing before an Administrative Law Judge (“ALJ”).

On September 14, 2012, Respondent filed a *Motion for Summary Decision*, arguing that Complainant had not engaged in protected activity as defined by SOX. I denied the motion in an Order dated December 12, 2012.

On July 9-10, 2013, I conducted a formal hearing in Des Moines, Iowa. The parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing memoranda. I admitted the following exhibits into evidence: Complainant’s Exhibits (“CX”) 1-46, Respondent’s Exhibits (“RX”) 501-558,² and Administrative Law Judge Exhibits (“ALJ”) 1-4. Five witnesses testified at the hearing: Complainant, Jonathan Ellstrom, Maureen Sammon, Brad DeBoer, and Richard Singer. The parties have both filed Closing Briefs which I have considered in rendering this decision.

COMPLAINANT’S POSITION

Complainant asserts that Respondent took adverse personnel actions against him, consisting of breach of confidentiality and termination of employment, because he engaged in SOX protected activities, i.e., he raised concerns of SOX violations in a letter to Warren Buffet, in communications with members of Respondent’s management, and in communications with members of the Department of Justice and Federal Bureau of Investigation.

¹ Complainant has withdrawn his claim under the CFPA. Transcript (“Tr.”) at 10.

² RX 559-562 were withdrawn at the hearing because the facts contained therein were set forth in the stipulation of the parties. (Tr. 8, ALJ 2). At the hearing, the affidavit of William J. Fehrman was then marked as RX 559. (Tr. 16). Three documents consisting of Respondent’s designation of Fehrman’s deposition testimony, Complainant’s designation of parts of Fehrman’s deposition testimony, and the transcript of the deposition, with highlighted portions by both parties, were marked as RX 560. (Tr. 17). I have considered RX 559 and 560. Also, RX 510 was replaced by RX 510A.

RESPONDENT'S POSITION

Respondent asserts that Complainant never engaged in SOX protected activity. It asserts that Complainant had no expectation of confidentiality and his termination of employment was due to his misconduct as an employee. It asserts that even if this tribunal were to find that Complainant demonstrated a prima facie case of retaliation, adverse personnel action against Complainant was taken for legitimate non-retaliatory reasons.

ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the SOX.
2. Assuming Complainant engaged in protected activity, whether Respondent was aware of the protected activity.
3. Whether Complainant suffered an adverse action or actions.
4. Assuming Complainant engaged in protected activity and suffered adverse action, whether his protected 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 adverse action irrespective of Complainant having engaged in protected activity.

STIPULATIONS

1. In a recorded telephone call on May 3, 2011, at 2:42 p.m. from his work telephone, Complainant called Joel Barrows in the U.S. Attorney's office and left a voice mail stating that he was calling about an issue with his sister's murderer.
2. In a recorded telephone call on May 3, 2011, at 2:52 p.m., Mr Barrows called Complainant. Complainant asked Barrows if he could talk to him in person, at his office. In the conversation, Complainant made no mention of Sokol or alleged fraud by anyone.
3. In a recorded telephone call on May 3, 2011, at 5:24 p.m., Complainant called his mother and left a message stating that a co-worker gave him a great contact with someone who works for the Federal Government, who provided great advice to get something done with Tom (his sister's murderer). Complainant did not state that he discussed Sokol or any fraud with the federal government employee with whom he spoke, and made no mention of Sokol or alleged fraud.
4. In a recorded telephone call on May 13, 2011, at 12:44 p.m., Complainant spoke with Madeline Henry, Constituent Services Assistant Director, Office of the Governor of Wisconsin. Complainant thanked Henry for her help in preventing his sister's killer from moving to

Wisconsin and told her he had talked to over 200 people in Government. Ms. Henry stated she let the Governor's counsel know "the closeness . . . how it could end up bigger than it is if Warren Buffet got involved"; to which Complainant responded, "Yep." Complainant discussed his planned future efforts to promote "Lynette's Law." Complainant made no mention of Sokol or alleged fraud.

(ALJ 2).

WITNESS TESTIMONY

Complainant, Robert Quast

[DIRECT EXAMINATION] Complainant testified that he graduated as his high school valedictorian in 1988 and received a full scholarship to St. Ambrose University in Davenport, Iowa. He has degrees in business, finance, business and accounting with a finance concentration, and a minor in economics. In 1999, he earned an MBA from the University of Iowa. After he was fired by Respondent, he was offered a teaching position at his alma mater and taught as an accounting instructor for the Fall 2011 semester. (Tr. 47-48).

He worked for Respondent for 21 years. He began in college as an intern buyer from April 1990 until graduation in 1992. A month before he graduated in 1992, he got a full-time job offer as a gas supply analyst, managing all the natural gas storage and transportation for the company. In 1995, following a merger, he switched careers and became a fuel supply contract administrator. It was his job to manage fuel contracts for the electric side of the business. He spent the remainder of his 16 year career in the fuel department. In 1998, he was promoted to senior fuel analyst, and in the Fall of 2000, he was promoted to coal portfolio manager. He worked as the coal portfolio manager for approximately 10.5 years, the last half of his 21 year career. He was in charge of the entire portfolio of coal. This was the position he held at the time Respondent terminated his employment. (Tr. 48-49).

At the time he was fired, his salary was approximately \$104,000 per year. He also received occasional spot bonuses. He received a few thousand dollars for the Pacific Corp. Project and he received \$5,000 for the Constellation project. He also received different bonuses based on performance of individual projects. Every year, he also received an annual bonus ranging anywhere from \$16,000-\$35,000 per year. He also received other benefits including a pension plan, to which Respondent contributed approximately \$11,000 per year based on salary and bonus, and a 401(k) in which Respondent would match a certain amount. He had health accounts and dental. In total, his compensation package was about \$150,000. (Tr. 49-50).

Complainant's direct supervisor was Rich Singer, vice-president of the fuel department. Singer reported to Jim Parker, vice-president of energy supply management, who reported to Bill Fehrman, president and CEO of Respondent, MEC. (Tr. 50-51).

Complainant worked with four primary third-party coal suppliers. He had a long-time relationship with all four of these companies, beginning in 1995 when he took the job. Part of his job was to develop a personal relationship that then was extended into a professional

relationship. He did many things, ranging from taking his wife out to dinner with him at the annual conferences and getting together with the other spouses in developing a close personal relationship with all four coal companies. With two of the coal suppliers, he had 16-year relationships and with the other two he had multi-year relationships, ranging from three to five years. He knew everybody by name, their wives' names, and their children's names. One of them attended his wedding in 1999, so it was a very personal, close relationship with all of them. The relationships extended into sharing details about family and other issues every time they met. Due to his close personal relationships with the coal suppliers, he got great coal deals and when his boss asked how he did it, he explained that it all started with personal relationships. His boss, Rich Singer, commended him for that. His work with the coal suppliers had the potential to impact Respondent's bottom line, because the delivered cost of coal is the single largest expense for Respondent. (Tr. 51-53).

He earned raises every year and never failed to receive one. He was never suspended. In 2000, his boss approached him with a performance improvement plan because he said Complainant had lost focus. He complied with the performance improvement plan and never had any other issues between the year 2000 and May 17, 2011. In April or May of 2000, he was promoted to coal portfolio manager with a pay grade increase just three or four months after the performance improvement plan. (Tr. 54-55).

His first protected activity was a letter to Warren Buffett. Complainant wrote Buffett because he saw a problem at the apex of MEHC and believed Buffett was the only person to whom he could go. He mailed the letter on April 11, 2011. Minutes later, he received an unexpected call from his boss, Rich Singer, who Skyped him from Thailand where Singer was on vacation. Complainant told Singer that he thought Sokol had committed fraud and told Singer he had written and mailed a letter directly to Buffett. He told Singer he did not want anyone to know about this other than his direct chain of command. Singer brought up Jim Parker's name who was Singer's boss. Complainant had a good relationship with Parker who had taught him about Sarbanes-Oxley. Complainant told Singer he would meet with Parker and lay out his allegations in two days because he would be together with Parker at the OGS, Ottumwa generating station, owner's meeting. Complainant followed up with an e-mail to Parker to schedule a time and told him he did not want to get into it because he did not want it to get out, but he wanted to discuss his allegations pertaining to a letter he had just mailed to Buffett. Parker responded that he would reserve time at the OGS meeting they were going to be together at on Wednesday, April 13, 2011. (Tr.55-56).

Another protected activity was when he went to the Department of Justice and told them he wanted to participate in the SEC investigation [of Sokol]. He met with an Assistant U.S. Attorney on May 3 and May 4, 2011, who told Complainant that he was not the correct entity to report to and Complainant should go to the local FBI. (Tr. 57).

The primary target of his SOX communications was David Sokol, the chairman of MEHC. Complainant told John Roche and Jim Parker that he believed there was fraud and Sokol was the sole party who could have pulled it off though there could have been others involved, but Complainant did not know who and did not name names. Complainant said there was something at MEHC that he believed needed to be investigated. (Tr. 57).

MEHC is the parent company of MEC. MEC, where Complainant worked, is a wholly owned subsidiary of MEHC. MEHC is owned by three different parties: 90% by Berkshire Hathaway, 9% by another person, and 1% by Greg Abel. Berkshire Hathaway is a publicly traded entity. (Tr. 58).

Complainant was highly suspicious of Sokol and he began looking into him when he received a phone call from Singer. Singer called Complainant on Wednesday, March 30, 2011, and asked if Complainant could believe the news about Sokol resigning. Complainant is the only person of the energy supply management who is not located in Des Moines, Iowa. Complainant was in an office in Davenport, Iowa and did not know what Singer was talking about. Singer told him that Buffett had just released a press release that was oddly worded to talk about two things. One was that Sokol had resigned two days before, and the other was about unusual Lubrizol trading that got everybody's attention, and the two had nothing to do with each other. Singer told Complainant that Sokol was going on television the next morning to try to explain his alleged insider trading or front running. (Tr. 59).

Complainant began reviewing Sokol before the year 2011. Complainant had a file on every project he had ever worked on. When MEC was acquired by Sokol, it was sold to CalEnergy. Complainant had a file on that acquisition. He later had files when one of their auditors thought something was peculiar with how Sokol had sold out of his ownership in MEHC, because Sokol was a former owner in MEHC and had sold tens of millions of dollars in stock. The internal auditor of MidAmerican had given Complainant a bunch of SEC reports, so he had those in a file. Although it seemed peculiar, Complainant did not think it was insidious at that point. He also had files when there was a CalEnergy zinc recovery loss. He also had files on the Casecan issue where there had been a lawsuit. However, Complainant had not investigated Sokol prior to that date, although he always thought certain things seemed odd. (Tr. 59-60). For example, he thought it was odd when Fehrman shook down the coal suppliers to donate to a \$100,000 a plate dinner to honor Sokol. He believed this was not ethical. Complainant did not see anything illegal prior to when he started looking at the March 31, 2011, interview of Sokol on television. In April 2011, he started reviewing his files on Sokol and laying out a timeline and thinking about how Sokol could have breached the Code of Conduct. He believed it was a blatant violation of the Code of Conduct for Sokol to have conducted insider trading and was concerned that based on Buffett's March 30, 2011, statement, there would be no further discussion of it as Buffett would revert to his March 30, 2011, press release and never talk about it again. (Tr. 59-63).

The files he reviewed (in April 2011) contained internal documents as well as press releases. Almost everything MidAmerican does is marked "confidential for internal use only," so his files contained a mishmash of internal and external documents. His files contained some documents that were not publicly available. All of his files were contained in his office but he was not allowed to remove them when he was escorted out of the building on May 17, 2011, and he has not been back to the building since then. The files contained the information that he relied on in making his SOX communications. In reviewing the information, he used his business background, background as an employee for MidAmerican, and the Code of Ethics to determine that things were peculiar. He knew that you cannot commit fraud and certain things

might fall under Sarbanes-Oxley. He knew that you cannot commit fraud or conceal pertinent items when you do financial filings and sell a company. (Tr. 64-65).

His specific areas of concern were when the company was sold to Cal Energy in 1999, the Casecan problems that came out in the 2005 lawsuit, and the 2003/2004 zinc recovery project. The Casecan lawsuit related back to the 1990s. The other key piece of his suspicion was what he saw as extremely peculiar timing of the stock sale of MEHC to Berkshire. He thought it peculiar that Sokol was selling out of his ownership in MEHC just before bad news was coming out. Sokol would have known that bad news was coming out because he was the one who made the decision to write off the zinc recovery losses, after-tax, \$340 million. Only Sokol would know that they were going to make a decision to write that off because it is his company. However, before that, if he started selling stock to Berkshire, that was not legal, because he was defrauding shareholders who did not have the information he had. (Tr. 66-67).

Cal Energy has eight geothermal wells in California. They are huge and industrial in size to make electricity on a very large scale. They tried to pull up the brine and turn it into zinc, but it failed. This was one of the two biggest disappointments that Sokol and Mr. Abel had. They admitted that they had failed to do it on a test scale and had to write-off half a billion dollars due to that failed project. Sokol went on DVD to say to internal employees only that he would have personally fired the person making this decision, but Mr. Buffett was very kind with him and said it was a lesson learned. This was in 2003 when they made the decision to write it off, and it became public in 2004. Complainant believes Sokol intentionally sold out some portion of his four percent stock ownership for Berkshire shares, perhaps thinking that Buffett was going to fire him for losing all that money and he would have a much weaker position. Since MEHC is not publicly traded, there is no way to value it other than internal pricing. Complainant's boss would get a copy of the internal valuation of MEHC, and Complainant thinks the price per share was about \$145. It was never written down for the pending loss that was coming. Yet, Sokol was starting to sell out his Berkshire stock, so he had knowledge that nobody else had that would hurt shareholders of Berkshire if they were paying him full price for his MEHC ownership for cash when, in fact, only he knew there was going to be a large loss that would absolutely lower MEHC's internal share prices. So, Sokol was selling an untraded security for cash paid for by a traded security, Berkshire, and was not disclosing what he knew. He had a good faith obligation to disclose and treat fairly the shareholders of Berkshire, and Complainant thought it was very peculiar timing and started to look at that. Complainant believed Sokol was getting out of MEHC while the getting was good. Sokol had to have known that MEHC's value was about to take a hit because of what happened with the CalEnergy zinc recovery project. He believes that if Berkshire Hathaway had known about the pending losses, it would have paid less for the shares of MEHC. He does not believe Berkshire Hathaway's management would have known about the pending MEHC CalEnergy loss or Sokol's decision to write off the losses before he had done so, because that was his decision to make. (Tr. 68-70).

He was also concerned about Sokol because when the Iowa utility was sold to Sokol it was sold for about \$4 billion. Less than a year later, Sokol took the Iowa utility company that he had paid \$2 billion dollars in cash, \$2 billion in debt, and he sold the whole package for \$9 billion to Buffett, to Berkshire Hathaway, which imputes CalEnergy having \$5 billion of value. Complainant believes Sokol duped Buffett in taking a \$4 billion utility, which was the utility

Complainant worked for, combining with CalEnergy that had lots of future losses, lawsuits related to Casecan, irrigation systems from the 1990s that didn't come to fruition with lawsuits until 2005. Complainant believes Sokol completely overvalued the CalEnergy assets knowing Buffett would not ask too many questions. (Tr. 71-72).

The other issue Complainant had with CalEnergy would be the Casecan lawsuits. Complainant started researching this in April 2011 to see what was behind all those lawsuits. They stemmed from a partnership Sokol had with one or two families in Casecan for a water irrigation project where you build an irrigation and energy system. You operate it for 20 years, are allowed a high rate of return, and then it turns over to the government. In that deal, the judge told Sokol that he had come in with unpure hands and cheated his partners. There were three different cases that got filed. CalEnergy countersued, said they did nothing wrong and were the ones injured. However Sokol cheated his partners and when you added up all the payments that were due and future royalties, it was over another half billion dollars from the three lawsuits that came about. Complainant believes that Buffett did not know about all this bad stuff related to CalEnergy which was supposed to be worth \$5 billion, but instead of assets, it had all of these liabilities. Complainant wondered whether Buffett knew about Sokol's lack of fair dealing with his joint partners in Casecan back in the 1990s and how he dealt in poor faith in the early 2000s. Nothing came to fruition until an Omaha District Court judge came out against Sokol and said he had dealt in bad faith, naming him individually. (Tr. 72-73).

Complainant began to think about the fact that Sokol did not run CalEnergy by himself. The accountant for CalEnergy was Mr. Abel. Complainant believed there were also others who needed to protect Sokol. He began to look at MEHC with the very different eyes when some very bad things came out. He did not see news stories on all these different court cases and started piecing it all together. He does not believe Sokol was at all truthful in his obligation to disclose the true merits and financial condition of CalEnergy, and does not believe Sokol timely shared the bad news with Buffett. (Tr. 73-74).

The Casecan lawsuit did not begin until 2005, but it was not until 2010 that there was a ruling that essentially was against Berkshire, because Sokol had no personal liability because he was no longer even an owner, so the ruling was against CalEnergy and its parent company, MEHC, and ultimately was paid for by Berkshire. Based on the judge's ruling, Complainant believed that Sokol came into these dealings with unclean hands. Complainant's concern with Casecan is that Sokol should have seen it as a liability for CalEnergy and should have disclosed it during the sale of CalEnergy to Berkshire. Complainant believed CalEnergy was overvalued and that the same people who would have created the value would have been the people who were the top officers of MEHC. Sokol signed off on everything as the Chairman and the person with the accounting background who is the chief operating officer and CEO is Greg Abel. Pat Goodman is the chief financial officer so any financials would have to go through him. Doug Anderson is the general counsel who has to give a legal sign-off. So, Complainant believes one of those parties or some combination thereof would need to be involved in overvaluing the company. The MidAmerican CEO sold the Iowa utility to CalEnergy. It was supposed to be a merger of equals, but that did not happen. CalEnergy was acquiring the company and adopted the MidAmerican name to create the parent company because MidAmerican had name recognition, lots of customers, and was well thought of, while nobody knew CalEnergy.

CalEnergy stayed as a subsidiary, and MidAmerican Energy Company (MEC) stayed as a subsidiary, and they adopted the name to create MidAmerican Energy Holding Company (MEHC) which owns the Iowa utilities and other utilities and pipelines that they later acquired. MEHC, not counting Berkshire, only has 27 employees; it's the top officers that oversee each of the underlying operating utilities. Sokol was employed by MEHC and was the CEO of CalEnergy. Sokol went from CalEnergy to MEHC. After leaving CalEnergy, Sokol was part of MEHC's decision to purchase CalEnergy. (Tr. 74-79).

Around April 4, 2011, Complainant turned his attention to what Sokol and others possibly knew, and he started revealing some of his suspicions to John Roche, the person who hired Complainant into his job in 1995 and who was vice-president of purchasing and engineering.³ Complainant thought of him as an honest person in senior management level who reported directly to Bill Fehrman, the president. Roche said he believed Complainant was dealing with a criminal enterprise. He believed there were things going on, but would be hard to prove. He advised Complainant not to go much further, unless he had another job lined up. Complainant told Roche he could not be fired for bringing these things up because he would have whistleblower protection, but Roche told him that is not how it works and he did not want to be involved. He said Complainant had three options: going to the press, going to the Government for investigation, or going to MEHC to investigate MEHC. (Tr. 80-82).

Complainant believed MEHC would not investigate themselves and did not believe calling the ethics hotline would remain confidential, based on his past experience when he called the hotline regarding his boss, Paul Freund. Complainant believed there is nothing confidential in the ethics hotline and believed he had to go to the top with his concerns. He did not believe going to the federal government would be effective unless he got Buffett to agree with him that Sokol did something illegal. Therefore, Complainant went to Buffett against Roche's recommendation. Complainant believed based on his discussion with Roche that Roche believed it was a corrupt enterprise and was not just Sokol, but involved other people as well. He spoke to Roche either on April 5 or 6, 2011. On April 7, 2011, Complainant decided to write the letter to Buffett. Complainant believed he had an obligation under the Code of Business Conduct to report wrongdoing. (Tr. 83-84).

Roche described some activities as a criminal enterprise. They discussed two things. First, was the fact that Sokol had abolished corporate jets and got rid of all the corporate jets from the three utilities that formed MidAmerican, but had bought a \$21 million jet for himself and a \$14 million jet for Abel. Additionally, Sokol was chairman of Net Jets which is where MidAmerican leased its corporate jets. Roche's job was to come up with a justification for leasing the jets, which he said was a complete fraud or sham with no true business or financial justification. The other thing they discussed was consolidating the lime bought for delivery in Iowa with the limestone purchased in the western states. These are two different products and transportation makes it impossible to cost justify. Complainant asked Roche why the leadership was pushing for this, and Roche said they were pushing for a lot of things he believed were illegal. Roche said he was planning to retire soon, on July 1, 2011, because of the extreme stress of what he thought were unethical, possibly illegal, orders he was being given. (Tr. 84-86).

³ I note that John Roche did not testify at the hearing and therefore could neither confirm nor deny the content of any conversations with Complainant.

Complainant had another conversation with Roche the next day. In 2008, when Sokol was receiving an award, all of Complainant's coal suppliers were "shaken down" for a \$100,000, what they deemed quid pro quo, donation. One of Complainant's coal suppliers had called him and asked whether he would be getting a lot more coal business since he had bought his \$100,000 table to honor Sokol. Complainant talked to Rich Singer about it, who was also uncomfortable, and said it was directed by Abel, and Fehrman was keeping track. Complainant would have called the hotline to report it, but believed the call would be reported to Abel and Maureen Sammon who would say it was none of his business. Roche admitted to Complainant that he had pushed back against that and told Fehrman it was completely inappropriate. (Tr. 87-88).

There was another issue that disturbed Complainant. He had been asked to review the coal piece of a purchase the company had made of 8,500 acres of pristine hunting grounds. Complainant was involved to look at coal in Lake DeSmet. When he looked at it and analyzed it, he realized the coal was junk and had zero value because it would barely burn. What Complainant uncovered was that the company had purchased this property, which used to be called the M&M Ranch, and was a big-game hunting ranch. It so happens that Sokol is a big hunter. Complainant looked online to see who reported to Sokol. It turned out that the Lake DeSmet ranch manager reported directly to Sokol. Complainant thought this was peculiar but had no evidence of wrongdoing. (Tr. 88-89).

In the postscript of his letter to Buffett, Complainant made mention of driving away if he saw a Falcon jet. This was supposed to be a reference to Sokol or Abel who had Falcon jets. Lake DeSmet is the property that Respondent bought at the direction of MEHC, i.e., Sokol and Abel. Complainant determined that the coal on this property was of such low value that it could never be used commercially for any purpose. He only made a veiled reference to this in his letter to Buffett because he was not sure if Sokol ever used the property as a hunting ground. (Tr. 90-91).

Complainant reviewed the MEHC business Code of Conduct and the Berkshire Code of Conduct which would apply to Sokol as well as MEC employees. Complainant is familiar with 18 U.S.C. Section 1348 and the Security and Exchange Commission's Rule 10-5(b). He believes Sokol willfully breached the codes. He believes Sokol knew he was defrauding shareholders and that you cannot reach his level without knowing these things are wrong. Beyond the U.S.C., Buffett imposes a higher burden by stating if you think something does not pass the "newspaper test," it is wrong. Complainant believed Sokol was breaching all the codes and committing fraud against shareholders with the intent of enriching himself which could only happen to the detriment of Berkshire shareholders. In the company's code of conduct written and signed on page one by Sokol, it says if a reporter with all the facts were to report what you are about to entertain and it would look bad before anybody else including your wife or neighbor, then you should not do it. Furthermore, the simple newspaper test is one that the Code of Conduct says applies to a higher degree to management. Complainant believed Sokol failed the test miserably by breaching the Code of Conduct of MEHC and Berkshire, as well as the U.S.C.. When Complainant saw Sokol on television being questioned, about insider trading, he could not believe Sokol said he had done nothing wrong. (Tr. 93-95).

Complainant believed Sokol as well as Abel and Goodman had intentionally improperly valued CalEnergy which had a \$5 billion value if MidAmerican had just been purchased for \$4 billion and sold to Buffett, i.e., Berkshire Hathaway, for \$9 billion. He believed they continued to conceal the truth and hid pertinent information that shareholders should have known, allowing Sokol to sell out of his MEHC shares before bad news would come out. Sokol was selling stock in MEHC at times just before bad news that he had authorized was to come out. He believed Sokol was not being fair to Berkshire shareholders, enriched himself at their expense, and brought disgrace to Berkshire. The value of Berkshire dropped by billions of dollars when this came out. Complainant believed the values would continue to drop if Buffett failed to investigate and it was revealed pursuant to a federal investigation. Complainant did not believe Sokol acted alone and thought the shareholders needed to know that aside from a few people, everything else about the company was still good. (Tr. 96-98).

Complainant became a Berkshire class B shareholder in 1999. From a shareholder's standpoint, he believed the information he had about Sokol was important and would influence shareholder decision-making. He believed that if shareholders were to find out in a different way (other than internally), e.g., through a Wall Street Journal investigation what was being hidden, it could absolutely destroy the company. That is why he was asking Buffett to root out and investigate the real problem. At the time Complainant wrote his letter, Berkshire shares were falling by billions of dollars a day. It was on the front page of every paper, why wasn't someone looking into Sokol. Complainant was looking into Sokol and did not like what he saw. He thought it looked like fraud and the company needed to get ahead of it, or it would end very badly. (Tr. 99-100).

He did not believe Buffett would have paid \$9 billion for a company, MEC, that was only worth \$4 billion. There was no way shareholders would pay an extra \$5 billion for something that was not worth it. Shareholders would never have paid that price if they had been told the truth of what CalEnergy really was worth and its assets and liabilities. (Tr. 100-101).

CX 6, contains excerpts from the MEHC Code of Ethics. The third page contains the newspaper test he referred to. The Code of Ethics states that it applies to directors, officers, and employees of each subsidiary of MEHC. It applies to all employees under all branches of MEHC. When he read the code, he believed he had an obligation to report what he believed was a severe violation by the chairman, Sokol. Looking at the fourth page of CX 6, it describes how an employee should avoid conflicts of interest and discusses stock ownership. Complainant believes Sokol violated the conflict of interest section. Complainant believes that when Sokol sold CalEnergy to Buffett he gave himself a 4% sweat equity ownership in the company. He knew he had specific information, he and only a few others within the CalEnergy senior leadership. So he gave himself a 4% ownership that later was sold out for hundreds of millions of dollars in an entity where only he had that information. He profited to the detriment of Berkshire shareholders who lost over \$1 billion from just a few things that had come out and been litigated and the losses that had been revealed. (Tr. 101-104).

RX 501 is a full copy of the MEHC Code of Business Conduct. At page 1 are listed five characteristics that MEHC employees were to demonstrate: honesty, loyalty, discipline,

uncompromising character, and continuous learning. He believes Sokol clearly violated the first four. After Complainant pushed for an investigation, the Berkshire audit committee came out with an investigation in court that agreed with everything Complainant said. Until Buffett came out with an investigation of Sokol, people started to believe Buffett or Berkshire or MidAmerican was no longer a credible company. At page 5 of RX 501 is a section that refers to fair dealing. He believes Sokol violated this section by taking advantage and through manipulation, concealment of privileged information going all the way back to Casecnan and CalEnergy, enriched himself to the detriment of Berkshire shareholders. When he hid the value of CalEnergy, Sokol was violating fair dealing with shareholders and he was not dealing fairly when he knew of things he had done that led to lawsuits and negative outcomes that had to be paid for by Berkshire. He abused his privileged information and made material misrepresentations. The ultimate Berkshire audit committee reports said exactly that. (Tr. 105-107)

CX 1 is Complainant's April 9, 2011, letter to Buffett. CX 2 is his April 12, 2011, letter to Buffett where he was trying to ask for a meeting. The April 9, 2011, letter is the one that contains his SOX protected communications. Looking at the April 9, 2011 letter, in the first sentence, he pointed out the lack of basic ethics and moral compass and failure to comply with Berkshire's and MEHC's codes. He made it very clear that he was writing both as an MEC employee who had unique knowledge having worked for Buffett for over a decade, seeing the inner workings not only of MEC but also MEHC, and also being a shareholder for over a decade. In the letter, he made reference to the conversation with Roche. He talked about the CalEnergy acquisition of MEC being a very well-timed cover up of CalEnergy's otherwise imminent financial collapse in 1999. The letter also talked about how CalEnergy had incurred a \$340 million after-tax loss on the zinc recovery project, and asked if he knew, and whether that was why Sokol tried to resign. It asked whether he tried to sell out his stock without giving notice, the timely disclosure of that sale of MEHC stock. (Tr.108-109).

Another issue contained in the letter was the Casecnan problems and whether Sokol disclosed all the issues, benefited financially, and hurt Berkshire shareholders when he hid the past behavior that started in the 1990s project and finished selling out of his MEHC stock prior to all the final bad news coming out. (Tr. 109).

Another part of his claim is that Respondent breached his confidentiality. On the second page of his letter to Buffett, he explained why he did not call the ethics hotline to report his concerns about Sokol. He believed if he called the hotline, it would have come back to MEHC to investigate itself. He believed based on past experience, that the ethics hotline was not confidential and that he would in effect be reporting to the very people whom he was asking be investigated. (Tr. 110).

On the fifth page of his April 9, 2011, letter to Buffett, in the first paragraph, he was describing his discussion with Roche that he already testified about. The second paragraph on page 5 refers to the failed zinc recovery project with CalEnergy that he testified about. Also on page 5 he referenced the Casecnan issues that he testified about. He sent the letter to Buffett. He shared the letter with Jim Parker on April 13, 2011. He also showed the letter to Roche. He also told Singer, his boss, that he had just mailed a letter because he thought there was fraud with

Sokol that needed to be addressed and he was sending a copy of the letter to Singer confidentially. Singer told him that Parker would probably need to know about the letter. After he showed the letter to Parker, Complainant offered to drive to Des Moines and show it to Fehrman since he did not want to give a copy to anyone. Parker said it should not be a problem because it was between Complainant and Buffett, but then Parker called him the next day and said Fehrman would like to have a copy of it. So, Complainant e-mailed a copy to Fehrman with great reservation and reminded him of the confidential nature of the letter. After he e-mailed it to Fehrman he decided to e-mail it to Singer so everybody in his chain of command would have a copy of it. He showed it to one or two of his coal suppliers the last week of April. He told one of his coal suppliers, Bruce Taylor, with whom he had the closest relationship and who attended his wedding, that if he was not working much longer as his representative, it would be because he was pushing for an investigation of Sokol and MEHC. (Tr. 111-114).

In addition to sharing a copy of his April 9, 2011, Buffett letter with various people, he also had discussions with MEC employees that he believes are SOX protected communications. The first one he talked to was Singer when he told him he had sent a strictly confidential letter to Buffett. On April 13, 2011, he talked to Parker about the letter and showed it to him, but refused to give him a copy. On April 14, 2011, he e-mailed the letter to Fehrman and may have had a phone conversation with him. Fehrman told him in an e-mail that he appreciated getting the letter and wanted to share it with Abel. Complainant responded that he did not think that was a great idea, but it was Fehrman's call, and he had a fear of retaliation by Sokol and MEHC. Fehrman responded that his only copy was with him and he had given a copy to Abel. Roche had seen a copy of the letter but did not get a copy of it. Complainant also discussed his concerns about Sokol with Kevin Dodson who used to work for him and Ron Henkins, who succeeded Kevin Dodson. All of the people he shared it with, knew the letter was confidential. (Tr. 114-116).

In a phone conversation with Singer on April 11, 2011, Complainant told him he believed Sokol had committed fraud and that he had written a letter to Buffett about it. On April 13, 2011, he showed the letter to Parker and discussed it with him. He told Parker he believed Sokol had committed fraud and it was something that could only be dealt with through Buffett. Parker would not comment on Complainant's allegations. Complainant told Parker they could go talk to Fehrman about it and he could not prevent Parker from talking to Fehrman, but he wanted this to be kept confidential, and did not plan to give Parker or Fehrman a copy of the letter. Complainant asked Parker if he would be fired for writing the letter. Parker's response was that Complainant should be okay since he wrote the letter as a shareholder, as long as he did not use any company resources. He showed Parker one of his folders concerning projects that he thought were unethical. Parker just closed it and returned it to Complainant stating that it was between Complainant and Buffett. The next day, Parker called Complainant and left him a voice mail stating that Fehrman would like a copy of the letter and to please send it to him. (Tr. 116-120). On April 15, 2011, at 10:02 AM, he had a telephone conversation with Fehrman that was recorded.

On May 17, 2011, he had a conversation with John Ellstrom, the facilities manager of the Davenport facility. He gave Ellstrom a copy of his AP article (flyer) and told him that he was giving them out to all his friends throughout the building. Complainant told Ellstrom he had just

been released from the hospital, had extreme stress, and had handed out the article so he could easily explain how his sister's killer was being released, almost was able to come to Wisconsin, but how Complainant had stopped it. He told Ellstrom that he was requesting a whiteboard and would like Ellstrom to come to the conference room. Complainant told Ellstrom his focus was to get caught up at work and reduce his stress level, and that he had initiated an investigation against Sokol and written a letter to Buffett demanding an investigation, which he would show to Ellstrom. He told Ellstrom to call Singer to verify this. He told Ellstrom that a copy of the Buffett letter was on the wall in the conference room and that he had been using the conference room while on vacation the last two weeks with his boss' permission. He told Ellstrom not to overreact when he saw letters all over the walls in the conference room and that he had succeeded in stopping [his sister's killer from returning to Wisconsin]. He showed the Buffett letter to Ellstrom, asked him not to tell anybody about it, and told him that Singer was aware of it and could confirm what Complainant had done. He told Ellstrom that he was participating with the Federal Government in the SEC investigation. (Tr. 120-122).

On May 3 and 4, 2011, he spoke to Assistant United States Attorney, Joel Barrows. He called Barrows to talk to him about the case of his sister's murder. He talked to Barrows about preventing the murderer from moving back to Wisconsin. Complainant also told Barrows he was the whistleblower who had written to Buffett about Sokol, and that Berkshire's audit committee had just announced an SEC investigation against Sokol.⁴ Complainant told Barrows he would like to cooperate with the federal investigation and turn over some of his files and allegations to the appropriate party. They continued their conversation on May 4, 2011. Barrows told Complainant that the appropriate person to talk to (about Sokol) was an FBI agent, and that he would set up an appointment for Complainant. (Tr. 123-125).

On April 13, 2011, he told Parker that he was going to push for a third-party investigation of Sokol which would be a federal investigation led by the SEC. He also told Ellstrom that he had sent a confidential letter to Buffett. He pointed the letter out to Ellstrom on the wall where it was hanging and told him that he was working with the Federal Government to cooperate in the investigation. Complainant told Ellstrom that Singer could verify this and that Parker and Fehrman also knew about the letter, but it was to be treated as confidential. He did not tell anyone other than Parker or Ellstrom about his contacts with the DOJ regarding Sokol. (Tr. 126-127).

CX 3 is an e-mail Complainant sent to Singer on May 5, 2011. In it, Complainant made reference to meeting with the Department of Justice. He did not explicitly tell Singer that he was in the active investigation phase with DOJ (regarding Sokol) and planned to go to the FBI. In his discussion with Parker, he did not refer explicitly to the Department of Justice, but referred to a federal investigation. (Tr. 128-129).

During the OSHA investigation, he told the investigator to talk to Parker and Singer. He did not realize that Parker or Singer would not be asked any questions. Complainant pleaded with the investigator to talk to Parker, but he said the investigation was being closed. Complainant told the investigator to talk to Parker and Roche, but was told that he would have

⁴ I note that Barrows was not called as a witness and therefore could neither confirm nor deny the content of any conversations with Complainant.

appeal rights. During the discovery process, he realized Parker had breached his confidentiality. He told the investigator to talk to Parker who was dying of cancer and would not be around for a trial. (Tr. 129-130).

The reason he failed to mention Sokol or shareholder fraud in discussions at the office, is because he works in a cubicle surrounded by other people and because his telephone line is recorded. He did not want others to know that he had blown the whistle against Sokol. During the first week of May 2011, his core focus was to get answers as to whether his sister's killer could return to Wisconsin. He did not want people to know, so he wanted to discuss it in person with Barrows. Once he began talking to Barrows about his sister's case, he then showed him the letters he had written to Buffett regarding Sokol. In recorded phone calls to family members he did not mention Sokol, because his family did not care about that. They only cared about his sister's case. (Tr. 131-132).

He attended the April 30, 2011, Berkshire Hathaway shareholder meeting in Omaha at the Qwest Center. Every year he goes to the MEHC booth to talk to people he knows. He approached the booth and after making eye contact with Fehrman, Fehrman walked away. The only other person he recognized was Maureen Sammon. He approached her and put his hand on her shoulder and stuck out his hands and said, "Hi, Maureen, nice to see you." Sammon did not respond and gave him a strange look. She shook his hand and then turned her back to him. He perceived this as her not wanting to talk to him and believed someone had given her a copy of his Buffett letter and she was not happy to see him. He felt that everybody in the booth turned their backs toward him, so he left. On April 30, 2011, he did not know whether Sammon had seen the letter, but he felt like she was not happy to see him. (Tr. 132-134).

Regarding events of May 16 and May 17, 2011, he does not believe he committed any termination level offenses. He believes it is possible he did something wrong depending on what authority he had received from Singer. He believes he had Singer's approval to do the things he did and was careful to follow the rules by not using company time and using his paid-time-off. He had permission to use the conference room, so he believed he was keeping his boss fully informed. He believes he had permission to do the things he did and that they have been mischaracterized as termination level offenses. He took full responsibility for everything he did when questioned about them. He still is unsure about what he did wrong. Because he used the conference room with his boss' permission, he believes that would trump the policy that says you cannot use a conference room. He did not want to get his boss, Singer, in trouble. (Tr. 135-136).

CX 28 contains the termination letter he received. The letter is signed for his boss, Rich Singer, by Rich Baltazor of Human Resources. Nobody explained why Singer did not sign the letter that had his name on it. The first bullet point accused him of distributing personal and political information to co-workers and third parties that can be best described as coal and line [sic] suppliers, business partners and customers. He did not believe that the AP article he distributed was much different than the same type of information he gave to co-workers and suppliers twelve years earlier when his sister was murdered and dismembered. (Tr. 137-138).

At that time, newspaper articles were forwarded to hundreds of his co-workers about what had happened. At that time, his co-workers and coal suppliers took up a collection and

raised money for Complainant's two nephews and signed a card with over 100 co-workers, and coal suppliers sent checks that he had to return because of a conflict of interest. So he believed that something so disturbing as the murderer being released from prison was less horrible than the actual murder and dismemberment that happened 12 years earlier. At that time, he had shared similar information and he did not get fired then. So, now (in May 2011) he was sharing an update about the situation. He shared the letter, so people would not try to talk to him about it. Because he cannot use Facebook at work, he included a Facebook reference to his nephews and a page they had set up called "Lynette's (his sister's) Law." He was working 9:00 to 3:00 that week, so he put it on his co-workers chairs facedown so they could, off business hours, read it in 5 minutes and get an update about things they had asked him about. He handed out no more than 250, one-page articles with an update. He did not believe this was an act of misconduct worthy of firing, because it had been the ordinary course of business of what had happened 12 years earlier. Since he had worked at the company for 21 years and his wife for 33 years, they knew most of the 500 or 600 people in the building. He tried to select those people they knew best to explain what was happening. He explicitly told this to Singer and Parker and put it in writing in an e-mail to Singer. He did this to avoid disruption and save company time because he did not want to have to explain all over to everybody what he had accomplished, and he thanked them for their prayers and letters. (Tr. 138-140).

He did not view what he did as an act of misconduct. He can accept that the Company may have viewed it differently, but he did not feel termination was appropriate punishment. When his sister was murdered in 1999, it was a large topic of discussion at work. The work environment at MidAmerican had always been a family atmosphere. He socialized with his co-workers and knew over half of the people in the building. It was a family atmosphere where people cared about each other. For example, when Parker was dying of cancer, a writing was cascaded throughout the company asking for donations. Mid-America sent a massive plant that had to cost hundreds of dollars to the funeral. (Tr. 140-141).

In 1999, he had workplace discussions with co-workers about his sister's murder. Nobody from Respondent company told him he should not do that. He was not disciplined for discussing his sister's murder in the work-place. In 1999, when his sister was murdered, he discussed it with his coal suppliers at length. One of his coal suppliers sent him a \$500 check for a scholarship fund for his nephews, so Complainant let the company know and decide whether it needed to be returned. In 1999, he had discussions with his coal suppliers about his sister's murder using the company e-mail system. They all wanted updates about how his family was doing. For many years, every time he met with his coal suppliers they would inquire about what was going on with his family. In 1999, he was never disciplined in any manner for sharing details through e-mails with coal suppliers. His boss was in meetings where it was discussed, but it was not discouraged or disciplined, it was encouraged and he received incredible support. (Tr. 141-143).

The second bullet point in his termination letter describes his second act of misconduct as, "He directed telephone calls of a personal and political nature to his office phone to avoid disruption of his personal business." Complainant and Singer had a conversation on May 5, 2011. Complainant sent Singer a draft copy of a nonpolitical letter to President Obama, and twenty-four others in which he told them that if they wanted to respond to him to contact him at his work phone number and they could meet in respondent's board room. Complainant showed

the letter to Singer on May 5, 2011, and Singer took exception to one thing. He told Singer that his first goal was to help his family, but he could stay and cover his coal duties from the office. Complainant did not want to work from home because his 9-year-old was unaware of the dismemberment of Complainant's sister. Singer gave Complainant permission to work in the file/war room, but refused to grant Complainant permission to use the board room to meet with people concerning his sister's case. Singer did not think it would be appropriate and would be escalating things too much. Singer suggested Complainant meet with people at his church or home, so in the letter, Complainant changed the Mid-American board room to his church or home. Just above that, he had his work phone number. Singer approved that in the letter. They could contact Complainant at work because that was where he was going to be the next several days. It was in the letter he showed Singer and Singer agreed. So, it is inaccurate to say that Complainant directed telephone calls of a personal and political nature to his office phone to avoid disruption of his personal business. (Tr. 144-146).

Singer not only gave Complainant permission to send the letter, but also gave permission to send a truly political one the next day to every member of Congress, when Complainant had the idea of "Lynette's Law." So, he was still using the conference room and had permission to use Molly (the secretary) to stuff envelopes in a discreet way, which he never did because he e-mailed them. So, he sent letters to 520 people asking for enforcement of the current laws which would keep his sister's murderer out of the state for 5 more years. Complainant did not direct the phone calls to the office to avoid personal disruption, but rather because Singer said he could and he was going to be at work doing Respondent's work that Singer wanted him to stay to do, when Complainant wanted instead to take all 6 weeks of his paid time off and concentrate solely on his family needs. He did not do that for personal gain, i.e. his limo business, because he shut that down for the month of May. Singer gave him permission to direct calls to his office. (Tr. 146-147).

He spent a lot of time in the office, while working on his personal project, because Respondent had significant things going on that required his attention at work. So, he was still overseeing his work duties. Singer could have assigned the responsibilities to co-workers, but he did not. So, Complainant stayed at work and used the number on the letter for that one reason, because Singer said he could. He has a personal cell phone which he uses for his limousine business. He could have directed calls to the cell phone, but he did not do that because he had one disciplinary issue in his 21 years of service, a performance development plan. In that plan, he was reprimanded for receiving limousine business phone calls at work. His boss told him at that time that it was a terminable offense to continue receiving calls on his cell phone and he was not to receive any calls on his limousine cell phone. Therefore, he did not even think to use his limousine phone at work, because he could be fired for that. That was the one thing he messed up on in the year 2000. It was not the only issue, but it was an issue that his boss told him he could be fired for. He had been told he needed to be off company property to use his limousine cell phone. He tried to explain that to Mr. DeBoer at his hearing, but was cut off. (Tr. 147-149).

The flyers he submitted to fellow employees which are referenced in bullet three of the termination letter, were on one page, the same thing he had e-mailed to his coal suppliers. It was a one-page, Associated Press article, that he thought clearly and succinctly described his family situation. He condensed the two-page article into one page so he could write down that if anyone

wanted an update on the kids, they could go to Facebook. He specifically thought about Facebook because it is blocked by Respondent. Therefore people would not be able to check it on company time or using company computers. So what he distributed could be read in 5 min. and would not waste his time at work trying to explain it to numerous co-workers who would ask more and more questions. That is what happened at the time his sister was murdered. He was trying to avoid spending time at work answering questions. His co-workers had been asking him about the situation and knew he was at the office on paid-time-off. His co-workers wanted updates, so he was trying to finish this. Also, his doctor had told him not to talk about the situation because of his high blood pressure. (Tr. 149-152).

On May 19, 2011, he had what is called a pre-disciplinary hearing. He does not believe he got a fair chance to tell his story. He came in not expecting to be interrogated. He thought he was just to come in and answer a few questions and take responsibility if they thought he did something wrong. At the hearing, he felt like he was on trial for murder. They did not take the time to meet him in-person, so any body language or non-verbal language was not seen by the person doing the interrogating, Brad DeBoer. DeBoer was in Des Moines with Singer, and Complainant just had a guy from HR from the Davenport office with him. They were on a conference call with a mediocre conference system. Complainant explained that he was recovering from extreme stress, thought he was just going to be asked a few questions, and did not know what he was being accused of. He asked if he had the right to an attorney, and was told that it was not allowed. When he tried to explain his answers, he would be cut off and they would go on to the next question. Complainant asked several times what he was being accused of. He wanted Singer to explain that he had been using paid-time-off, but Singer never spoke once. Baltazor never spoke once. It was only DeBoer interrogating and Complainant answering. (Tr. 152-154).

At the hearing, he tried to explain to DeBoer that his sister had been murdered and he had his boss's approval to do certain things from the conference room, even approval to mail every member of Congress, but he did not do something political. The May 6 letter was political, but the May 5 letter was not. He sent the May 5 letter to the President, politicians, and governors who could enforce an existing law, but he was not asking for "Lynette's Law" on May 5, 2011. He tried to explain that he had stage two hypertension and was extremely stressed about the way DeBoer was asking questions. DeBoer said he did not need to know about Complainant's medical history, and would cut him off. Whenever Complainant tried to explain, he would turn it around, say he had heard enough, and move on. It was not a fair hearing. The way he found out about the hearing was through a voice mail. DeBoer left him a voice mail saying they would like him to come in and talk about some of the things he had been doing. The only questioner was DeBoer. No one else spoke. (Tr. 154-156).

Complainant would like to return to his career with Respondent. He knows that they have moved his job from Davenport to Des Moines and he is not interested in moving, but would love to do the same job he used to do. He would also like a letter of apology. In his current job, he makes a third of what he used to make. On every job application, he has to explain why he was fired. He does not believe he will ever be able to advance and makeup the hundred thousand dollars differential between the \$50,000 he makes now and the \$150,000 he used to make before being fired by Respondent. No potential employers can understand how that could have

happened and they think there must be something deeper, because that just does not happen in today's world. (Tr. 156-157).

He is seeking back pay and lost wages from May 20, 2011, to the present. He had a unique job, and he would like to get it back. Since being fired, he has found work at an Army contracting plant in Rock Island, Illinois as a federal employee. He started working there on January 28, 2013, and his salary is roughly \$50,400, minus 20% for the sequester. He does not have dental or health benefits through the Federal Government, because he has them through his wife's job with Respondent. He has the thrift savings plan and unemployment. The value of his benefits are a few thousand dollars. Prior to getting the job with the Army, he taught one accounting class at St. Ambrose University which paid \$2,700. He has had no other employment, although he still owns his limousine business. Last year's reportable income was a few thousand dollars, so he had that when he was still working for Respondent. He submitted over 200 resumes, many with great effort, trying to get a manager, director, or vice president job with his skill sets. He made it to an interview with about five, and the first question potential employers had was why he left Respondent. He explained to them that he was a whistleblower and believed he had been retaliated against. They wanted to know why he would blow the whistle. (Tr. 157-159).

He is seeking compensatory damages for emotional distress. His termination destroyed who he was and his political career. He wrote a book to try to explain to people that it's about who you are, not what you do. He thought he had moved beyond the termination, but it is not something you get over because your career does define who you are. He spent his entire 21-year career, building up to be the greatest expert at PRB coal. His experience does not translate to any other specific job in the Quad City area. He would have continued at his job for the next 20 years. He loved the people he worked with and lost most of his friends, because he is not allowed on company property. He was not allowed to attend Roche's retirement. He cannot go to the building to see his wife retire or visit his wife. There have been rumors around town that his wife divorced him. (Tr. 160-161).

He thought Singer and Parker were his friends and that he had a good business relationship with Fehrman who called him his buddy. He feels betrayed and that they breached his confidentiality, when they knew that that was the only thing he asked of them. He also asked Parker if he wanted to join with Complainant to help him uncover the fraud. He did not expect Parker to say yes, but Complainant absolutely asked him not to betray his confidence and give up his name to Maureen Sammon. That is why he wants a letter of apology. He believes Maureen Sammon fired him, not Parker or Singer. He admits that he made a mistake, although he did not know what the mistake was, because they would not tell him the allegations. However, he admitted he must have made a mistake, because he was called in to answer questions. He asked them to please tell him the charges that were being leveled against him so he could fully apologize. (Tr. 161-163).

He has lost most of his relationships in the coal industry. Last April, he attended the National Coal Transportation Conference in Colorado Springs. His biggest coal supplier, Alpha, wanted to come to court to testify, but he told him that his testimony would just be hearsay and would not matter. He has lost hundreds of relationships. He was a workaholic so he did not

have a lot going on outside of work. He committed his entire life from age 22 to age 41 to Respondent. This has been extremely stressful for his family. They lost 75% of their income, and his children do not understand. He has been humiliated and was dumb to think he could stop corruption by Sokol and others. He believed Buffett would call him back and want to know the details. In hindsight, it is humiliating to think he actually believed he had power to make change and make people do the right thing. (Tr. 163-164).

He is seeking compensatory damages for harm to his reputation in the coal industry. If you are not a coal buyer, you are a coal seller, and no one is going to hire him to sell coal to Respondent, as long as there is a belief of friction between him and Respondent. He would do his best if called back to work for Respondent. His reputation is permanently tarnished in the coal industry. People do not know what happened, and assume that it must have been something bad. His reputation will never be the same, barring an apology from Respondents, in which they state that they overreacted and should not have terminated him for handing co-workers who cared about him an update on his family's progress and how he succeeded in something they cared about. After they fired him, they moved his job along with all the trading jobs of gas and electric to Des Moines, Iowa. They had kept the job in Davenport for his benefit. (Tr. 164-166).

[CROSS EXAMINATION] The first bullet on his termination letter stated that he had distributed personal and political information to co-workers and third parties that can best be described as coal and line [sic] suppliers, business partners and customers. RX 527 is an e-mail that he sent to, amongst other people, M. Mitchell at peabodyenergy.com, who is a coal supplier. He sent several other e-mail's to other coal and lime suppliers. The e-mail discusses his work, as well as his personal family situation. The e-mail refers to "Lynette's Law." The e-mail references Facebook and instructs people to "friend request" Chris Craft which will bring them to the "Lynette's Law" community page. He was not attempting to encourage people to pass "Lynette's Law," but was giving them a place they could go to get information on what had been going on with his family. Attached to the e-mail was an AP article containing his hand-writing. Singer did not give him permission to send this e-mail containing personal information. (Tr. 166-170).

The second bullet point on his termination letter states he directed telephone calls of a personal and political nature to his office phone to avoid disruption of his personal business. He did direct some calls regarding his personal issues to his office phone. The calls that were directed to his office phone were based on an e-mail he sent to people with the signature block that contained his e-mail address. He could not have sent his business card other than on May 5, 2011, to 25 people. He e-mailed the members of Congress from a St. Ambrose account. There was no Respondent phone number with several of these, and the letter about "Lynette's Law" contained his personal address. He did send a number of e-mails from his account with Respondent. The only letters he sent out by U.S. mail or FedEx that contained Respondent's phone number or address were the 25 letters he sent on May 5, 2011. He sent those letters out with Singer's permission. At times, when he sent out or called people, he left a call back number for his office. (Tr. 170-172).

During the pre-disciplinary hearing on May 19, 2011, he said one of the reasons he included the business card was so people could get a hold of him at Respondent's offices. He

tried to explain at the hearing why he did not want to change the message on his personal cell phone which he used for his limo business, but was cut off by Brad DeBoer. He said it would not make sense to change the greeting on his limo cell phone because he already had Singer's approval to use Respondent's number and he did not have a personal cell phone. He only had his limo cell phone, and he was not allowed to receive limo phone calls on Respondent's property. (Tr. 173-174).

The third bullet point on his termination letter was that he distributed several hundred flyers to other employees causing disruption of the business. He distributed 200-250 AP articles to his suppliers and co-workers. RX 520 contains the flyer that he distributed at the Davenport facility on May 17, 2011. The flyer contained his handwriting and referenced "Custom Limos on Facebook." Sometimes he left the flyers at people's desks or on their chair and some he handed directly to people. Some people who received the flyers would not have known about Tom Craft getting out of prison. Handing out over 200 flyers of this nature was not a normal business day at the workplace. (Tr. 174-177).

RX 552 is a letter he prepared addressed to Buffett regarding final justice for Lynette (Quast) Craft and needed change to our justice system. He prepared that letter on Respondent's computer system. RX 552 at page 3 contains a letter addressed to John Walsh that says, "Please help my family with a dire unjust cause." Walsh is someone who hosts a television show about wanted criminals. This letter was prepared on Respondent's computer system. The letter at MAE 397 is a letter to Senators and Congress people. He e-mailed this letter to 520 people, but not using Respondent's e-mail system. However, he prepared the letter on Respondent's computer. MAE 398 is a letter to a collection of Senators, US representatives, President Obama, and others. A letter similar to this was sent from Respondent's offices. Some letters he prepared at home on the weekends and put them on a thumb drive and may have downloaded them on to Respondent's computer. The May 5, letter to President Obama, which Singer approved, he started at home on a thumb drive. He later put it on Respondent's computer. There were things he may have done wrong, but it was unclear to him because he was never accused of anything in particular. At the hearing DeBoer asked him if sending the May 5, 2011, letter was appropriate. Complainant's response was that it was approved, reviewed, and consented to by his boss with full knowledge that he would use the conference room and facilities. Complainant paid for copying, so he thought that was justified because it was fully vetted through the process. He thought it was appropriate because it was not political and it was approved. He does not believe it was political even though the letter was sent to various politicians and government officials. He copied the flyers that he distributed on Respondent's property on Respondent's copy machine, after he sent a note to Singer that it was fair trade for anything such as incidental copying up to \$300. Complainant believes that Singer gave him permission to do this because Complainant offered 6 hours of work (using his vacation time) in exchange for his use of the conference room, incidental copying, incidental long-distance, and things like that. When they did his timesheet, they took all of his hours as vacation hours. Therefore they accepted his offer to use his vacation time to do work. There was offer and acceptance. (Tr. 177-182).

Singer did not expressly respond to the e-mail where Complainant said he would do incidental copying on the company's machine. Complainant believed Singer had consented when Respondent charged the 6 hours of work he had performed for Respondent as vacation

time. When DeBoer asked him if he would do the same thing again, he said he could not do the same thing again because he had one sister and she is dead. When he was asked if he saw nothing wrong with sending the May 5, 2011, letter, Complainant said he had approval to send it from Singer. He asked Singer to confirm that he had approval to send the May 5, 2011, letter and use the conference room. The question that was asked of him concerned the May 5 letter, not his other activities. During the pre-disciplinary hearing, he took full responsibility for conduct other than the May 5 letter. To the specific question of whether he would do anything differently regarding the May 5 letter, he said he would not do anything differently with the May 5 letter, because of the approval he had from Singer. (Tr. 182-183).

The termination letter shows that it was signed by Rich Baltazor for Rich Singer. Singer was not in Davenport. Complainant believed that, because he had done similar activities at work in 1999 when his sister was killed, such as send e-mail and talk to people, he thought it was okay to do the same thing in 2011.⁵ (Tr. 184).

RX 501 contains the full version of the MEHC Code of Business Conduct. He understands that Respondent believes his conduct violated page 9 of the policy which prohibits using company resources for the purpose of supporting political activities. He used the company e-mail system to e-mail individuals and government officers about his personal situation and to promote "Lynette's Law." He prepared letters to various Congress people using the company computer. He also either worked on letters or put them on the computer at Respondent's offices. He used the office phone to make some personal calls and receive calls. Page 13 of the code is the conflict of interest policy. The policy states that conflict of interest occurs when you or a family member have a personal interest or involvement in an activity that could interfere with your ability to perform your job in an objective, impartial and effective manner. It states you must avoid personal conflicts of interest or appearance of such conflicts that could reflect adversely on you or the company. He understands that Respondent believes he violated the conflict of interest policy. He did send e-mail's to various coal supplier that included the e-mail and flyer discussed. (Tr. 185-188).

He had close personal relationships with his coal suppliers and others at those companies. He would attend dinners with them and they knew his wife. He had multi-year relationships with the coal suppliers to whom he sent the personal e-mails. However, he did not meet the lime supplier until 2006. He agrees that the e-mail he sent mixed business and personal information. (Tr. 188-189).

He understands that Respondent thinks he violated page 19 of the Code (Posting and Distributing Materials) by distributing flyers around the work premises. Singer did not give him express permission to distribute flyers all over the Davenport building. He understands that Respondent believes he violated page 20 of the Code (Disturbing Others) by talking to people and handing out flyers. He understands that Respondent believes he violated page 20 of the Code (Solicitation) by handing out flyers, although he does not believe he was soliciting, which he thinks means selling something. (Tr. 189-191).

⁵ At this point of the testimony, Respondent's counsel explained that RX 537 contains handwritten notes made by Baltazor at the pre-disciplinary hearing and a typed version of the same. RX 540 contains handwritten notes by DeBoer.

Page 21 of the Code states that users may not utilize the Company's intranet e-mail resources for commercial and personal advertisements, solicitations, promotions, political material etc.. He has already acknowledged that he created, revised, or in other ways used Respondent's computer for personal use and the cause he was promoting. Page 22 of the Code states that you may not use the company name in any transaction, lease, purchase agreement, etc. as a representative of the company without the advance approval of management, and communications with the media must be approved in advance. It is true he sent e-mails from the Respondent company computer to members of the media. In some mailings, he included his business card from Respondent. He also had communications with an individual who is in constituent services with the Wisconsin governor's office. He sent the May 5, 2011, letter to the Governor of Wisconsin. (Tr. 192-193).

He did not encourage Ms. Henry of the Wisconsin governor's office to think he had a relationship with Warren Buffett. RX 505 is an e-mail he sent to Fehrman. Attached to the e-mail, was his April 9, 2011, and April 12, 2011, letters to Buffett. The introduction to the April 9, 2011, letter does not identify any specific conduct of Sokol. Page 5 of the letter, refers to a \$340 million after-tax loss by CalEnergy. He was never employed by CalEnergy and never worked on the zinc project. He never had access to CalEnergy's accounting records. With regard to the Casecnan project, that was a project that CalEnergy was involved in. Respondent was not involved in that project. He never worked on the project. There were three lawsuits relating to the Casecnan project. He has no information about those lawsuits other than what was in the public record. He has information about the Casecnan project that was not publicly available. As an employee for Respondent, he had access to all of Casecnan and CalEnergy's results because they are shared with employees. Financial results, including things like zinc recovery losses of Casecnan, that are reported as major successes or failures could be found in monthly reports of MEHC. Because he worked on the MEHC corporate report, he was aware of lawsuits and such things which were for the eyes of somebody at manager level or above. The information about the zinc project began as confidential information that was only for the eyes of MidAmerican, but once they reported it to Berkshire, it became a footnote in Berkshire's 2004 annual report. That report is not part of the record. On page 5 of his April 9, 2001, letter he was referring to the buy-out of CalEnergy by Berkshire Hathaway which is linked to the merger of CalEnergy and Midamerican. He had no involvement in the establishment of the price in either transaction. He does not know who made the valuation. The board of directors approved it, because that was stated in the press release. (Tr. 194-201).

Page 6 of his letter where he referred to an elephant gun was code for the situation at Lake DeSmet, M&M Ranch. This was originally a much longer paragraph, but he took it out because he did not have the evidence to support the allegation. (Tr. 203).

In 1999, he engaged in similar conduct to what he did in 2011. In 1999, there was communication, i.e., written, e-mail, verbal, that went on for long periods of time with scores of co-workers. The conduct was similar, but not exactly the same. In 1999, he had a different boss. There have been upper management changes in the Company from 1999 to 2011. He believes they had a similar Code of Conduct in 1999, although it may have been different than the one he signed for in 2001. (Tr. 208-210).

In his April 9, 2011, letter to Buffett at page 5, he expressed that he felt Sokol had somehow manipulated or inflated the stock price at the time of the acquisition by Berkshire. He is aware that some of Sokol's stock sales were the exercise of options and that there was a lawsuit regarding the sale. He is aware that the lawsuit alleged the stock price was undervalued and not overvalued. He believed Sokol was able to dupe Buffett, who was known for making decisions quickly. He has no personal knowledge of what MEHC disclosed to Berkshire at the time of the acquisition. He agrees that Buffett is one of the most successful investors in history and is not naïve. He believed that Sokol did not act alone and there could have been somebody else in MEHC's management who assisted him. The individuals he named were Goodman, Abel, and Anderson. He was never part of any conversations between these individuals and Sokol regarding the share price and has no personal knowledge about how that share price was calculated. The share price calculation was not contained in any of the information he received as a manager at Respondent or in any of the DVDs or annual reports. (Tr. 210-214).

There were also things he was concerned about regarding Sokol that were not contained in his Buffett letters. One was the purchase of a Falcon corporate jet and the other was the purchase of property at Lake DeSmet, which used to be called the M&M Ranch. There were also lime and limestone purchases. Another concern was a charitable event at which Sokol was to receive an award and there was a solicitation of donations to buy tables. His sentence on page 6 of his April 9, 2011, letter regarding using one bullet left in your elephant gun was a veiled reference to the Lake DeSmet purchase. On page 7 of the April 9, 2011, letter in the first P.S., he refers to a Falcon jet. That was a reference to his claim that there was something improper about purchase of a Falcon jet. Mr. Roche is not going to be called as a witness and is retired from Respondent. (Tr. 214-217).

Complainant believes he initiated the investigation that the Berkshire Hathaway audit committee conducted of some of Sokol's conduct. The audit committee investigation led to the SEC investigation of Sokol. He does not believe he initiated the audit committee investigation, but believes he influenced it. The day Becky Quick received his letter, was the day the audit committee met. He has no evidence that the audit committee conducted an investigation, in part, because of his letter. There is no evidence that the audit committee ever saw his letter. He has no evidence that Becky Quick of CNBC asked questions in her interview because of his letter or that she ever read his letter. (Tr. 217-219).

On page 7 of his April 9, 2011, letter to Buffett, he solicited Buffett for a job leading an ethics improvement initiative. On page 7, he also told Buffett about the personal issue with his sister and former brother-in-law getting out of prison. After he was terminated, that was the subject he later wrote to Buffett about. He was seeking help with some of the legislative things he was trying to accomplish. (Tr. 219-221).

RX 505 also contains his second (April 12, 2011) letter to Buffett. He sent a copy of this to Fehrman and Singer. In the letter, he offered to give Buffett a limousine in exchange for a meeting to discuss the specifics of his two-step solution. One of the steps was to create the position he had asked Buffett to place him in. In both letters that are part of RX 505, he typed the words "Strictly Confidential." He sent the letters to Buffett's business and home addresses.

He did not call the ethics and compliance hotline number that is in the Code of Business Ethics for MEHC. He did not send an e-mail to the BRK hotline e-mail address. He did not send any of the information in the letters to the audit committee for MEHC. He showed the letter to Roche and had a telephone conversation with Singer. On April 13, 2011, he showed a copy of the letter to Parker. He also sent a copy of the letter to Fehrman. He agrees that Fehrman could send it to whomever he desired. In his e-mail to Fehrman, he stated that he would appreciate it if Fehrman would not share the letter with anyone else, because he had the only copy other than Buffett. Complainant did send a copy of the letter to Singer. He also talked to two other employees, Dodson and Hankins, about the letter, but did not give them a copy. He talked to one or two coal suppliers about the letter, but did not give them a copy. He told them he had tried blowing the whistle on Sokol. (Tr. 221-228).

He felt he had received permission for everything he had done from Singer. If he testified previously that the permission had come from an e-mail he sent to Singer on May 5, 2011, he thinks, in fact, they had a phone conversation on May 5, 2011, and perhaps the e-mail was on May 12, 2011. There were several e-mails back and forth. He does not know if the e-mail is amongst his exhibits. He cannot recall if that permission was written or verbal, but he did have a recorded conversation with Singer in which he explicitly said on May 6, 2011, that Complainant had permission to even use Molly, the secretary, to send letters to every member of Congress. He may have previously used the word "e-mail" when he meant "letter." He thinks he may have faxed the letter first to Singer to review, and Singer sent an e-mail back on the morning of May 6, 2011, saying he received the final copy of the letter that went out. He believes he faxed it on May 5, 2011, and Singer e-mailed him on May 6, 2011. Complainant later e-mailed the final version that went out after he had scanned it, and Singer e-mailed back his approval. He does not have a copy of the fax. (Tr. 228-233).

In the year 2000, he had a Performance Development Plan (RX 503). He agreed at that time not to conduct personal limousine business during work hours, to reduce personal work interruptions, and to rededicate himself to improving his performance to his previous high level. At his 2011 pre-disciplinary hearing, he testified that the reason he distributed flyers around respondent's Davenport facility on May 17, 2011, was because he was trying to avoid phone calls, e-mails, and personal visits by co-workers. He has not offered the e-mails as exhibits. (Tr. 233-235).

RX 528 contains an e-mail from Molly Mitchell of Peabody Energy, replying to an e-mail Complainant sent with the coal nominations in which he described his family situation. CX 38-40 are e-mails from individuals to whom he sent an e-mail with information about his family. These e-mails are from people who worked as coal suppliers or vendors of Respondent. Each of the e-mails was in response to an e-mail Complainant sent out. He had personal relationships with these individuals and had their personal phone numbers. For some of them, he only had their business number because they use their business number for personal calls as well. (Tr. 235-238).

RX 548 is an e-mail he sent to Mike Oesch dated November 17, 2011. Oesch was an investigator with OSHA who was investigating Complainant's whistleblower complaint. Complainant had a discussion with Singer on May 2, 2011, about taking some paid-time-off to

deal with his family issue. He does not believe this telephone call was from a recorded line. He did not like to make personal calls in his office because his co-workers could listen, so sometimes he called from the "war room" which did not have a recorded line. He believes that the call to Singer to explain about his sister's killer was made from the war room, which was not recorded. He told Oesch that he believed people at Respondent company knew he had gone, or intended to go, to federal authorities and the DOJ or FBI. He agrees that he told Oesch that he told Singer in a phone call that he planned to go to the DOJ or FBI, and suggested Oesch listen to all his recorded phone calls. The record does not contain a recorded call in which Complainant told Singer he was intending to go to the DOJ or FBI. He is not claiming he ever told Singer he intended to go to the DOJ or FBI. In his discussions with Oesch, Complainant never told him that he told Parker he was going to the DOJ or FBI. (Tr. 238-245).

At the time he spoke to Oesch, he believed that Singer and Parker had not tried to fire him and that it had been done because of Sammon. Complainant believed that if Oesch spoke to Singer and Parker, they would clarify what had happened. He did not want to get them in trouble. He did not realize that Oesch would fail to interview Singer or Parker. Complainant told Parker in April 2011, that he was pushing for a third party investigation (of Sokol), which he was hoping would be at the federal level. Therefore, when Oesch asked him if he had told any of his supervisors of his intent to go to the DOJ or FBI, he did not mention Parker because he had not used those specific words with Parker, just the more generic "federal level." He does not know why Oesch did not interview Parker. In his e-mails with Oesch, Complainant did not mention that he told Parker in April 2011 that he planned to go to some sort of federal agency or investigators. In the investigation, he also mistakenly told Oesch that he had discussed Sokol in telephone calls with U.S. Attorney, Joel Barrows. (Tr. 245-249).

RX 513 contains an e-mail dated May 12, 2011, that he sent to a number of people, some of whom worked for Respondent including Singer in which he described what happened on that day regarding fixing a flat tractor tire and then sleeping. However, in a book he wrote, when he described that day, he said that instead of taking a nap, he drove, "Cannonball Run" style to Whitewater, Wisconsin. (Tr. 249-250, RX 558).

RX 552, at page number 255 contains a heading, "Bob's Ultimate Cannonball Run." This document was on Respondent's work computer and was prepared by Complainant. It details all of his activities from 9:07 a.m. to 3:06 p.m.. In this document, he exaggerated about the speeds he was traveling. (Tr. 251-252).

He testified that he had accordion files of documents he had collected regarding Sokol. The files were kept in his office at Respondent. The hard drive on his computer at home crashed as well as the recording of the pre-disciplinary hearing that he had on his phone. (Tr. 253-254).

When he interviewed for a job, he told a potential employer that he had been fired for whistleblowing as well as told them why Respondent said it had terminated his employment. He wrote a book and sold it, but put all proceeds into domestic violence donations, so the book was nonprofit. (Tr. 254-255).

In 2007, he called the ethics hotline to ask a question. He believes that as a result of that phone call, an investigation was conducted and an individual was discharged from employment. Complainant did not receive any adverse action for making the phone call. He called the hotline because he wanted to determine whether his boss was violating Sokol's new entertainment policy. Prior to the policy going into effect, they were allowed to do a lot of things with management approval that involved entertainment with vendors. In February 2007, Sokol instituted a new entertainment policy which prohibited activities that were formerly allowed. He has not violated the new policy. (Tr. 256- 259).

[REDIRECT EXAMINATION] RX 510A (MAE 1764) is the May 5, 2011, letter that he showed to Singer. At page 3 of the letter (MAE 1767), he mentioned his office telephone number at Respondent company. He showed the full May 5, 2011, letter to Singer. (Tr. 263-264).

[REXCROSS EXAMINATION] The first two pages of RX 510A contain an e-mail from Complainant to Singer, containing the letter and attachments (MAE 1764-1777). (Tr. 265).

Jon Ellstrom, Facility Manager

[DIRECT EXAMINATION] He is employed by Respondent and is the facility manager for the East District of Iowa and Northwestern District of Illinois. He is based at the headquarters building in Davenport. This is the building Complainant worked in when he worked for Respondent. He is responsible for building operations. On the morning of May 17, 2011, Complainant came to see him and requested a whiteboard and started to explain the reason was because he was on a campaign. Complainant said that the campaign was called "Lynette's Law" and explained that his sister had been murdered sometime prior, and he was trying to get this law passed to keep criminals in prison longer. Complainant came to see him in his office and handed him the document which is at the second page of RX 522 (the flyer). RX 522 shows that Ellstrom then sent a copy of the document to Russ White, his boss. White then forwarded the e-mail to several people (Fehrman, Sammon, Lovig, Sonnenburg). Ellstrom told White that Complainant had been papering the building with these flyers. Complainant told him that he had given the flyer to other employees in the building. Some employees mentioned the flyers, in passing. He believes that most of the employees knew Complainant by face. He does not know if anyone who received a flyer did not know Complainant. (Tr. 267-272).

Ellstrom went to the eighth floor conference room to take a look at the room where Complainant wanted the whiteboard placed. He noticed a bunch of clippings taped to the wall. He did not stop to read what was on any of the papers in the room. He did not see any letters that Complainant had written to Buffett. He did not see any business cards for any representatives of the DOJ or the FBI or any documents referring to them. After observing the room, he went to his office and called his boss to let him know what he had seen. His boss asked him to put a narrative together as to what he had discussed with Complainant and send it to him. RX 521, page 2, is the narrative he sent to his boss, White, at his request. Complainant told him he had written to Warren Buffett, asking for his help with the new law. Complainant did not mention any other subject that he had written to Buffett about. Complainant told him that he had

contacted the President of the United States. He understood Complainant to say that he was contacting them about "Lynette's Law." (Tr. 272-276).

[CROSS EXAMINATION] Of the people he encountered on May 17, 2011, he does not know which of them may have known Complainant very well or which may have been strangers to him. Some of the people expressed surprise about the flyers, but he does not know their names. None of them seemed upset, just surprised. Nobody said they were upset about receiving the flyers. Complainant did not tell him the letter he wrote to Buffett discussed confidential whistleblowing or wrongdoing at Respondent company. Complainant did not tell him he had been working with the DOJ as part of his confidential investigation into MEHC. He did notice newspaper articles or clippings taped to the wall. He did not see a letter to Buffett. He did not notice that any of the documents taped on the walls included letters or other information to Buffett. He did not see a business card for Joel Barrows of the U.S. Department of Justice. Complainant did not tell him he needed the whiteboard to prepare for a meeting with the DOJ. Complainant did not tell him to contact Singer to discuss the confidential nature of the work Complainant was doing with the DOJ and an internal ethics investigation into Sokol. (Tr. 276-279).

Maureen Sammon, Senior Vice President and Chief Administrative Officer, MEHC

[DIRECT EXAMINATION] She has corporate-wide responsibilities across MEHC's businesses for human resources, information technology, insurance, corporate communications, safety and labor relations. In April 2011, she took notes of events that occurred, which are contained in RX 546. The notes are dated June 15, 2011. She first learned that Complainant had sent a letter to Warren Buffett when Jim Parker told her about it. Parker was the Vice President of Energy Trading. He was the supervisor of Complainant's boss. Parker told her on April 13, 2011. RX 504 contains an e-mail she wrote to Fehrman on April 13, 2011, describing her conversation with Parker on that date. At the time she sent this e-mail, she had not seen the letter Complainant wrote to Buffett. When she stated "we should see the letter and then consider disciplinary action on two possible fronts," she meant that they should see if the letter involved company resources being used for a personal matter. She also thought they should find out if Complainant used the company's name on behalf of a personal matter. (Tr. 281-284).

When she stated in the e-mail that it didn't sound like the letter contained any new information and thus wouldn't qualify for whistleblower status, she meant that based on what Parker told her about the letter, it sounded like it was referencing actions or business activity that had already been disclosed publicly. The reason she stated that it did not sound like the letter contained anything that would qualify Complainant as a whistleblower was because Parker told her the letter was about actions that Sokol had taken several years earlier and had been publicly disclosed. (Tr. 284-285).

RX 507 contains an e-mail from Fehrman to her showing he forwarded the Buffett letter to her. RX 505 is an e-mail from Complainant to Fehrman with the attachment of Complainant's (April 9, 2011) letter to Buffett. It would be typical for Fehrman or his peers, i.e., other company presidents, to send her significant correspondence from employees. There are nine energy companies and a real estate company that fall within the holding company of MEHC. Fehrman

wanted her to review the letter. After she reviewed it, she talked to Russ White, V.P. Of General Services, because she wanted to review whether there were any threats to company employees. The letter did reference a gun at one point, so she wanted to do a threat analysis, and White is in charge of security. They determined there was likely not a threat to other employees. The reference to a gun appeared to have been a reference to some statement that had been in a shareholder letter. After she reviewed the letter, she did not feel any disciplinary action was necessary. When she looked at the references to CalEnergy and Casecnan on page five of the letter, she viewed those as the issues or events that Complainant was raising regarding Sokol. (Tr. 285-289).

The CalEnergy zinc recovery project concerned a project of Southern California with geothermal operations. CalEnergy is a subsidiary of MEHC. The project was to extract minerals from the geothermal design by-products. It was not a successful project, so they wrote it off. This occurred around the year 2004. The write-off was a matter of public record, disclosed in SEC filings. Complainant did not work for CalEnergy or have access to any nonpublic information regarding the zinc recovery project. Nor would he have had access to any nonpublic information about the write-off. When she reviewed Complainant's (April 9, 2011) letter to Buffett, she determined that Complainant was not reporting any new information. (Tr. 290-291).

Casecnan is a hydroelectric project in the Philippines. It is owned by CalEnergy. There have been two lawsuits related to that project. The first began around 2001. Complainant did not perform any work on the Casecnan project. When she reviewed Complainant's letter to Buffett, she determined he would not have any information that he could be reporting related to Casecnan. She never discussed Complainant's April 9, 2011, letter with Warren Buffett or Greg Abel. Abel is the Chairman, President, and CEO of MEHC. She never discussed the letter with Sokol. Sokol resigned from his position at MEHC in March 2011. After he announced his resignation, she never talked to him. (Tr. 291-293).

MEHC is a majority-owned subsidiary of Berkshire Hathaway, so Berkshire Hathaway owns most of MEHC. MEC (Respondent) is a direct subsidiary of MEHC. Berkshire Hathaway has an annual shareholder meeting. In 2011, the meeting was held in early May. It is a large event with over 30,000 attendees who are shareholders of Berkshire Hathaway. There are members of the media and financial community present. There is an exhibit hall where dozens of the companies owned by Berkshire Hathaway have displays for shareholders to visit, and there is a question and answer session and a business meeting in another location within the same arena. Shareholders can tour the exhibit booths, and Mr. Buffett generally takes at least one tour around the exhibit hall before he conducts the question and answer session. (Tr. 293-295).

As part of her job, she is responsible for MEHC's booth at the meeting. The booth represents all of their businesses, so the energy businesses plus the real estate company are on a display with a backdrop and they hand out materials to shareholders who have questions or need information. A number of employees of the company work in the booth. They are trained every year about overall company issues that could come up. They are trained about issues that could be controversial or cause disruption, and they are given information to hand out to shareholders. (Tr. 295- 296).

At the shareholder meeting, there could be distractions, such as members of the media who have not been straightforward with them in the past, whom they do not want to spend a lot of time with. There could also be special interest groups or individuals who have issues and want to use this very large meeting as a forum. She considered Complainant to be a potential distraction, because in his Buffett letter, he stated he desired a meeting with Buffett and wanted to speak to him. Therefore, she had a picture of Complainant that she showed to the booth workers and designated a person to be in charge of him. She had what Complainant looked like confirmed by Russ White. She saw Complainant at the shareholder meeting, but he did not cause a distraction. Complainant came up to her at the booth, jabbed her in the arm, stuck out his hand to shake, introduced himself, and asked how she was doing. She had no other conversations with Complainant. She was not angry or upset. (Tr. 296-299).

During Complainant's employment at Respondent company, she had never heard that Complainant communicated with or approached anyone at the DOJ, FBI, or any other regulatory agency. To her knowledge, MEHC was never contacted by the DOJ, FBI, or SEC about anything in Complainant's letter to Buffett. If such contact had occurred, she would have been aware of it. (Tr. 299-300).

In mid-May 2011, Russ White informed her of some activity in the Davenport office. She received the e-mail and attachment at RX 522 from White. The (May 17, 2011) e-mail was also sent to Fehrman who is the CEO of MEC, Lovig who is in charge of Employee and Labor Relations at MEC and reports to her, and Sonnenburg who reports to Russ White. RX 521 contains another e-mail that she received from White that same morning. She believed that the description of Complainant's behavior described by Ellstrom was a cause for concern for the company. She talked to Lovig about having Brad DeBoer investigate. DeBoer conducted an investigation. After he finished investigating, DeBoer, along with Rich Baltazor, a Labor and Employee Relations employee, looked at what was happening, interviewed people including Singer and Complainant, and ultimately a group of management officials met to discuss what was discovered. She learned what DeBoer had found out at that meeting. (Tr. 300-303).

RX 546 contains her notes. DeBoer reported that there had clearly been use of company resources, a flyer that was not about company business had been passed out to a number of employees, and the flyer had been attached to business correspondence with key coal suppliers of Respondent. DeBoer reported that Complainant had acknowledged his actions had violated the Code of Conduct, and stated he would do the same thing again if faced with similar circumstances. At the management meeting, some people were on the phone and some were in person. It included Baltazor, DeBoer, Lovig, herself, Singer, and Parker. In person with her were Singer and Parker. DeBoer and Baltazor were on the phone, and she does not recall if Lovig was in person or not. She would normally participate in such meetings involving employees. The group decided that Complainant's employment should be terminated. The reason for termination was that Complainant had made a serious error in judgment by using company resources and the company name for personal political gain. When he said he would do it again, they determined there was no way to properly have him conduct his job responsibilities and insure that he did not do it again. They discussed whether there was any way to retain him in his position or a lower level position and determined there was not. Everyone agreed to termination. (Tr. 303-307).

RX 544 contains Complainant's termination letter. The letters that Complainant wrote to Buffett (in April 2011) had nothing to do with the decision to terminate his employment. At the meeting in which it was decided to terminate his employment, no one mentioned the Buffett letters. At no time from May 17, 2011, until Complainant's termination, were the Buffett letters ever discussed. At the management meeting discussing Complainant's termination, no one brought up that Complainant might be talking to any federal investigators. At the time that Complainant was employed by Respondent, she was unaware that he had talked to any federal investigators. The termination decision was conveyed to Complainant by Baltazor, in person, with DeBoer and Singer on the telephone. After that meeting, DeBoer sent her the e-mail at RX 545. She was surprised when she heard that Complainant had said his letters to Berkshire Hathaway and Buffett must have angered her, and that she was obviously upset when he approached her at the Berkshire Hathaway meeting and described her as pale. She did not see any connection between the earlier events [and Complainant's termination]. At the Berkshire Hathaway meeting, she was not angry or upset. She was not angry that Complainant had written letters to Buffett. Complainant's termination had nothing to do with his letters to Warren Buffett. (Tr. 307-310).

[CROSS EXAMINATION] She first learned of Complainant's April 9, 2011, letter to Buffett on April 13, 2011. The decision to terminate Complainant was made on May 19, 2011, approximately 5 weeks later. Before she had the chance to read Complainant's April 9, 2011, letter to Buffett, she did consider that discipline might be appropriate. At that time, she was aware that Complainant had written a letter to Buffett and that it referenced allegations regarding Sokol. (Tr. 311-313).

CX 20 contains the e-mail she sent to Fehrman on April 13, 2011 (and states that they might consider disciplinary action on two possible fronts). The second possible reason for discipline was whether Complainant wrote his letters as if he were doing so on behalf of the company, but was really looking out for his interests as a shareholder. The company she was referring to was Respondent, MEC. She also stated in her e-mail that it did not sound like Complainant's letter contained any new information. In the e-mail, she stated that the lack of new information would disqualify the letter from whistleblower status. She was stating that she did not think that Complainant would qualify for whistleblower status if the letter contained no new information. In the third paragraph of her e-mail, she stated that, "Regardless, he made a serious error in judgment that should ultimately be addressed." She is not sure what she meant by that sentence. (Tr. 314-316).

After that sentence, she wrote that they have many avenues for employees with issues to pursue, short of writing to Mr. Buffett. In other words, she would remind an employee of all the other avenues that they have internal to the company if they have a complaint. She wanted to scan Complainant's e-mail and computer drives because he wrote a letter that sounded like it might be personal in nature, and it would be typical to see if that was done on company time and equipment. Her suggestion to Fehrman to scan Complainant's computer drives and e-mails was not pursued. She does not recall discussing this with Fehrman, but if he testified at his deposition that he counseled her not to scan Complainant's computer and e-mail, she would have no reason to disagree with him. (Tr. 316-317).

In her position at MEHC, she is responsible for the top human resources people. There is one overarching Code of Conduct that applies to all MEHC employees including those at Respondent, MEC. CX 33 contains a human resources policy. The same policy is contained at RX 502. She assumes this is MidAmerican Energy Company's policy. The policy would apply to the review and potential discipline of Complainant beginning May 17, 2011. CX 33 (MAE 34) states that formal discipline is to be used only after the appropriate investigatory discussions or disciplinary hearings as outlined in labor contracts or company procedures. CX 33, page MAE 36, defines an investigatory discussion or disciplinary hearing as an opportunity for the employee and supervisor to get together, giving the employee an opportunity to respond to an attendance, conduct or work performance concern, before formal discipline is determined. The people involved in Complainant's May 19, 2011, disciplinary hearing were Complainant, DeBoer, Baltazor and she is not sure if Singer was present or not. (Tr. 317-321).

The policy states that the investigatory discussion or disciplinary hearing must take place before formal discipline is determined. Before the determination, the whole investigation should be completed. She agrees that Respondent would want all available information before deciding whether to discipline an employee or deciding what level of discipline is appropriate. She would say they would want all information about the situation they were investigating, not all information about an employee. The information about the situation they were investigating would not necessarily include the investigation summary, such as that prepared in Complainant's situation. They would like to have available the employee's responses and answers during the disciplinary hearing. (Tr. 321-323).

Complainant's disciplinary hearing occurred on May 19, 2011, and the investigation summary prepared by DeBoer was also issued on May 19, 2011. In an e-mail she wrote to Parker on May 18, 2011 (CX 11), she stated that she believed "our next step will be termination." She wrote this e-mail before the disciplinary hearing and before she had the investigation summary. (Tr. 321-324).

She had a business relationship with David Sokol. She had no reason to want to protect him from allegations of wrongdoing. She was not concerned that Complainant's April 9, 2011, letter to Buffett would lead to an internal ethics investigation at MidAmerican or to an outside investigation by the SEC. (Tr. 324-325).

At the Berkshire Hathaway shareholder meeting, she had a picture of Complainant. He introduced himself by name when he came up to her at the meeting. She did not recall meeting him previously. CX 16 (MAE 369) contains an April 21, 2011, e-mail from her to Russ White. She sent White the attached newspaper article with a photo and stated that she believed the letter-writer was the guy in the background of the photo. By letter-writer she was referring to Complainant. She had received the news article as an alert because she receives any stories that come over electronically about the company. She was getting ready for the Berkshire Hathaway shareholder meeting, and White's staff helped her with the booth set up, security and staffing. There was nothing specific in Complainant's April 9, 2011, letter to Buffett that indicated he planned to disrupt the shareholder meeting. In the letter, Complainant was offering to work for Buffett. (Tr. 325-329).

CX 8 contains an e-mail she sent to Terry Payne who was in charge of IT infrastructure, on May 17, 2011, asking him to immediately capture all available files of Complainant. She asked him to capture the last 30 or 45 days of information. At that time, Complainant's supposed wrongdoing including sending e-mails to suppliers and handing out flyers in the workplace. In investigating these two potential acts of wrongdoing, she needed 30 to 45 days of information from Complainant's electronic records including e-mails, PDF files, and all kinds of documents. Other than the three bullet points of the May 20, 2011, termination letter, nothing else played a role in Complainant's termination. (Tr. 330-331).

Referring to her notes at RX 546 (MAE 216) she stated that the purpose of her reviewing the April 9, 2011, Buffett letter was to assess whether there were any perceived threats to any employee and to prepare for any potential media, as well as to review whether there were any allegations that should be further investigated. The allegations she was referring to that might need further investigation were the allegations about Sokol. After she read the letter, she determined that those allegations did not require further investigation. She did not refer the letter to any sort of internal audit committee. She also reviewed the Buffett letter to determine whether Complainant should be disciplined for writing it. She did not state that in her notes. (Tr. 332-333).

At the shareholder meeting, she did know who Complainant was because she had handed out his picture to the booth workers. She does not recall how long the management's conversation, regarding whether Complainant should be disciplined, lasted. That discussion took place on May 19, 2011, the same day as Complainant's disciplinary hearing. Referring to the human resources policy, RX 502 (MAE 42), Complainant was fired solely for events that occurred on the evening of May 16, 2011, and May 17, 2011, as well as his comments during the investigatory hearing. The policy states that you can forfeit your right to the disciplinary process if you commit an offense of major consequences. (Tr. 334-337).

CX 14 contains a series of e-mails. On May 17, 2011, at 5:59 p.m., she sent an e-mail to Russ White discussing that Complainant was told he needs to go through an EAP (Employee Assistance Program) assessment before he can return to the workplace. However, the e-mail did not absolutely say he could return to the workplace. At that time, they had not determined whether to fire Complainant. They had defined what the next step would be before Complainant could come back to work. Before they decided if he could return, they were going to conduct an assessment or an investigatory hearing. At 8:47 p.m. on May 17, 2011, she wrote an e-mail to White. (CX 15). She is not sure what risks she was referring to in that e-mail. In an e-mail that White sent to her at 7:48 p.m., there was discussion about Complainant returning to work after going through appropriate medical analysis. (Tr. 337-341).

CX 18 contains an e-mail she wrote to Fehrman on April 15, 2011, regarding an employee letter to Buffett. In the e-mail, she told Fehrman that she had pulled [Complainant's] personnel file. She pulled this file to determine if there were any other issues that Complainant had had with the company. On April 14, 2011, she sent an e-mail to Susan Leonard, who is responsible for employee relations and HR compliance, and asked her to pull Complainant's employment file and any PD (Performance Development) log information. In looking at

Complainant's employment file, it is possible she was checking to see if he had written a letter like this before. In his file, he had one previous warning about conducting personal business on company time. (Tr. 341-344).

CX 22 contains an e-mail string concerning circulating the draft termination letter that would eventually be sent to Complainant. She questioned why Parker was having Fehrman review the letter. She was concerned that after she had reviewed the situation with Fehrman, other people had also tried to review it with him. She did not want to waste his time. Fehrman would expect her and the management team to handle something like this. She did not have a preferred outcome as to what should happen to Complainant. During the investigation of Complainant between May 17 and 19, 2011, she was aware that he was the same person who had written a letter to Buffett (in April 2011). She does not know if anyone actually looked at the "Lynette's Law" internet page. (Tr. 344-348).

Respondent company was part of MEHC after March of 1999. She is unaware of any disruption in the workplace in 1999, when Complainant's sister was murdered. She did not give a copy of the Buffett letter to Sokol, does not know if anybody gave him a copy, or if anybody ever spoke to him about the letter. Sokol, Abel, and Buffett did not have any input into the investigation of Complainant in May 2011, or the disciplinary action taken.

[REDIRECT EXAMINATION] Regarding CX 20, an e-mail she sent to Fehrman on April 13, 2011, she referred to Parker speaking to her about the Buffett letter. Parker told her that besides the discussion of Sokol, the letter mentioned Complainant's status as a shareholder in Berkshire Hathaway and his desire to speak to Buffett. If the letter contained no new information other than information that had previously been disclosed, she would have concluded that this was not a whistleblower situation. According to what she had been told, the letter only contained items that had already been publicly disclosed in SEC filings. (Tr. 350-351).

In reference to the e-mail at CX 11 in which she stated she believed our next step will be termination, the reason she referenced termination was because based on her experience in investigations, that was her guess as to what would happen to Complainant. Although the group had not yet reached a final decision, she thought that could be the outcome. (Tr. 351-352).

The reason she did not do any further investigation [of the Sokol allegations contained in the April 9, 2011, letter] was because when she read the letter, she determined there were no allegations that needed to be investigated. The Calendar G and Casecan situations were completed and had been publicly disclosed. There are some situations where a company might make a decision prior to having every bit of information, based on an analysis that they had sufficient information.

Brad DeBoer, Labor And Employee Relations Representative, MEC

[DIRECT EXAMINATION] He has been employed at MidAmerican Energy as a senior labor and employee relations representative for just over five years. Part of his job is to work with managers and supervisors on disciplinary issues and investigate circumstances of potential

wrongdoing. On May 17, 2011, he received a phone call from somebody in the Quad Cities with concerns about Complainant. He did not know Complainant prior to that. He was told Complainant had placed flyers throughout the building and had a medical bracelet on his wrist. After he received the phone call, he received an e-mail from Rich Lovig at RX 522. He was concerned because Complainant had a medical bracelet on which indicated he had been in a hospital. They have a procedure for employees who are in hospitals. They need to show they are capable of returning to work. He believed the first thing to do was make sure that Complainant was safe to return to work. He spoke to Complainant's supervisor, Singer, and told him that Complainant would need to be on leave until he could get some paperwork signed by his doctor. (Tr. 354-359).

RX 535 contains the investigation summary he wrote. In conducting the investigation, he spoke to Singer, Parker, and Ellstrom and started getting information as to why Complainant may have been putting papers on people's desks and some of his other activities. He also got a snapshot of Complainant's e-mail account and his computer drive where he stores company work product. He received the e-mail at RX 526 from Parker. He spoke to Ellstrom telephonically and to Singer multiple times. RX 532 contains his hand-written notes of his discussions with Singer regarding Complainant. On May 17, 2011, Singer sent him an e-mail at RX 527, asking DeBoer to call him. There was concern about a May 16, 2011, e-mail that Complainant had sent to coal vendors in which he blended personal information with company business communications. Attached to the e-mail was a screen shot of a newspaper article with a hand-written note (MAE 277). The article was the same one that he had received attached to RX 522, although it had different handwritten notes. (Tr. 360-367).

When he reviewed Complainant's e-mails, he was concerned because he saw a number of e-mails to different individuals such as celebrities, politicians, and reporters containing similar information. RX 515 contains an e-mail Complainant wrote to Mary Lou Risley and others on May 16, 2011, in which he blended personal and business information and attached the AP news article. RX 522 is a collection of documents which have a political aspect to them. The document at MAE 390 is addressed to John Walsh, the host of "America's Most Wanted." The letter at MAE 397, dated May 5, 2011, was addressed to 520 Honorable Senators and Congressmen/women. The next page is a letter addressed to President Obama. All of these documents were found on Complainant's work computer. (Tr. 368-370).

When he reviewed Complainant's personnel file he found something that seemed relevant to the investigation. RX 503 is a Work Performance Improvement Plan dated June 14, 2000, that discussed that Complainant was doing non-work related activities while at work. That seemed similar to what DeBoer was seeing happening currently. He did not listen to any recorded phone calls on Complainant's phone, because he was not aware of them. He does not recall getting an e-mail (CX 10) from Sammon about a recorded call. During his investigation, he did not see a need to listen to any phone calls. (Tr. 370-372).

He conducted a pre-disciplinary ("PD") hearing on May 19, 2011. He prepared handwritten notes and questions in preparation for the hearing which are contained at RX 539. In his notes, he wrote "Coc" which was a reference to the Code of Conduct. Underneath that, he wrote notes abbreviating the terms political activities, conflict of interest, posting or distributing,

solicitation, computer or communications device, and company name. The rest of the documentation was his preparation of questions he wanted to ask. Besides Complainant, Baltazor and Singer also participated in the PD hearing. DeBoer was not present in person with Complainant, but was on the telephone. Singer was co-located with him. Baltazor was present in person with Complainant. During the hearing, he took the notes located at RX 540. Baltazor also took notes at RX 537 and sent them to him after the hearing. (Tr. 373-376).

At the hearing, he asked Complainant about the e-mails he had sent, about distributing documents, and whether he was aware of the Code of Business Conduct. Complainant admitted to handing out the flyers, but stated he did not go in the call center or to the fifth floor of the building. Complainant stated he wanted people to know about the situation before it got into the news. Complainant said he sent the e-mails to coal suppliers because he thought they were friends with whom he had relationships and thought they would want to know. Complainant stated that he was not sure what he was doing was political, but if trying to change the law made it political, then it may have been political. Complainant stated he was doing these things from the office rather than home because he did not want his daughter to know about the situation with his sister. He indicated that he did have a cellular phone, but it was for a limousine business and he did not want to disrupt or change the voice mail on that cell phone to something else and disrupt the limousine business. (Tr. 377-379).

Complainant said he had asked Singer about using a conference room and table to stuff envelopes for the mailer he sent out. He said he had discussed using the office while he was on PTO with Singer. When DeBoer spoke with Singer, Singer confirmed that he had given Complainant some permission, but did not give permission for Complainant to distribute flyers around the building. He did not give Complainant permission to send the flyers to the coal suppliers. At the hearing, Complainant said he would do the same thing again under similar circumstances. At the end of the hearing, DeBoer believed he had obtained all appropriate, necessary information from Complainant. He believed Complainant had violated several portions of the Code of Conduct. The portions of the Code he believed were violated are summarized in his notes at RX 535, page 3 (Political Activities, Conflict of Interest, Posting and Distributing Materials, Disturbing Others, Solicitation, Use of Company Computers and Communications Systems, and Use of Company Name and Endorsements). (Tr. 379-381).

After the hearing, Complainant left the building and they had a conference call to discuss the investigation. Those involved in the discussion were: DeBoer, Baltazor, Lovig, Sammon, Singer, and Parker. He laid out the facts that have been discovered during the investigation. He talked about the various disciplinary options under the performance development policy, and after discussion, it was decided termination was appropriate. There was discussion about other disciplinary options. Everyone agreed that termination was appropriate. During the discussion, no one mentioned any letters Complainant had written to Buffett about Sokol. That subject never came up in the decision-making process. At the discussion, no one mentioned that Complainant may have made a report or contacted any federal authorities. During the time that Complainant was employed with Respondent, DeBoer was never aware that Complainant claimed he had contacted any federal authorities or intended to contact federal authorities about Sokol. (Tr. 381-383).

After the discussion, DeBoer drafted a termination letter contained in RX 541 and e-mailed it out for review. RX 542 contains an e-mail response from Lovig in which he made some changes to the draft, which DeBoer agreed with. In the late afternoon or early evening of May 19, 2011, he became aware of an out-of-office message that Complainant had left on the computer which contained personal information, the content of which is contained in RX 536. He thought it was inappropriate because it referred to Complainant's medical conditions and referred people to "like" a community page called "Lynette's Law" on Facebook. RX 544 contains the final draft of the termination letter that was given to Complainant. On the evening of May 19, 2011, he also prepared an investigative summary, contained at RX 535. He had not completed the summary by the time the group met to discuss what action should be taken. However, he verbally provided the group with all of the information concerning his investigation that is contained in RX 535. (Tr. 383-386).

Complainant was informed of his termination at the Davenport office. Baltzor met him in person and DeBoer and Singer were on the telephone. DeBoer made notes of Complainant's comments, contained at RX 545. DeBoer believes that what made Complainant's actions "political" was that he sent his communications to political figures, senators, congressmen, and the president in an attempt to either create or change a law. The e-mails and flyers encourage people to support his cause. When Complainant stated that his letters to Buffett must have angered Maureen, that was new information to him. He had not been aware of any letters to Buffett. He had no reason to believe Sammon was angry with Complainant. She did not direct DeBoer to fire Complainant. They did discuss the letters that Quast wrote regarding "Lynette's Law," but never discussed any letters Complainant had written to Buffett about Sokol. (Tr. 286-390). Nor did Complainant's communications with the DOJ, FBI, or any regulatory agency in any way contribute to the decision to terminate his employment. Complainant was terminated due to the things he discovered in his investigation. (Tr. 386-390).

[CROSS EXAMINATION] He drafted the termination letter for Singer's signature, but Rich Baltazor signed it for Singer. He drafted the letter after the disciplinary hearing. He does not recall exactly what time the hearing started on May 19, 2011, but it seemed like it lasted about two hours. After the hearing, he had a discussion with management personnel concerning what to do with Complainant. After that, he drafted the termination letter. All of this occurred in the afternoon of May 19, 2011. He does not recall how long the management discussion lasted. He discussed the facts contained in his investigative summary with the management personnel. He prepares an investigation summary as a matter of course. He interviewed a number of people during the investigation and even received some typed statements. The investigation summary is an important document in the disciplinary process. (Tr. 391-395).

At the time of the May 19, 2011, disciplinary hearing, Complainant was on crisis suspension. He was not even allowed in the building. When a person is on crisis suspension, they want to get the issue resolved as soon as possible. They made the decision on May 19, 2011, because the people who were to be involved were available. He made some phone calls and people were available, so they decided to have the meeting. CX 36 contains an e-mail from him to Sammon, Lovig, and Singer dated May 19, 2011, at 3:45 PM. The subject is "Quast's term letter draft 5.19.11." By 3:45 p.m., on May 19, 2011, they had conducted the disciplinary hearing, had the management discussion, and he had already prepared a draft termination letter.

He was not a decision-maker in the ultimate discipline of Complainant. Sammon was not the ultimate decision-maker. Singer was Complainant's supervisor. DeBoer discussed the facts and options. It was a general discussion and he does not recall who said what. He does not recall who brought up the prospect of termination. (Tr. 396-399).

CX 27, page three (his investigation summary) states that it is not unusual for employees to engage in charitable activities in the workplace, sometimes by e-mail. He also noted that employees use the e-mail system for nonbusiness purposes on an incidental basis. One of the allegations against Complainant was that he was using Respondent's e-mail for non-business purposes. However, according to his summary, other employees have used the e-mail system for non-business purposes. During the hearing, he sometimes cut Complainant off when he was trying to give an answer, because he felt he was telling him things he already knew. (Tr. 399-401).

He does not recall any discussion about firing Complainant prior to his disciplinary hearing. On May 18, 2011, Singer sent him an e-mail inquiring as to how Complainant's time should be charged until termination. "Termination" was the word Singer used. In his answer, DeBoer responded that it would be PTO until the issue was resolved. Singer never explained where he got the idea by May 18, 2011, that termination was a potential outcome. He does not recall any discussions about terminating Complainant for his May 17, 2011, activities prior to the May 19, 2011, disciplinary hearing. When he first spoke to Singer and Parker about Complainant, he was concerned because Complainant was wearing a medical bracelet and was not safe to be at work. Then they discussed putting him on crisis suspension. After the investigation was complete, they decided to fire Complainant. He received a snapshot of everything that was on Complainant's e-mail and x-drive. At the hearing, he recalls Complainant stating that he would do this all again under the same circumstances. (Tr. 401-405).

[REDIRECT EXAMINATION] In his investigative summary (CX 27, p. 3) after he stated that it is not unusual for employees to solicit charitable sales or utilize e-mail for non-business purposes on an incidental basis, he then said that, in this instance, Complainant's activities appear to far exceed the level of an incidental communication. One example of when he cut Complainant off at the hearing was when Complainant was discussing his cause related to "Lynette's Law" and kept going on about the cause and had to be redirected back to his activities in the workplace. He has no knowledge of Sokol ever being consulted with respect to the termination decision of Complainant. (Tr. 405-407).

Richard Singer, Vice President for Nuclear Development, MEC

In April and May 2011, he was Vice President of Fuels, Emissions and Transportation for Respondent and was the immediate supervisor of Complainant. His office was at a different location than Complainant's office. He was one of the people who determined Complainant's employment should be terminated. In April of 2011, he was in Thailand and received an e-mail from Complainant stating that he wanted to talk to him. RX 534 contains his notes of events that occurred regarding Complainant that he prepared in May 2011. He talked to Complainant on April 11, 2011. Complainant told him that he had sent a letter to Buffett and wanted to discuss

it. He was under the impression Complainant had already sent the letter. In the letter, Complainant was suggesting that Buffett implement a sort of management review approach in which there would be a peer review and subordinate and supervisor review type of approach on managers. He was under the impression that Complainant was writing the letter as a shareholder of Berkshire Hathaway and advising Buffett of what he thought would be a better way to manage the company. Complainant said he would be meeting with Parker the next day on a trip he was taking to the Ottumwa generating station and they would be traveling to the same meeting. Complainant asked if he should discuss this with Parker who was Singer's boss at the time. Singer thought it would be a good idea. On April 15, 2011, Complainant sent him a copy of the letter, as an e-mail attachment (RX 506). When he read the letter, he didn't think Complainant was saying anything that was not public knowledge, but was just making a suggestion on a management approach. (Tr. 408-413).

The fifth page of Complainant's letter to Buffett referenced CalEnergy. The coal portfolio manager for Respondent would not have anything to do with CalEnergy because it is a different company than Respondent. It was a geothermal facility located in Southern California. Casecan is also a CalEnergy asset located in the Philippines. It is a hydroelectric irrigation system built in the 1990s. The coal portfolio manager for Respondent would have nothing to do with the Casecan project. Nor would the coal portfolio manager have anything to do with the lawsuits related to that project. The fact that Complainant sent a letter to Buffett did not affect the way he treated Complainant as an employee after that. He does not believe it affected how Parker would have treated Complainant either. During the period Complainant was employed by Respondent, he was unaware that Complainant had contacted the DOJ, FBI, or other regulatory agency about Sokol. He was aware that Complainant had been in contact with the DOJ about matters related to his sister. Complainant sent him an e-mail stating that he had worked with the Attorney General's Office regarding his sister. (Tr. 414-416).

In early May 2011, Complainant told him he needed to take paid-time-off to deal with a personal issue. RX 508 contains an e-mail Complainant sent to him and Terry Nielsen on May 5, 2011, stating that he is going to be taking paid-time-off due to his sister's killer being paroled. He approved Complainant's request for PTO. Around the same time, Complainant requested to use a conference room at Respondent company. Complainant requested to use the conference room because he wanted to stuff some envelopes and send out 25 urgent letters. He suggested that Complainant should do this at home, but Complainant said he did not want to expose his daughter to the issues that were related to his sister's murder. Therefore, he allowed Complainant to use the conference room to stuff his envelopes. He also asked Complainant to work on coal nominations, if it would fit into his schedule, and they also talked about the Peabody contract. He told Complainant if he was there and had the time, to try to get these things done. Complainant sent him an e-mail on May 6, 2011 (RX 509), asking if he could have two individuals who report to Singer assist him with stuffing 500 envelopes. In response, he called Complainant and told him he could use Molly to assist him with stuffing the envelopes but told him to be discrete and not disturb people and be cautious about using the company facilities. (Tr. 416-420).

While Complainant was working on this project, he would sometimes call or e-mail Singer with updates. RX 511 contains an e-mail update in which Complainant informed him he had had some success. Complainant was trying to prevent the individual who was getting out of jail from moving back to Wisconsin, so that he would not be able to live close to where Complainant's parents lived. On May 13, 2011, Singer sent an e-mail (to Parker and Bacon) reporting that he had received a call from Complainant in which he indicated the State of Wisconsin had decided not to accept the parole of Complainant's brother-in-law (RX 514). At the end of the e-mail, he said Complainant seemed very pleased with these developments. (Tr. 420-421).

Then, on May 17, 2011, he received some information that there were concerns about Complainant's conduct in the workplace. He found out about these concerns when Parker came to him with an e-mail that Complainant had distributed throughout the Davenport building, a flyer. RX 518 is an e-mail from Parker to him. Right below that e-mail, there was an e-mail from Fehrman to both Parker and him, telling them to get on this right away. The last page of RX 518 is the flyer. He learned that Complainant had distributed this flyer throughout the building, putting it on every desk, work station, whatever he could access. He was shocked when he heard this. He had never seen anyone distribute a flyer throughout the company. He did not understand the reason for the flyer, because he thought that Complainant's family was safe. He was also shocked because he had told Complainant not to disrupt work, and distributing this throughout the company was disruptive to the workplace. (Tr. 421-423).

Parker and he then called the human resources department to get an idea of what they should do in this situation. He learned that since Complainant was wearing a medical bracelet, he needed to get a return-to-work medical release form completed before he could return to work. He was also supposed to inform Complainant that he needed to vacate the building by noon. He also learned that human resources would conduct an investigation into what had happened. He then called Complainant and asked him to go to the "war room" (conference room) so they could discuss this. He wanted to understand what Complainant had done. Complainant explained that he had distributed the flyers, and in some cases stopped to talk to people, about whether they were aware of this and what they could do to help support the "Lynette Law" initiative. They discussed why he was doing this after on Friday he had finished up with getting the protection he needed for his family. They also discussed things that Complainant was supposed to do such as gather up his materials, leave by noon and complete a medical release form. After he spoke with Complainant, Complainant e-mailed him some information at RX 520. On May 17, 2011, at 12:46 PM, he sent an e-mail (RX 517) to Parker describing the events and discussions with Complainant. (Tr. 423-425).

Later on May 17, 2011, he learned from members of the fuels, emissions, transportation group that Complainant had sent out similar information to coal suppliers when he was sending out the coal nominations. Someone also said that Complainant had included his business card with his mailing of the 500 envelopes. In RX 527, he informed Parker and DeBoer of this. On the evening of May 16, 2011 (at 7:08 p.m.), Complainant had sent an e-mail to coal suppliers mixing personal and business information. Singer had not read this e-mail before someone alerted him to its content. The e-mail he sent out contained a full page discussing his sister, the killer, his personal health, and Lynette's Law. Attached to the e-mail was a copy of the flyer that

Complainant had handed out around the office. Complainant's actions were inappropriate. This information was not part of the contract negotiations and had no value to the customer or company. (Tr. 426-430).

Brad DeBoer conducted the investigation for human resources. He spoke with DeBoer multiple times. He was also present when DeBoer spoke to Complainant. RX 538 is a (May 19, 2011, 8:05 AM) e-mail from him to Parker informing him that Singer, DeBoer, and Baltazor will be meeting with Complainant this afternoon by teleconference. Singer and DeBoer were in Des Moines and Baltazor and Complainant were in Davenport. DeBoer asked the questions from a prepared script. Complainant was given a fair opportunity to explain his actions. Singer was astounded that Complainant said he would do it all over again, handing out the flyers all over the company. He had no remorse and was willing to take whatever happened. He said that more than once. (Tr. 430-431).

After the discussion, they had a meeting to determine what action to take against Complainant. The participants were Singer, DeBoer, Baltazor, Lovig, Parker, and Sammon. DeBoer talked about what he had found in the investigation. He went through each of the responses that he had received from Complainant. The group unanimously decided to terminate Complainant's employment. Complainant's (April 2011) letter to Buffett had nothing to do with the decision to terminate him and was never brought up. Nor did anyone mention that Complainant had spoken with the FBI, DOJ or a regulatory agency. He was never aware of Complainant discussing Sokol with any law enforcement or regulatory agency. (Tr. 431-434).

After the decision was made, DeBoer circulated a draft termination letter (RX 541). The reasons stated in the letter are the reasons they decided to terminate Complainant's employment. He had Baltazor sign the letter for him and give it to Complainant because Baltazor was in the Davenport office with Complainant. On May 20, 2011, Baltazor gave it to Complainant, while Singer and DeBoer were on the telephone. He never gave Complainant permission to distribute campaign information to coal suppliers or direct telephone calls of a personal and political nature to his office phone number. At the hearing, Complainant said he did not want to use his cell phone because he did not want to disrupt his limousine business. He never gave Complainant permission to distribute flyers throughout the office. On May 20, 2011, Complainant was handed a copy of the termination letter. Complainant was surprised and asked about his 401(k). RX 545 is an e-mail from DeBoer describing the conversation with Complainant when his employment was terminated. (Tr. 434-439).

Complainant's actions were political because he was actually telling people to write their congressmen and senators. Sammon never said she was angry at Complainant or displayed behavior indicating she was angry. Complainant was not retaliated against for sending letters to Buffett. On May 20, 2011, he sent an e-mail (RX 543) to a number of people informing them that Complainant was no longer an employee of Respondent. Before that date, he had not done anything to fill Complainant's position. (Tr. 439-441).

[CROSS EXAMINATION] He believes all the information identified by Complainant in his April 9, 2011, letter was public knowledge. On page 5 of the April 9, 2011, letter (CX 1), he is not sure if the information in the first paragraph was a matter of public knowledge. In the

second paragraph, the \$340 million after-tax loss was a matter of public knowledge. He does not know if the question about whether Sokol probably reflected the loss in MEHC's internal share value was a matter of public knowledge. He was not sure what Complainant was driving at. He thinks it was public knowledge that Sokol eventually sold his shares of MEC, but does not know if the issue of whether Sokol used some sort of insider information regarding CalEnergy was a matter of public knowledge. The Casecan litigation was very much public knowledge, but he does not know whether the issue in the letter of whether Sokol properly disclosed the risk and potential future cash outflows in his internal valuation of MEHC was public knowledge. He is not sure whether the issue of whether Sokol benefitted financially by hiding his past behavior in the 1990s projects was a matter of public knowledge. He agrees that Sokol's motives in transferring shares would not necessarily have been a matter of public knowledge. It is possible that there were aspects of Complainant's allegations in the letter that were not a matter of public knowledge. (Tr. 443-447).

Prior to the May 19, 2011, disciplinary hearing he thought it was probable that Complainant's employment might be terminated, but the decision was not made until they all met. He does not recall who first raised the possibility of termination. Everyone was able to give their input during the management discussion. In an e-mail he wrote to DeBoer on May 18, 2011 (RX 530), he was discussing steps necessary for Complainant to return to work. At that time they were considering whether Complainant would return to work. In his e-mail to DeBoer on May 18, 2011 (CX 26), he did not mention termination, but six hours later he asked DeBoer whether Complainant's time should be charged as PTO until termination. He put the word suspension in quotes, because he was not sure of the proper terminology. He thought that Complainant would probably be terminated for what he had done. No one told him that it was expected that Complainant would be fired. Sammon did not say that. He did not discuss terminating Complainant with anyone prior to the hearing. He did not tell Complainant's wife on May 18, 2011, that he would not be fired. Complainant showed no remorse even though at times he said he took full responsibility for what he had done. (Tr. 448-457).

[REDIRECT EXAMINATION] In Complainant's position as the coal portfolio manager for Respondent he would not have any information about CalEnergy and whether it was covering something up. Nor would he have knowledge about how MEHC's internal share value was calculated. He found the April 9, 2011, letter confusing. (Tr. 457-459).

William J. Fehrman, CEO/President, MEC (deposition testimony), RX 560

Complainant gave him a copy of his April 9, 2011 letter to Warren Buffett. He did not receive a copy from anyone else. Parker had called him and told him that Complainant had sent a letter to Buffett but he had no information other than that. He and Parker had a brief discussion about discipline regarding the letter. Since the letter had not been seen by anybody, it was not a matter for discipline because they did not know its content or the circumstances behind it. However, any time people write letters to Chairman of the Board or others, there is always a discussion around whether it was done on company time or using the company as a basis, and whether there should be any follow-up. As he had not seen the letter, he could not determine if it had been written on company letterhead.

He later asked Complainant if he could share the letter with Greg Abel. He also told Sammon, who worked for Abel and was the senior vice-president for human resources (“HR”) and other areas of the company, that there was a letter. It is the normal course of business to inform the head of HR of what is going on with employees. This was not out of the ordinary. He asked Sammon for advice as to whether there was anything to be concerned about and if there was any action he needed to take. However he had not yet read Complainant’s April 9, 2011, letter. So, he was asking her advice about a letter that he had not yet seen and perhaps she had not yet seen as well. He told Sammon that he would not recommend searching Complainant’s e-mails or scanning his hard drive. He did not see this as necessary. It appeared to be a letter sent by a shareholder to a chairman of his company. He did not believe there were any threats contained in the April 9, 2011, letter. Nor did it contain a threat that Complainant would be disruptive at the April 30, 2011, Berkshire Hathaway shareholder meeting. Abel gave no instructions regarding the letter other than to give it to Sammon, because she was the senior vice-president of HR.

Sammon mentioned whistleblower status in an April 13, 2011, e-mail. He did not have any discussions about possible whistleblower protection for Complainant’s April 9, 2011, letter. He is not an expert in whistleblower status. He believed Complainant was writing the letter as a shareholder. This is different than if Complainant had written as a representative of the company. He believes that since Complainant was writing as a shareholder, it was his prerogative to say anything he wanted. If he were writing as an employee representing the company, then there are other means of addressing issues that potentially should have been followed first, such as reporting concerns to a supervisor or the hotline. As a shareholder, he was free to do anything he wanted to do. If you are writing as a representative of the company, then there are other avenues to go through other than going straight to the apex of the pyramid. The same ethics policy applies to both MidAmerican Energy Holding Company and Respondent, MidAmerican Energy Company. They also get an ethics letter from Mr. Buffett that applies to all employees of Berkshire Hathaway.

He never gave Abel a copy of Complainant’s April 9, 2011, letter. He does not know if anyone gave Abel a copy. He did not give Sokol a copy. Nor did he ever talk to Sokol about the letter. After he read the letter, he believed Complainant was asking for a job in ethics. Sammon was not angry about the letter and never said she was angry. He does not recall speaking with Parker any time between April 13 and May 17, 2011. He did not make a report to the SEC regarding the allegations in the letter. He does not know if anyone made such a report. He did not make any reports to anyone regarding the letter.

On May 17, 2011, he received an e-mail from White involving events in the Davenport office regarding Complainant. He told Singer and Parker to get on it right away and figure out what was going on. He was concerned, because the person in charge of security reported to him that he had a concern. He was concerned that Complainant might be disrupting the workplace. He was also concerned because Complainant’s family was requesting he get medical help. He wanted to make sure Complainant was fit for duty.

From time to time, employees do include personal matters within company e-mails. Whenever that happens, he asks for a careful review. He is aware of people being disciplined for this, but cannot recall if anyone has been terminated. Part of Complainant's job would have been to establish a relationship with coal suppliers. Complainant was a good employee. However, he believes termination was appropriate. There was a detailed investigation and much discussion. He would expect that Complainant would be able to have a fair chance to speak. At times, employees have been fired immediately following a disciplinary hearing. He discussed with Sammon that the investigation had been done, the proper people had gone through and discussed the matter, and that the recommendation letter was out. In his discussion with Sammon, she did not mention anything about Complainant's April 9, 2011, letter to Buffett. No one ever told him the Buffett letters were part of the discussion involving the termination. Abel, Buffett, and Sokol were not involved in any of the discussions concerning Complainant's termination.

James Parker (deceased), Vice President, Energy Supply Management, MEC, RX 550 (affidavit)

He became vice-president of energy supply management at Respondent on August 15, 2009. Singer reported to him and Complainant reported to Singer. On April 13, 2011, he attended a meeting in Ottumwa, Iowa. Complainant was also at the meeting and told him he had a document for him to read, but wanted it back since he had no copies. The document was a letter to Warren Buffett. He read the letter and returned it. It was written from the perspective of a concerned shareholder. He later talked with Fehrman about the letter. Fehrman said the letter was not a matter for discipline and he agreed. Concerns about Complainant's activities and disruption in the workplace surfaced in mid-May 2011. He participated in the discussion in which the decision to terminate Complainant was made. He agreed with termination as the outcome. The letters written by Complainant to Buffett played no role in the termination.

Documentary Evidence

At the hearing, I admitted the following exhibits into evidence: Complainant's Exhibits ("CX") 1-46, and Respondent's Exhibits ("RX") 501-558. 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

1. Complainant began full-time employment with Respondent in 1992 and was employed by Respondent until his employment was terminated on May 20, 2011. At the time of termination, Complainant's position was Coal Portfolio Manager. As part of his job, Complainant worked with third-party coal suppliers. Complainant had personal/social relationships as well as business relationships with some of the coal suppliers. Complainant is a Berkshire Hathaway shareholder. (Tr. 48-49, 51-53, 98, 435, RX 544).

2. Complainant was considered a good employee and only had one disciplinary incident in June of 2000 when he was counseled for losing focus and doing non-work related activities while at work. He had to prepare a Work Performance Improvement Plan. After this incident, Complainant had no further disciplinary issues, was promoted, and received raises. (Tr. 54-55, 147-149, 370-372, RX 560).

3. Complainant's supervisor was Rich Singer, vice-president of the fuel department. Singer reported to Jim Parker, vice-president of energy supply management. Parker reported to Bill Fehrman, President and CEO of Respondent, MEC. (Tr. 50-51)

4. Respondent, MEC, is a direct subsidiary of MEHC. MEHC is a majority owned subsidiary of Berkshire Hathaway. (Tr. 293-294).

5. On April 9, 2011, Complainant wrote a letter addressed to Warren Buffett, Chairman and CEO of Berkshire Hathaway Inc. At the top of the letter he wrote "Re: Dave Sokol failing your Golden Rule." Complainant mailed the letter to Buffett on April 11, 2011. (Tr. 55, CX 1).

6. David Sokol, the former CEO of MEHC, resigned from his position at MEHC on or about March 28, 2011. (Tr. 59).

7. On the first page of the letter, Complainant alleged that Sokol had failed to comply with Berkshire Hathaway's and MEHC's Code of Business Conduct and Ethics. On the first page of the letter, he stated that over the last twelve years under Sokol's control and leadership, he had come to know many details of Sokol's and CalEnergy's past that had disturbed him and his co-workers. (CX 1).

8. On the fifth page of the letter, he alleged *inter alia* that Sokol had taken cash from employees' pay, pension, and benefits, had covered up CalEnergy's financial collapse, and used insider information to cash out of stocks to the detriment of Berkshire Hathaway shareholders. He also alleged that Sokol failed to properly disclose the risk and potential future cash outflows in his internal valuation of MEHC. He alleged, furthermore, that Sokol had benefited financially by hiding his past behavior regarding the Casecan project in the 1990s. On the sixth page of the letter, Complainant encouraged Buffett to address Sokol's ethical failure. On the ninth page of the letter, Complainant encouraged Buffett to ruthlessly rebuke Sokol's actions.

In addition to Mr. Sokol's prior activities at Berkshire, Complainant's letter discussed personal topics, including the murder of his sister by her then-husband in 1999, and Complainant's efforts to protect his family in anticipation of the murderer's impending release from prison on July 1, 2011. Complainant's letter also described his participation in an internal investigation of his supervisor in 2007 for allegedly accepting gifts from vendors in violation of an internal directive, which ultimately led to the supervisor's termination. Finally, Complainant lobbied Buffett to appoint him to create and lead an ethics improvement initiative, and described in detail an idea for a contest to motivate management to participate in his proposed ethics improvement project. (CX 1).

9. The letter did not contain allegations against anyone other than David Sokol or mention anyone else by name or implication as being suspected of wrongdoing. The letter praised Singer, Parker, and Fehrman. (CX 1).

10. On April 11, 2011, Complainant sent an e-mail to his boss, Rich Singer, in Thailand stating that he wanted to talk to him. In response, Singer called Complainant on April 11, 2011. In that conversation, Complainant told Singer that he had sent a letter to Buffett, alleging that Sokol had committed fraud. Singer was under the impression Complainant was writing the letter as a shareholder of Berkshire Hathaway and advising Buffett as to how to manage the company. Complainant asked Singer if he should discuss the letter with Parker, and Singer said it would be a good idea. (Tr. 55-56, 408-413).

11. Sometime after talking to Singer, Complainant sent Parker an e-mail stating that he wanted to talk to him at the April 13, 2011, meeting in Ottumwa, Iowa about a letter that he had sent to Buffett. On April 13, 2011, Complainant met with Parker in Ottumwa, Iowa. Complainant showed Parker the April 9, 2011, letter he had written to Buffett and told Parker he believed Sokol had committed fraud. He let Parker read the letter, but did not give him a copy. Parker read the letter and returned it to Complainant. After Parker read the letter, Complainant offered to take a copy to Fehrman. (RX 550, Tr. 115, 118-119).

12. On April 12, 2011, Complainant sent a second letter to Buffett. Complainant does not assert that this letter contained any protected activity and, upon review of the letter, I do not find any information that could potentially be considered a protected activity. In this second letter, Complainant seemed to be further soliciting Buffett for a job leading an ethics improvement initiative and requesting a meeting to discuss his job proposal. Complainant offered to give Buffett a Ferrari-brand limousine⁶ in exchange for a 60-minute, in-person meeting to discuss the specifics of his two-step solution.

All conversations about Complainant's "letter" amongst members of MEC and MEHC management were in reference to the April 9, 2011, letter rather than the April 12, 2011, letter. Future references in this decision to the "letter" are to the April 9, 2011, letter. (Tr. 222, CX 2).

13. On the evening of April 13, 2011, Parker called Fehrman and told him that Complainant had written and mailed a letter to Buffett regarding David Sokol and that it did not discuss any current management, only Sokol, and raised past issues Complainant had with Sokol. On April 13, 2011, at 8:29 p.m., Fehrman sent an e-mail to Abel, CEO of MEHC, with a courtesy copy to Bjorgan conveying these facts. Simultaneously, Fehrman sent an e-mail to Sammon, the head of Human Resources, asking if she had any advice for him on this. At this point in time, neither Fehrman nor Sammon had seen the letter. It was the normal course of business for Fehrman and his peers to discuss significant correspondence from employees with the head of Human Resources. (Tr. 286-287, CX 18, RX 501).

14. On April 13, 2011, at 8:55 p.m., Sammon responded to Fehrman stating she had also talked to Parker and that they needed to see what the letter said, and then consider disciplinary action on two possible fronts: whether Complainant had written it on company time and

⁶ As noted in his letters to Buffett, Complainant owns and operates a limousine service as a side-venture.

equipment and whether he had represented that he was writing the letter on behalf of the company, when in fact he was writing it in his personal capacity as a shareholder. Sammon also recommended asking for a copy of the letter and scanning Complainant's e-mail without his permission. She stated that once they saw the letter, they could decide whether it would be a matter for discipline. She stated that it did not sound like the letter contained any new information and she did not believe it would qualify for whistleblower status. She stated however that regardless, Complainant made a serious error in judgment that should ultimately be addressed. She stated that they have many avenues for employees with issues to pursue, short of writing to Mr. Buffett. She asked Fehrman to let her know what he thought about scanning Complainant's e-mail and other drives. Fehrman did not approve this suggestion and Complainant's e-mail and drives were not scanned. (Tr. 316-317, CX 20, RX 504, RX 560).

15. On April 14, 2011 at 6:03 p.m., Sammon instructed Susan Leonard of Human Resources to pull Complainant's employment file and any PD (performance development) log information. (CX 19). On April 15, 2011, at 8:28 a.m., Sammon sent an e-mail to Fehrman stating that she had pulled [Complainant's file] and would review it when she got back from a meeting. (*Id.*).

16. Parker called Complainant sometime between April 13 and April 14, 2011, and told him Fehrman would like to have a copy of the (April 9, 2011) letter. On April 14, 2011, at 7:21 p.m., Complainant sent Fehrman a copy of both letters by e-mail. In the e-mail, Complainant discussed the April 9, 2011, letter and stated he would appreciate it if Fehrman did not share the letter with anyone else, although it was his prerogative to do so. Complainant did not discuss the April 12, 2011, letter. In the e-mail, Complainant did not make allegations against anyone other than Sokol or indicate that he suspected anyone else of wrongdoing. Fehrman did not receive a copy of the letter from anyone else. On April 14, 2011, at 8:18 PM, Fehrman responded to Complainant thanking him for sending him the letter. He told Complainant that if he did not mind, he would share the (April 9, 2011) letter with Greg Abel, just in case he got questioned by Mr. Buffett, so that he would not be out of the loop. Fehrman also said he would read the letter and get back to Complainant with any thoughts. After reading the letter, Fehrman believed Complainant had sent it in his capacity as a shareholder to the chairman of the company. Fehrman did not believe it contained any threats or that it was a cause for disciplinary action against Complainant. Fehrman and Parker spoke at an unknown date and time and agreed the letter was not a matter for discipline. (RX 501, RX 506, RX 550, RX 560, CX 21, CX 42, CX 44, Tr. 113, 115).

17. On April 15, 2011 at 5:07 p.m., Fehrman forwarded Complainant's e-mail to Sammon. After reading Complainant's letter to Buffett, Sammon talked to Russ White, the vice-president of General Services (who was in charge of security) because she wanted to assess whether the letter contained any threats to company employees. Page 6 of Complainant's April 9, 2011, letter to Buffett made reference to a gun. Also in the letter, Complainant solicited Buffett for a job leading an ethics improvement initiative and stated that he wanted to have a meeting with Buffett. After reviewing the letter with White, they determined that the letter did not contain a threat to company employees and the reference to a gun was a reference to something that had been contained in a shareholder letter. After reviewing the letter, Sammon did not believe any disciplinary action was necessary. Furthermore, she believed that the allegations Complainant

made against Sokol were already a matter of public knowledge and that he was not raising any new issues. (Tr. 285-289, CX 42, RX 507).

18. Berkshire Hathaway has an annual shareholder meeting. The meeting is a large event with over 30,000 attendees who are shareholders of Berkshire Hathaway companies. There is an exhibit hall where dozens of the companies owned by Berkshire Hathaway have displays for shareholders to visit and Mr. Buffett tours the exhibit hall before conducting a question and answer session. As part of her job, Sammon was responsible for MEHC's company booth in the exhibit hall. The booth workers are trained about issues that could be controversial or cause disruption. Sammon considered Complainant to be a potential distraction at the shareholder meeting because in his April 9, 2011, letter he stated that he desired a meeting with Buffett and wanted to speak to him about a job proposal. Therefore, Sammon circulated a photo of Complainant to the booth workers and informed them that Complainant could be a potential distraction. At the shareholder meeting on April 30, 2011, Complainant approached Sammon at the MEHC booth where she was speaking with another person. When Complainant came to the booth, introduced himself and stuck out his hand to shake, she shook his hand and then returned to her conversation. She had no further conversation or contact with Complainant at the shareholder meeting. Complainant's perception was that Sammon was not happy to see him. Complainant did not cause a disruption at the shareholder meeting. (Tr. 133-134, 296-299).

19. On April 15, 2011, at 6:14 a.m., Complainant decided to send a copy of the letter to Singer by e-mail so everyone in his chain of command would have a copy of it. In the e-mail, Complainant stated that Parker had read the letter when they were together on Wednesday (April 13, 2011) and then called him on Thursday (April 14, 2011) and expressed that Fehrman would appreciate a copy of the letter so that he would not be surprised if Greg Abel came to him (assuming Buffett would send the letter to Abel). Complainant stated that he therefore agreed to scan and send the letter to Fehrman last night (April 14, 2011) who now plans to proactively share it with Abel. Therefore, Complainant thought it best that Singer be fully up to speed too. Complainant stated the only people who should have copies are Buffett, Abel, Fehrman, Complainant, and Singer, and that Parker was fine with just reading it. Complainant stated that he would appreciate it if Singer did not send further copies outside the chain of command (Tr. 113, RX 506).

20. Although on April 14, 2011, Fehrman asked Complainant if he could send a copy of the letter to Abel, he never sent Abel a copy of the letter. (RX 560).

21. Complainant showed the letter to a fellow employee, Roche, and one or two coal suppliers and discussed it with fellow employees, Dodson and Henkins. (Tr. 111-116).

22. On May 3-4, 2011, Complainant shared his concerns about Sokol's securities fraud with a member of the U.S. DOJ. He was referred to the FBI where he discussed this information in further detail with a special agent on an unknown date. No member of Respondent, MEC, MEHC, or Berkshire Hathaway was aware that Complainant had ever discussed or planned to discuss the Sokol allegations with the DOJ, FBI, SEC, or any other federal agency.

In an e-mail dated May 5, 2011, from Complainant to Respondent employees Nielsen, Singer, Hankins, Mandernach, Schaab, and Litwiler, Complainant stated that he had learned yesterday from the U.S. DOJ that his sister's killer was going to be released early from prison and would be able to move within five minutes of Complainant's family's home. Complainant did not indicate in any way that he had spoken to or was going to speak to the DOJ regarding his allegations against Sokol. (CX 3, RX 555, Tr. 277-279, 299-300, 383, 415-416).

23. In early May of 2011, Complainant told Singer that he needed to take some personal time off to deal with a personal family issue. Complainant's sister had been murdered in 1999 and her killer, Complainant's brother-in-law, who was serving a twelve year prison sentence pursuant to an Alford plea, was going to be released early. Rather than having to serve five years of probation in Ohio, he would be able to move to within five minutes of Complainant's parents' home in Wisconsin, where they were raising his sister's children. Complainant feared that the killer posed a threat to his family and that he would be able to regain custody of the children. Complainant wanted time off to work on obtaining an order from the Attorney General or President which would prevent this from happening. On May 5, 2011, Complainant informed Singer, Nielsen, Mandernach, Hankins, Schaab, and Litweiler of this and said he would be taking substantial PTO over the next six weeks. In the e-mail, Complainant said he was going to be mailing a letter to 25 people including a number of politicians. In the e-mail, Complainant also asked Singer to call him because he had a favor to ask. (Tr. 416, RX 508).

24. On May 2 and 3, 2011, Complainant sent e-mails from his work computer to the Michigan Attorney General, requesting that he reopen cold cases of murdered prostitutes and asserting that his sister's killer had been responsible for these murders. He signed the e-mail using his job title, address, and work phone and fax numbers. (RX 510A).

25. On May 5, 2011, at 12:42 PM, Complainant sent Singer an e-mail indicating he needed to speak to him from the file/war room. Complainant indicated in the e-mail that because a judge and others had not completed some paperwork, his sister's killer would be allowed to move back to Wisconsin near his parents and family. Singer then spoke with Complainant by telephone. Complainant requested to use a conference room at Respondent company in order to stuff envelopes to send out 25 urgent letters to politicians. Complainant related that he did not want to do this at home because he did not want his young daughter to be aware of what was happening.

Singer granted Complainant permission to use his earned PTO, but asked if Complainant could also work on completing the coal nominations which were due and that Complainant had worked on exclusively and was proficient in completing. Singer granted permission to Complainant to use the conference room to stuff the 25 envelopes since it would assist Complainant in meeting his job duties as well as assist Complainant in not exposing his daughter to information regarding his sister's death.

Singer found out, after the fact, that Complainant had also asked two employees, Barb Schaab and Molly Litwiler, to assist him in stuffing the envelopes and downloading electronic labels. Complainant justified to himself the use of these employee and other company resources, e.g. copying, use of telephone, etc., by adding extra time to his PTO hours. He believed that charging his PTO hours was fair trade for his use of company resources and that Respondent

consented to this deal by charging his time sheet for vacation rather than work hours. Neither Singer nor any other member of Respondent ever agreed to such a deal or authorized the use of company resources in exchange for Complainant using his vacation time to perform work. Singer did not expect Complainant to perform work during his PTO and never instructed him to do so. (Tr. 144-145, 181-182, 416- 418, RX 534).

26. On May 6, 2011, at 5:46 a.m., Complainant sent an e-mail to Singer, with the subject listed as "Round 2." In the e-mail, Complainant explained that he had sent out the attached letter to 25 members of "senior government" the day before, but in the middle of the night, he woke up and realized that he still needed to send out another 520 letters to members of Congress to pass what he entitled "Lynette's Law" which would: make it illegal to release convicted murderers from prison without first receiving a sign-off on the conditions of parole from the victim's family; be passed by Congress and signed into law no later than May 31, 2011; and be in effect no later than June 19, 2011. (RX 509, 510, 510A).

27. Attached to Complainant's e-mail to Singer at 5:46 a.m. on May 6, 2011, was a letter dated May 5, 2011, that Complainant had mailed to 25 politicians on May 5, 2011. The letter contained statements representing that Complainant's direct supervisor at Respondent company fully supported all Complainant's actions including, by implication, the contents of the letter. The letter contained statements that Respondent would not necessarily agree with or want to be associated with including *inter alia* statements critical of the government such as assertions that: the government had a proclivity to be compassionate to cold-blooded killers and protect their rights at the expense of victims and their families; the government had failed; the system was broken causing Complainant's family to be in imminent danger; the government was not protecting Americans from domestic threats; the government had done nothing to protect Complainant's family; the government was wasting money and misspending taxpayer money; and the government failed miserably by having weak laws, poor resources to prosecute, lack of executive oversight, and a justice system that served none. The letter was also critical of the government's foreign policy. Claimant enclosed his business card with the 25 letters that he mailed on May 5, 2011. (Tr. 171, 173, RX 510, 510A).

28. On May 6, 2011, at 5:51 a.m., Complainant sent a second e-mail to Singer, requesting permission to use Molly (the secretary) to make 520 address labels. He stated that he would gladly use his PTO hours to cover her work for his personal campaign. He requested that Singer let him know how he wanted to handle this. In response, Singer called Complainant and told him that he could go ahead and stuff the envelopes, but to remember Molly works in an area with a low desk, accounting books and purchasing documents. Singer told Complainant he did not want too much of a distraction at work and told Complainant to be discreet about stuffing his envelopes, not to disturb people, and to be cautious about using company facilities. This was the extent of the permission granted by Singer. Complainant also requested to use the board room to meet with Senators or Representatives concerning his sister's case. Singer told him this would not be appropriate and would be escalating things too much and suggested Complainant use his home or church to meet with people. (Tr. 419-420, RX 509, RX 534).

29. On May 6, 2011, Complainant sent out the 520 letters using the St. Ambrose e-mail system, rather than mailing them. Therefore, he did not use Respondent's conference room to

stuff envelopes. However, Complainant prepared this letter on Respondent's computer system. Complainant did not receive permission from Respondent to prepare the letter on the company computer. Singer had consented to letting Complainant use the tables in the conference room to stuff the envelopes and have Molly assist him with stuffing them, but did not consent to any other use of company resources. Complainant justified to himself the use of other company resources, including the computer, copy machines, and telephone system, because he was also doing work for Respondent and not charging the company for it, but instead was charging it as vacation time. Respondent did not approve of such an arrangement and had not told Complainant that he had to perform work on his vacation time. Complainant was aware that Singer had not granted permission to use these additional company resources. (Tr. 146, 171, 178-179, 419, RX 509, RX 534)

30. RX 552 contains various letters and other personal documents which Complainant prepared on Respondent's computer system, without Respondent's approval. In addition to the May 6, 2011, letter discussed above, these included *inter alia* a May 10, 2011, letter to Warren Buffett requesting his assistance in passing "Lynette's Law," a letter to John Walsh host of the television show America's Most Wanted, and several other documents relating to "Lynette's Law." (Tr. 177-182, RX 552).

31. On May 9, 2011, Complainant called Singer and told him he had met with the family and parents of his sister's killer in Wisconsin. Complainant stated his family was in danger and he needed to increase his effort and urgency to prevent the killer's release. Singer urged Complainant to make sure he was taking care of himself. Singer then spoke with Parker and told him about the call and said he was concerned about Complainant's health. Singer then scheduled a presentation for an employee in Complainant's office for the next day so that he could check on how Complainant was doing. Singer and Parker's offices were located in Des Moines Iowa and Complainant's office was located in Davenport Iowa. Parker also suggested that Singer consult with Jodi Bacon of Human Resources regarding his concerns about Complainant. (RX 534).

32. On May 10, 2011, Singer met with Complainant at the Davenport office. Prior to the meeting, Singer consulted with Jodi Bacon who suggested that the trip was a good idea and that Singer discuss with Complainant the health and counseling services available to him. In Davenport, Singer met first with one of Complainant's co-workers who indicated she was concerned about Complainant's health and that Complainant's activities were becoming a distraction through the elevated tension and Complainant's discussions of his activities. Singer then met alone with Complainant who provided him with a copy of a letter that was an attachment sent to U.S. Congressmen describing Lynette's Law. Complainant related that his time was running out and he needed to stop the killer's release by May 20, 2011. Singer told Complainant he was concerned about his health and that the company could provide health and counseling services. Singer told Complainant if he would rather work from home, they could accommodate him. Complainant indicated he did not want to work from home. During the visit, Singer noted that Complainant had placed several documents in the conference room, but that they were constrained to the tables that they had previously discussed (for stuffing envelopes). Upon returning to Des Moines, Singer received a voice mail from Complainant acknowledging his concerns for his health and stating that he was taking care of himself. Singer sent this to Jodi Bacon and called her to summarize the day's events. (RX 534).

33. On May 11, 2011 at 12:45 p.m., Complainant sent an e-mail to Madeline Henry of the Wisconsin governor's office from his work computer thanking her for taking up his sister's case to the Department of Justice. In the e-mail, he identified himself by his job title and address and included his work phone number and fax number. On May 11, 2011, at 12:54 p.m., Complainant sent an e-mail to several people including Singer, stating that he had good news of a major miracle and that the Wisconsin governor's office had helped move his cause one step closer to the Attorney General who could help keep the killer in prison. (RX 511).

34. On May 11 and 12, 2011, Complainant sent e-mails to Michael Grubb using his work computer and identifying himself by his job title and address and including his work phone number and fax number. The e-mails discussed possible representation by Grubb of Complainant's family members and his sister's case. On May 12, 2011, Complainant also sent an e-mail to Singer, family members, and others using his work computer and updating them on his health status. (RX 512, RX 513).

35. On Friday, May 13, 2011, Singer sent an e-mail to Parker and Bacon on the subject of "Bob Quast update." In the e-mail, Singer stated he received a call from Complainant about 3:30 p.m. indicating the State of Wisconsin had decided not to accept the parole of his brother-in-law. Singer said Complainant seemed very pleased with these developments and was appreciative of the support he had received. He stated Complainant indicated he had made a point to get more rest and felt healthy. At this point, Singer believed Complainant had achieved his goals. (Tr. 420-421, RX 514, RX 534).

36. On Monday, May 16, 2011, Complainant called Singer and said that at the urging of his friends, he went in for a health evaluation at the local emergency room on May 15, 2011. He said he had high blood pressure from hypertension, but was relaxing and felt fine. (RX 534).

37. On May 16, 2011, at 7:06 p.m., Complainant sent an e-mail to coal suppliers for Respondent with a courtesy copy to Singer and other employees from his work computer. The subject of the e-mail was, "Mid-month coal noms & update on my family's personal crisis." In the e-mail, Complainant mixed business and personal information and attached an AP news article concerning his sister's case and the release of her killer. The content of the e-mail was a long explanation of Complainant's attempt to prevent the release of his sister's killer and a detailed description of Complainant's medical condition. On the AP article, Complainant had hand-written, "This is what I did on vacation last week." In the e-mail, Complainant referred to Lynette's Law and directed people to a Facebook page where they could find a link to the Lynette's Law community page. Singer did not read this e-mail on May 16 and did not become aware of its contents until it was brought to his attention by other employees on May 17, 2011. (Tr. 167-170, 426-430, RX 515, RX 519, RX 527).

38. On the morning of May 17, 2011, Complainant distributed over 250 flyers at the Davenport facility of Respondent. He placed the flyers face-down on employees' chairs at their work stations. He handed some of the flyers directly to employees. Complainant did not personally know all of the people to whom he distributed these flyers and not all of them were aware of the situation with his sister. The flyers consisted of an AP news article describing the

release of Complainant's sister's killer, the same article he had sent to coal suppliers the previous day. On the flyer, Complainant, in his own hand-writing, referred people to Facebook pages where they could find out more information about "Lynette's Law." He also stated that this was what he did on vacation last week and he signed it with his name as Lynette's brother, and referred them to his "Custom Limos" page on Facebook. (Tr. 139, 174-177, RX 520).

39. After distributing the flyers, Complainant went to see Jon Ellstrom, the facility manager, and requested a whiteboard. Complainant was wearing a hospital bracelet. Complainant explained that he needed the whiteboard because he was on a campaign called "Lynette's Law." He explained that his sister had been murdered sometime prior and he was trying to get this law passed to keep criminals in prison longer. Complainant gave Ellstrom a copy of the flyer. Ellstrom accompanied Complainant to the eighth floor conference room where Complainant wanted to place the whiteboard. Ellstrom observed a number of clippings taped to the wall. Ellstrom did not stop to read what was on any of the papers in the room. No one at Respondent company had been asked by Complainant or approved of Complainant's continued use of this room after May 6, 2011, or of his taping items to the walls. Complainant told Ellstrom that he had written to Warren Buffett asking for his help in passing Lynette's Law. He did not tell Ellstrom that he had written to Buffett about any other subject, including allegations against Sokol. After leaving the room, Ellstrom went to his office and called his boss, Russ White, to report what he had observed in the building. At 8:18 a.m., Ellstrom e-mailed White a copy of the flyer that Complainant had distributed. White asked Ellstrom to put together a narrative as to what he had observed and send it to him. (Tr. 269-274, RX 522).

40. At 8:49 a.m. on May 17, 2011, White sent an e-mail to Fehrman, Sammon, Lovig, and Sonnenberg stating that he would have a narrative coming from Ellstrom regarding his conversation with Complainant that morning. White stated that Ellstrom had reported Complainant was papering the entire building with flyers, was wearing a medical bracelet, and told Ellstrom that his family was requesting he get medical help because he couldn't sleep over this matter. Complainant told Ellstrom that Singer had told him he was on permanent vacation so he could work on getting some type of legislation passed. (RX 522).

41. At 8:45 a.m. on May 17, 2011, Ellstrom prepared a summary of what he had observed and sent it to his boss, White, by e-mail. In the e-mail, Ellstrom explained that Complainant came to his office to request a whiteboard for use during a campaign he was working on. Complainant told him he wrote letters to Warren Buffett asking for his help with some new law to keep criminals in jail. Complainant seemed to jump from topic to topic. Complainant indicated Singer was aware of his activities and had approved unlimited vacation to help him with his campaign. He wanted to set up an area in the file room to install a whiteboard and have a place to post literature involving the case of his sister's murder. Complainant said he had purchased his own copy paper and used that to distribute this information about his sister's killer throughout the building. Complainant also said that his health was affected and he underwent a full physiological exam. Complainant was wearing a hospital identification bracelet. Complainant was calm and looking for support to help pass some kind of legislation. He kept referencing contact with Buffett, President Obama, and various other political figures in his campaign. (RX 521).

42. At 8:54 a.m. on May 17, 2011, White forwarded Ellstrom's e-mail summary to Fehrman, Sammon, and Lovig (Director of Labor and Employee Relations for Respondent). At 9:02 a.m., Fehrman forwarded White's e-mail to Singer and Parker and told them to get on this right away. At 9:19 a.m., Lovig forwarded the e-mails from White and Ellstrom to DeBoer. DeBoer, the Senior Labor and Employee Relations Representative for Respondent, was directed to conduct an investigation into Complainant's May 17, 2011, activities. Prior to this, DeBoer did not know Complainant. DeBoer was concerned because Complainant was wearing a medical bracelet, indicating he had been in a hospital. Respondent has a procedure for employees who have been hospitalized to follow before they may return to work. DeBoer spoke to Singer and told him Complainant would need to be on leave until he could get an authorization to return to work signed by his doctor. (Tr. 354-359, CX 17, RX 518, RX 521).

43. Singer called Complainant and asked for an explanation as to what he had distributed. Complainant explained that he had distributed an AP article about the details of his sister's death and developments of the prior week with a notice to visit the "Lynette's Law" website. Complainant told Singer he was getting questions and wanted to prevent hundreds of calls that he would get from fellow employees. Singer told Complainant he had to remove all personal items from the file room and to obtain a medical release form prior to returning to work. Complainant was placed on crisis suspension and not allowed in the building. Singer called Roche, a manager located near Complainant's office, to assist Complainant in packing his items and escorting him from the building. Following the conversation with Complainant, at 10:09 a.m., Complainant sent Singer an e-mail explaining what he had done that morning. (Tr. 396, RX 534, RX 531).

44. In the e-mail, Complainant explained that he had distributed the flyer to employees and friends he and his wife had known for several years and that he wanted to prevent hundreds of calls and/or visits from co-workers. However, Complainant, had also distributed the flyer to employees who did not know him. Complainant also stated that he had been in the emergency room Sunday (May 15, 2011) with stage two hypertension and chest pains. He apologized for any infractions and stated he was bewildered over HR's mention of him using his own PTO. He stated that he had done Respondent's work for free last week as a trade-off for the use of the conference room which otherwise would sit dark. He stated he would take any penalties that came his way, but had no regrets and felt he had saved his family's lives. At 9:29 a.m. on May 18, 2011, Singer forwarded the e-mail to Parker with a courtesy copy to DeBoer. (RX 531).

45. On May 17, 2011 at 10:56 a.m., DeBoer sent an e-mail to Parker, Singer, Roche, and Ellstrom with a copy to Lovig, asking them to send him an e-mail detailing conversations they had had with Complainant on the issue of his PTO, use of the room on the 3rd floor, recent non-work related activities in the building and events of today when he was asked to go home and return with a physician's note. (RX 533).

46. On May 17, 2011, at 12:17 p.m., Parker responded to DeBoer's request with an e-mail. In the e-mail, Parker did not mention anything having to do with Complainant ever sending a letter to Buffett or making allegations against Sokol. From the e-mail, it is clear however that Respondent was aware that Complainant was dealing with a family emergency relating to the release of his sister's killer from prison and that Singer had granted Complainant permission to

use the file/storage room to stuff envelopes for a mailing. Complainant exceeded the extent of that permission by “setting up shop” in the storage room to conduct his Lynette’s Law campaign without Respondent’s knowledge, and continued to use the room well after May 6, 2011, when he was granted permission to use the tables in the room to stuff envelopes. (RX 526).

47. On May 17, 2011, at 2:30 p.m., Singer sent Parker an e-mail stating that in reviewing the mid-month coal nominations that Complainant sent out last night to Respondent’s coal suppliers, he noticed that Complainant had sent a summary of his family issues and a newspaper clipping summarizing the events regarding his sister’s case. The e-mail and attachment was sent to business representatives of Respondent’s four coal suppliers. This is the e-mail referenced in paragraph 37, above. At 2:37 p.m., Singer also forwarded the e-mail to DeBoer and asked him to call him. (RX 527).

Parker forwarded the e-mail to Sammon. Sammon contacted the company’s information technology representative, Terry Payne, forwarded the e-mail to her, and asked her to capture all available files for Complainant to capture documents like the one attached plus all e-mails. At 3:20 p.m., Complainant’s supervisor was granted access to his network drive and at 3:22 p.m., Complainant’s computer account was disabled. (Tr. 426, RX 527, CX 8).

48. On May 17, 2011, at 7:48 p.m., White sent an e-mail to Sammon stating that he was convinced that they acted appropriately in canceling all access by Complainant. He stated the decision was reached early on by Singer, but in a later conference call with Singer, DeBoer, and Ellstrom, DeBoer recommended not cutting Complainant’s building access or disabling his IT accounts. However, White was opposed to changing their previous decision to do so. He urged the HR team to be clear with Complainant’s wife, a Respondent employee, so she understood that Complainant’s access was being restricted and he was not to enter the building until he had a return to work slip. White referenced Complainant’s (unspecified) letter to Buffett in which he mentioned that his wife was unaware of some of his actions, leading him to believe she might not be fully informed of the situation he was creating. White was starting to receive calls following Complainant’s distribution of the flyer around the building from employees who were nervous and asking what was going on. White expressed concern that Complainant’s frustration over the justice system regarding his former brother-in-law might cause him to display hostile actions and make him a security risk. White thought it best to require Complainant to obtain a return to work document from his doctor before being allowed to return to the workplace. (CX 15).

On May 17, 2011, at 8:47 p.m., Sammon responded to White thanking him for the information and saying she was not aware of DeBoer’s recommendations and that she took a command-and-control approach and directed some of what they did. She stated that in taking the risks that they did today, they were actually being conservative in looking out for others and they have to do that. She would follow up with DeBoer regarding her expectation that he listen to White’s folks. At this point in time, Respondent was concerned that Complainant could pose a security risk to other employees. (CX 15).

49. On May 18, 2011, at 11:22 a.m., Sammon informed Lovig, DeBoer, and White that Complainant was on crisis suspension until further notice and not to access the company

locations. At 11:24 a.m., Sammon informed Parker that she would be in touch later today to finalize what she believed the next step would be, termination.

On May 18, 2011, at 3:20 p.m., Singer sent an e-mail to DeBoer with the subject: Bob Quast Crisis Suspension Confirmed. He stated that he had timesheets to approve and with the "suspension" he did not know how to charge Complainant's time. He inquired as to whether it would be charged as PTO until termination.

At this point in time, Complainant's supervisor clearly was considering termination of employment as a possible disciplinary action, but the decision had not yet been made. (CX 11, CX 26).

50. On May 19, 2011, Singer responded to DeBoer's May 17, 2011, request for information with a detailed memorandum setting forth a chronology of his interactions with Complainant. In the chronology, he stated that during a Skype call on April 11, 2011, Complainant had informed him that he sent a letter two days earlier to Warren Buffett "regarding the resignation of David Sokol." He stated that Complainant sent him the letter by e-mail on April 15, 2011, which he read on April 20, 2011 after returning to the U.S.. He stated that the details of Complainant's sister's death were detailed in a P.S.S to Warren Buffett and that Complainant indicated that his sister's killer intended to return to live near his parents when released on July 1, 2011. In the memorandum, Singer did not mention that Complainant had made any allegations against Sokol or describe any details of the April 9, 2011, letter other than those relating to Complainant's sister's death and the release of her killer from prison. (RX 534)

51. DeBoer sent an e-mail to Sammon, Fehrman, Singer, Parker, and Lovig on May 18, 2011, at 12:03 p.m., stating that he had spoken with Complainant from 11:45 to 11:55. He told Complainant that he was investigating his use of company facilities and blending personal with business communication to key suppliers, and that during the investigation Complainant is on crisis suspension and not to report to work. DeBoer stated he told Complainant they would call him when ready to speak to him. DeBoer said Complainant stated *inter alia* that he had communicated with vendors/suppliers via e-mail because it was the easiest way. Complainant volunteered that not all the suppliers he communicated with were familiar with his situation, nor were they close relationships. (RX 529).

On May 19, 2011, DeBoer became aware of an out-of-office message Complainant had left on his computer which contained personal information and told people to "like" a community page titled "Lynette's Law" on Facebook. (Tr. 384, RX 536).

52. In the course of his investigation of Complainant, DeBoer interviewed Parker, Singer, Ellstrom, and Complainant. He also examined e-mail and documents from Complainant's computer. In examining Complainant's e-mails, DeBoer noted that Complainant had sent e-mails to different individuals such as celebrities, politicians, and reporter's containing personal information and mixing business with personal information. He noted that Complainant's x-drive of his computer revealed a number of non-business related documents and photographs dating back several years, including several relating to the document that Complainant distributed on May 17, 2011. DeBoer also examined Complainant's personnel file and noted that

in 2000, Complainant had to complete a Performance Development Plan for conducting non-work related activities while at work.

In DeBoer's interview with Complainant, Complainant stated he felt he had given Respondent approximately \$300 in wages since he had performed some work for the company while taking PTO. Complainant felt this was sufficient "rent" for using the conference room and company facilities. Complainant said that he had e-mailed this information to Singer, but he never received a response from Singer, and agreed that he did not have clear agreement or permission from Respondent to use company resources in this manner.

Complainant did not view his distribution of flyers in the workplace as a distraction. He assumed that his fellow employees would want to know about his personal situation. The flyers were printed on paper supplied by Complainant, but copied on Respondent's copy machines. Complainant did not believe that including non-work related information with business information to Respondent's coal suppliers was inappropriate because he had a personal relationship with them and believed they would want to know what he was doing. Complainant stated that he accepted full responsibility for his actions, but would do some of the same things again under similar circumstances, including handing out the flyers. Although Complainant had a personal cell phone to which he could have directed personal calls relating to his Lynette's Law campaign, he did not want to use it to receive calls regarding his sister's case and related matters. (Tr. 360-372, 380, 431, RX 535, RX 522).

53. A pre-disciplinary hearing was conducted by DeBoer on May 19, 2011. (TR 373-376, CX 27). Complainant and Baltazor of Human Resources were located in the Davenport office of Respondent, and Singer and DeBoer were co-located and communicating telephonically from Des Moines. DeBoer questioned Complainant regarding allegations that he had distributed non-business related flyers in the workplace, used company facilities for personal business, and sent e-mails to key suppliers that included personal business mixed with work-related information.

At the hearing, Complainant admitted to using Respondent's computers for personal use, sending non-business related e-mails to various third parties, using the company computer for personal business, scanning and preparing personal documents using the company computer and scanner, sending e-mails to coal suppliers that mixed personal and business information, and distributing personal flyers around the office. Complainant justified his actions by stating that he was performing these actions while on PTO and had permission from Singer to use Respondent resources. Complainant stated that he had given the company approximately \$300 of his wages by performing work duties while on PTO and felt that was sufficient "rent" for using a small conference room and some company facilities, and that he had e-mailed that information to Singer. Complainant admitted however, that he never received a response from Singer and agreed that he did not have clear agreement or permission for his activities. Complainant accepted full responsibility for his actions, but stated he would do some of the same things again under similar circumstances. (Tr. 135, 181-183, 431, RX 540, CX 27).

54. After the pre-disciplinary hearing, members of Respondent's management and HR team had a meeting to discuss what action to take against Complainant. The participants were Singer, Parker, Sammon, Baltazor, Lovig, and DeBoer. DeBoer discussed his investigation and went

through each of Complainant's answers to his questions. DeBoer concluded that Complainant violated Respondent's Code of Business Conduct in several areas: political activities, conflict of interest, posting and distributing materials, disturbing others, solicitation, use of company computers and communications systems, and use of company name and endorsements. DeBoer was not one of the decision-makers, he simply presented his investigative findings. Sammon was not the ultimate decision-maker, although she participated in the discussion. (Tr. 397-398, 432-433).

The group unanimously decided that termination of Complainant's employment was appropriate. Respondent did not decide to terminate Complainant's employment until after the pre-disciplinary hearing was concluded and the investigation was discussed by management officials. In the course of the investigation surrounding the events on or about May 17, 2011, the subject of Complainant sending an April 2011, letter to Buffett with allegations against Sokol or making allegations regarding Sokol to a federal or regulatory agency never came up. Nor were such subjects brought up by Respondent or anyone associated therewith in the course of deciding what if any disciplinary action should be taken against Complainant for his violations of the Code of Business Conduct. Fehrman did not participate in the discussion of what action to take against Complainant, but was informed of the decision to terminate Complainant's employment. He agreed that termination was appropriate. Abel, Buffett, and Sokol played no role in the investigation of Complainant or the decision to terminate his employment. (RX 501, CX 27, Tr. 431-434, 453-455, RX 560).

55. Complainant violated page 9 of Respondent's Code of Business Conduct (Political Activities) by using company resources for the purpose of supporting a political issue. Complainant's activities which included soliciting support from politicians, co-workers, coal suppliers, and others by means of preparing letters and documents on the company computer, using the company e-mail system, directing phone calls to his work phone, sending out letters enclosing his company business card, stating in a letter that was critical of government policies and laws that his supervisor fully supported his activities, and handing out flyers on company property with the goal of gaining support to pass legislation which he referred to as "Lynette's Law" was prohibited political activity. Respondent was aware that Complainant was using the conference room to stuff envelopes to send to various politicians and more specifically, Singer was aware that Complainant was sending letters to politicians to try to get a law passed. So Respondent did approve of some use of company resources, i.e., the conference room and secretary, to support a political issue. However, Respondent did not approve of or know of the extent of Complainant's use of company resources to support a political issue.

Complainant did not violate page 13 of Respondent's Code of Business Conduct (Conflicts of Interest). Nor was this violation listed in his termination letter.

Complainant violated page 19 of Respondent's Code of Business Conduct (Posting and Distributing Materials) by distributing and posting informational material regarding the release of his sister's killer and his attempts to pass legislation without the express permission of Respondent.

Complainant violated page 20 of Respondent's Code of Business Conduct (Disturbing Others) by placing flyers at their work stations or handing them directly to employees. This conduct caused some employees to contact Russ White with concerns about Complainant's activities.

Complainant violated page 20 of Respondent's Code of Business Conduct (Solicitation) by soliciting for passage of "Lynette's Law" on company premises without authorization by Respondent.

Complainant violated page 21 of Respondent's Code of Business Conduct (Use of Company Computers and Communication Systems) by using Respondent's computers to prepare personal documents and send them to others using Respondent's e-mail system, without Respondent's authorization.

Complainant violated page 22 of Respondent's Code of Business Conduct (Use of Company Name and Endorsements) by enclosing his business card in letters sent to politicians and using his business title and business information in e-mail correspondence to others in support of his personal cause. He also represented in his May 5, 2011, letter that Respondent was fully supportive of his actions and the contents of his letter. Complainant did not have approval to use the company name in this manner. (RX 501).

56. Respondent did not deviate from its human resources policies governing formal disciplinary actions. Although Respondent could have taken a lesser form of disciplinary action against Complainant, termination of employment was a permitted option under Respondent's policies. (RX 502).

57. On May 20, 2011, Complainant was presented with a termination letter by Baltazor, who was co-located with him in the Davenport office. Baltazor signed the letter for Singer and gave it to Complainant, at the direction of Singer. Singer and DeBoer were on the telephone with the parties at the time the letter was presented. In the letter, Respondent explained that Complainant's employment was terminated because he "distributed personal and political information to co-workers and ... coal and line [sic] suppliers, business partners and customers," he directed "personal and political" phone calls to his office phone, and "distributed several hundred flyers to other employees, causing significant disruption to the business." I note that the letter did not state that Complainant's violations included using the conference room or secretary to stuff envelopes, so Respondent did not fault Complainant for the activity it had approved. The letter stated that this conduct constituted "serious violations of the [MEHC] Code of Business Conduct," and that Complainant "refused to acknowledge that this behavior was unacceptable" at the pre-disciplinary meeting.

DeBoer summarized what occurred at the presentation of the letter in an e-mail dated May 20, 2011, at 9:52 a.m. to Lovig, Sammon, Parker, Baltazor, and Singer. Complainant stated *inter alia* that his multiple letters to Berkshire Hathaway and Buffett must have angered Sammon and that he believed his termination was retaliation for his letters to Buffett. DeBoer was unaware of Complainant's letters to Buffett concerning allegations against Sokol. The only letter

to Buffett that was discussed in the course of the disciplinary proceedings was the letter to Buffett requesting help with passing Lynette's Law. (Tr. 386-390, 437-440, RX 544, RX 545).

58. No adverse or disciplinary action was taken against Complainant from the time he wrote the April 9, 2011, letter to Warren Buffett until May 20, 2011, when his employment was terminated. Between April 9, 2011 and May 17, 2011,⁷ Complainant was not treated differently by his supervisors or co-workers. Nor were his job duties or treatment at work changed during this period of time.

Credibility

Complainant

After conducting a thorough review of the briefs, transcript, and exhibits submitted in this case, I find there are 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 portions of his testimony not credible. I incorporate the following points into my specific findings of fact, above, to the extent that they were not already discussed:

1. In his testimony, Complainant stated that on April 11, 2011, a few minutes after he mailed the April 9, 2011, letter to Buffett, he got an unexpected call from Singer who was on vacation in Thailand. Because Singer called him, Complainant said he felt a need to share with him that he thought Sokol had committed fraud and he had just mailed a letter directly to Buffett about his concerns. (Tr. 55-56).

However, Singer testified that Complainant e-mailed him in Thailand and said he needed to talk to him. Therefore, in response to Complainant's e-mail, Singer called Complainant. Complainant told Singer the reason he wanted to talk to Singer was because he had sent a letter to Buffett referencing Sokol and he was suggesting that Buffett implement a management review approach in which there would be a peer, subordinate and supervisor review of managers. (Tr, 410-412, RX 534).

I find Singer's testimony on this point to be more credible than that of Complainant. I find it unlikely that Singer, who was on vacation in Thailand would have spontaneously called Complainant on the very day that he had mailed a letter to Buffett, absent a request from Complainant to call him. It is also apparent that the entire content of the phone conversation was in regards to the letter, therefore it does not appear that Singer had any other reason to call Complainant. (Tr. 410-412).

2. In his testimony, Complainant stated that when Ellstrom came to the conference room on May 17, 2011, to view where Complainant wanted the whiteboard placed, he told Ellstrom that he had initiated an investigation against Sokol and written a letter to Buffett demanding an

⁷ This is the date Complainant was placed on crisis suspension. Complainant does not assert that this was an adverse action.

investigation of Sokol. Complainant says he told Ellstrom he had written a letter to Buffett complaining about Sokol, it was on the wall, and he would show it to him. Complainant also says he told Ellstrom he was participating with the federal government in the SEC investigation against Sokol. (Tr. 122).

However, Ellstrom denies that this conversation ever took place. Ellstrom said that Complainant told him he needed a whiteboard for use during a campaign he was working on to pass a new law. Complainant told Ellstrom this was the first time he had told anyone about his sister's murder. He indicated it started back when his boss was terminated for violating company policy relating to vendor gifts. He said he wrote letters to Buffett asking for his help with some new law to keep criminals in jail. He did not mention any other subject he had written to Buffett about. (Tr. 275-276). When speaking to Ellstrom, Complainant jumped topics all over the place from talking to Buffett to contacting the President. Complainant wanted to set up an area to install the whiteboard so he could post literature involving the case of his sister's murder. Complainant was wearing a hospital identification bracelet and told Ellstrom he had undergone a physiological exam and had high blood pressure. (Tr. 272-276, RX 521).

I find Ellstrom's version of what occurred on May 17, 2011, to be more credible than Complainant's. Immediately after his conversation with Complainant, Ellstrom called his boss to report that Complainant had distributed flyers throughout the building, requested a whiteboard, and to report on what he had observed in the conference room. Ellstrom immediately wrote a narrative as to what had occurred. (RX 521). I find that Ellstrom had no motive to misreport his interaction with Complainant. Furthermore, based on the testimony and narrative of Ellstrom, I find that on the morning of May 17, 2011, Complainant was focused on his campaign to pass Lynette's Law, he had recently been released from the hospital for stress and hypertension, he was jumping from topic to topic, and I find his memory of what occurred to be less reliable than that of Ellstrom, a disinterested observer.

3. Complainant testified that he told Singer, Parker, and Ellstrom that he had contacted the DOJ, FBI, SEC or other federal agency regarding his allegations against Sokol. (Tr. 122, 128-129).

Singer denies that Complainant ever told him he had spoken to the DOJ or any other federal agency regarding his allegations against Sokol. Singer was aware that Complainant had been in contact with the DOJ regarding matters related to his sister's killer. On May 5, 2011, Complainant sent Singer and others an e-mail stating that he had spoken to the DOJ regarding the attempt of his sister's killer to move close to Complainant's family and regain custody of his sons. (Tr. 415, RX 534).

I find Singer to be more credible when he says that Complainant never told him he had spoken to or was going to speak to the DOJ or any other federal agency regarding his allegations against Sokol. Complainant seems to have imputed such knowledge to Singer based on the May 5, 2011, e-mail he sent Singer and others. However upon review of the e-mail and all evidence of record, I see no evidence that Singer had such knowledge or that Complainant ever told him that he had reported or was going to report Sokol to a federal investigative agency.

Parker was deceased by the time of the hearing. However, prior to his death he rendered a written statement. The statement indicates that Complainant showed him the April 9, 2011, letter he had written to Buffett. It makes no mention of Complainant reporting these allegations to a federal agency. While this alone is not definitive proof that Complainant did not tell Parker he was going to report his Sokol allegations to a federal agency, I find no other indications of such knowledge by Parker or any member of Respondent, throughout the record. All other Respondent witnesses who had daily contact with Parker and were involved in this matter, testified credibly that they were unaware that Complainant had reported his Sokol allegations to the DOJ, FBI, SEC, or any other federal agency. Therefore, I find that Complainant's testimony that he told Parker he was going to report Sokol to a federal agency, is not credible. As with Singer, I find that Complainant imputed such knowledge to Parker.

Ellstrom denies Complainant's assertion that he told him he was participating in an SEC investigation of Sokol. (Tr. 122). Ellstrom further denies seeing any business cards or documents relating to the DOJ or FBI in the conference room. (Tr. 274).

As stated above, I find Ellstrom's testimony of the events of May 17, 2011, to be more credible than Complainant's version of those events. Ellstrom was a disinterested observer with no motive to lie and he immediately reduced his observations to a written summary. I find that Complainant mistakenly imputed such knowledge to Ellstrom because he thought Ellstrom may have seen something in the conference room relating to the DOJ or FBI. (RX 521).

4. After reading Complainant's April 9, 2011, letter to Buffett and listening to his testimony about this letter, I find that the letter was filled with several veiled references to potential allegations against Sokol or others that were unclear to anyone other than Complainant. Complainant imputed knowledge to others that they could not possibly have gained from a reading of his letter. For example, Complainant testified that in his letter he was also making allegations against others management officials besides Sokol and he believed Abel, Anderson, and Goodman conspired with Sokol to commit fraud. (Tr. 73-74, 79, 96, 213). However, I see no reference to such individuals either directly or by implication in Complainant's letter. The letter contained no allegations against anyone other than Sokol.

Similarly, Complainant testified that when he referred in his letter to an "elephant gun" this was really a reference to his allegation that Sokol had improperly made Respondent purchase a property called Lake DeSmet because he liked to hunt and it was formerly the M&M Ranch, a hunting ground. Such an allegation was not apparent from the letter. Complainant further testified that he had no evidence to support such an allegation. (Tr. 88-89, 203). In a post script to his letter, Complainant made reference to a Falcon jet. He testified that this was supposed to be a reference to an allegation that Sokol had improperly purchased a Falcon jet. (Tr. 216). However, such an allegation would not be apparent to anyone reading the letter other than Complainant. Overall, I find that Complainant had a tendency to impute knowledge to others that they did not have.

5. Complainant testified that he believed Sammon was behind his termination, she was angry and upset with him for writing to Buffett and making allegations against Sokol, she gave him a strange look, turned her back on him, and did not want to talk to him at the share-holder

meeting, she was looking for a reason to fire him, and the reasons given for his termination were just a pretext. (Tr. 133-134, 162, RX 545).

I do not find Complainant's beliefs about Sammon's actions and motivations to be supported by the objective evidence of record. Based upon my review of the evidence, it does appear that before she read Complainant's April 9, 2011, letter, Sammon believed that he may have misrepresented that he was writing to Buffett on behalf of and as a representative of Respondent company and misused company resources in preparation of the letter. Therefore, initially, before reading the letter, she advised Fehrman that it might be a basis for disciplinary action and recommended scanning his e-mail and drives. (CX 20). However, after reading the letter, Sammon testified credibly that she did not believe it was a basis for disciplinary action and did not recommend it. However, Sammon credibly stated she believed, based on his statements in the letter, that Complainant was seeking a meeting with Buffett and might pose a security risk based on his mention of a gun in the letter. Sammon testified credibly when she stated that she felt it necessary to consult with White, who was in charge of security, and evaluate whether the letter was cause for concern of a threat to Buffett who would be appearing at the upcoming shareholder meeting or other employees. Furthermore, she believed that the allegations Complainant made against Sokol were already a matter of public knowledge and that he was not raising any new issues. She testified credibly that at the shareholder meeting she shook Complainant's hand and then turned away to return to her conversation with another person that Complainant had interrupted. (Tr. 285-289, CX 42, RX 507).

6. Complainant testified inconsistently about what authorization he had received from Singer to use company resources. Complainant first testified that he had Singer's approval to do the things he did and stated they were "in the normal course of business." (Tr. 135). Complainant also testified that he had approval from Singer to send both the May 5, 2011, and May 6, 2011, letters and to direct phone calls resulting from the letters to his office telephone number. (Tr. 144-146, 148, 174, 181). On cross-examination, Complainant testified however, that he did not have authority from Singer to send the e-mail to coal suppliers in which he mixed business and personal information. Nor did Singer grant him authority to send the attached AP new article. On cross-examination, Complainant also testified that handing out flyers to employees at the Davenport office was not "the normal course of business." (Tr. 177). He also testified that he did not have permission from Singer to place flyers around the Davenport building. (Tr. 190).

Complainant testified that by virtue of charging some of his work for Respondent as vacation hours, he believed that Singer/Respondent had consented to his use of the company's copy machine, long distance telephone service and other incidental expenses up to \$300. He stated that he had made an offer to Singer in an e-mail to this effect. However, he then admitted that Singer never expressly consented to this or responded to his email "offer." Looking at the text of the actual e-mail (RX 509), the only company resource that Complainant requested to use in exchange for PTO was "Molly" to help him make address labels. (Tr. 181-182). The record does not contain an e-mail or note in which Complainant clearly made the offer that he is asserting or in which he received acceptance of such an "offer." When questioned further about this, Complainant stated that despite earlier testimony that the e-mail was sent on May 5, 2011, he believed his "fair trade" e-mail may have in fact been written on May 12, 2011. (Tr. 229).

He then stated that perhaps there was a verbal conversation that made him believe he had certain approvals to use the copier. (*Id.*). He stated that there were several e-mails back-and-forth. When pressed, he stated that the specific e-mail he sent to Singer that he believes formed the basis of his belief that he had been given permission to do all the things he did was a May 5, 2011, e-mail. However, there is no May 5, 2011, e-mail to this effect in the record. He then equivocated, and stated that perhaps he received the permission in an oral conversation. (Tr. 229-232).

Complainant also testified that he faxed a copy of the May 5, 2011, letter to Singer on May 5, 2011, and received Singer's approval for it prior to mailing it out on May 5, 2011. However, he also inconsistently testified that he faxed the letter at first to Singer to review and Singer sent an e-mail back on the morning of May 6, 2011, with his approval. However, looking at the record it appears that the May 5, 2011, letter was e-mailed to Singer on May 6, 2011, after it had already been sent out. (RX 509, 510, 510A). In testimony, Complainant stated that he did not have a copy of the fax he allegedly sent to Singer on May 5, 2011. (Tr. 232-233). I find Complainant's memory on these key details to be too tenuous to rely upon.

Singer's testimony is in direct conflict with that of Complainant's on several key points. Singer testified that he only gave Complainant specific permission to use the conference room on May 5, 2011, to stuff 25 envelopes and to use the conference room and Molly the secretary on May 6, 2011, to stuff approximately 500 envelopes. (Tr. 417-420, RX 534). His testimony was that he did not consent to Complainant's use of the company computers, e-mail system, telephone system, or business cards in his personal cause relating to his sister's case. Singer also testified that he was unaware that Complainant had sent out an e-mail to coal suppliers in which he mixed business and personal information and attached an AP news article or that Complainant had distributed flyers around the Davenport office with the same AP news article, until after the fact. (Tr. 421-429, RX 534).

Singer also testified that he had granted Complainant's request to use his PTO to take care of his personal family business, but that he did not agree to any use of company resources in exchange for Complainant's use of additional PTO. Nor did he expect or tell Complainant that he had to use PTO while performing work for Respondent. (Tr. 416-419, RX 534).

I find Singer's testimony regarding the permission granted to Complainant to be more credible than that of Complainant. I found Complainant's testimony to be inconsistent and his memory of key dates and events to be unreliable. At times he testified that he had told people things on certain dates which could be confirmed by documentation, but then was unable to produce such documentation or he had remembered documents differently than they actually appeared. Complainant also seemed to assume that he should be able to do certain things such as use the copiers and telephone because in his mind they were incidental or insignificant expenses to Respondent. I find that Singer did grant Complainant permission on May 5, 2011, to use the Davenport conference room to stuff 25 envelopes and to use the conference room on May 6, 2011, to stuff approximately 500 envelopes, as well as use Molly to assist him. However that is the extent of the permission that Singer granted. I do not find that Singer approved the content of Complainant's May 5, 2011, letter or that by virtue of letting Complainant use the conference

room to stuff envelopes, that somehow that translated into Respondent endorsing the content of the envelopes that Complainant was stuffing in its conference room.

7. Complainant testified inconsistently as to the nature of his relationship with the people to whom he distributed flyers in the Davenport office. Complainant initially testified that he distributed the flyers only to people whom he or his wife knew well and with whom he had a personal relationship. He specifically stated that he selected those people whom he or his wife knew best to explain what was going on with his family. He testified that he was trying to avoid disruption and save the company time because he did not want to have to keep explaining to people what he had accomplished. (Tr. 139-140). He testified that his co-workers had been asking him for updates about his family situation and he did not want to have to waste time trying to explain what was happening and to answer questions of co-workers. (Tr. 150-151).

However, when questioned on cross-examination, Complainant admitted that some employees to whom he handed flyers did not know him or know about his family situation. (Tr. 176-177). I find that Complainant distributed flyers indiscriminately to everyone at the Davenport office regardless of whether he knew them or they were aware of his personal family situation. Complainant's distribution of flyers to people he did not know prompted some employees to inquire with the facility manager, as to what was going on. Complainant's distribution of flyers was disruptive to the office environment. (CX 15).

8. Complainant testified repeatedly that he took full responsibility for everything that he did and does not know what he did wrong because the things he did were in the normal course of business and with his boss' permission. He then qualified this and said that he took full responsibility for everything other than sending the May 5, 2011, letter because he believed he had permission from Singer to send it. Complainant asserted that he only said he would do nothing differently with regard to the May 5, 2011, letter. (Tr. 135-136, 183).

Complainant's testimony was in direct conflict with that of others who were at the pre-disciplinary hearing. Sammon testified that Complainant stated at the hearing that he would take the same actions again. (Tr. 306). DeBoer also testified that at the pre-disciplinary hearing, Complainant said he would do the same thing again under similar circumstances. (Tr. 380). Singer testified that Complainant had no remorse and testified that he would do it all over again, handing out the flyers all over the company. (Tr. 431).

I find that, contrary to his testimony, Complainant did not take full responsibility for his actions at the pre-disciplinary hearing, and his lack of remorse was a factor in Respondent's decision to terminate his employment.

9. Complainant testified that the reason he did not direct personal calls to his cell phone was because the cell phone was for his limousine business and he had been reprimanded previously in 2000 for conducting limousine business while at work. Therefore he testified that he did not direct people to whom he sent letters or e-mails regarding "Lynette's Law" to call his cell phone because he feared that he could be terminated if he used the limousine cell phone at work. Complainant justified his use of the office telephone to receive personal calls, because during the time period that he was working on passage of Lynette's law, he was also spending time at the

office doing some work for Respondent. Complainant also testified that he did not direct calls to his personal cell phone, because Singer gave him permission to direct calls to his business phone. (Tr. 148-149).

Complainant's testimony on this point was in direct conflict with that of DeBoer and Singer. DeBoer testified that Complainant stated he did have a personal cellular phone, but it was for a limousine business and he did not want to change the voice mail on that phone to something else as it would disrupt his limousine business. (Tr. 379). Singer testified that at the hearing, Complainant said he did not want to disrupt his limousine business because that was the number he was using for his limousine service. Singer also testified that he did not give Complainant permission to direct personal calls to his business phone. (Tr. 436-437).

I find the testimony of DeBoer and Singer on this point to be more credible than that of Complainant. Although Complainant testified that he was afraid to use his personal cell phone while on company property due to his reprimand in 2000, it does not appear that Complainant ever asked Respondent if he could use his personal cell phone to receive calls regarding his family's case during the time period when he was working on his personal family issues. Although, Complainant may have subjectively believed that he had permission to direct personal calls to his office telephone, the objective evidence does not support that such permission was granted. Based on the evidence presented, I find that after the fact, Complainant attempted to bolster the justification for using the company telephone by reasoning that he was not allowed to use his personal cell phone on company property.

10. Complainant testified that one of the reasons he believed his actions with regard to use of the Respondent e-mail, computer, and telephone system was permitted was because in 1999, when his sister was murdered, he was allowed to use these company resources to disseminate information regarding his sister's case and family situation. (Tr. 140-143, 184, 208-209). However, on cross-examination, Complainant clarified that in 1999 he did not hand out flyers, but communicated verbally, by e-mail, and in writing. I find that the record does not contain sufficient information for me to evaluate whether Complainant engaged in similar conduct in 1999 that was either condoned by or not punished by Respondent.

11. Complainant testified that in an e-mail dated May 12, 2011, to a number of people, some of whom worked for Respondent, including Singer, he described activities that he performed on May 12, 2011. However, he then admitted that he did not tell the truth in that e-mail and that in a book he wrote, he stated that instead of taking a nap, he drove "Cannonball Run" style to Whitewater, Wisconsin at speeds reaching 180 miles per hour. Complainant testified that he prepared the e-mail and document detailing his activities on May 12, 2011, using Respondent's computer. Complainant admitted that he exaggerated in describing his activities on that day to his supervisor and others. (Tr. 249-252, RX 513, RX 552 at MAE 411).

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).⁸ 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 knew he or she engaged in protected activity; (3) the respondent took unfavorable personnel action against him or her; and (4) the protected activity was a contributing factor in the adverse personnel action.⁹

⁸ See 18 U.S.C.A. § 1514A(b)(2)(C).

⁹ See 18 U.S.C.A. § 1514A(b)(2). See also, *Feldman v. Law Enforcement Associates Corp.*, No 12-1849, 2014 WL 1876546 (4th Cir. May 12, 2014).

If the complainant carries his 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.¹⁰

Protected Activity

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 he provides information regarding corporate conduct which the employee reasonably 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, his 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].¹¹ 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.

¹⁰ *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); see also, *Feldman*, supra, n. 9.

¹¹ This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

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 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 his concern to either his 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 three potential forms of protected activity:

- 1) He sent an April 9, 2011, letter to Buffett in which he alleged that Sokol had violated federal securities laws and Respondent's Code of Ethics;
- 2) He informed management of the Sokol allegations contained in his April 9, 2011, letter to Buffett. Specifically, on April 11, 2011, in a telephone conversation, he informed Singer of the contents of the April 9, 2011, letter; and on April 13, 2011, in a meeting in Ottumwa, Iowa, he told Parker about the letter and let him read it; and
- 3) He reported his concerns about Sokol to the federal government, specifically the DOJ on May 3-4, 2011, and the FBI on an unknown date thereafter. (Tr. 55-57; 108-110, 409-413, C. Br. at 7).

1) **April 9, 2011, Letter to Warren Buffett**

As discussed in my specific findings of fact above, on April 9, 2011, Complainant sent a letter to Buffett alleging that Sokol had violated the Respondent's Code of Business Conduct and Ethics and committed various types of fraud in violation of SOX. (Specific Findings of Fact 7, 8).

Respondent argues that the statements in the letter were not protected activity because Complainant did not specify what conduct committed by Sokol violated Respondent's Code of Business Conduct or explain why he believed the conduct was a violation of a law enumerated in SOX. With respect to Complainant's allegations regarding the CalEnergy acquisition of MidAmerican, CalEnergy zinc recovery project, and Casecan project, Respondent argues that Complainant admitted he was not involved in any of these projects, had no personal knowledge of decisions made with regard to them, could not identify what specific conduct Sokol committed that was wrong, and was merely speculating that Sokol did something wrong based on information that was public knowledge. Respondent argues that because Complainant did not provide information regarding any specific conduct of Sokol that could be a violation of anything, his letters do not provide the kind of "specific factual allegations" that are required to constitute protected activity under SOX. Because Complainant merely asks questions apparently based on things that were contained in public records or press releases, Respondent argues his letter cannot constitute protected activity. (R. Br. at 37-41).

Complainant argues that it is sufficient if an employee merely identifies the specific conduct thought to be illegal, and by identifying the actions of Sokol that formed the basis of his belief that Sokol committed securities fraud, Complainant believes his letter satisfies this requirement. Complainant asserted in testimony that his letter alleged that Sokol concealed from Buffett massive liabilities tied to CalEnergy, which resulted in huge losses charged to Berkshire shareholders, and further that Sokol engaged in insider trading at the expense of Berkshire shareholders. Even if Complainant communicated these allegations by way of a string of rhetorical questions, Complainant contends that he nonetheless identified the conduct that he believed to be illegal when he asked Buffett for an investigation of Sokol's alleged fraud against Berkshire shareholders.

I find that Complainant sufficiently identified the conduct that led him to believe that Sokol had committed securities fraud, on page 5 of the April 9, 2011, letter. Complainant communicated concerns related to purported violations of a federal law or SEC rule or regulation relating to fraud against shareholders. Although he did not cite to a particular statute, he was not required to do so in order to state a whistleblower claim under SOX.

I further find that Complainant subjectively believed that the conduct complained of constituted a violation of federal security laws and internal ethics codes relating to fraud against shareholders, based on his credible testimony in this regard. (Tr. 92-107).

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 that Sokol engaged in the type of misconduct alleged. Complainant testified that, in addition to the information that was reported in the public press, he maintained his own “Sokol files” in which he collected internal company documents such as internal auditor/SEC reports and had discussions with other employees regarding questionable activities by Sokol. In his testimony, Singer confirmed that there were several aspects of Complainant’s allegations against Sokol that were not a matter of public knowledge.

Accordingly, I find that Complainant engaged in protected activity by sending an April 9, 2011, letter to Buffett which contained allegations that Sokol had committed fraud to the detriment of Berkshire Hathaway shareholders.

2) Conversations with Singer and Parker

As discussed in my specific findings of fact above, on April 11, 2011, Complainant had a telephone conversation with Singer in which Complainant told Singer that he had sent a letter to Buffett alleging that Sokol committed fraud. He discussed the nature of his allegations against Sokol. Similarly, on April 13, 2011, Complainant had a conversation with Parker regarding these same matters and additionally allowed Parker to read the April 9, 2011, letter. (Specific Findings of Fact 10, 11).

Complainant asserts that these conversations were protected activities. Respondent argues that in the conversation with Singer, Complainant merely talked about his April 9, 2011, letter and did not suggest that he was making some kind of a report to Singer. Respondent asserts that the conversation merely made Singer aware of the existence of the letter, but not of any specific conduct allegations within it. Respondent argues similarly that Complainant did not make a report of Sokol’s misconduct to Parker on April 13, 2011. Respondent again asserts that the conversation merely made Parker aware of the existence of the letter, but not of any misconduct allegations within it.

I do not find Respondent’s arguments with regard to these conversations convincing. Complainant was not required to state that he was making a report. I find that Complainant not only told Singer and Parker of the existence of a letter he had mailed to Buffett, but he also explained to them the specific allegations that he was making against Sokol. As Singer and

Parker were both members of Respondent's management team, and supervised Complainant, I find that Complainant's conversations with them regarding his allegations against Sokol were protected activities.¹²

For the same reasons as stated in my discussion above with regard to the April 9, 2011, letter to Buffett, I find that Complainant subjectively believed that the conduct complained of constituted a violation of federal security laws and internal ethics codes relating to fraud against shareholders, based on his credible testimony in this regard. I also find for the reasons stated above that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed that Sokol engaged in the type of misconduct alleged.

3) Reports to DOJ and FBI

As discussed in my specific findings of fact above, on May 3-4, 2011, Complainant discussed his allegations against Sokol with a member of the U.S. DOJ. The agent he spoke with referred him to the FBI as the proper investigative agency. At some unspecified time thereafter, Complainant spoke with an agent of the FBI. (Specific Findings of Fact 22).

Complainant argues that these conversations were protected activities. Respondent argues that this tribunal cannot conclude from the evidence at the hearing that Complainant actually had such communications with federal agents because there is no evidence of such communications other than Complainant's testimony.

While Respondent is correct in stating that the only evidence of record relating to these conversations is Complainant's testimony, I found Complainant's testimony that he had spoken with federal agents regarding his Sokol allegations to be credible. Complainant's testimony in this regard was consistent and he specified the dates that he spoke with an agent of the DOJ. It is reasonable to conclude that although the purpose of his meeting with DOJ on those dates was to discuss matters concerning the release of his sister's killer from prison, he might also have mentioned his allegations against Sokol, given the temporal proximity of his letter to Buffett which had been mailed approximately two weeks earlier. The issue of whether Respondent had knowledge of these communications is a separate issue that will be discussed subsequently.

For the same reasons as stated in my discussion above with regard to the April 9, 2011, letter to Buffett, I find that Complainant subjectively believed that the conduct complained of constituted a violation of federal security laws and internal ethics codes relating to fraud against shareholders, based on his credible testimony in this regard. I also find for the reasons stated above that a reasonable person in the same factual circumstances, with the same training and experience as Complainant would have believed that Sokol engaged in the type of misconduct alleged.

¹² Although the parties did not address it in the briefs, I find that Complainant's conversation with Fehrman about the letter was also a protected activity for the same reasons as I find the conversations with Singer and Parker were protected activities.

Knowledge of Protected Activity

Although Respondent disputes that Complainant engaged in protected activity, it does not dispute that Complainant made numerous employees, including managers of Respondent, aware of his April 9, 2011, letter to Buffett which contained allegations of fraud against Sokol.

However, Respondent denies any knowledge of Complainant's communications with the DOJ and/or FBI concerning his Sokol allegations. (R. Br. at 43). Complainant has alleged that he informed Parker and Singer, that he intended to contact or had contacted federal agencies about his allegations against Sokol.

In my Specific Findings of Fact, above, I found that Respondent did not have knowledge that Complainant had ever discussed or planned to discuss his Sokol allegations with the DOJ, FBI, SEC, or any other federal agency. (Specific Findings of Fact 22). I explained my reasoning for this finding in my discussion of credibility above (paragraph 3).

Adverse Action

The ARB 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),¹³ 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* 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 has alleged two adverse personnel actions were taken against him: termination of employment and breach of confidentiality. Respondent does not dispute that its termination of Complainant's employment constituted an adverse action, and I specifically find that termination was an adverse personnel action. However, it denies that Respondent's alleged breach of Complainant's confidentiality was an adverse employment action.

¹³ 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."

Complainant alleges that Fehrman, Respondent's President and CEO, breached his request for confidentiality by describing the contents of his April 9, 2011, letter to Sammon, Respondent's top human resources executive, and seeking her advice on how to handle the letter. Sammon in turn shared the letter with White, who was in charge of security. Additionally, Complainant asserts that Abel, President and CEO of MEHC, breached his confidentiality by instructing Fehrman to give a copy of Complainant's April 9, 2011, letter to Sammon. Complainant asserts that Respondent's parent companies, MEHC and Berkshire Hathaway have relevant policies that require confidentiality for reports like Complainant's and that Respondent violated these policies. Complainant asserts that under *Menendez* an employer's violation of an employee's confidentiality rights is an adverse action. (C. Br. at 10-11).

Respondent argues that the circumstances in *Menendez* are distinguishable from those in Complainant's case. It argues that because Complainant did not utilize the company procedures established for reporting ethical violations, he should not be allowed to claim protection of those procedures. Second, it argues that Fehrman reasonably discussed the letter with Sammon because she is the head of human resources and he wanted her advice on whether he needed to do anything, and it was normal to discuss an employee matter with the head of human resources. Furthermore, contrary to Complainant's belief as expressed in his testimony, Sammon was not responsible for terminating his employment. Although she played an advisory role as the head of human resources, she was not Complainant's supervisor. Finally, Respondent argues that Complainant had no expectation of confidentiality in the April 9, 2011, letter. Complainant did not report his concerns to the ethics hotline or audit committee, but sent his letter to Buffett and then himself immediately began sharing his letter or its contents with every person in his management chain as well as other co-workers and suppliers.

Having examined the *Menendez* decision, I find that the circumstances in that case were significantly different than those in Complainant's case. The problem in *Menendez* was that the complainant's SEC allegations were revealed to the very people against whom he had made allegations of misconduct and were also widely disseminated throughout the respondent company. After *Menendez*' identity as the complainant was revealed, he then suffered immediate repercussions including receiving no phone calls, receiving few e-mails, co-workers avoiding him, and auditors refusing to interact with him. His job was so affected, that he requested to be placed on administrative leave and ultimately resigned his employment, claiming that the respondent had demoted him and intended to persist in violating securities laws.

In the current case, I find that Complainant voluntarily revealed the contents of his April 9, 2011, letter to all members of his management team including Singer, Parker, and Fehrman, as well as to non-supervisory co-workers and coal suppliers. The letter, as well as discussions about it with Singer, Parker, and Fehrman did not contain either explicit or implied allegations against anyone other than Sokol, who had already resigned from Respondent's parent company. Fehrman asked Complainant if he could share the letter with Abel, but ultimately did not send it him. Abel did not desire to see the letter and advised Fehrman that he should give the letter to Sammon and seek her advice as to whether he needed to do anything further.

Fehrman consulted Sammon before either of them had actually seen the contents of the letter. Prior to seeing the letter, Sammon speculated as to whether Complainant had improperly represented that he was writing the letter on behalf of the company, rather than in his personal capacity as a shareholder and/or improperly used company resources to prepare a personal letter, which might be grounds for disciplinary action. However, after reading the letter, she did not believe it was a basis for any disciplinary action or recommend any such action be taken. Complainant was not disciplined for writing the letter. Sammon shared the letter with White, head of security, to evaluate whether the letter raised any issues of a security threat to Buffett or other employees. Since the letter mentioned a gun, recommended severely rebuking Sokol, implied that Buffett had not taken proper action against Sokol, and that Complainant desired to meet with Buffett, such consultation was appropriate. Upon review, White and Sammon determined that the letter did not, in fact, raise a security threat to any current or former employees. The letter was not shared with anyone else or for any improper purpose. Accordingly, I find that Complainant's confidentiality was not breached and there was no adverse action taken in consulting with the heads of the human resources and security departments.

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 his protected activity and the unfavorable personnel action.

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.¹⁴ *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 was one adverse personnel action taken with regard to Complainant, termination of employment.

Complainant's Position

Complainant argues that his protected activity of April 2011, was a contributing factor in his May 20, 2011, termination. Specifically, he argues that the following factors establish that his protected activity was a contributing factor:

- 1) temporal proximity between his April 9, 2011, letter to Buffett and April 11 and 13, 2011, discussions with Singer and Parker about the letter;
- 2) his strong, positive relationship with senior management immediately became strained with all members of top management;
- 3) senior executives isolated Complainant and refused to speak with him at the April 30, 2011, shareholder meeting;
- 4) Respondent's stated rationale was only one of the reasons for his termination;
- 5) Respondent's stated reasons for termination were pretextual;
- 6) Respondent inconsistently applied its human resources policy on performance development and discipline of Complainant; and
- 7) Respondent's explanations shifted for its breach of Complainant's confidentiality, as well as handling Complainant's alleged wrongdoing and fast-tracking of the investigation that resulted in his termination. (C. Br. at 13-21).

¹⁴ 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).

Respondent's Position

Respondent argues that Complainant's alleged protected activity was not a contributing factor in its decision to terminate Complainant's employment. It argues that while temporal proximity between an alleged protected activity and adverse action can be circumstantial evidence in determining causation, its presence does not compel a finding of causation. It further argues that this is particularly true when, as in Complainant's case, there is an intervening basis for the adverse action.¹⁵ Respondent argues that it consistently explained that it terminated Complainant's employment because of his conduct in May 2011 in which he distributed 200-300 flyers at Respondent's Davenport facility, urging people to support "Lynette's Law" and sent similar information to Respondent's coal suppliers in a business communication in which he mixed business and personal information. Respondent argues that the sole reasons for Complainant's termination are detailed in a letter to him dated May 20, 2011. These reasons include:

- 1) Complainant distributed personal and political information to co-workers and third parties that can best be described as coal and line [sic] suppliers, business partners, and customers;
- 2) Complainant directed telephone calls of a personal and political nature to his office to avoid disruption of his personal business;
- 3) Complainant distributed several hundred flyers to other employees, causing significant disruption to the business; and
- 4) Complainant refused to acknowledge that his behavior was unacceptable and stated he would do it again under similar circumstances. (R. Br. at 47-55, RX 544).

Discussion

The parties are correct in asserting that temporal proximity of Complainant's protected activity and adverse personnel action may be circumstantial evidence that the protected activity was a contributing factor to his termination of employment. Certainly the time period between Complainant's protected activities of which Respondent had knowledge (April 9-13, 2011) and his termination (May 20, 2011) is short enough that the evidence must be evaluated to determine whether it signifies that the protected activity was a contributing factor. However, I find that the probative significance of the temporal proximity between these events is diminished upon consideration of the entire record and sequence of events that led up to Complainant's termination. I find that the circumstantial evidence is outweighed by other evidence in the record which demonstrates that there was, in fact, an intervening basis for the termination and that the protected activity played no role.

Complainant's protected activities occurred from April 9-13, 2011. Between April 9, 2011, and May 17, 2011, when it came to Respondent's attention that Complainant was

¹⁵ Respondent cites to two cases in support of its position: *Tice v. Bristol-Myers Squibb Co*, ALJ Case No. 2006-SOX-20, Slip Op. (April 26, 2006); *Feldman v. Law Enforcement Associates Corp.*, No. 12-1849, 2014 WL 1876546 (4th Cir. May 12, 2014).

distributing flyers throughout the Davenport office, had posted numerous articles on the walls of the conference room, was wearing a hospital bracelet, and was requesting a whiteboard to use in the conference room to assist him in carrying out his personal campaign to pass “Lynette’s Law.” I see absolutely no evidence in the record that any adverse personnel action was taken against Complainant, or even evidence of any action of a negative nature that might not rise to the level of an adverse personnel action. Complainant was not counseled or disciplined, his work duties did not change, and contrary to his assertions, I see no evidence in the record that his “strong and positive relationship with senior management almost immediately became strained,” or that “senior executives isolated Complainant, even refusing to speak with him” as he asserts in his brief. It is possible that Complainant may have subjectively believed these things, but I see no objective evidence to support his views.

On the contrary, Complainant’s supervisor, Singer, displayed support and compassion for Complainant when the Complainant requested on May 5, 2011, to use the conference room to stuff envelopes so his young daughter would not be exposed to information regarding his sister’s case. Singer consented to let Complainant use the tables in the room to stuff envelopes for a mailing. Respondent also allowed Complainant, with no previous notice during a busy time period when coal nominations were due, to take multiple days of paid-time-off to deal with his personal family issues, asking only that he work on the coal nominations - if his schedule allowed for it. Singer also displayed support for Complainant and concern for his health by inquiring as to whether there were any company health and counseling resources to assist Complainant and personally visiting him on May 10, 2011, to see for himself how Complainant was doing.

Complainant went way beyond the authority that had been granted to him by Singer to use the company conference room to stuff envelopes on May 5 and 6, 2011. Rather, Complainant, unbeknownst to Singer or any other member of Respondent’s management team, completely took over the conference room to wage a campaign to pass “Lynette’s Law.” He posted news articles on the walls and was seeking to install a whiteboard in the room to help him track activities. Additionally, he used the company computers, e-mail system, copiers, and telephone system to support his personal cause. On May 16, 2011, he sent e-mails to coal suppliers in which he mixed business and personal information, attached an AP news article about the release of his sister’s killer, and sought support to pass “Lynette’s Law.” On May 17, 2011, he distributed flyers throughout the Davenport office building to support the “Lynette’s Law” campaign, placing them on the chairs of every employee and handing them out to people who were passing by. This caused a disruption, causing some employees to be concerned and contact the facilities manager to find out what was going on. Complainant justified all of his activities to himself by reasoning that since he was doing some work for the company while being charged for paid-time-off, it was a fair trade for him to use company resources for his personal use. No member of Respondent had agreed to such an arrangement or was aware that Complainant was doing this.

While Complainant was dealing with a family crisis and his attempt to pass legislation to protect crime victims’ families may have been a noble cause, it was not the cause or business of Respondent. Complainant assumed that other employees of Respondent, as well as coal

suppliers, and others, would want to know about his family issues and support his cause and that Respondent approved of his use of company resources.

When Complainant's activities came to Respondent's attention on May 17, 2011, it immediately began an investigation, conducted by DeBoer, who had no prior knowledge about any of Complainant's activities and was totally unaware of his April 2011, protected activities. I see no evidence in the record to support Complainant's assertion that Sammon conducted a five-week long investigation or that she "took the director's role in addressing Complainant's protected activity." In the course of the investigation, DeBoer interviewed Complainant's management team and conducted a pre-disciplinary hearing, in which he asked Complainant about his May activities concerning "Lynette's Law." I see no evidence that Complainant's protected activities of the previous month were ever brought up in the course of the investigation, pre-disciplinary hearing, or discussion as to what disciplinary action should be taken against Complainant. I find that Respondent terminated Complainant's employment solely for the reasons listed in the May 20, 2011, termination letter. (RX 544). I do not see any evidence to support Complainant's assertion that Respondent's stated reasons for termination were pretextual or that his protected activity was a contributing factor to the termination of his employment. Nor do I see any evidence that Respondent inconsistently applied its human resources policy, shifted its explanations, or "fast-tracked" the investigation.

While Respondent's disciplinary action for a twenty-one year employee who had a good performance record and was dealing with a traumatic family situation was severe, it was an action that Respondent was allowed to take in its business judgment provided it followed the necessary procedures. I find that Respondent did, in fact follow the required procedures and contrary to Complainant's assertion, did not decide to terminate his employment prior to his pre-disciplinary hearing, although it was considering this action as a possible outcome.

Accordingly, I find that Complainant cannot establish by a preponderance of the evidence that his protected activity was a contributing factor to Respondent's decision to terminate his employment. Since Complainant has thus failed to establish this necessary causation element, he has not established a prima facie case of retaliation. Since Complainant has not established all of the necessary elements of his claim, I need not address whether the Respondent could avoid liability by demonstrating clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.¹⁶ However, based on my analysis above, I do find that Respondent could meet this burden, if called upon to do so.

CONCLUSION

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

¹⁶ *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). *See also, Feldman*, *supra*, n. 9.

ORDER

The discrimination complaint of ROBERT S. QUASt against MIDAMERICAN ENERGY COMPANY, brought under the employee protection provisions of SOX, is **DISMISSED**.

SO ORDERED

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.