



Issue Date: 27 February 2015

In the Matter of:
CRISELL SEGUIN
Complainant

v.

2012-SOX-00037

NORTHROP GRUMMAN CORPORATION
Respondent

E. Patrick McDermott, Esquire¹
For Complainant

Lincoln Bisbee, Esquire and P. David Larsen, Esquire²
For Respondent

DECISION AND ORDER
AWARD OF DAMAGES

This case arises under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002 (“the Act” or “SOX”), 18 U.S.C. § 1514A, enacted on July 30, 2002, as further amended. Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A, as amended, in part prohibits any publicly-traded company from discharging or otherwise retaliating against an employee in the terms and conditions of his or her employment because the employee provided to the employer or the federal government information relating to alleged violations of 18 U.S.C.A. § 1341 (mail fraud), § 1343 (fraud by wire, radio, or television), § 1344 (bank fraud), § 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.³

¹ Complainant was represented by Martin P. Hogan, Esquire at hearing, but I granted a motion for his withdrawal on September 11, 2014, before the briefs were due. Initially, the complaint was filed by Nicholas Woodfield, Esquire, but I granted his motion for withdrawal in September, 2013. Complainant was pro se until Mr. Hogan entered his appearance on February 4, 2014. Complainant was again pro se from September 2014 to early December, 2014.

² James J. Kelly, Esquire, was lead counsel at hearing, but he has since retired.

³ 18 U.S.C.A. § 1514A(a), as amended by Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010), expressly provides:

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)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner

An action brought under SOX’s whistleblower protection provisions is governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C.A. § 42121(b). See 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a complainant must prove by a preponderance of the evidence that:

- (1) he or she engaged in activity or conduct that the SOX protects;
- (2) the respondent took unfavorable personnel action against him or her; and
- (3) the protected activity was a contributing factor in the adverse personnel action.⁴

If Complainant proves that protected activity was a contributing factor in the personnel action, Respondent may nevertheless avoid liability if it proves by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected activity.⁵ Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard.

THE PROCEEDING

Complainant tested software for police dispatching, for EMS dispatching, for records management and computer-aided dispatching software that was under development, and for servicing completed products such as police, fire and EMS communications software. See TR 88. By stipulation, as of January 14, 2011 Complainant was the subject of progressive discipline for conduct that she alleges violates the statute. After Respondent terminated her position in a reduction in force (“RIF”) procedure, she filed a claim alleging retaliation.

Prior to hearing, Respondent filed a Motion for Summary Decision, arguing that the

discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

(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.

⁴ *Sylvester v. Parexel Int’l*, ARB (Department of Labor Administrative Review Board) No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011); see 29 C.F.R. § 1980.109(a).

⁵ *Halliburton, Inc. v. Admin. Review Bd.*, No. 13-60323 (5th Cir., November 12, 2014); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); see 29 C.F.R. § 1980.109(b).

Complainant could not establish a protected activity. Complainant filed an Opposition. Respondent filed a Reply in Support of Summary Disposition. I denied the Motion. I cited to *Sylvester v. Paraxel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011).⁶ Contrary to Respondents position, any conduct which the employee reasonably believes constitutes a violation of the enumerated federal provisions can constitute a protected activity. If the employee proves a prima facie case, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of the [protected] behavior." 29 C.F.R. § 1980.104(c); *Poli v. Jacobs Eng'g Grp., Inc.*, ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 4 (ARB Aug. 31, 2012). I also noted that to survive a motion to dismiss, Seguin's complaint had to be reviewed to determine whether it provides "fair notice of [her] claim." *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 9 (ARB July 31, 2012). In *Evans*, the ARB explained that "fair notice" for purposes of surviving a motion to dismiss requires a showing that the complaint contains: "(1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes in the [DOL's] jurisdiction; (2) some facts about the adverse action; (3) an assertion of causation, and (4) a description of the relief that is sought." *Id.* I found that Respondent did not address current law in the Motion or in the Reply and that there were material facts at issue.⁷

I held telephone conferences with the parties: September 6, 2013; February 4, 2014; June 13, 2014; July 8, 2014; July 18, 2014; September 11, 2014 and November 18, 2014.

After two continuances, this case came to hearing over a five day period from July 21 to July 25, 2014. The Complainant, Crisell Seguin, testified over a two day period. Complainant called Richard Edelman, Caren Goldberg, and Steven Shedlin and Complainant was recalled on the last day on rebuttal. Edelman's and Shedlin's evidence is limited to damages. Respondent

⁶ I note that in its brief, Respondent maintains that a "definitively and specifically" standard remains the applicable standard in the Fourth Circuit. In doing so, it cites to *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221–22 (2d Cir. 2014) for the proposition that whereas Complainant maintains that courts should give Chevron deference to the DOL holding in *Sylvester*, "the Second Circuit recently applied Skidmore deference—a far lower level of deference than Chevron deference—to the ARB's decision in *Sylvester*. However, to the contrary, the Second Circuit rejected the "definitively and specifically" requirement. In *Nielsen*, it held that Section 806 "extends whistleblower protection to information provided by an employee regarding any conduct which the employee reasonably believes constitutes a violation of the enumerated federal provisions." *Id.* at 221.

⁷ Respondent argues that in the Fourth Circuit, to engage in protected activity, an employee must have a subjective belief that a law listed in Section 806 has been violated and that belief must be objectively reasonable. *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008). "The Fourth Circuit has not adopted the protected activity standard announced by the Administrative Review Board ("ARB") in *Sylvester v. Paraxel International LLC*, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011). See *Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 344 n.5 (4th Cir. 2014). Thus, in the Fourth Circuit, to constitute a protected activity, an employee's communication must identify the specific conduct believed to be illegal, and the communication must definitively and specifically relate to a law listed in Section 806. *Platone v. Dep't of Labor*, 548 F.3d 322, 326 (4th Cir. 2008); *Welch*, 536 F.3d at 275-76."

Respondent argues that the test for protected activity relies on what an employee actually communicated to the employer. *Welch*, 536 F.3d at 277; *Platone*, 548 F.3d at 327. According to Respondent, a belief is not objectively reasonable if the employee does not explain how the reported conduct could reasonably be regarded as a violation of a law listed in Section 806. See, e.g., *Welch*, 536 F.3d at 279; *Platone*, F.3d at 327. Mere general inquiries about conduct or internal policy compliance do not constitute protected activity. *Welch*, 536 F.3d at 277.

However, even if this were the standard, I found that this was hotly contested factually and the evidence had yet to be proffered.

called Kenneth Uffelman, Laretta J. Shertzer, Teresa Wimbush, Edward D. Sturms, and Bart C. Barre. Initially, I admitted one administrative law judge exhibit, "ALJX-1"; eighty seven Complainant's exhibits, "CX" 1- CX 87 and ninety two Respondent's exhibits, "RX" 1- RX 92. Later, I admitted CX 88-CX 89, additions CX 73-A and CX 75-A-1, RX 93-RX-9. The transcript ("TR") in this case is in five volumes. I hereby admit RX 100-RX 103, documents regarding comparable employees in the performance evaluation process that were proffered post hearing without objection.

Post hearing, after Mr. Hogan, her trial attorney was relieved and she was *pro se*, Complainant requested that I strike certain stipulations entered at a time when she was represented by former counsel. Respondent filed a motion requesting that I enforce the stipulations. I held that matter in abeyance and discussed in in a telephone conference. I hereby deny the request to strike the stipulations. Also acting *pro se*, Complainant alleged that the Respondent was obstructing justice and asked me to reopen the case. I denied that request in a telephone conference.

Subsequent to the hearing, the parties submitted briefs and replies to each other's briefs and the Respondent filed proposed findings of fact and conclusions of law. I do not admit Exhibit 1 and Exhibit 2 to Complainant's post hearing rebuttal brief, as the record is closed. The Rules of Practice and Procedure prohibit the introduction of evidence into the record after the close of a hearing except upon a showing of good cause that the late-submitted evidence was not previously available. 29 C.F.R. § 18.54(c). Good cause was not established. As a result, evidence submitted after the close of the hearing may not be considered, and arguments based on that evidence are disregarded. The same ruling applies to the Declaration of Linda Hayes, Attachment 1 to Respondent's Reply.

During the hearing, the parties stipulated that the case falls within the jurisdiction of the Fourth Circuit Court of Appeals. TR 438.

After the briefing was closed Respondent submitted a Motion to Strike. I find that this Motion is in the nature of argument after the record was closed and I do not entertain it.

FINDINGS OF FACT

There is no controversy that Complainant suffered an adverse employment action. She lost her job. In fact, the parties stipulated to three separate adverse actions.

Respondent does not challenge that it is a 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.

The primary issue in this case is whether Complainant's refusal to sign a company C-196 Form, RX 54, an internal conflicts of interest document, and facts surrounding her refusal constitute protected activity in this claim and if so, whether they were a contributing factor in the adverse personnel action. See Tr. 822. Complainant alleges that she filed a viable SOX allegation on January 14, 2011 that started a chain of events that led to her removal, the adverse

action. She notified the Respondent that she was making SOX allegations. Included was a charge that a Time and Labor Charging training module had incorrectly marked her status and that “it was irresponsible for the company to have allowed a program to show that you’ve completed something when you had not completed it.” RX 27. She later sent other emails that elaborated on these charges.⁸ Respondent alleged that the Complainant was removed from her job as a result of a reduction in force.⁹ She was ranked fifth out of seven employees, and was selected for layoff along with three other employees in her unit. A business necessity defense was addressed by Kenneth Uffelman, Director of Respondent’s Public Safety Systems, who alleged that routinely, on a monthly basis starting in January, 2011, business forecasts showed that backlogs of the contract base and projections of replacement work led to the conclusion that “we would have to reduce some of our costs going forward in 2011, in order to meet those requirements.” TR 606-608.¹⁰ Respondent alleges that this constitutes an intervening event of a decline in business that required a reduction in force.

Complainant’s job performance as a Test Engineer 4 was evaluated annually through a Performance Management Process (“PMP”). She received an overall score of 2 (Meets Expectations) every year that she was a Test Engineer 4. TR 309; RX 12; RX 18; RX 23; RX 24. However, the parties have a history of litigation, in part concerning her ratings, and her most recent rating was downgraded for “conduct,” refusal to sign the C-196 form, at about the same time that the Respondent was disciplining her for failure to sign the C-196 form, and at the same time that the RIF was in process.

Complainant called Dr. Caren Goldberg, as an expert in Human Resource Management and reductions in force, a management professor transitioning to a psychology department to teach industrial psychology, who testified that in her opinion, the C-196, which for years was not a discipline issue, “suddenly” became a disciplinary issue, and that in effect, the RIF was a disciplinary issue. Tr. 483, TR 536; CX 75-A RX 95. Respondent did not question whether Dr. Goldberg was an expert. She stated that the discipline for failure to sign the C-196 form was inconsistent. Tr. 486-487. Also, she alleged that the discipline was accelerated too quickly in contravention of Respondent’s stated policy. TR 488-489. On cross examination, she stated that

⁸ On January 31, 2011, Complainant sent an email to Wesley Bush, Sheila Cheston, Linda Mills, Bart Barré, and Lee Karbowski. (RX 49); 23; on February 14, 2011, she sent an email to Wesley Bush, James Palmer, Sheila Cheston, Ed Smith, Linda Mills, and Stephen Yslas. (RX 37); and 30; on February 22, 2011, she sent an email to Wesley Bush, James Palmer, Sheila Cheston, Stephen Yslas, Debora Catsavas, Linda Mills, Ed Smith, Michele Toth, Lee Karbowski, Jim Myers, Ed Sturms, Ken Uffelman, Lauretta Shertzer, Bart Barré, Lewis Coleman, Victor Fazio, and Steven Frank. (RX 38). She stated that she wanted to inform Company management that she was investigating whether the Time and Labor Charging training module was tricking employees into agreeing to Northrop Grumman’s mandatory arbitration policy. She also alleged that “the main issue” was that she did not agree with a statement contained in the Company’s Form 10-K and 14A SEC filings that Northrop Grumman’s Standards of Business Conduct applies to all employees. RX 37. She alleged that this was a misrepresentation because she believed that certain employees were exempt from the Standards of Business Conduct.

⁹ “Ms. Seguin was not laid off for cause. She was, she was laid off as part of a reduction in force.” Respondent argument at TR 61. Laurie Shertzer prepared a matrix allegedly used to determine the respective qualifications of Complainant and her coworkers. RX 32; RX 33 is a skills matrix.

¹⁰ Although Respondent argues in its Reply Brief that the decision to initiate a RIF was made in 2010, I specifically find otherwise, and that a fair reading of the testimony and all reasonable inferences from the entire record relates this determination to the same time that Complainant was being disciplined. Ms. Shertzer testified that *she* decided that an RIF was necessary in January, 2011. TR 673.

the Respondent failed to follow its own policy in developing the RIF.¹¹ Respondent did not provide a controverting expert, although Theresa Wimbush, a Respondent human relations specialist who was characterized as one testified. However, her fund of information was limited to her employment with Respondent, she was not qualified as an “expert” and I attribute little weight to her testimony.¹²

Once a complainant has established a prima facie case, the burden of proof shifts to the Respondent to show by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant’s protected activity. 18 U.S.C.A. § 1514A(b)(2)(C) provides that SOX whistleblower actions shall be governed by the legal burdens of proof set forth under AIR 21 at 49 U.S.C.A. § 42121(b)(2)(B)(Thomson/West 2007), which requires that once the complainant has demonstrated that his or her protected activity was a contributing factor in the adverse personnel action at issue, the respondent must prove its affirmative defense by “clear and convincing evidence.” See also *Allen v. ARB*, 514 F.3d 468, 475-76 (5th Cir. 2008).

During the course of the hearing, I ruled that if the claim were to proceed to the last stage of evaluation, whereas Respondent tried to establish that Complainant had been removed from

¹¹ Q. [Mr. Kelley]When comparing employees under these circumstances, criteria will focus first on an ability to perform remaining work. Past performance, conduct, and job-related training, experience and/or education will be some of the other criteria taken into consideration. Correct?

A. That’s what it says.

Q. Okay.

A. But that’s not what they did.

TR 536.

¹² The witness attempted to bolster Ms. Shertzer’s exclusion of years-of-service and inclusion of conduct in creating the matrix. TR. 777-778, 783, 787. Respondent asked me to find:

57. Lauretta Shertzer was responsible for implementing the reduction-in-force for the PIT group because Ms. Shertzer was its direct supervisor at the time and had the most knowledge about the employees’ skills and abilities. (Tr. 779:4-10 (Wimbush); Tr. 602:15-24 (Uffelman); Tr. 641:19-643:11, 699:1-700:19 (Shertzer)).

58. Ms. Shertzer engaged in a comprehensive, detailed analysis to determine which employees in the group were best suited to perform the group’s future work. Ms. Shertzer consulted with Public Safety Systems managers Gary Wilkerson, Pat Boyle, and Jeri Mindak to discuss the nature of future work and skills and abilities that would be needed. (Tr. 689:8-690:19 (Shertzer)).

59. Based on those discussions, Ms. Shertzer prepared a mathematical reduction-in-force selection matrix containing criteria relevant to the needs of future work. (Tr. 691:3-7 (Shertzer)). Ms. Shertzer included skills needed for future work, employees’ performance ratings, and employee conduct in the selection matrix. Ms. Shertzer included employee conduct as a criterion because, in her view, employee behavior impacts the group’s performance of its work. (Tr. 682:9-18 (Shertzer)).

60. Ms. Shertzer did not include years-of-service as a criterion in the matrix because years-of-service did not directly speak to the skills or abilities to perform future work. (Tr. 679:10-18, 757:25-758:3 (Shertzer)). Ms. Shertzer excluded other criteria that similarly were not relevant to determining who could best perform future work. (Tr. 681:5-21 (Shertzer)).

61. The exclusion of years-of-service and inclusion of conduct were consistent with the five prior reductions-in-force that Ms. Shertzer had prepared at Northrop Grumman. (Tr. 679:19-25, 715:23-716:1 (Shertzer)).

On cross examination, Ms.Wimbush was directed to the Respondent’s policy, RX 77, at 1-4, she was directed to language that includes experience. She was asked where "may be considered" is found. She could not. TR 782-783. I find that she would not directly answer the question. I also find that she is not credible and the inference is that Respondent failed to follow its own policy.

her position after a reduction in force layoff, in reality, the Respondent was faced with a strict burden of proof: it was just as reasonable that she had been fired and that it was just as reasonable that Respondent's defense was an elaborately constructed but classic "pretext."¹³ Since the Respondent at that level of inquiry, must show by clear and convincing evidence that it did not discriminate against her, I still find the defense is not "clear" and I remain unconvinced.¹⁴ Even if I credit Mr. Uffelman's testimony that business in his division was in decline, there is no clear and convincing proof that layoffs were necessary. I was not provided any supporting documentation to show business necessity required a RIF. The stipulated emails show that as of that time, Complainant had been threatened, first by actually suspending her and later with termination of her job. See discussion of protected activity *infra*. In fact, after a review of the entire record, I now find that to a reasonable degree of probability the RIF was a pretext for discrimination.¹⁵

¹³ Tr. 882. Respondent reminds me that by her own calculation, Complainant submitted over fifty internal complaints to Northrop Grumman between 2007 and 2011. Tr. 358. See Respondent Brief at 41. This allegation, even if true, connotes a "mixed message." The notion that she was a constant complainer was not the stated reason for removal. She was ostensibly removed during a reduction in force procedure initiated in January, 2011, where her qualifications and experience were ostensibly carefully weighed against her peers. Respondent did not object to Dr. Goldberg's status as an expert. Among other reasons why I find that this can as easily be considered evidence of pretext, is that Dr. Goldberg testified and the record confirms that C-196 form had never been viewed previously as urgent. TR 483-484, 517-522. I also accept that Respondents did not rebut the Dr. Goldberg opinion that they violated an "ample warning principle" by not giving Complainant enough time to respond to discipline, Tr. 486, 517-522. Dr. Goldberg also identified a violation of a "hot stove rule." Discipline "needs to be immediate. You need to have the immediate ouch. It needs to be progressive. And, again, if you look at Northrop Grumman's standards of conduct, they state a progressive disciplinary procedure. And, in fact, they even use the term it's progressive. But in practice, this was anything but progressive." Tr. 484. She also testified that in her opinion, Respondent did not fairly establish comparative items among Complainant's peers during the reduction in force. Tr. 488-491. On cross examination, she was pressed regarding this allegation:

Dr. Goldberg:

Then it doesn't make a sense from a business perspective that they would weight [sic, probably a court reporter error] conduct four times as heavily as the most heavily weighted skill.

[See CX 4, RX 32, RX 33.]

THE WITNESS: And skills and abilities is number one there. Conduct is not on there. There's a -- just a huge disconnect in general, you know, because the training and education wasn't considered. The experience, years of service weren't considered. Security clearance wasn't -- as far as I could tell wasn't either, but it doesn't look like anybody had any. So, that would have been moot mathematically.

...

Q. And to the paragraph after subpart F.

A. Uh-huh.

Q. When comparing employees under these circumstances, criteria will focus first on an ability to perform remaining work. Past performance, conduct, and job-related training, experience and/or education will be some of the other criteria taken into consideration. Correct?

A. That's what it says.

Q. Okay.

A. But that's not what they did.

Tr. 533-535. Later I asked whether there was literature that confirmed her views, and was directed to a textbook. Respondent did not provide impeachment on this issue.

¹⁴ According to Dr. Goldberg, whereas Complainant had the ability to test three matrix categories, most of the other people only had the ability to test two. TR 467. She also alleged that the Respondent, i.e. Laurie Shertzer, overweighted a "conduct" category, which was, in reality, the act of refusal to sign the C-196 form. TR 474-477.

¹⁵ I specifically reject the argument that business necessity was proven:

This [RIF] decision was made before Ms. Seguin sent any of the four alleged protected emails contained in

As set forth above, clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain and the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard.

The ARB has been using the following test: the plain language of the statute requires a case-by-case balancing of three factors:

- (1) How ‘clear’ and ‘convincing’ the independent significance is of the non-protected activity;
- (2) The evidence that proves or disproves whether the employer ‘would have’ taken the same adverse actions; and
- (3) The facts that would change in the ‘absence of’ the protected activity.

Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (internal citations omitted). Although Speegle was a nuclear whistleblower, the standard would be the same. See also *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-3 (ARB Aug. 29, 2014).

Respondent argues that Dr. Goldberg’s testimony lacks the necessary factual predicate and is not probative of relevant issues in this case.¹⁶ I disagree. I find that she was able to review

the parties’ stipulation. In addition, as Ms. Seguin acknowledges in her post-hearing brief, Ms. Shertzer completed and “submitted the RIF Matrix on February 11, 2011.” (Seguin Br. at 44). Yet, the only alleged protected email copying Ms. Shertzer was sent on February 22, 2011. (RX 38).

See Respondent reply at 52. In fact, it is as reasonable temporally that the RIF determination was a response to the January emails. At this level of inquiry, the Respondent bears the burden of proof. I find that Respondent does not meet the burden.

¹⁶ Respondent argues:

First, Dr. Goldberg admitted that she had not reviewed the Northrop Grumman policies— Progressive Discipline policy (RX 52) and Employee Acknowledgments, Certifications, and Data Requests policy (RX 28)—that she opined Northrop Grumman did not follow. (Tr. 499:22-500:11, 503:8-17 (Goldberg)). Second, Dr. Goldberg confirmed her deposition testimony that she knew “very little” about the history and factual context under which Ms. Seguin was disciplined for her refusal to sign the C-196 Form. (Tr. 511:25-512:21 (Goldberg)). Accordingly, Dr. Goldberg’s opinion that Northrop Grumman “suddenly” made the C-196 a disciplinary issue and accelerated discipline too fast (Seguin Br. at 38) lacks a proper factual predicate, and should be given no weight.

Equally important, Dr. Goldberg admittedly did not offer any opinion regarding whether Northrop Grumman’s discipline of Ms. Seguin was retaliatory. (Tr. 522:25-523:10 (Goldberg)). Her testimony that Northrop Grumman could have structured its discipline differently is not probative of any relevant issue, and Dr. Goldberg’s testimony on that point has been rejected by courts for exactly that reason. *Apsley v. Boeing Co.*, 722 F. Supp. 2d 1218, 1240 n.62 (D. Kan. 2010) (“The essence of Dr. Goldberg’s expert report is simply that, in her opinion, there was a better way to make the hiring decisions and the fact that Defendants did not use her preferred method indicates animus. The Court gives no credence to these opinions regarding the motivation of Defendants’ actions”); *Apsley v. Boeing Co.*, 691 F.3d 1184, 1205-06 (10th Cir. 2012) (“Dr. Goldberg concluded . . . that the Companies’ process was ‘excessively subjective,’ provided ‘fertile grounds for bias,’ and was otherwise unfair and unreliable. Assuming for the sake of argument that these conclusions were accurate, they are nonetheless of little use to the Employees. Our role is not to determine whether the Companies’ hiring process could have been better, but only whether a jury could discern from the evidence a pattern or practice of intentional age discrimination.”). This Court

the pertinent documents and was presented with appropriate hypothetical facts and is competent to describe what standard business practice with respect to reductions in force may be and her testimony helps me render a determination whether Respondent followed (1) standard business practice and (2) its own policy with respect to the purported reduction in force. The burden on these issues is not with Complainant.¹⁷

Whereas Laretta J. Shertzer, Systems Engineering Manager, and by January 2011 acting first level supervisor for the Product Integration and Test Section¹⁸ where Complainant worked, and the Respondent employee tasked with performing the reduction in force evaluation, was supposedly in process of weighing employment factors and deliberating on which employees would be “Riffed” or terminated, before she completed the RIF process, *she had already* prepared an April 1st, 2011 termination letter firing the Complainant for cause. TR. 767-768, CX 49. (Emphasis added). As she was the same person executing discipline for cause, and because her testimony is filled with inconsistencies and is, on occasion contrary to the full weight of the evidence, I find that Ms. Shertzer was not credible. She testified that she decided to execute the RIF. TR 673-578.¹⁹ According to all of the competent testimony and evidence, the

should disregard Dr. Goldberg’s irrelevant testimony for the same reasons.

¹⁷ *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); see 29 C.F.R. § 1980.109(b).

¹⁸ In April, 2011, another person was selected to fill the first level supervisor position. TR 642

¹⁹ Ms. Shertzer admitted that she had signed the letter of termination for cause dated April 1. She did not send it, however. I reminded her that Dr. Goldberg had accused her of double-weighting the performance evaluation and the matrix by using the C-196 issue. She admitted that “conduct” was an element in both the performance evaluation and in a separate category in the matrix:

JUDGE SOLOMON: I read the performance review into the record, when it was brought up by counsel. The first sentence was C-196, Conduct.

THE WITNESS: Right. But --

JUDGE SOLOMON: First -- very first sentence.

THE WITNESS: It doesn’t factor into the overall rating. It’s not part of basically the math to give the overall rating.

JUDGE SOLOMON: Okay. So you were a systems engineer, right? So, you had math? You had statistics?

THE WITNESS: Yes.

JUDGE SOLOMON: Okay. So how should I take that? I mean, in reality you have, you -- it’s a factor. At one point, you said it was about 30 percent, it was 30 percent of the evaluation, is that right?

...

She did not answer the question. On direct examination her testimony was as follows:

Q. [Mr. Bisbee] And you rated conduct as 30 percent of your analysis?

A. Yes.

Q. Why did you decide to weight conduct as 30 percent of the total score?

A. It was reflective of my view, and I believe Northrop Grumman’s view, that conduct and how you perform your work is just as important as what work you perform. We have corporate values and ethics and that’s what this reflects.

Q. And conduct, the way that it was scored is you received a one for no conduct issue or a zero for a conduct issue?

A. Yes.

Q. Why did you decide to score conduct in that way?

A. I couldn’t really come up with, you know, what I felt was a very objective means of saying what conduct meant. I mean, to me if you have conduct -- if there are conduct issues, it’s impacting. And so it was a yes or no.

TR 694-695.

fact that a RIF was in progress was not disclosed to Complainant until April, 2011.²⁰ Mr. Uffelman was presented as the person who determined that there was a business necessity for the RIF. Ms. Shertzer was, according to Respondent's argument, not involved in the final termination decision. I find that these positions are conflicting.

I also note that whereas she testified she was not aware of the discipline for cause, on February 28, 2011, Ms. Shertzer had executed a suspension, escorting Complainant off Respondent premises, "for not completing the ethics training and the C-196 form." TR 667. See RX 4, CX 38; see Complainant's testimony TR 158-160, 177. The discipline for failing to sign the C-196 (which Ms. Shertzer was noticed and in part was executing) was progressing contemporaneously with her creation and implementation of the RIF. I find that these are inconsistencies that cannot be rationalized.

Ms. Shertzer created a matrix and executed a layoff procedure, which, Respondent argues, was the reason for termination. She testified that she compiled an evaluation matrix that contained a list of skills - weighted skills - and then it also included conduct as a criteria, and performance reviews as a criteria, evaluated everybody and then mathematically came up with a score. "So, I tried to do it as objectively as I could, and basically the lowest four scores were selected" for discharge. TR 682-683. Ms. Shertzer had discretion in creating the matrix categories and in determining the weight given to factors. TR 675-677. Ms. Shertzer admitted that the act of refusing to complete the C-196 fell within category one of major offenses under the Respondent's policy. TR 671. She also relied in part on a performance evaluation that included a downgrade for bad "conduct." The bad conduct was the same offense: act of refusing to complete the C-196. Ms Shertzer was responsible for downgrading the Complainant exclusively on the basis of bad conduct.

Complainant alleged that whereas she did three kinds of work that are within the matrix, the rest of the employees only did two different kinds. I find that this allegation was not rebutted. Whereas Complainant had the most experience in the unit, Ms. Shertzer admitted that she omitted years of service as a factor in the matrix and that it was her sole decision not to include it. TR 679, 681-682. On cross examination, she could not explain why it was not included. TR 741-744.²¹ Ms. Shertzer also attributed the lowest score in the group to Complainant in a

²⁰ Ms. Shertzer testified that she started the RIF process in January 2011. Tr. 683 On February 11, 2011 she emailed Kim Monachino, Human Resources Director, concerning "PMP for Review - Seguin". There is no mention of any impending RIF. CX 30 See also CX 35, February 21, 2011. On February 28, 2011 Monachino updates Mr. Barre, Lee Karbowski, Ed Sturms and Irwin Golub concerning Seguin's C-196 discipline. CX 39 Monachino asks about how to handle notification to Seguin of her merit increase. There is no mention of the RIF. The first document setting forth the RIF is dated March 24, 2011. CX 43.

²¹ Ms. Shertzer denied that the Respondent RIF policy, set forth at CX 5, RX 77, listed matrix categories that were mandatory. She was directed to those documents and admitted that categories that favored the Complainant were not included in the matrix. TR 740-743.

Teresa Wimbush, a Respondent Employee Relations Specialist, once an Employee Relations Manager, who was not offered as an expert witness, but was characterized by Respondent as qualified as an expert as a Respondent reviewer of reductions in force, was also directed to CX 5, RX 77, Respondent's RIF Policy, which states in part, "The following layoff selection factors apply." TR 775. Whereas the policy the policy lists six factors, including years of service and "Job-Related Training and Education," which were omitted from the matrix she created, she testified:

The criteria noted on this form are among the array of criteria that may be utilized. They do not all have to

category that involved “AFR,” automated field reporting, and “RMS,” records management. TR 707. In “performance testing,” Complainant was given a zero (0), whereas another employee was given a five (5), the maximum score. TR 706. None of the other employees performed the tasks involved because none of them had been assigned them. Finally in “conduct,” Ms. Shertzer attributed a zero (0) “based on the discipline for not completing the ethics training and C-196 form.” TR 714.

Ms. Shertzer downgraded Complainant’s 2010 rating at about the same time that the Respondent was disciplining her for failure to sign the C-196 form, and at the same time that the RIF was in process.

I accept Dr. Goldberg’s opinion evidence that the record shows that the “conduct” factor attributed to the Complainant in the matrix rigged the procedure. Ms. Shertzer alleged that even if conduct were excluded, the Complainant would have been fourth on the list. TR 714-715, 719. However, Ms. Shertzer established the amount of weight to be attributed to each category, and to a reasonable degree of probability omitted other feasible categories (like experience and tenure) that might have benefitted the Complainant in the analysis. On cross examination, Ms. Shertzer was directed to the fact that some of the employees subject to the matrix performed different job duties and that there could be no comparison in some of the categories. TR 737-740. I find that she could not rationalize the basis for this discrepancy. *Id.* Therefore, I find that the matrix and its implementation were flawed.

I find that it would have been feasible to have included experience as a factor. I find that “performance testing” as described by Ms. Shertzer, was an inappropriate category for evaluation. Based on a review of all of the evidence, I find that the “conduct” category was double weighted. According to the record, as set forth *infra*, the “bad conduct” was an act of whistleblowing.

Given that Ms. Shertzer executed the suspension for cause on February 28, 2011, and the allegation by Respondent is that the RIF is an intervening force that began in 2010, I find that the termination letter, CX 49, constitutes a proverbial “smoking gun” as impeachment evidence to the allegation that the reduction in force process was fair.²² Ms. Shertzer also completed the

be used in synchrony on any given reduction in force.
TR 776.

A review of the document does not substantiate these allegations.
Ms. Wimbush testified that it is common for Respondent to exclude one or more of the factors. TR 777-778.

I find that given the language in CX-5, RX 77, this is not “clear and convincing” evidence and that it is just as reasonable that the Respondent failed to follow its written policy.

Ms. Wimbush also testified that the 30% weight given to conduct was not out of the ordinary.

I find that she is not a qualified statistician and did not refute the allegation that the matrix factors double weighted “conduct.”

²² I do not find Ms. Shertzer is credible that although she received an email entitled “Retaliation by attempted unlawful termination,” she did not read it. TR 648; RX 38. She had to admit that she saw it on February 22nd, 2011. *Id.* Further, I find that she is not credible she had no knowledge about Ms. Seguin being involved in legal matters involving Northrop Grumman, TR 649, especially since she executed the suspension February 28, 2011, when she escorted Complainant out of the building.

Complainant's personnel ration on or about February 11, 2011, at the same time that she was involved in discipline for cause and in creating and executing the RIF.²³ I also note that internal memo CX 40, dated March 24th, 2011, states: "Unless Crisell Seguin completes her C-196 by tomorrow, we will proceed with termination based on what was communicated to her in the suspension memorandum dated February 28th, 2011." According to Respondent, and the record substantiates, the RIF was well underway by then. Although she was being evaluated, Complainant was not advised about it until sometime after April 4, 2011. TR 186. On May 3, 2011, Complainant was notified that she had been RIFed. TR 188.

In reviewing the time line, and the lack of evidence as to business necessity, I find that it is reasonable to infer that Ms. Shertzer and Mr. Barre knew or had reason to know that the RIF was a pretext. The record shows that Mr. Sturms and Mr. Barre supervised Ms. Shertzer throughout the deliberations over discipline for cause and the creation of and the implementation of the RIF process.²⁴ Pretext is substantiated by Complainant's credible testimony that Ms. Shertzer did not have personal knowledge of her skills. TR 248. In her testimony, Ms. Shertzer exhibited limited knowledge about the skills of the other employees of the unit.²⁵ Complainant

²³ TR 663. I also note that in so doing, she downgraded Complainant's ratings from those proposed by her prior supervisor, Mr. Allen. At the time, she was supervisor of 55 employees. TR 726. Although her primary duty was to supervise the 55 employees, she also was in charge of several projects. TR 729-730. On cross examination, Ms. Shertzer was directed to several of the employees and testified that she could not (or would not) state the amount of time spent on each at the same time she was allegedly observing Complainant, working on her personnel evaluation and establishing the reduction in force matrix. TR 732-735.

²⁴ See testimony of Edward D. Sturms, Vice President for Civil Division within Respondent, at 798-799. I note also,

A. Bart called to tell me that he had met with Ms. Seguin, that he attempted to explain to her why she had to sign the C-196, and to get her to sign it.

...

A. I authorized him to proceed with progressive discipline.

Q. Was it your responsibility to assess progressive discipline at that stage?

A. Yes.

... Q. Were you informed that Ms. Seguin had been suspended at some point in time?

A. Yes. I was.

Q. Did -- had you been informed that her suspension had been extended --

A. Yes.

Q. -- for a period of time?

A. Yes.

Q. Did you -- what was your understanding as to why the period of suspension was extended?

A. I don't believe I knew the reason why.

Q. Okay. Did you concur with the decision to extend?

A. I wasn't given the option, but I would have.

TR 799-801.

²⁵ Although on direct examination, Ms. Shertzer maintained that she observed all of the employees in the unit, TR. 656, I find that Ms. Shertzer could not or would not directly state how much time she spent observing members of the unit. See TR 733-735. She admittedly did not review their performance evaluations when she was their acting manager. TR 753. Although she allegedly observed Complainant and evaluated her 2010 performance based on reports from Chris Allen, Complainant's former manager, who provided a draft evaluation of her performance. RX 23; TR 656-657. Mr. Allen was not called as a witness. Based on "her" evaluation Ms. Shertzer found that for 2010, the Complainant "[met] expectations." Admittedly she changed the display high ethics rating from a Y, yes, to an N, for no. She changed it because Complainant refused to sign the C-196 form. TR 658; RX 12. See also CX 23, RX 96-4. She also downgraded a test readiness review rating. Complainant testified that whereas Ms. Shertzer had little contact with her as manager, Mr. Allen had supervised her closely for a year and a half to two years. TR 211-212.

also asserted that the categories of skills that were on RX 32 did not match up with the categories of skills on RX 33, and therefore, the two forms did not correlate. TR 249. She also alleged that she wrote the test plans for the test group for the entire unit. TR 252. Ms. Shertzer created the matrix and created the subcategories within it and I find that the process was a sham.

Actually, at this stage of inquiry, a complainant does not bear the burden of proof under the statute.²⁶ The Respondent has the burden to produce “clear and convincing” evidence.²⁷

Complainant argues alternatively, that even if the layoff *were* fair, the Complainant had 22 years of service and excluding negative emphasis on “conduct,” that she would have been one of the employees retained.²⁸ I accept this analysis.

Moreover, the record reflects and Dr. Goldberg’s testimony established that Respondent “suddenly” made the C-196 a disciplinary issue and accelerated the discipline process. When she rendered her opinion, Dr. Goldberg was not aware of the termination letter in CX 49. Applying the *Speegle v. Stone & Webster Constr., Inc.* rationale, I find that the smoking gun evidence cannot be rationalized and precludes “clear and “convincing” proof.

The record shows that the form in question incorporates an arbitration clause. RX 56. Mr. Sturms and Mr. Barre are both lawyers and knew or had reason to know that both the for cause discipline process and the RIF were operating simultaneously and the legal implications from this fact. They were placed on notice that the complaints may have involved SOX accusations. RX 27. Apparently both supervised or had authority to supervise Ms. Shertzer.

The parties in this case had been involved in litigation regarding arbitration for several years prior to the filing of this claim. On May 17, 2007 Complainant filed a complaint in Fairfax County Circuit Court alleging defamation by Respondent (also “NGC”) and another Respondent employee, her Manager, John Gage. CX 86, Tab 23. The state complaint alleged malice for falsely reporting her job performance.

At that time, Complainant was employed in Respondent’s Public Safety Systems

²⁶ Whereas Respondent alleges that because neither Mr. Uffelman nor Ms. Shertzer was copied on any of Complainant’s emails discussing the alleged “flaw” in the Time and Labor Charging training, “Thus, those emails could not possibly have been a contributing factor to Ms. Seguin’s inclusion in the reduction-in-force.” I find that the logic does not preclude knowledge of her complaints at this level of inquiry. In fact, in reviewing Mr. Uffelman’s and Ms. Shertzer’s testimony, I accept that they had reason to know about Complainant’s allegations, especially as “conduct” was a matrix category and the Complainant’s position on the C-196 was part of the inquiry.

On February 28th, 2011, when Respondent claims the RIF was already in force, Complainant was suspended from her job and was escorted out of the building by Ms. Shertzer. “[S]he called me to her office to get my annual review, and then at that point she said are you going to sign the C-196, and I said no. And she says you’re suspended.” TR 159-160. This evidence is unrefuted.

²⁷ *Menendez v. Halliburton, Inc.*, *supra*; see 29 C.F.R. § 1980.109(b).

²⁸ “[F]ailing to get rid of the Complainant with the C-196 issue, [Respondent] did an about-face and turned right to the RIF process as Plan B. And when you look at this process, you will see that if you look at the machinery or process you can find discriminatory intent and data manipulation in, and then manipulation of final scores and retaliatory discharge out.” TR 38. After a review of the evidence, to a reasonable degree of probability, I find that this argument is just as reasonable as removal by layoff, which must be proven by a higher “clear and convincing” standard.

division, working on software related to emergency responder systems, such as 911 and emergency radio systems used by first responders. TrR 601 Complainant was responsible for software quality management, and for leading and directing testing. TR 90 In 2005 an incident arose with Gage concerning the deployment of software for the City of Philadelphia for training that Seguin and others did not believe was ready. CX 86, Tab 3; TR 97. Seguin pled that Gage improperly attempted to coerce her and co-workers into approving release of software which they declined to do for several reasons. Gage ignored the software issues and ordered that the 911 software was going to training, “as is” and the decision was made “not to blink”. CX 86, Tab 8, item #2. The software was not ready for release for training when, on November 7, 2005, less than two months later, it was approved by Gage for release without Seguin’s knowledge or assent. CX 86, Tab 7. This was related to 911 dispatch software reliability; this was in the fall of 2005, a few years after the attack on the World Trade Center. Id.

On November 11, 2005, as part of her weekly activities report (WAR), Complainant reported “Observations regarding the recent deployment of software to Philadelphia” where she described several violations of company quality policies including a requirements review and that the Functional Specification Document (“FSD”) review “was never done”. CX 86, Tab 8, item 1 and item 2, #6. In addition to these and other policy failures, she reported the incomplete status of the released software for the Philadelphia project. She alleges that this conduct by Gage was computer and wire fraud and also related to shareholder fraud. CX 86, Tab 3, para. 1b.

Seguin later filed a formal SOX claim in this case wherein she alleges shareholder fraud by Gage and NGC by the act of defrauding the City of Philadelphia. Id. She checked a box for the secondary act of “Wire and Computer” fraud related to this shareholder fraud on her homemade evaluation template. CX 86, Tab 3 This form was prepared by Seguin. Id. The form asserts an “Alleged SOX 806A Violation”. Id. The essence of the claim is that the premature release of defective 911/emergency responder software on November 7, 2005 by Gage defrauded Philadelphia and thus was related to shareholder fraud. Id. This document summarizes those software issues and concerns. CX 86 Tabs 1-9 The specific SOX fraud alleged includes falsification of company records, documents, timecards and related dishonest conduct. Id. On November 13, 2005, after the software incident with Philadelphia, Gage declined to award Seguin the position of Test Manager. CX 87, Tab 6a-c; CX 87, Tab 5a. She had applied for this promotion but has consistently alleged that her protected activity caused her rejection. Id., CX 86, Tab 8

In February of 2007, in her 2006 Performance Evaluation from Gage; Complainant was downgraded from past evaluations and received a “needs improvement” rating, was placed on a Performance Improvement Plan (“PIP”); she was subsequently demoted from her management title on June 27, 2007. Seguin has consistently alleged that this was retaliation based upon a SOX report made to Karbowski in February 23, 2007. CX 87, Tab 9d; TR 44; CX 87, Tabs 8 and 24, CX 87, Tab 12 a-b, CX 86, Tab 17.

Complainant averred that Gage failed to promote her and defamed her because of her observations report and related opposition to the software release. CX 86, Tab 23. On February 23, 2007 she filed a report alleging defamation and the creation of false records concerning her performance evaluation. CX 86, Tab 17. She asserted that her 2006 Performance Evaluation

was false and defamatory due in part to her protected Philadelphia related activities. Id. The Philadelphia project is referenced at paragraph 15 of the defamation complaint. Id. at p. 3.

Respondent filed a Motion to Compel Arbitration pursuant to its mandatory arbitration policy. Id. at Tab 24 The court litigation began in the Circuit Court for Fairfax County Virginia and included a decision issued by the Virginia Supreme Court finding that an order compelling arbitration could not be appealed on an interlocutory basis. CX 87, Tab 31. This was followed by a failed petition for certiorari before the Supreme Court of the United States. RX 78 At the time, the issue of forced arbitration of employment law disputes was litigated in courts and deeply debated by legal academics.

During the litigation over the propriety of the mandatory arbitration clause Seguin vigorously opposed positions taken by NGC before the Virginia courts.

After the court litigation on the Motion to Compel Arbitration, Complainant still has an open arbitration case pending under the NGC policy. CX 86, Tab 30 (first page only); CX 61, p. 3, para.3, Exhibit 3, Tr. 824-826; Tr. 79-80; RX 93 Exhibit 8; RX 97. The record is not clear as to whether the Fairfax County Circuit Court retained jurisdiction over the arbitration case for post award vacation or confirmation. NGC Assistant General Counsel and Senior Labor Counsel for Seguin's division, Bart Barre, testified that the arbitration is pending. Tr. 868 I have asked the parties about this on several occasions, and apparently no action has occurred. I am advised in the Briefs that to date arbitration has not been scheduled.

At present, Complainant maintains an active arbitration claim that alleges retaliation by defamation related to her alleged SOX protected conduct surrounding the Philadelphia software debacle. The pending arbitration requires that the arbitrator address the underlying internal SOX complaints flowing from the Philadelphia software release, opposition to the release, retaliation claims, and defamation. The defamation case necessarily requires a finding as to whether Seguin was retaliated against due to her SOX protected activities beginning with her September 26, and November 11, 2005 complaints and the resultant defamatory 2006 performance evaluation. The Dodd-Frank amendments to SOX directly raise the issue as to whether Seguin can now be forced to arbitrate this case.

Complainant alleges that she filed other continuing internal complaints under the Respondent's OpenLine process concerning this continuing "forced arbitration" of her defamation and SOX retaliation claim without success.

Again, I find that if protected activity and contribution is established, Respondent cannot establish by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. To the contrary, I find that Complainant has established pretext.

PROTECTED ACTIVITIES

Because this case has been fully tried, theoretically there is an inference that a prima facie case has been made. *Kester v. Carolina Power & Light Co*, ARB No. 02-007, ALJ No. 2000-

ERA-031, slip op. at 5-8 (ARB Sept. 30, 2003) (“[W]e continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried.”). *Kester* has been cited as authority in many recent cases, i.e. *Barrett v. e-Smart Technologies, Inc.*, ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013).²⁹ Most recently, in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014), the Board discussed the several burdens of proof in SOX cases, specifically, mentioning *Kester*,³⁰ and in whistleblowing cases generally, to determine that proof by a complainant of the elements of a prima facie case of retaliation by a preponderance of the evidence, including proof of “contributing factor” causation, shifts to the employer the burden of proving by “clear and convincing evidence” not only the existence of a legitimate, non-retaliatory basis for the contested personnel action but also that the employer would have taken the contested action on that basis alone had the complainant not engaged in protected activity.³¹

Respondent did not address this in its briefs. It submitted the following as findings relating to protected activities.

1. Complainant Crisell Seguin and Northrop Grumman entered into a valid and binding stipulation that specifically defines and limits the alleged protected activities and adverse actions at issue in this case. (RX 1; Tr. 10:6-12, 12:2-13-

²⁹ See also *Hoffman v. Nextera Energy*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 12 (ARB Dec. 17, 2013) (prima facie showing irrelevant once case goes to hearing before ALJ); *Barry v. Specialty Materials*, ARB No. 06-005, ALJ No. 2005-WPC-003, slip op. at 7 n.32 (ARB USDOL/OALJ Nov. 30, 2007) (same); *Journey v. Barry Smith Transp.*, ARB No. 01-046, ALJ No. 2001-STA-003, slip op. at 3 n.5 (ARB June 25, 2001) (same); *Zinn v. American Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 10 (ARB Mar. 28, 2012) (equating prima facie case with inference of causation); *Jordan v IESI PA Blue Ridge Landfill*, ARB No. 10-076, ALJ No. 2009-STA-062, slip op. at 2 (ARB Jan. 17, 2012) (same); *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (equating prima facie case with inference of discrimination); *Spelson v. United Express Sys.*, ARB No. 09-063, ALJ No. 2008-STA-039, slip op. at 3 n.3 (ARB Feb. 23, 2011) (identifying investigatory stage before OSHA as the “prima facie level of proving a case”).

³⁰ See footnote 52: Seemingly supportive of Fordham’s position, the ARB in *Kester* upheld the ALJ’s determination that the complainant met his burden of establishing “contributing factor” causation based on a showing of temporal proximity and evidence of illegitimate reasons on the respondent’s part for the personnel action at issue, while reserving the respondent’s asserted non-retaliatory reasons for the action that was taken for consideration under the “clear and convincing” evidentiary burden of proof test. Yet, the ARB invoked the Title VII burden-shifting pretext framework as “warranted in [the] typical whistleblower case where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence.” *Kester*, ARB No. 02-007, slip op. at 10-12, & n.17. On the other hand, in *Paynes v. Gulf States Utils.*, ARB No. 98-045, ALJ No. 1993-ERA-047 (ARB Aug. 31, 1999), the ARB affirmed the ALJ’s finding that the complainant failed to prove “contributing factor” causation based upon weighing of the complainant’s evidence against the employer’s evidence of legitimate, nondiscriminatory reasons for the adverse personnel action. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011), another decision arguably relevant, merely discusses at length the various kinds of circumstantial evidence to be taken into consideration “on the record as a whole” in proving “contributing factor” causation.

³¹ The ARB noted that in whistleblower cases, as in Title VII discrimination cases, evidence is typically in the possession of the employer and direct evidence of retaliation for whistleblowing is rare. As the legislative history of the 1992 ERA amendments demonstrate, Congress unambiguously sought to benefit whistleblowers by altering the existing burdens of proof. At 36-37. In a dissent, one ARB member argued against “the majority’s new view that requires the ALJ to ignore essential facts in ultimately deciding after an evidentiary hearing whether the complainant proved that her alleged protected activity contributed to her administrative leave and termination of employment.” At 38.

17).

2. Pursuant to the parties' stipulation, Ms. Seguin's alleged protected activities in this case are limited to:

(1) a January 14, 2011 email introduced into evidence as RX 27/CX 25;³²

(2) a January 31, 2011 email introduced into evidence as RX 49/CX 27;

(3) a February 14, 2011 email introduced into evidence as RX 37/CX 31; and

(4) a February 22, 2011 email introduced into evidence as RX 38/CX 36. (RX 1; Tr. 10:6-12, 12:2-13-17).

3. Pursuant to the parties' stipulation, the alleged adverse actions at issue in this case are limited to three specific events:

(1) a February 18, 2011 written warning, introduced into evidence as RX 35;

(2) a suspension commencing on February 28, 2011 for failure to heed the February 18, 2011 warning (RX 4); and

(3) a layoff as part of a reduction-in-force on May 17, 2011. (RX 1; Tr. 10:6-12, 12:2-13-17).

As discussed, Complainant requests that I reject the stipulations. At the time they were made, the Complainant was represented by another law firm. That firm withdrew in favor of Mr. Hogan, who withdrew after hearing in favor of Mr. McDermott. I am directed to evidence that Respondent improperly used the attorney-client privilege to redact documents that if produced would have affected the stipulations in this case and the facts of the case by revealing, inter alia, the motivations of Bart C. Barre, assistant general counsel of Respondent, and others when he allegedly made the decision to terminate Complainant on or about January 26, 2011. The record shows that at that time, Mr. Barre was the lead labor and employment lawyer for the Information Systems sector, among other responsibilities. Tr. 816.

This case has proceeded for a long time. At this late date I will not reopen the entire record based on a bare allegation. I am not directed to the specific documents and to the specific protected sections of those documents. If this is a motion to reopen the evidence, it is denied. I accept the above findings.

However, there is also controversy regarding the effect of the stipulations. In her January 14, 2011 email, Complainant averred that a Time and Labor Charging training module had incorrectly marked her status as "complete." (RX 27). Ms. Seguin testified that she thought that "it was irresponsible for the company to have allowed a program to show that you've completed

³² Also CX 40.

something when you had not completed it” and requested that Northrop Grumman correct her training status. TR 120, 129. Respondent maintains that none of her allegations relate to SOX Section 806. I am advised by Complainant that Respondent misstates the substance of the stipulations:

NGC [Respondent] falsely asserts that Seguin does not claim that her pre-2011 SOX complaints constituted protected activities or resulted in an adverse action. NGC Post-Hearing Brief at p. 6 NGC does not provide any citation to evidence for its claim; the record reflects that Seguin has a long standing pending arbitration claim related to prior protected activity.

Complainant’s Reply Brief.

Respondent argues:

First, the record evidence shows that Ms. Seguin’s alleged conduct fails the statutory test for protected activity because she did not have an objectively reasonable belief of a violation of any of the laws enumerated in Section 806 of Sarbanes-Oxley (“Section 806”). At most, Ms. Seguin believed only that: (1) Northrop Grumman was attempting to trick her into agreeing to compulsory arbitration, which the Company explained to her was not true, and (2) Northrop Grumman was misstating the scope of its Standards of Business Conduct policy, which the record evidence clearly shows was not the case.

Second, the record evidence demonstrates that any alleged protected activity could not have been a contributing factor to Ms. Seguin’s discipline for at least four independent reasons: (1) Ms. Seguin engaged in the same alleged protected activity months prior to her discipline and layoff yet suffered no adverse action; (2) the decision to enforce the C-196 requirement and conduct a reduction-in-force—and the determination of the governing criteria for the reduction-in-force—occurred prior to Ms. Seguin engaging in any of her alleged protected activities; (3) Northrop Grumman passed on multiple opportunities to lawfully discipline and terminate Ms. Seguin for refusing to complete the C-196 Form (thus evidencing a complete absence of retaliatory intent); and (4) Northrop Grumman disciplined and laid off Ms. Seguin solely due to legitimate non-retaliatory reasons.

Finally, even if Ms. Seguin presented evidence establishing a prima facie case by a preponderance of the evidence—which she has not—the record evidence clearly and convincingly establishes that Northrop Grumman would have both disciplined her for refusing to complete the C-196 Form and included her in the 2011 reduction-in-force regardless of any protected activity.

DISCUSSION

In making my determination, in an abundance of caution, I do not apply the *Kester v. Carolina Power & Light Co.*, inference in this discussion. I also address both the ARB *Sylvester*

approach and the *Platone* approaches to protected activity. Whistleblower disclosures are protected if they are made to “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 to Congress or certain governmental agencies (including the Commission). *Id.* §1514A(a)(1)(C) . Neither party addressed 18 U.S.C. §1519 , which expands existing law to cover the alteration, destruction or falsification of records, documents or tangible objects, by any person, with intent to impede, obstruct or influence, the investigation or proper administration of any "matters" within the jurisdiction of any department or agency of the United States, or any bankruptcy proceeding, or in relation to or contemplation of any such matter or proceeding. This section explicitly reaches activities by an individual "in relation to or contemplation of" any matters. No corrupt persuasion is required.

Initially, I note that Complainant had made an initial SOX allegation in February 23, 2007. CX 87, Tab 9d; Tr. 44; CX 87 Tabs 8 and 24, CX 87, Tab 12 a-b, CX 86, Tab 17. I do not find that this provides her with protected status in her current claim, which began, ostensibly by stipulation, in January, 2011.

I also find that the stipulations do not bar other evidence including all of the testimony and exhibits that were entered at hearing, from amplifying and explaining the allegations made by Complainant, including internal Respondent evidence. As noted previously, on January 31, 2011, on February 14, 2011, and on February 22, 2011 she sent emails. They eventually went to Respondent CEO Wesley Bush, Ms. Karbowski, Mr. Sturms, Mr. Uffelman, Ms. Shertzer, and Mr. Barré, among others. RX 38. She stated that she wanted to inform Company management that she was investigating whether the Time and Labor Charging training module was tricking employees into agreeing to Northrop Grumman’s mandatory arbitration policy. She also alleged that “the main issue” was that she did not agree with a statement contained in the Company’s Form 10-K and 14A SEC filings that Northrop Grumman’s Standards of Business Conduct applies to all employees. RX 37, RX 48, RX 49. She alleged that this was a misrepresentation because she believed that certain employees were exempt from the Standards of Business Conduct.

Complainant’s 2010 rating was downgraded at about the same time that the Respondent was disciplining her for failure to sign the C-196 form, and at the same time that the RIF was in process. I also note that the stipulated emails were tendered after the effective date of the Dodd-Frank Act, § 922, which in part pertinent states:

...no predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.³³

The Form C-196, the mandatory form, has such a provision.

Respondent argues that Complainant’s position of the arbitration clause is unreasonable in light of the Company’s arbitration policy, which states that it does not “apply to or cover claims . . . as to which an agreement to arbitrate such claims is prohibited by law.” RX 97.

³³ See discussion *supra*.

However, even after Complainant complained about “forgery and fraud,” Respondent continued to insist that she sign the C-196 form with the arbitration clause.

Neither of the parties cited to *Stewart v. Doral Financial Corp.*, 997 F. Supp. 2d 129 (D.Puerto Rico Feb. 21, 2014), where the Plaintiff was a Senior Vice President and Principal Accounting Officer for a financial corporation who had filed a SOX Section 806 whistleblower complaint, and breach of contract claims. The Defendant sought dismissal of the breach of contract claims on the ground that they were subject to an arbitration agreement. The Plaintiff countered that the arbitration agreement was invalid and unenforceable as the breach of contract claims were "entangled with the SOX dispute and arise from the same nucleus of operative facts." Slip op. at 19. The court agreed with the Plaintiff. The court noted that an amendment to SOX from the Dodd-Frank Act in 2010 rendered predispute arbitration agreements invalid and unenforceable as to claims arising under Section 806. See 18 U.S.C. § 1514A(e)(2).

Although this case is not entitled to precedence, I find that the logic employed is applicable here.

Respondent argues that the provision “as to claims arising under Section 806” does not include the four stipulated emails.

Section 1514A of the Sarbanes-Oxley Act provides whistleblower protection to any lawful act done by [an] employee to provide information ... which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by ... a person with supervisory authority over the employee.

18 U.S.C. § 1514A(a). To set forth a prima facie case under the whistleblower protection provision of Sarbanes-Oxley, a plaintiff must plead, and ultimately prove, that the employee engaged in a protected activity or conduct. In other words, in order to satisfy the first prong under the whistleblower protection provision of SOX, Complainant must show that: (1) (s)he had a subjective belief that the complained-of conduct constitutes a violation of relevant law; and (2) that the belief was objectively reasonable. See *Sylvester*.

I also note that in the Preamble to the Air 21 amended regulations now in force in all our OSHA Whistleblower cases, in discussing the standards derived from the case law, the Department of Labor stated:

Under these standards, a complainant may prove retaliation either by showing that the respondent took the adverse action because of the complainant’s protected activity *or* by showing that retaliation was a motivating factor in the adverse action (i.e. a ‘mixed-motive analysis’).

76 Fed. Reg. 2808, 2811 (Jan. 18, 2011). (Emphasis added).

Initially, I find that Ms. Shertzer was a first line supervisor and in developing the RIF and by executing the discipline was involved in an “a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).” 18 USC §1514A(a)(1)(C). Respondents claimed that the decision to initiate progressive discipline for Ms. Seguin's refusal to sign the C-196 Form “was made solely by Vice-President Ed Sturms on January 26, 2011.” However, I find that he delegated authority to Mr. Barre and to Ms. Shertzer. Please note that both he and Mr. Barre were on the stipulated e-mail string. RX 38. I accept Complainant’s rendition that Ms. Shertzer was involved. When Mr. Allen, Complainant’s former first line supervisor left in 2010, Ms. Shertzer became Complainant’s supervisor. She downgraded Mr. Allen’s evaluation and signed her rating. She also perpetrated the RIF. It is reasonable that she had access to Complainant’s personnel records.

The remaining evaluation centers on whether Ms. Shertzer was engaged in discharging or otherwise retaliating against an employee in the terms and conditions of his or her employment because the employee provided to the employer or the federal government information relating to alleged violations of 18 U.S.C.A. § 1341 (mail fraud), § 1343 (fraud by wire, radio, or television), § 1344 (bank fraud), § 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

As stated above, Section 922 of the Dodd-Frank Act which amends the whistleblower protection set forth in the Sarbanes-Oxley Corporate and Criminal Fraud Accountability Act of 2002 (the "Sarbanes-Oxley Act"), 18 U.S.C. § 1514A, by adding a new section as follows:

(e)NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

Dodd-Frank Act, § 922, 124 Stat. at 1848. According to the Federal Register, the SOX Amendment by Pub. L. 111–203 became effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Certiorari of the Virginia Supreme Court case requiring the parties to submit to arbitration in the prior litigation was finally denied after a request for reconsideration by the United States Supreme Court on August 16th, 2010. RX 78, RX 80; Tr. 332.³⁴

³⁴ In opening, Respondent argued that the evidence would show that following a final decision by the Virginia

The most salient evidence regarding protected activity came from Mr. Barre. He was in charge of the discipline process. He related that, at hire, employees are required to fill out a Form C-196, an internal conflict of interest form. For the Information Systems sector, all employees annually fill out the same form. In addition, he related that when there may be an actual or perceived conflict, employees are supposed to update or redo the form. The form is then reviewed by a business conduct officer, by their management, to determine whether there is an actual or perceived conflict and, if so, what needs to be done about it.

According to the testimony, an infraction for failure to sign the C-196 form would constitute a “major offense.” Tr. 821, 824, 850. The form includes a reference to and incorporation of Corporate Procedure H-103-A, Employee Mediation Binding Arbitration Program that was in effect as of 15 September 2006. RX 97.

According to Mr. Barre, Corporate Procedure H-103-A applies to covered claims and lists the types of claims that are covered with respect to employees. It does have a number of exceptions as to who it applies to, which are indicated on page 1. According to the testimony, the import of H-103-A is that if somebody has a covered claim that they could otherwise bring in court that they’re bound to bring that claim in litigation in accordance -- in arbitration in accordance with the H-103-A procedure.

All Information Systems sector employees were required to sign. There is no requirement for completion of ethics training on an annual basis.

Company Policy H-100 covers a failure to complete the C-196. In 2008, following the commencement of a defamation lawsuit in the Circuit Court for Fairfax County, Virginia, Complainant was excused from signing the C-196 at her request.

Mr. Barre described the state claim as a defamation claim related to a performance appraisal issued by her former manager in the 2006 time frame filed in the Virginia Circuit Court for Fairfax County. After Complainant had exhausted all appeals with respect to the order compelling arbitration that was entered by the Virginia Circuit Court for Fairfax County,

Mr. Barre maintained that the lawsuit did not have anything to do with a refusal to sign the C-196. However, Ms. Seguin had indicated her belief that signing the C-196 would jeopardize her -- the argument she was making on appeal and her ability to appeal.

When her state case was pending, when she objected to the arbitration clause, Respondent excused her from completing the C-196. CX2. Mr. Barre testified that “we thought, in the beginning of 2010, with the denial of her motion for a rehearing with the Virginia Supreme

Supreme Court in Ms. Seguin’s defamation claim, Respondent rescinded the exemption from having to sign the Form 196 in April 2010, “more than nine months before Ms. Seguin was disciplined for failing and refusing to complete the form.” In April of 2010, an e-mail from Konya Doucette explicitly referenced the exemption and said it was no longer in place going forward.

JUDGE SOLOMON: Do you have the exhibit number for that?

See Tr., 48.

Court. And at that point, the company reassessed. And we were in a new cycle in that point, so we were in the 2009 cycle still, at the beginning of 2010, and determined that there was no basis for continuing to excuse her from signing the C-196, based on that appeal concluding.” She was asked to fill out the 2009 C-196 form. CX 60:

We could have terminated at the first step. But we chose in this case to begin with the warning and move to suspension and then termination, with the goal all along to try to get her to complete the C-196, which we had been trying to do for a number of months.

Tr. 850.

Complainant submitted her own certification statement and signed and submitted that to the company on or shortly before March 25th, 2010.

And the company felt that that was at least a step towards acknowledging that we needed her to complete the C-196 requirement. So, the company gave her one additional week to fill out the actual form.

Id.³⁵

In May, 2010, Ms. Monachino was able to then meet with Ms. Seguin to talk through the C-196, and my understanding is that Ms. Seguin refused to talk about the C-196 at that meeting. And then it was thereafter that Ms. Seguin filed the petition with the U.S. Supreme Court to review the Virginia Supreme Court’s decision.

At that point, Patty Page was the business conduct officer.

Q. Did there come a time in the summer of 2010 when there was an exchange between Ms. Seguin and Ms. Patty Page with respect to the requirement to sign the C-196?

A. Yes.... [o]n June 17th of 2010, the new annual cycle began. The e-mail came out from Linda Mills, who was president of the sector at that time, instructing the Information Systems sector employees to proceed with the annual ethics training and complete the C-196 form. In the July 2010 time frame, Ms. Seguin sent an e-mail to, I believe it was myself and others, with a concern about the training. And Ms. Page, as the sector’s -- or the Information Systems sector’s business conduct officer, responded to Ms. Seguin’s e-mail.

³⁵ Mr. Barre denied Complainant was treated any differently from any other employee and that any reservations or complaints about the mandatory arbitration policy or alleged flaws in the training module concerning completion of training play any factor in the decision to suspend and ultimately the decision of termination.

This was about the C-196 form. Ms. Page, back in July, had already indicated that the C-196 requirement was completely separate from anything with respect to H-103-A, the mandatory arbitration, and that she was required to fill out the C-196 form. So, this exercise, this progressive discipline, was focused on the C-196 form.

Tr. 852. I note that as of that date, the Dodd-Frank/SOX non-arbitration provision had not become effective.

Mr. Barre discussed Ms. Seguin's compliance with the C-196 requirement with her attorney at that time:

On August 24th, I spoke directly to Mr. Roche and indicated to Mr. Roche that in response to his August 16th letter that Ms. Seguin's appeals at that point were completely exhausted, and by appeal, I mean appeal of the Virginia Circuit Court order compelling arbitration of her defamation claim related to the 2006 performance appraisal -- that those appeals had been exhausted. On August 16th, the U.S. Supreme Court had denied her motion to reconsider the denial of a petition for cert and that there were no other appeals, and based on his letter indicating that what Ms. Seguin was asking for was to be excused during the appeal, that there wasn't an appeal. And so we continued to require her to fill out the C-196 form. He requested that I send him the form and the documents referenced in the form, which I did on that same day, August 24th, 2010, and he indicated that he would review those materials and get back in touch with me.

I note that by this time, the SOX/Dodd-Frank non-arbitration provision had become effective.

Complainant argues that the first email of the chronology is admitted by NGC Lee Karbowski, Director of Workplace Relation, was considered a SOX complaint.

Complainant argues as follows as to the stipulated January 14, 2011 Email:

The January 14 email speaks for itself concerning the SOX related claims contained therein. RX 27 Generally, it is clear from the totality of the email that Seguin reports that CEO Bush and others at NGC are violating a securities law, SOX, by their conduct. Specifically, the subject line is "Forgery and Fraud". Id. Seguin's prefatory statement notes that this submission by her is pursuant to the NGC OpenLine Ethics policy and that the alleged forgery, fraud, contract violations etc. are serious potential issues impacting the entire company. Id. Thus she invokes shareholder related fraud by this language. The statement then asserts that "The reporter is protected by SOX, FRANKEN (sic), and other laws and rules that prohibit retaliation." Id. Seguin categorizes this document as a "Category 3" filing under NGC Policy A 202, entitled "OPENLINE". RX 50 A Category 3 filing is the most serious classification and is defined as:

An allegation of a financial, quality, import, export, legal and/or contractual issue, such as, but not limited to, the following:

- * accounting irregularities
- * mischarging or improper time reporting
- * misuse of company resources
- * failure to comply with contractual or internal quality or manufacturing requirements Id.

This complaint then alleges in large bold type, inter alia, “Apparent Attempted Computer Forgery to Create and Maintain False Company Records”. Id. The time and labor charging software as it operates is alleged by Seguin to be an attempt of forgery and fraud. Id. A breach of fiduciary duty is alleged. Id. Seguin’s complaint alleges that NGC CEO Wes Bush and others are sanctioning this fraudulent conduct by unlawfully rejecting a valid SOX complaint by NGC’s concocting a cover-up of her SOX claim . Id. She states that multiple misrepresentations are sanctioned by CEO Bush. Id. Seguin’s OpenLine filing discusses the impact of this software on all NGC employees as well as herself. Id.

B. NGC Validation Of The January 14, 2011 OpenLine Complaint As A SOX Complaint

Complainant maintains that NGC took this January 14 email as a serious fraud complaint. NGC’s effort to chip away at the protected nature of this communication is wholly undermined by the admissions against interest of Lee Karbowski, Director of Workplace Relations.

Karbowski’s deposition testimony directly contradicts NGC’s brief. Karbowski testified that she received the January 14, 2011 email from Seguin. Ex. 1, Deposition of Leona Karbowski (“Karbowski Dep.”), Transcript Page (“Tr.”) 64, Lines (“ll”) 4-16 Karbowski admits that this OpenLine complaint caused her concern because it raised allegations of fraud. Id. at Tr. 69, ll. 2-11 Karbowski testified that she had communicated with Seguin directly in the past and that Seguin had not engaged in any previous communication with her that caused the “same level of concern” as this January 14, 2011 email. Id. at Tr. 69-70, lines (“ll.”) 19-22; 1-11

I admitted the Karbowski deposition as CX 70. Complainant argues that these statements constitute admissions against interest. I agree that it is substantial evidence. Karbowski’s admissions do not necessarily bind Respondent, but I find that they do substantiate the Complainant’s allegations.

I am directed to the requirement that Complainant must (1) subjectively believe that Respondent was violating a law listed in Section 806, and (2) that her belief was objectively reasonable. *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008).

Respondent argues Complainant’s arguments are “nothing more than mischaracterizations and contradictions of the record evidence” in an attempt to obscure that: (1) no objectively reasonable person could conclude that Northrop Grumman was falsely certifying completion of Time and Labor Charging training; (2) Ms. Seguin’s hearing testimony disavowed any belief of government contracting fraud or shareholder fraud; and (3) Ms. Seguin’s only concern was that the alleged “flaw” required her to follow Northrop Grumman’s arbitration policy, something that does not constitute protected activity.

Respondent directs me to “uncontradicted” record evidence that, in 2010, a Northrop Grumman programmer “set up the IS Time and Labor Charging training module so that if the employee opened and clicked through each slide in the training, the system would reflect that the

employee completed the training, regardless of whether the employee clicked ‘Finished’ or ‘Exit Now’ at the end.” (CX 82). I am advised that although Ms. Seguin describes this as a “flaw,” there is nothing improper in determining that an employee completes a training module by viewing all of its slides. Northrop Grumman explained this to Ms. Seguin as follows:

We appreciate your raising your concerns about the training system and the 2010 IS Time and Reporting Training module. You successfully completed this in 2010 by opening each slide of the module, and IS determined this as successful completion of the module even if you do not click on the ‘finish’ or ‘exit now’ box.”

(RX 35).

I am further directed to Gregg Kirchner’s email to Mr. Barre on February 4, 2011 which “does not show that Ms. Seguin was correct, nor does it confirm that ‘NGC is falsely certifying completion of the Time and Labor Charging module’ (Seguin Br. at 68). Instead, the record evidence shows that Northrop Grumman required all IS employees to complete the Time and Labor Charging training module by viewing all of its slides. (RX 35; CX 82). While Ms. Seguin contends that the training module marked employees as “Complete” when they opened the training, and that she exited in the middle of the training module (Seguin Br. at 23, 27), she presents no evidence in support of that contention.”

I am advised that moreover, her claim is directly contradicted by her own hearing testimony that: (1) she had no knowledge of other employees’ experiences with the training; and (2) she reached the last page of the training module. (Tr. 361:21-23, 363:17-25 (Seguin) (“Q: and you reached that last page and saw the finish button? A: Yes.”)). Respondent alleges that given her admission that she reached the last page of the training - thereby completing the training per the parameters established by the module’s underlying programming - her complaint that Northrop Grumman incorrectly marked her as “Complete” is both objectively and subjectively unreasonable and cannot constitute protected activity. Respondent argues that the Time and Labor Charging training module worked as intended and certified employees as complete only when they viewed all slides of the training module. “Ms. Seguin’s complaint boils down to frustration that she was marked as ‘Complete’ after viewing each of the slides in the training but consciously refusing to click the “Finish” button. Her dissatisfaction with the Company’s internal decision-making concerning what constituted completion of the training is not protected activity.”³⁶

After a review of the evidence, on this issue, I find that it hinges on credibility and I find that the Complainant is credible. The Complainant is not a legal scholar. There is no evidence that as of the January 14, 2011 e-mail that she was acting on advice of counsel. Complainant testified that when she opened Time training and then left her desk and came back, the computer system already treated her as if she completed the time and labor training. She assumed that it

³⁶ Citing to *Joy v. Robbins & Myers, Inc.*, Case No. 2007-SOX-74, 2008 WL 7835885, at *8 (ALJ Jan. 30, 2008), aff’d, ARB Case No. 08-049, 2009 WL 3614508 (ARB Oct. 29, 2009) (holding that complaint about internal compliance program was not protected activity where the compliance program was not required by a statute enumerated in SOX); see also cases cited in Northrop Grumman Br. at 27-28.

was inaccurately reporting her time. She is acknowledged to be a well-qualified test engineer. I find that she was not challenged as to these facts. Acceptance of those facts leads me to conclude that it is prudent that the system should have been tested for validity. There is no Respondent testimony or any evidence directly on point. It is reasonable that the Time issue goes to the “forgery and fraud” accusation.³⁷ I accept that Complainant has, through her testimony, convinced me to a reasonable degree of probability that she subjectively believes that she was, in fact, saving the Respondent from potential fraud. As to the allegation that Complainant did not have a reasonable belief concerning shareholder fraud during the period subsequent to January 14, 2011, apparently *Respondent* had a reasonable belief.³⁸ This meets the first prong of *Welch*.

³⁷ Respondent requested that I find as follows surrounding the January 14 timeframe:

41. From April 2010 through January 26, 2011, Northrop Grumman made repeated efforts to work with Ms. Seguin to discuss her concerns with completing the C-196 Form and explain to her why her completion of the Form was required. (Tr. 322:19-21 (Seguin); Tr. 834:24-841:21 (Barré)); see also RX 9; RX 46; RX 48; RX 57; RX 58; RX 79; RX 96-1). Ms. Seguin continuously refused to complete the Form despite Northrop Grumman’s many attempts to work with her. (Id.).

42. In January 2011, Northrop Grumman scheduled a meeting between Ms. Seguin; Bart Barré, legal counsel for NGIS; and Lee Karbowski, Director Ethics & Workplace Relations, to discuss the C-196 Form and to secure Ms. Seguin’s completion of the C-196 requirement. (Tr. 338:3-8 (Seguin); Tr. 841:16-842:13 (Barré)).

43. At that January 26, 2011 meeting, Ms. Seguin refused to discuss the C-196 Form. (Tr. 338:9-14 (Seguin)). When Mr. Barré attempted to go over the C-196 Form with her, Ms. Seguin got up and left the meeting. (Tr. 843:18-844:11 (Barré)).

44. After Ms. Seguin walked out of the meeting, Mr. Barré called Ed Sturms, Vice President for Civil Security and Infrastructure (the business unit in which Ms. Seguin worked), to inform him about the meeting. (Tr. 845:3-7 (Barré)).

45. Under Northrop Grumman policy, Mr. Sturms was responsible for initiating progressive discipline when employees in his chain-of-command refused to complete required certifications. (RX 28; Tr. 798:20-800:10 (Sturms)).

46. Under Northrop Grumman’s progressive discipline policy, Ms. Seguin’s refusal to complete the C-196 Form constituted a “major offense” both because she refused to provide the Company with “necessary information” and because she willfully disobeyed a reasonable and legitimate instruction issued by members of management. (RX 52 at 3-4).

First, this rendition does not discuss the Time and Labor Charging issue. Second it does not mention the OpenLine Complaint. I accept Complainant’s argument that Respondent neglected or purposefully overlooked the SOX charges as set forth by the Karbowski deposition, CX 70. I accept the finding that in January 2011, Respondent scheduled a meeting between Complainant; Bart Barré, legal counsel for NGIS; and Lee Karbowski, Director Ethics & Workplace Relations, to discuss the C-196 Form and to secure Ms. Seguin’s completion of the C-196 requirement. (Tr. 338:3-8 (Seguin); Tr. 841:16-842:13 (Barré)). However, the implication that she was insubordinate is not reasonable because had she been, the Respondent would have charged her accordingly. Instead, she was warned for failure to sign the C-196 Form. RX 35.

I accept Respondent’s finding of fact that because the Company had exhausted all other efforts to have Ms. Seguin complete the C-196 Form, Mr. Sturms authorized initiating progressive discipline for Ms. Seguin’s refusal to complete the C-196 Form. (Tr. 798:20-25 (Sturms)). However, I do not accept the allegation that Mr. Sturms had no knowledge of any alleged protected activities at the time of his decision to initiate progressive discipline. As stated elsewhere, he is a lawyer and (1) knew or had reason to know that an anti-arbitration provision related to SOX had become law, (2) knew or had reason to know the history expressed in Mr. Barre’s testimony and (3) had access to the stipulated January 14 email.

³⁸ RX 27 is evidence that substantiates her allegation, in that the Respondent actually labelled her charges as SOX allegations.

As to the second prong, a review of the evidence shows that the complaint about the Time and Labor Charging Software goes to whether it is objectively accurate. The Complainant maintains that it is not. She had initially raised reliability concerns before the first stipulated email. TR 365.³⁹ That does not mean that she is barred from raising it again. Moreover, she maintains she emphasized a different aspect:

A. It targets the same problems with training.

Q. [Mr. Bisbee] The subject matter of this July e-mail is the same as the subject matter of the January e-mail?

A. The other --

MR. HOGAN: Objection. Which document is he referring to?

MR. BISBEE: Sure. The subject matter of Respondent's Exhibit 26, which is your July 21st, 2010 email, is the same subject matter and raises the same issues as your January 14th, 2011 e-mail, which is Respondent's Exhibit 27.

MR. HOGAN: Objection. The documents speak for themselves.

BY MR. BISBEE:

Q. This isn't the only time in which you have raised this issue, right, Ms. Seguin? You had raised it in -- in addition to in July of 2010 and January of 2011, you had raised the issue of time and labor charging on other occasions?

A. Different problems. It's not the same issue. It's a different problem.

Q. If you could look at Respondent's Exhibit 3. This is an e-mail from yourself to Ken Uffelman, and it copies a number of individuals. It's dated August 11th, 2010. Is that right?

A. Yes.

Q. And this e-mail concerns, among other issues, the time recording training issues raised in your January 14th, 2011, e-mail?

I am advised that the criminal litigation mentioned in her email (potential forgery and larceny under Virginia law) is not protected activity because it has no connection to the laws listed in Section 806. Citing to *Nielsen*:

Second, Ms. Seguin's email expresses nothing about potential injury to shareholders. (See generally RX 27). Even if it did, a speculative, unsupported assertion of shareholder injury is not protected activity. See *Nielsen*, 762 F.3d at 223 (holding that a bald statement that Company was engaging in conduct which "had the potential of exposing the company to extreme financial risk" and "thus constituted shareholder fraud" was not protected activity); *Robinson v. Morgan Stanley*, ARB Case No. 07-070, 2010 WL 348303, at *8 (ARB Jan. 10, 2010) ("A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough" to constitute protected activity).

Respondent Brief.

As set forth above, I find that *Nielsen* does not support this argument. More importantly, the Complainant offered more evidence by way of testimony and exhibits to show otherwise. E. G. after CX 60 was admitted into evidence, Respondent objected on the basis of attorney-client privilege. TR 865. That document was already in evidence and the objection was overruled. It is an E-mail dated February 11th, 2011, authored by Mr. Barre. I find that it is reasonable that this document substantiates that Respondent was concerned about such matters. Complainant also argues that her January 14 email is protected activity because Northrop Grumman referred the email to Deborah Woodward, NGIS Director for Regulatory Compliance and Financial Controls.

³⁹ Complainant testified on cross examination it was July 21, 2010.

A. Yes.

TR 265-266.

I find that whereas the Respondent alleges that the above colloquy in part rules out the Time and Labor Charging issue,⁴⁰ I find that it clarifies it and substantiates that in her mind, she again put the Respondent on notice that the time management process was subject to manipulation and flawed. I note that Respondent asks me to find:

10. In her January 14, 2011 email, Ms. Seguin complained that an NGIS Time and Labor Charging training module had incorrectly marked her status as “complete.” (RX 27). Ms. Seguin testified that she thought that “it was irresponsible for the company to have allowed a program to show that you’ve completed something when you had not completed it” and requested that Northrop Grumman correct her training status. (Tr. 120:23-25, 129:3-6 (Seguin)).

11. Ms. Seguin’s January 14, 2011 email also complained that the word “procedures” had been added to the Time and Labor Charging training module. Ms. Seguin contended that introduction of the word “procedures” was an attempt to “trick and/or force me to accept an embedded arbitration clause disguised as a procedure without knowing exactly what I am agreeing to.” (RX 27).

12. Ms. Seguin wrote in her January 14, 2011 email that the training module marking her as “Complete” would not have been a problem in the past but was a problem “for the first time” in 2011 because the word “procedures” had been added to the training module. (RX 27, at 5). Thus, Ms. Seguin’s sole alleged concern was with the addition of the word “procedures” and not with the module marking her “complete.”

See proposed findings.

I do not accept the inferences that Respondent raises in the proposed findings. From reading the email at face and the surrounding documents I reject the assertion that she had a “sole” concern. On the other hand, I find that the Respondent’s argument actually reinforces Complainant’s credibility as to objectivity in that the email chain reports that CEO Bush and others violated SOX, by their conduct in failing to investigate. RX 27 is evidence that substantiates her allegation, in that the Respondent actually labelled her charges as SOX allegations.

Moreover, as of January 14, 2011, the Dodd/Frank anti-arbitration clause was in effect. If the Time and Charging complaint is viewed as a SOX allegation, the Respondent C-196

⁴⁰ Respondent alleges that during the hearing Complainant admitted her January 14 email did not concern:

- (1) any allegations that employees were not properly recording their time;
- (2) any concerns about potential debarment of Northrop Grumman as a government contractor; or
- (3) anything related to the False Claims Act. (Tr. 361:24-362:12 (Seguin)). “Given that testimony, Ms. Seguin cannot show that her January 14 email evidences either an objectively or subjectively reasonable belief of government contracting fraud. Moreover, Ms. Seguin has made no attempt to tie any supposed allegation of government contractor fraud to one of the enumerated categories set forth in Section 806. As a result, she cannot show that her January 14 email constituted protected activity.

See Northrop Grumman Br. at 27-30.

requirement incorporated by reference the arbitration procedure. See discussion re: *Stewart v. Doral Financial Corp.* *supra*. Respondent asks me to find:

14. The Virginia courts had previously enforced Northrop Grumman's arbitration policy, and informed Ms. Seguin that the arbitration policy applied to her. (See RX 81).

In reviewing the record I find that if the email were viewed with the complaints of "forgery and fraud" as a SOX violation, Respondent failed to follow the law.

A review of the evidence shows that Respondent did not actually perform an internal investigation regarding the charges that Complainant made about the time and labor charging.⁴¹ I find that Respondent did not impeach Complainant's testimony on this issue. The mere fact that she may (or even may not) have completed the training does not mean that her allegations are false.⁴² Whether the software coding algorithm was completed does not mean that it is accurate and cannot be manipulated. There was no testimony or other evidence presented about the accuracy of the software. I find further that Mr. Barre's testimony substantiates that the Time and Labor Charging issue directly relates to Section 806, 18 U.S.C.A. § 1348 and meets the *Platone* test. TR 862-863.⁴³

⁴¹ I was not provided proof that the Time and Charging software was audited for error or for potential manipulation. Under Section 404 of the Act, management is required to produce an "internal control report" as part of each annual Exchange Act report. See 15 U.S.C. § 7262. The report must affirm "the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting." 15 U.S.C. § 7262(a). The report must also "contain an assessment, as of the end of the most recent fiscal year of the Company, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting." The Complainant did not request the documents for the period since 2011.

In most SOX cases, an outside law firm is chosen to perform this task due to an appearance of a potential conflict of interests. However, the Respondent apparently did not appoint an internal committee or hire a law firm to investigate the SOX allegations..

⁴² The letter states:

We appreciate your raising your concerns about the training system and the 2010 IS Time and Reporting Training module, You successfully completed this in 2010 by opening each slide of the module, and IS determined this as successful completion of the module even if you do not click on the "finish" or "exit now" box. Therefore, as the LX system reflects, you have finished two of the required modules, but still must complete the remaining modules and the Form C-196. Despite your apparent protests, the Company continues to expect you to comply with the Company's Standards of Business Conduct and the requirement to complete the 2010 training and Form C-196.

There was no evidence submitted that her claims were investigated.

⁴³ [by Mr. Hogan]. Now, let me ask you this. Time and labor training is a critical function, correct, in contracting?

A. Yes. It is a critical function in government contracting.

Q. Right. And that's because we're dealing with the public purse, federal tax dollars, on projects, correct?

A. Correct.

Q. And how people know how to charge their time properly?

A. Correct. And Ms. Seguin always knew how to charge her time properly, and there's evidence of that.

MR. HOGAN: That's nonresponsive, Judge. That's nonresponsive.

JUDGE SOLOMON: That is correct. Just wait until he asks you another question.

BY MR. HOGAN:

Q. So, there's no debate about that, that time and labor reporting goes right to the heart of federal government contracting. Is it -- that's fair to say, correct?

The evidence also shows that the Respondent also did not perform an internal investigation regarding allegations Complainant entitled “forgery and fraud.”⁴⁴ I find that this fact, standing alone, places the Complainant in protected status.

I also note that Mr. Barre was not asked at hearing and the parties have not raised in argument whether the arbitration procedure in Corporate Procedure H-103-A and Company Policy H-100 applied upon the effective date of the SOX/Dodd Frank Amendments in 2010 that includes the anti-arbitration provision. The Complainant had made allegations of “Forgery and Fraud” and the express language “The reporter is protected by SOX, FRANKEN (sic), and other laws and rules that prohibit retaliation.” The Time and Labor Charging training issue relates to those charges. I find that as a matter of law, by the effective date, as SOX allegations were pending, the non-arbitration provision was applicable. By February 28, 2011 the Complainant had been suspended for failing to complete the company C-196, threatened with termination over the arbitration clause, and had communicated several concerns that give fair notice of SOX violations to Mr. Barre.

Moreover, although they are ostensibly still involved in the state arbitration action and although the SOX/ Dodd Frank anti-arbitration effective date had been enacted, Respondent failed to make any accommodation as the failure to file on the official form was required. When Complainant submitted what she thought was an equivalent form to the C-196, she added:

This form is being signed and submitted under protest due primarily to company approval of other forms of this certification being used and submitted to the government, but my similar approach was rejected in recent communications, and that several employees still have not been forced to submit the same which I believe is discriminatory, disparate treatment, and violates company policy.

RX 41, March 31, 2011. She returned to work on April 4, 2011. TR 184-185. I note that by that time, Ms. Shertzer was well engaged in the RIF process.

Complainant also sent an email May 3rd, 2011:

On February 14th, 2011, I notified Mr. Bush and other senior executives that I had initiated a SOX investigation due to finding substantial evidence that would reasonably affect an investor’s opinion of our company and could affect an investor’s decision regarding how much of any stock they may wish to have in our company.

See CX 56. An internal email stated:

-
- A. It is important in federal government contracting that people charge their time appropriately.
Q. It’s actually critical, isn’t it? Not just important but critical, about how money and time is spent, right?
A. Critical is a fair description.

⁴⁴ See footnote 41.

FYI, Crisell responded to our e-mail communication from earlier this week. While she didn't complete the C-196, she provided a written statement that indicated some interest in resolving this issue. So legal has extended her suspension one additional week to allow her time to complete the process.

See TR 182, 209.

As to fraud allegations, Respondent argues that Complainant admitted that her January 14, 2011 email (RX 27) did not raise any concerns about potential fraud related to government contracting:

In a 180-degree reversal, Ms. Seguin now argues that she had an objectively reasonable belief of government contracting fraud based on the possibility that Northrop Grumman could enter into government contracts based on alleged false training certifications. (Seguin Br. at 68-70).

See Respondent's Reply.

Complainant directs me to a January 26, 2011 Seguin Affidavit. RX 30, CX 31. I am advised that while the stipulations on their face ignore this affidavit, this document restates the January 14, 2011 OpenLine allegations in detail. RX 30 Soon after handing it to Mr. Barre, the decision to recommend discipline through to discharge is made. Seguin states:

- NGC has created fraudulent time and labor charging training records. Id. at para. 25, 26, 34
- "A false writing (my corporate training record regarding time and labor charging) has been made against my will; is a misrepresentation, and is being stored against my will." Id. at para. 28
- Seguin cites the Model Penal Code concerning "forgery" and how it applies to this allegation. Id. at para. 27
- Seguin alleges that the training software has caused a false record to be made in violation of the Model Penal Code and Virginia criminal law. Id. at para. 29
- Seguin alleges that the company is aware that these false registrations of "complete" are being made. Id. at para. 30
- Seguin cites Virginia case law and the Virginia Code to support her claim of forgery. Id. at paras. 32-33, 35
- Seguin's affidavit also specifically alleges that her affidavit lays out probable cause for a criminal investigation of NGC leadership, including CEO Bush, other top executives, and Counsel Barre for wire fraud and related conduct associated with the software and refusal to fix the error. Id. at para. 26, 37, 38
- Seguin states that she believes she is protected as a whistleblower under "...U.S. Labor Dept., SOX, FRANKEN, and others...". Id. at para. 40

Complainant maintains that this affidavit clearly shows that she was continuing to push the Time and Labor Training Certification issue; it is being reported by her as forgery and fraud; and a violation of criminal law.

I find that Complainant did not make a “180 degree reversal” from her testimony. I find that the testimony, taken as a whole, shows that she consistently maintained the position over time, and moreover, I find that the Respondent’s conduct in failing to investigate her claims in handling her complaint, substantiates her claim.

Therefore I find that the Complainant presents an objectively reasonable belief of fraud in manipulating time records, a violation of Section 806. See TR 847-848. See 18 U.S.C. §§ 1519 ... falsification of records, documents or tangible objects, by any person, ...of any "matters" within the jurisdiction of any department or agency of the United States, ...or in relation to or contemplation of any such matter or proceeding.

Complainant also raised the claim that the Respondent’s top leadership was acquiescing to this illegal conduct. RX 27 I am directed to protection for allegations of “any provision of Federal law relating to fraud against shareholders”. Id. The allegation is that CEO Bush and others acquiesced to this conduct is an allegation that a securities law (SOX) was violated.⁴⁵ Respondent did not present any proof to the contrary.

Complainant argues that as to CEO Bush and others, she also satisfies the *Welch v. Chao* standard on numerous respective elements of the January 14, 2011 email. She argues that this was validated by Lee Karbowski’s admission of concern and the fact that the legal department addressed this as a SOX complaint. Complainant argues:

... Seguin stated in her email; she called it wire fraud and forgery that CEO Bush and other were tolerating. NGC’s Post Hearing Brief is also not a honest depiction of NGC’s and Karbowski’s contemporaneous reaction. Seguin related these facts to shareholder concerns; there was no expert legal opinion as to how false certifications of time and billing training and related compliance by a government military contractor can raise significant financial and government contracting concerns. A layperson like Seguin is not required to do so; she alleged it was fraud under Category 3 of the OpenLine policy and that NGC’s leadership was compliant in this continuing fraud. RX 27 She was required by the NGC Standards of Business Conduct policy to report such concerns.

- The January 26, 2011 Seguin Affidavit
While the stipulations on their face ignore this affidavit, this document restates the January 14, 2011 OpenLine allegations in detail. RX 30 Soon after handing it to Barre, the decision to recommend discipline through to discharge is made by Barre. Seguin states under oath in this affidavit that:
 - NGC has created fraudulent time and labor charging training records. Id. at para. 25, 26, 34
 - “A false writing (my corporate training record regarding time and labor charging) has been made against my will; is a misrepresentation, and is being stored against my

⁴⁵ Citing to *Jones v. Southpeak Interactive Corp.*, 2013 U.S. Dist. LEXIS 37999 at *17 n. 3 (E.D. Va. Mar. 19, 2013).

will.” Id. at para. 28

- Seguin cites the Model Penal Code concerning “forgery” and how it applies to this allegation. Id. at para. 27
- Seguin alleges that the training software has caused a false record to be made in violation of the Model Penal Code and Virginia criminal law. Id. at para. 29
- Seguin alleges that the company is aware that these false registrations of “complete” are being made. Id. at para. 30
- Seguin cites Virginia case law and the Virginia Code to support her claim of forgery. Id. at paras. 32-33, 35
- Seguin’s affidavit also specifically alleges that her affidavit lays out probable cause for a criminal investigation of NGC leadership, including CEO Bush, other top executives, and Counsel Barre for wire fraud and related conduct associated with the software and refusal to fix the error. Id. at para. 26, 37, 38
- Seguin states that she believes she is protected as a whistleblower under “...U.S. Labor Dept., SOX, FRANKEN, and others...”. Id. at para. 40

This affidavit clearly shows that Seguin is continuing to push the Time and Labor Training Certification issue; it is being reported by her as forgery and fraud; and a violation of criminal law. More important, Seguin directly alleges “probable cause” to investigate NGC leadership’s acquiescence to this wire fraud because she had reported it and NGC failed to take action.

This affidavit is the first time that Seguin directly alleges the names of the top NGC executives who Seguin states have violated SOX. This same day Barre decides to terminate Seguin if she does not sign the C-196.

I accept that the clear language of the email establishes that Seguin’s concerns were driven, in part, by her concern that fellow employees have been defrauded as shareholders. RX 49.

Therefore:

1. I find that the first email, standing alone, provided not only “fair notice” as set forth in *Evans v. EPA*, but also meets the *Sylvester* standard and the Second Circuit *Nielsen v. AECOM Tech. Corp.* standard.⁴⁶
2. Alternatively, I find that the Respondent rigged the 2011 RIF. By inference, it was done because the Complainant had “blown the whistle” by complaining, and was in protected status. In sum, I find that the arbitration issue, through the strict requirement that she sign a mandatory C-196 Form, was the vehicle that Respondent used to eliminate her employment. In her performance evaluation and in a matrix devised by Respondent to prosecute a RIF, the category “conduct” was double weighted. “Conduct” in this setting is synonymous with her objections and her refusal to sign the Form C-196.
3. Moreover, even if I apply the “definitively and specifically” *Platone* standard, I find that the subject line of the first stipulated email is “Forgery and Fraud,” that it relates

⁴⁶ In an abundance of caution, I do not apply the *Kester v. Carolina Power & Light Co* standard.

that she unambiguously accuses the Respondent of a Section 806 violation, and I accept that her position is substantiated in the evidence. The allegation that the contents of the email are not credible is rejected.⁴⁷

4. The evidence also shows that the Respondent also did not perform an internal investigation regarding allegations Complainant entitled “forgery and fraud.” I find that this fact, standing alone, places the Complainant in protected status.

Accordingly, I find that the Complainant was engaged in a protected activity.

CONTRIBUTION

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity. See *Benjamin v. Citationshares Mgmt., L.L.C.*, ARB No. 14-039, ALJ No. 2010-AIR-001 (ARB July 28, 2014).

The Complainant need not show that the protected activity completely or even significantly caused the adverse action.⁴⁸

First, I find that the direct evidence shows that the C-196, which for years was not a

⁴⁷ 18 U.S.C. §§ 1519 expands existing law to cover the alteration, destruction or falsification of records, documents or tangible objects, by any person, with intent to impede, obstruct or influence, the investigation or proper administration of any "matters" within the jurisdiction of any department or agency of the United States, or any bankruptcy proceeding, or in relation to or contemplation of any such matter or proceeding. This section explicitly reaches activities by an individual "in relation to or contemplation of" any matters. No corrupt persuasion is required.

See also See, e.g., *Gladitsch v. Neo@Ogilvy*, 2012 WL 1003513 at * 4-8 (S.D.N.Y. 2012) (holding that allegation of fraud is not a necessary component of protected activity under Section 1514A and that plaintiff “has alleged sufficiently that she reasonably believed that the pricing scheme, which overcharged IBM, violated an enumerated category of misconduct under SOX," and "her communications with supervisors ... identifies specifically the overcharges ... she believed to be unlawful."); *Lockheed Martin v. ARB*, No. 11-9524 (10th Cir. 2013) (complainants who report violations of 18 U.S.C. §§ 1341, 1343, 1344, and 1348 are not required to also establish that such violations relate to fraud against shareholders). Indeed, a complainant is only required to identify a specific type of conduct he believes to be illegal. See *Ashmore v. CGI Group Inc.*, 2012 WL 2148899 at *6 (S.D.N.Y. 2012), (“the fact that [the plaintiff] did not specifically inform [the employer] ... of his belief that the scheme involved mail or wire fraud, or his reasons for thinking so, does not mean that the information he communicated was insufficiently specific to count as activity protected by § 806.”).

⁴⁸ In *Marano v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the whistleblower protections of 5 U.S.C. § 1221(e)(1), the Court observed:

The words “a contributing factor” . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action. *Id.* at 1140 (citations omitted).

discipline issue, “suddenly” became a disciplinary issue and the sequence of events that followed led to Complainant’s removal from her position.⁴⁹ This constitutes “a change in the employer’s attitude toward the complainant after he or she engages in protected activity.”

Benjamin v. Citationshares Mgmt., L.L.C, supra.

Second, when the Complainant filed complaints and was engaged in protected activity, Respondent in essence demurred, and failed to investigate her claims. See discussion, *infra*. This led to removal from Complainant’s position.

Third, Complainant’s 2010 rating was downgraded at about the same time that the Respondent was disciplining her for failure to sign the C-196 form, and at the same time that the RIF was in process. Laurie Shertzer, then Complainant’s first line supervisor, was part of the “progressive” discipline chain of responsibility for Complainant’s violation of failing to sign the C-196 form. She also downgraded the Complainant’s personnel evaluation on or about February 11, 2011 for a refusal to sign the form. TR 857-862, On February 28, Ms. Shertzer escorted the Complainant from the premises when she was suspended. At the same time, Ms. Shertzer prepared a matrix allegedly used to determine the respective qualifications of Complainant and her coworkers. RX 32; RX 33 is a skills matrix. She had also prepared a termination letter. According to Dr. Goldberg’s credible opinion, Ms. Shertzer overweighted a “conduct” category, which was, in reality, retaliation for the act of refusal to sign the C-196 form. TR 474-477. I also find that these facts show pretext; although Respondent characterizes the removal as a layoff, and by inference, a preponderance of evidence shows it was termination for cause. I find that this meets the “falsity of an employer’s explanation for the adverse action taken.” ***Benjamin v. Citationshares Mgmt., L.L.C, supra.***

Any of the above is sufficient, standing alone, to establish contribution.

DAMAGES

The statute provides:

(1) In general.—An employee prevailing in [an anti-retaliation action] shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.—Relief for any action under paragraph (1) shall include—

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

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

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

18 U.S.C. § 1514A(c). Under the Dodd Frank Act, "no employer may discharge . . . a whistleblower because of any lawful act done by the whistleblower" in providing information to the SEC. 15 U.S.C. § 78u-6(h) (1) (A). Any individual who alleges "discharge or discrimination" as a result of providing information to the SEC may bring an action in the district court. 15 U.S.C. A. § 78u-6(h) (1) (B) (i). A prevailing plaintiff is entitled to be reinstated and to recover

⁴⁹ Tr. 483; CX 75-A RX 95.

"2 times the amount of back pay otherwise owed to the individual, with interest; and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees." 15 U. S . C. § 78 u - 6 (h) (1) (C) (i) - (i i i).

REINSTATEMENT

18 U.S.C. § 1514A(c)2(A):

reinstatement with the same seniority status that the employee would have had, but for the discrimination.

Complainant testified that when she was removed from her position, she was a "Senior Software Quality Test Engineer 4," earning \$115,000 per year. She also received full benefits and pension, including healthcare. She was also in a matching contribution program, which permitted a maximum contribution of 8 percent matched by Respondent. TR 76, TR 86, CX 76.

Respondent alleges in its briefs that it has no suitable employment for Complainant. There is no record testimony to substantiate this. Respondent attached an affidavit to its brief. Declaration of Linda Hayes, However, this evidence was not produced at trial and leave was not requested to submit it. Complainant objects to its admission and I sustain the objection. Richard Edelman, Professor Emeritus, American University, and forensic economist, and Complainant's economic expert, found front pay, from July 21st, 2014 forward, would be \$303,047. TR 427. This is based on retirement at age 69. Respondent did not offer opposing evidence.

I find that Complainant is entitled to reinstatement. Therefore, front pay is not owed.

BACK PAY

The parties have stipulated that the Complainant was paid \$115,000 per year when she was employed. TR 418. They also stipulated to a benefits package described in a report submitted by Dr. Edelman, Complainant's economic expert. Id., CX 73-A, CX 79.

Even after agreeing to the stipulations, Respondent argues that at most, Complainant should be awarded no more than six months of back pay. Steven Shedlin, Complainant's vocational expert, testified that she failed to mitigate her damages:

- (1) She had not engaged in a proper job search at any point following her separation; and
- (2) if she had conducted a proper job search, she would have been reemployed within six months of her separation.

TR. 586-588.

After he was accepted as an expert witness, Dr. Edelman testified that he estimated back pay as \$412,130. This was based on annual income of \$115,426, based on Respondent documents. He noted Respondent contributions toward the funding of fringe benefits, and Respondent contributions toward the 401(k) retirement savings. Based on historical contribution information provided, the contribution was 4.1 percent of her income. TR 428. He further considered increase wages for normal cost of living adjustments. In the five years before the

termination, the average annual wage growth was 1.98 percent.

Dr. Edelman testified that he reduced future numbers back to present values, utilizing a laddered portfolio of U.S. Treasury securities. Each future year's income is discounted by a Treasury security that matures within that same year so that there's no interest rate risk and there's no default risk.

He also considered offsetting but based on a report from Mr. Shedlin's vocational expert, there is no mitigating or offsetting income from future employment in this record. TR 429.

On cross examination, Dr. Edelman admitted that he relied on the vocational expert's expertise.

At hearing, Mr. Shedlin recanted his opinions in his report.

A complainant has a duty to exercise reasonable diligence to attempt to mitigate damages; however, the Respondent bears the burden of proving that the Complainant failed to mitigate. *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004).

Complainant argues that she applied for numerous jobs, by attending job fairs and responding to openings online by sending her resume electronically.

She did not apply for unemployment benefits.

Respondent did not present any expert vocational testimony and did not present any other evidence proving that the Complainant failed to mitigate.

After having been fully advised in this matter, applying the formula, I find Complainant is entitled to \$59,800.00 (half of \$115,000 x 4%) plus interest.

COMPENSATORY DAMAGES

Complainant requests damages for impairment of reputation, personal humiliation, mental anguish and suffering. She reminds me that damages are appropriate. *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, (4th Cir. S.C. 2003); *Abdur-Rahman et. al. DeKalb Cnty.* ARB Case Nos. 12-064,067; ALJ Case Nos. 2006-WPC-002-003; slip op. at 8. The "overarching goal is to make the employee whole for the unlawful whistleblower retaliation". Id. at 9. Uncertainties in the amount owed should be resolved against the discriminating party. Id.

Complainant presented no medical witnesses and no medical bills.

She alleges:

[By Mr. Hogan] ... Well, how did this termination affect you once you arrived at

home?

A. Well, I was devastated by the whole situation and it took me months to come back to just my regular self.

Q. What happened during those intervening months, before you came back to your regular self?

A. Well, I was depressed. I had a hard time believing that if you do such a good job and try to follow all the rules and regulations that people would actually work against you to put you out. It's a hard thing to describe. I'm not a type of person who outwardly shows my disappointment and my feelings. I internalize a lot, so I was very quiet and withdrawn for quite a bit.

Q. Did you talk to any family members or friends and express how you felt at that time?

A. Yes. I did.

Q. Who was that?

A. I talked to my now fiancé.

Q. Okay. What did you say to him?

A. I said I can't believe it. Things are so unfair. But then nobody has ever said anything would be fair, so --

Q. Did you talk to anybody else, other than your fiancé?

A. Let's see. I tried to find a lawyer. So, I talked to lawyers.

Q. Okay. Other than lawyers. I'm talking about people that you know.

A. No, I didn't want my family -- I had older relations and I didn't want to upset them. And my brother, I didn't want to concern him. So, I didn't talk to them about that.

Q. So you internalized the event?

A. Yes.

Q. To this day, have you finally adjusted to the fact of that termination?

A. Well, yes, I've adjusted to it. ...

TR. 218-219.

As with back pay, a complainant has a duty to exercise reasonable diligence to attempt to mitigate consequential damages; again, the Respondent bears the burden of proving that the Complainant failed to mitigate. *Roberts, supra*.

Complainant argues that she mitigated her damages while fighting to get her job back. She alleges that she was thrown into the job market at an older age with few transferable skills. She argues that she was unable to function, in part due to depression and withdrawal from interpersonal relations. She also alleged that she spent much of her time seeking representation.

Respondent argues that Complainant is not entitled to any consequential damages. It alleges that she was represented by counsel by November 2011 when she submitted her position statement to OSHA, (CX 61). However, I note that Complainant had problems with counsel during the pendency of this action.

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. Compensatory damages are designed to compensate not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), citing *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-307 (1986); *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996) (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); *Crow v. Noble Roman's, Inc.*, No. 95-CAA-08, slip op. at 4 (Sec'y Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and Truck repossessed deemed sufficient bases for awarding the compensatory damages).

The testimony of medical or psychiatric experts is not necessary, but it can strengthen a complainant's case for entitlement to compensatory damages. *Thomas v. Arizona Public Service Co.*, 89- ERA-19 (Sec'y Sept. 17, 1993); *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981), cert. denied, 454 U.S. 897 (1981). See also *United States v. Balistreri*, 981 F.2d 916, 931-32 (7th Cir.1992) (a party's own statements can support a mental suffering award if they are more than simply conclusory), cert. denied, 510 U.S. 812, 114 S.Ct. 58, 126 L.Ed.2d 28 (1993).

Complainant never saw a counselor or a therapist or any other type of professional to help with alleged emotional distress. She was never diagnosed with any medical or emotional condition. TR 368-359. She did not offer any evidence to show that her reputation was damaged. Mr. Shedlin, a rehabilitation counselor specializing primarily in vocational rehabilitation counseling, did say that when a prospective employer notes that someone has been inactive,

...clearly other than being active, and may lead to them having questions as to why they're inactive.

TR 564. On cross examination he related:

...looking at a person who had worked 22 years for one employer, who had been terminated at age 64, irrespective of the reason for that, who had -- was looking for work for a few years, I just didn't see it as being appropriate to even reinvent her a little bit, in terms of other things for which she might be qualified. I might have done an analysis like that for a -- in looking at a younger person who could go in and sort of show that they could -- with an employer, that they might be able to learn on the job and do something different. I just didn't see that as being appropriate for the stage of life in which Ms. Seguin is right now and the fact that she would be looking for work as an older American

right now.

TR 574.

The Complainant bears the burden of proof on this issue. The key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009). Complainant did not supply me with any cases for comparison. I find that the Complainant has established that she had untreated situational depression, but that she has now adjusted. I find that the level of harm demonstrated by the testimony here is similar to the level of harm demonstrated by the testimony in *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 08-030, ALJ No. 2008-STA-006 (ARB February 27, 2009), in which the ARB affirmed an award of \$5000 in compensatory damages where the complainant testified that he suffered from stress and the loss of insurance and other fringe benefits as a result of the wrongful adverse action and *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008), supra, in which the ARB affirmed an award of \$5000 in compensatory damages where the complainant testified that his termination generated anxiety. Therefore, I find that \$5000 is an appropriate amount for compensatory damages for emotional distress in this case.

As to loss of reputation, which is akin to defamation, I find that the Complainant has not proven that her reputation has suffered. However, I do find that given the circumstances she has suffered humiliation, reduced to an economic loss of due to her inactive status for the time she should have been looking for work. She failed to mitigate except for the six month period. Using the same analysis as above, I cannot find any cases on point for comparison. However, I accept that she suffered a loss and award damages in the amount of \$1000.

PUNITIVE DAMAGES

Although Complainant requests punitive damages, they are not permitted under SOX and Dodd/Frank.

ATTORNEY'S FEES

Finally, as a prevailing party, Complainant is entitled to recover litigation costs and expenses, including witness fees and reasonable attorney's fees. An itemization of such costs and expenses, including supporting documentation, must be submitted by the Complainant to Respondent within thirty days from the date of this order. Respondent shall have fifteen days thereafter within which to challenge payment of the costs and expenses sought by the Complainant. The parties shall confer before presenting me with the documents.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Respondent shall reinstate Complainant to her former position with the same pay, terms, conditions and privileges of employment that she would have received if she

had continued working from May 7, 2011 through the date of the offer of reinstatement.

2. Respondent shall pay Complainant back pay in the amount of \$59,800.00 with interest.
3. Respondent shall pay to Complainant the sum of \$6000.00 in compensatory damages.
4. In the event that it is impossible to reinstate Complainant to her former position, the Respondent will pay Complainant front pay, \$303,047.
5. Respondent will provide Complainant with a neutral employment reference.
6. Counsel for Complainant shall have 45 days from the date of this Decision to file a fee petition.

**DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE**

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1980.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed

thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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