In the Matter of:

Keith J. Folger,
Complainant

v.

SimplexGrinnell, LLC,
Respondent

RECOMMENDED DECISION AND ORDER
DENYING CLAIM

This proceeding arises from a complaint filed by Mr. Keith Folger against SimplexGrinnell, LLC, alleging violations of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. § 1514A (hereinafter “the Act”). Enacted on July 30, 2002, the Act provides the right to bring a “civil action to protect against retaliation in fraud cases” under section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Security Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78o(d)). Specifically, the law protects so-called “whistleblower” employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. § 42121(b). 18 USC § 1514A(b)(2)(B).

PROCEDURAL BACKGROUND

On March 7, 2012, the Complainant, Keith Folger, filed a Sarbanes-Oxley whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U.S. Department of Labor. On May 13, 2013, after conducting an investigation, OSHA’s regional director issued the Secretary’s Findings, dismissing the complaint. Subsequently, Mr. Folger filed his objections
with the Office of Administrative Law Judges, U.S. Department of Labor (OALJ). A formal hearing was held before me in Washington, DC, on July 28 and 29, 2014, at which times the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainant’s Exhibits (CX) 1-24, Respondent’s Exhibits (RX) 1-27, and Administrative Law Judge Exhibits (ALJX) 1-2 were admitted into evidence.

On September 3, 2014, I issued an Order providing the parties time to submit post hearing briefs. The Complainant and Respondent filed post-hearing briefs on October 7, 2014. The Claimant and the Respondent both submitted a Reply Brief.\(^1\) I have based my decision on all of the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties.

**STATEMENT OF THE CASE**

**Background**

The Respondent, SimplexGrinnell LLC, specializes in delivering fire protection and life safety systems to customers nationwide. It is a subsidiary of Tyco International, a prominent publicly traded company, with stock registered on the NASDAQ National Market under the symbol TYC. The Complainant worked for Respondent from July 2000 until his termination on October 5, 2011.

**HEARING TESTIMONY\(^2\)**

*Keith J. Folger*

The Complainant, Keith J. Folger, resides in Baltimore, Maryland (Tr. 39). He completed high school and worked several jobs before completing a course at the Arundel Institute of Technology (Tr. 40). In October 1993, he began working at Executone. He performed installation and service work of nurse call and emergency call systems. The systems, frequently found in hospitals and nursing homes, are designed to alert medical personnel in the event of a patient going into cardiac arrest, falling or experiencing some other form of acute injury (Tr. 41).

In July 2000, Executone was purchased by Tyco/Simplex, and Mr. Folger became an employee of Respondent (Tr. 41). He continued doing the same work for Respondent in the Baltimore district office. Mr. Folger typically received a service call assignment on his laptop computer. If the service call concerned an emergency, he made it his first assignment of the day. Mr. Folger also performed installation service during his tenure.

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\(^1\) By letter dated November 16, 2014, despite the fact that the time for submitting evidence had passed, and neither party had been granted leave to submit additional evidence into the record or a response to the opposing party’s reply brief, Mr. Folger’s counsel submitted a copy of the death certificate of Mr. Folger’s father and his obituary, in order to correct a “factual error” in the Respondent’s Reply Brief. As no objection has been lodged by the Respondent, I will take judicial notice that Mr. Folger’s father died on July 21, 2010, and his funeral was held on July 31, 2010.

\(^2\) The summary below is taken from the Hearing Transcript (Tr.).
In addition to service calls and installations, Mr. Folger also worked on testing and inspection of the systems at various locations in the greater Washington metropolitan area (Tr. 42). The frequency of an inspection depended on the contract with the individual facility. Mr. Folger received a notification on his dispatch queue, and coordinated his inspection schedule with a security technician (Tr. 43). A typical inspection took between one and two days. After completing the inspection, Mr. Folger generated a report to the Respondent’s office and sent a copy of the report to the client (Tr. 44-46). The report was then entered into a central database. If any deficiency was specified in the report, Mr. Folger followed up and attempted to correct it as soon as possible (Tr. 48). Mr. Folger was the only nurse call inspector at Simplex in the Washington area:

Q. [....] So if an inspection was going to be done, you would be the guy to do it?  
A. Only me.  

(Id.).

At some point in 2006, after hearing some billing complaints from several major clients, Mr. Folger noticed that Respondent was “sending out bogus invoices that either didn’t have service request numbers or didn’t have a service ticket to match to them” (Tr. 50). Mr. Folger suspected that Respondent, “for lack of better words, was cooking the books” (Id.). Mr. Folger raised this issue with Tim Gioutlos, his immediate supervisor (Tr. 53). He also discussed the problem with Jenny Sutherland and Dan Reams, both of whom did billing at the time. Finally, Mr. Folger alerted Frank Peluzo, who operated as the total service manager. As total service manager, Mr. Peluzo oversaw multiple departments, including inspections, service, electronic service, and sprinklers (Tr. 54).

None of these individuals took Mr. Folger’s concerns seriously, and Mr. Peluzo “would basically just blow me off whenever I was in the office” (Tr. 56). Mr. Peluzo also told him to “stay out of it” and “[j]ust do your job” (Tr. 60). According to Mr. Folger, Respondent was billing clients with bogus invoices while also providing them with future credits to account for the erroneous charges. Someone at the office told Mr. Folger that the corporate department “did not see” the invoices and credits at the same time. Mr. Folger suspects that Respondent implemented this scheme to create the appearance of increased revenue (Tr. 58). All the individuals Mr. Folger contacted about the billing irregularities have since been reassigned or are no longer employed with Respondent (Tr. 64-65).

In 2010 or 2011, Mr. Folger again started noticing inconsistencies with Respondent’s billing and inspection practices. Certain inspection assignments on his dispatch queue “just disappeared . . . right off the database” (Tr. 68). Mr. Folger repeatedly brought up the issue of missing inspection assignments with several individuals. He first informed Andrea Matthews, who worked in administration, about his concerns with the dispatch system (Tr. 69). Mr. Folger

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3 Mr. Folger estimated that Respondent services hundreds of clients in the D.C., Maryland, and northern Virginia area (Tr. 42).

4 Mr. Folger did not remember exactly when he uncovered these concerns and did not recall when he contacted the individuals referenced below.
could not “get any answers” from Ms. Matthews and proceeded to contact Leah Henderson, a customer contracts administrator (Tr. 71). Ms. Henderson suggested that maybe the customers cancelled the contract. Mr. Folger did not think clients would cancel an inspection contract, because they were happy with his performance and they had already paid for the service (Tr. 71-72). At another time, Ms. Henderson raised the possibility that someone else did these tests and inspections. Mr. Folger did not accept this explanation, as he and his security technician were the only employees who performed these services (Tr. 74).

Mr. Folger also told Doug Beamon, test and inspections supervisor, about the problem with the missing assignments. Mr. Beamon “flat-out blew me off and that was it” (Tr. 73). He additionally tried to notify Sergio Victores, the total service manager. Of all the people Mr. Folger contacted, Mr. Victores was highest in the chain of command. Mr. Victores would not sit down and discuss the issue with him (Tr. 76).

Mr. Folger attempted to notify Jim Drenning, who was his direct supervisor at the time (Tr. 78). Each time he broached the subject, Mr. Drenning told Mr. Folger he was not “getting involved in that mess” and that Mr. Folger needed to bring his concerns to another department (Tr. 78).

Mr. Folger explained his motivation for making these complaints as follows:

For one thing . . . I worked on these systems all my career. Put a lot of lives in danger a lot. I didn’t like that, and I’ve always been an honest person. I don’t like the dishonesty. They were flat-out ripping the customers off, and they knew it, and they continue to do it and nobody would listen to me. Nobody.

(Tr. 80).

Mr. Folger continued to alert the Respondent about the missing dispatch inspections when he contacted Jim Horner, who was hired as Mr. Beamon’s replacement (Tr. 81). According to Mr. Folger, soon after being hired, Mr. Horner was warned not to speak to him (Tr. 82). Mr. Folger continued pressing Mr. Horner about the missing inspections. Mr. Folger reminded him that this was a “huge liability issue” where many lives were placed at risk and “customers could be sitting on a time bomb and not even know it” (Tr. 91). Mr. Horner replied that clients would receive a credit.

On September 9, 2011, Mr. Folger was in the office preparing a service request form for Prince George’s Hospital, a client in Maryland (CX-25). As Mr. Folger was working, Kevin Brydge, a fire alarm technician, approached him. That day, Mr. Brydge was temporarily filling in for Mr. Drenning and was dealing with service calls and customer requests (Tr. 108).

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5 Ms. Matthews and Ms. Henderson are not supervisors (Tr. 147).
6 According to Mr. Folger, Mr. Victores was subsequently fired for his alleged involvement in cooking the books. The company’s explanation for Mr. Victores’ departure was his family’s desire to return to their hometown in Florida (Tr. 89-90).
7 Mr. Horner told Mr. Folger that Mr. Beamon was terminated for “cooking the books” for several departments, including nurse call, security, and fire alarm inspections (Tr. 81, 85).
8 Mr. Folger knew Mr. Brydge as a colleague for about 10 or 11 years (Tr. 106).
According to Mr. Folger, Mr. Brydge was “harassing me the whole time I was in the office” (Tr. 108). Mr. Brydge kept telling Mr. Folger that he needed to go out and make money. Mr. Folger asked him to stop. Mr. Brydge would “stop a little bit” but would then repeat his comments even as Mr. Folger moved to other parts of the office. 9 Rene Gottermeyer, who worked at accounts payable, also made some comments about Mr. Folger needing to make money. Ms. Gottermeyer was not “as malicious” as Mr. Brydge and she stopped when Mr. Folger told her to leave him alone (Tr. 114). 10

Mr. Folger did not recall saying “If I was 10 or 15 years younger, you can ask my friends what I would do” (Tr. 112). He denied threatening Mr. Brydge in any way or making any statements about beating Mr. Brydge up (Tr. 113). Mr. Folger denied speaking to Ms. Henderson that day (Tr. 113).

On September 14, 2011, there was a town hall meeting, with supervisors, managers, and employees in attendance (Tr. 118). Mr. Folger was at the meeting. He wanted the meeting to end because he had a lot of service issues to take care of, and he did not know how long the meeting would last (Tr. 119). During a lunch break, Mr. Drenning approached Mr. Folger and said, “you know everyone hates you” (Tr. 119). Mr. Folger did not get a chance to respond and Mr. Drenning walked away without saying anything else. After the conclusion of the meeting a few hours later, Mr. Drenning again approached Mr. Folger and asked him to stop by the office (Tr. 120). Mr. Drenning said that Greg Patton, the general district manager, wanted to meet with Mr. Folger, without providing any other information (Tr. 121).

Mr. Folger went upstairs to Mr. Patton’s office. He saw Mr. Patton sitting in a nearby conference room with Joyce Peugh, who works in human resources (Tr. 122). Mr. Drenning was also present. Mr. Patton informed Mr. Folger that an employee claimed that he made a “partial threat.” At first, Mr. Patton would not disclose the substance of the complaint or the identity of the employee who made the claim.

After some time, Mr. Patton described the extent of the alleged threat as follows: “one of these days when I walk into the building” (Tr. 123). Mr. Folger denied making this statement, and also maintained that the statement itself did not amount to a threat. Mr. Patton asked Mr. Folger to sign a written warning, and told him that he would be immediately terminated if he did not participate in the company’s Employee Assistance Program (“EAP”) (Tr. 124; CX-8). According to Mr. Folger, EAP was “some type of treatment program, anger management I guess you could call it, that they were trying to force me into going into” (Tr. 125). Mr. Folger refused to sign any of the paperwork and “was not going to go into treatment for something that never happened” (Tr. 126).

Mr. Folger conceded that he was upset because “I had just been ambushed” (Tr. 124). He told everyone in the room that he needed to take a walk. Mr. Patton responded that he could not leave the office before he signed the documents. Mr. Folger said they could not legally keep him inside. After a few minutes, Mr. Patton agreed to let Mr. Folger go outside. Mr. Folger went to the front loading dock to smoke and Mr. Patton, Ms. Peugh, and Mr. Drenning followed him out

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9 Mr. Folger had previously told Mr. Brydge about his suspicions of Respondent’s widespread fraud (Tr. 109-10).
10 Ms. Gottermeyer is not a supervisor (Tr. 149).
Ms. Peugh gave Mr. Folger a copy of the written warning, which specified that it would become part of Mr. Folger’s personnel file (Tr. 129). At the conclusion of the meeting, Mr. Patton gave Mr. Folger until September 15th to decide if he would agree to the EAP process or be fired (Tr. 131). On September 15th, Mr. Folger called Mr. Patton, letting him know that he would not be signing anything (Tr. 131).

Mr. Folger stated that he refused to sign the EAP referral form because a copy of it would be placed in his personnel file and anyone looking at his file would think “I’m as guilty as sin”:

If I do that, I’m tarnished, real tarnished. If I sign this and go to a counselor, psychiatrist or whatever they’re referred as, they’re going to make me to be some kind of – make me out to be a fruitcake of some sort, that I have emotional issues, mental issues.

(Tr. 190). He was also worried that even if he agreed to participate in EAP, he would not be released from the program until he admitted to something he did not do (Id.).

Mr. Folger did not see any police or law enforcement on site and disputed claims that the police were called at any point (Tr. 130). Mr. Folger did his own research and called the Howard County Police Department and the Maryland State Police. According to Mr. Folger, both law enforcement agencies confirmed that a police officer was not assigned to the Respondent’s location on the day in question (Tr. 131).

In the next few days, Mr. Folger tried to call several numbers that Ms. Peugh provided him at the meeting with Mr. Patton. One of the numbers was for Respondent’s corporate HR office. Mr. Folger reached Hayes Baker at the corporate office. Mr. Baker told him that he would have to sign the EAP form or face termination (Tr. 132).

One day after speaking with Mr. Baker, Mr. Folger contacted Kate Kadis, a corporate HR employee working out of an office in Boston. At some point during his conversation with Ms. Kadis, Mr. Folger was referred to the Respondent’s Concern Line. Mr. Folger initially thought the Concern Line was “an unbiased line with [an] unbiased person that you call in and, you know, make a complaint” (Tr. 133). Mr. Folger was led to believe that the corporate office and the Concern Line are separate entities. He later found out that Ms. Kadis was the Concern Line – “she was playing both sides of the fence” (Tr. 133). Mr. Folger had several phone conversations with Ms. Kadis and asked her to connect him to the ombudsman, who Mr. Folger thought was an outside party (Tr. 135). The ombudsman never reached Mr. Folger and Mr. Folger did not try to initiate contact with the ombudsman (Tr. 136, 156). Mr. Folger did not give Ms. Kadis or Mr. Baker the details about fraudulent invoices and book cooking, because he did not trust these individuals, and was concerned the Respondent would try to “cover it up” (Tr.

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11 Before the disciplinary meeting, Mr. Folger was aware of the Concern Line as a resource for employees. He did not use the Concern Line because he was unofficially “forewarned about ever using it” by several individuals (Tr. 154, 168).
According to Mr. Folger, “they’re ready to terminate me for something I didn’t do. I’m not going to trust her with this information, her or anybody else” (Tr. 138).\footnote{Mr. Folger did not raise the allegations of financial improprieties or other problems with the Respondent’s legal department (Tr. 186).}

Mr. Folger’s official termination notice is dated October 5, 2011 (Tr. 152).

Even though he initially refused to agree to the EAP counseling and was subsequently fired, Mr. Folger made an attempt to get his job back in order to “keep a roof over my head and [have] my bills paid” (Tr. 140). Several days after his termination, he emailed Mr. Patton, who called him back, advising him to get in touch with Ms. Kadis to try to get his reinstatement approved. Mr. Folger called Ms. Kadis, who told him “no and that was the end of that” (Tr. 140).

On cross examination, Mr. Folger denied thinking that the Respondent would be reluctant to fire him on account of him being the only nurse call technician on staff (Tr. 184).

Mr. Folger filed a whistleblower complaint on March 2012. He was not interviewed by an OSHA investigator (Tr. 142). He submitted some handwritten rebuttals to Respondent’s submissions (CX-7, CX-10). He is currently seeking $100,000 in emotional distress damages, stemming from the traumatizing experience of his termination (Tr. 145).

On March 26, 2014, Mr. Folger secured new employment with Alarm Tech Solutions. He performs installation and service work for fire alarm and nurse call systems (Tr. 145).

On around July 14, 2014, Mr. Folger spoke to Mr. Horner on the phone and asked Mr. Horner to get in touch with his attorney. Mr. Horner mentioned that James Maymon “tried to investigate and straighten [out]” the alleged book cooking and that Ms. Matthews and Ms. Henderson were “directed to” perform the book cooking by someone else (Tr. 98-99). Mr. Horner did not provide any additional details during this conversation. Mr. Folger memorialized the conversation by taking notes on a cigarette case (CX-23; Tr. 100).

Mr. Folger testified that Mr. Drenning and Mr. Victores advised him to avoid Mr. Maymon whenever he visited the office (Tr. 452-453).

\textit{Wendell Hayes Baker, III (“Hayes Baker’’)}

Mr. Baker currently works for Scott Safety, a subsidiary of Tyco International (Tr. 193). He was previously employed by Respondent for about 12 years. His last position with Respondent was as HR Director of Eastern Operations (\textit{Id.}). He served in that capacity on September 2011 and worked out of the Northern Virginia district office. He was responsible for overseeing the day-to-day HR operations of Respondent’s mid-Atlantic region (Tr. 204).

On September 13, 2011, Mr. Baker received an email from Greg Patton concerning Mr. Folger (Tr. 194; RX-7). According to Mr. Baker, “[t]his was an escalation of a concern regarding
Mr. Folger and some of his behaviors, and [Mr. Patton] was asking for advice on . . . how to handle that” (Tr. 194).

Mr. Baker received an email attachment of the alleged threat Mr. Folger made before the disciplinary meeting with Mr. Folger took place. According to Mr. Baker, Mr. Folger said, “[i]f I was 20 years younger, you know, I would take him out back, or something to that effect” (Tr. 223). Based on Ms. Henderson’s written description, Mr. Folger appeared agitated and angry (Tr. 223).

Mr. Baker, Mr. Patton, and Joyce Peugh, HR Coordinator of the Baltimore office, reviewed the conversations they had about Mr. Folger. Mr. Patton raised the possibility of workplace violence based on Mr. Folger’s behavior. Mr. Baker also spoke with Ed McDonough, Tyco’s director of security. After some discussion, Mr. Baker made the recommendation that Mr. Folger receive a written warning and a mandatory EAP referral in order to keep his employment (Tr. 195). Mr. Baker did not personally contact Ms. Henderson to inquire about her allegations concerning Mr. Folger (Tr. 219). Mr. Baker did not perform an independent investigation on the nature of Mr. Folger’s threatening behavior (Tr. 220-221).

Mr. Baker outlined several components of the company’s EAP counseling program. There is a voluntary program that all employees can use to call confidentially to seek counsel and advice if they are experiencing financial or personal problems. Another part of the program is designed to provide guidance to managers having problems with employees. A third option, which is relevant to Mr. Folger, is known as mandatory EAP. Under this setup, an employee is required to obtain counseling through the program. The EAP counselor does not disclose any details of the sessions other than to confirm the employee’s attendance and participation in a given regimen (Tr. 196).

Mr. Baker explained that it is standard protocol for employees to have to sign disciplinary actions. The purpose of signing such a document is not to have the employee acknowledge guilt of wrongdoing, but to simply confirm receipt (Tr. 197).

On September 14, 2011, Mr. Patton called Mr. Baker and said that Mr. Folger walked out of a disciplinary meeting; Mr. Patton wanted advice on how to handle the situation. Mr. Baker advised Mr. Patton that in order to remove Mr. Folger from the premises, they would need to give him some more time to consider the documents he was asked to sign (Tr. 198).

Mr. Baker explained that whenever there is an employee who might be a threat, the protocol is to alert local law enforcement either to the premises or to the general area (Tr. 198-199). Mr. Baker did not recall if a police officer came to the site. He remembered that Ms. Peugh contacted the Howard County Police Department (Tr. 199).

Mr. Baker spoke to Mr. Folger on the phone at some point after September 14th: Mr. Patton or Ms. Peugh had given Mr. Folger his cell phone number. During the call, Mr. Baker told Mr. Folger that he needed to sign the document and participate in the mandatory EAP counseling or be terminated (Tr. 200).
Mr. Baker did not remember how many times he spoke to Mr. Folger, though it seemed to be more than once (Tr. 201). In their communication, Mr. Folger did not raise the issue of his disciplinary action being connected to previous complaints of book cooking or financial fraud (Tr. 201). As he was investigating Mr. Folger’s situation, Mr. Baker was not aware of any past complaints of alleged fraud or book cooking (Tr. 204).

Mr. Baker did not recall the specifics of Sergio Victores’ separation from the company. He remembered that there was a “mutual agreement” with Mr. Victores to leave the Respondent for a number of reasons, including performance (Tr. 208). Mr. Victores previously worked as a total service manager in the Miami district office before being assigned to the Baltimore location. After working for some time in Baltimore, he had some performance issues (Tr. 208). Mr. Victores’ separation from the company was not in any way connected to allegations of improper conduct on his part. Had there been any evidence of improper conduct, Mr. Victores would not have received any severance pay (Tr. 209).

Mr. Baker stated that Doug Beamon may have been terminated for cause but he did not recall the exact details (Tr. 209). Mr. Beamon worked as an inspections manager or supervisor and may have had performance problems with his inspections assignments (Tr. 211).

Mr. Baker is familiar with James Maymon, who was the operational service manager, and is currently the Boston district manager (Tr. 213). Mr. Maymon would “come down to all of our district offices routinely, so . . . if there was ever an issue, [he] would be part of it” (Tr. 213).

Mr. Baker was aware of the issue of high inspection volume. Staff in some offices had difficulty completing the inspections in a timely manner (Tr. 214). Credits were given to customers for unfinished inspections in the Washington metropolitan region (Tr. 215). The problem was brought to Mr. Baker’s attention by Dan Bombachi, the Respondent’s finance controller, at some point in 2012 (Tr. 215).

When asked if he experienced “similar situations” to that of Mr. Folger, Mr. Baker stated: “We’ve had individuals that, you know, acted in an agitated manner or made comments that, yes, we sent to mandatory EAP” (Tr. 224). Mr. Baker recounted that one employee who slapped his own face in a meeting with a supervisor was ordered to participate in EAP and was subsequently able to continue his employment (Tr. 224).

On cross examination, Mr. Baker acknowledged that had he been made aware of Mr. Folger’s allegations of financial fraud before the disciplinary meeting, the requirement of participating in EAP counseling would not be as immediate:

Q. Hypothetically now, [Leah Henderson]’s the accuser. You’re telling us, yes, that would’ve been something you would’ve taken into consideration; you might have delayed the action against Mr. Folger just to make sure that there was no possibility that this was a retaliatory act, is that correct?

A. That’s correct.
Robert Boushard

Mr. Boushard resides in Baltimore, Maryland. He was employed at Tyco and SimplexGrinnell for 41 years; he retired in 2008 or 2009 (Tr. 247, 250-251). He started working in fire alarm systems and expanded to nurse call inspection troubleshooting. He has known Mr. Folger for the past 10 years or longer (Tr. 248).

Mr. Boushard is familiar with Mr. Folger’s complaints of book cooking. When servicing fire alarm systems, Mr. Boushard noticed disappearing assignments in the dispatch calls (Tr. 248). According to Mr. Boushard, Mr. Folger told his direct supervisor about the book cooking allegations (Tr. 250).

Brian Smith

Mr. Smith resides in Union Bridge, Maryland (Tr. 252). He worked in sales at SimplexGrinnell from 1984 until 2012. Over time, his job duties changed but his quota requirements remained constant. He was put on notice that he was not meeting his goals and was let go. He currently works as a design engineer for a systems integrator in Virginia (Tr. 253).

Mr. Smith interacted with Mr. Folger when he worked with the Respondent’s healthcare systems. Mr. Folger was a technician, and Mr. Smith worked as a sales person. They often worked on the same accounts, and Mr. Smith dealt with him on a regular basis. Mr. Smith and Mr. Folger talked “on many occasions about issues with billing, wrong billing, crediting back service calls that weren’t legitimate, and customers being charged for technicians that weren’t even there and other situations like that” (Tr. 255).

Mr. Folger told Mr. Smith that he raised the issues of book cooking and fraudulent invoices with several service managers, including Mr. Victores, Mr. Drenning, and Mr. Beamon. There were a few other names Mr. Smith did not recall (Tr. 256). Mr. Drenning told Mr. Folger not to worry about it and to stay out of it. Mr. Smith did not personally witness Mr. Folger’s conversations with Mr. Drenning or any other managers (Tr. 260).

Mr. Smith spoke to Mr. Folger several times a week. He did not witness Mr. Folger threaten anyone (Tr. 258).

No management official ever told Mr. Smith that they were upset at Mr. Folger for making complaints about alleged book cooking (Tr. 261).

James Maymon13

Mr. Maymon is presently employed by the Respondent and serves as the district general manager of the Boston office (Tr. 265). Mr. Maymon previously worked as an operational service manager from August 2008 until July or August 2011 (Tr. 265).

13 Mr. Maymon testified by telephone during the second day of the hearing on July 29, 2014.
As an operational service manager, he worked as a consultant to his superiors and looked at opportunities to improve service deliverables. He noticed that the Baltimore office had a significant past due “inspection situation,” and he tried to work with the local district team to get caught up on the outstanding inspections or take corrective action (Tr. 266). He estimated that about 15 percent of the inspections were past due (Tr. 281). Mr. Maymon travelled to Baltimore on multiple occasions as part of that process. The office experienced significant turnover with management staff, leading to a lot of “turbulence and inconsistency” (Tr. 266).

Mr. Maymon did not recall communicating with Mr. Folger. The problem with past due inspections came to his attention after he reviewed several monthly inspection reports. The Baltimore office is one of Respondent’s busiest locations, and it had a substantial amount of overdue inspections. In instances where it would be impossible to complete an inspection in a given contract, Mr. Maymon and members of the Respondent’s legal team decided to issue vouchers to clients (Tr. 267-268). A group of people came up with the voucher program (Tr. 280).

Mr. Maymon described the previous system of inspections as riddled with “mistakes and sloppiness” (Tr. 270, 277-278). In numerous instances, a computerized system of closing out pending inspections was not supported by accompanying paperwork. As a result, inspection jobs were prematurely closed out based on a verbal acknowledgement (Tr. 270). According to Mr. Maymon, this faulty process was being corrected when the new service manager, Mr. Victores, started working at the Baltimore office.

Mr. Maymon did not receive any information concerning a complaint made by Mr. Folger about missed or fraudulent inspections. Mr. Maymon noted that he would not be dealing directly with the employees. In his management capacity, he dealt only with other management staff.

Mr. Maymon did not have any involvement with Mr. Folger’s disciplinary proceeding or subsequent termination (Tr. 271). He was not aware of anyone being fired for making alleged threats in the workplace (Tr. 272). Mr. Maymon was unaware of any employee reporting the problem of inspection backlogs (Tr. 273).

Mr. Maymon had some minimal contact with Doug Beamon. His recollection was that Mr. Beamon left the company for personal reasons and moved to the Southwest (Tr. 74).

Mr. Maymon did not find evidence of alteration of any books or records concerning the company’s inspections (Tr. 278).

Respondent’s in-house legal staff was aware of Mr. Maymon’s investigation of the inspections problems (Tr. 279).

Mr. Maymon and his team created a program called MapPoint to better manage the inspections in different geographical areas. He also hired additional inspectors and associate inspectors to manage staffing levels and minimize the business backlog (Tr. 289-290).
Kevin Brydge

Mr. Brydge has worked at SimplexGrinnell for 16 years (Tr. 295). He is currently a fire alarm service technician. He previously worked as an inspector for the company.

Mr. Brydge described Mr. Folger as a friend. They met through work about 8 or 9 years earlier (Tr. 296). They spoke on the phone several times a week about work and non-work-related topics.

Mr. Brydge often saw Mr. Folger in the office when he made copies, attended meetings, or submitted his timesheet (Tr. 298). Mr. Brydge explained that Mr. Folger spent more time in the office than he did, and usually took longer to fill out paperwork.

On September 2011, Jim Drenning was the service supervisor. While Mr. Drenning was on vacation, Mr. Brydge took over some of his assignments, including clerical work and liaising with customers (Tr. 300).

On September 9, 2011, Mr. Folger confided to Mr. Brydge that everyone hated him and that he “had a target on his back” (Tr. 302). This was a general comment and Mr. Brydge did not know who it was directed to or why. Mr. Brydge did not tell Mr. Folger that everyone in the office hated him. Mr. Folger appeared to be more stressed out and tired than usual that day (Tr. 302).

Mr. Brydge and Rene Gottermeyer were joking with Mr. Folger that he should get back to work and make some money. According to Mr. Brydge, everyone hears these comments at the office (Tr. 303). Mr. Brydge denied following Mr. Folger around. He did see Mr. Folger while both men were taking a smoke break at the loading dock (Tr. 304). Mr. Brydge was trying to help Mr. Folger by showing him how to efficiently input paperwork into the new computer system (Tr. 305, 326-327).

Mr. Brydge was in his office working on paperwork when Mr. Folger came in and commented, “if I was 10 to 15 years younger, you can ask my friends what I would do” (Tr. 328). This was a broad statement and Mr. Brydge was not sure who it was directed to; he assumed Mr. Folger was referring to him. Mr. Folger did not try to hit Mr. Brydge at any point. Mr. Brydge did not feel threatened by Mr. Folger (Tr. 328). He did not tell Mr. Folger he wanted to fight him at any point (Tr. 304).

Mr. Brydge had a conversation with Kate Kadis at HR some time afterward on September 9th, when she called him and said someone had made a complaint against Mr. Folger. She asked what “my dealings were with Keith and what our past was and that sort of thing” (Tr. 309). Mr. Brydge told Ms. Kadis about Mr. Folger’s comments. Mr. Brydge also phoned Mr. Drenning, who was on vacation, and briefed him on the day’s events concerning Mr. Folger (Tr. 333). Mr. Brydge did not recall if he told Mr. Drenning that Mr. Folger threatened him (Tr. 335). Mr. Brydge also had a talk with Ms. Henderson, though he did not remember if he brought up Mr. Folger (Tr. 335).
Mr. Brydge did not know that Ms. Henderson was the one who made the complaint against Mr. Folger. He assumed an administrative employee named Shekisha, who Mr. Folger spoke to on September 9th, made the complaint (Tr. 337).

Mr. Folger later spoke to Mr. Brydge on the phone and said that the company was forcing him to sign some papers obligating him to attending counseling, after someone made a complaint about him to HR (Tr. 306). Mr. Brydge advised Mr. Folger to sign the papers and participate in the counseling so that he could retain his job. Mr. Brydge believed company policy dictates that an employee must go to counseling after being faced with a complaint (Tr. 307). Mr. Folger told Mr. Brydge he would not be signing the documents (Tr. 308). Mr. Folger thought that by signing the papers, he would be admitting guilt of doing “stuff with children . . . things like that” (Tr. 308). A few weeks afterward, Mr. Folger left a voicemail on Mr. Brydge’s phone, saying that he was leaving, that the company was picking up his computer, and wishing Mr. Brydge a good life (Id.).

Mr. Brydge heard Mr. Folger making complaints about book cooking over the past 3 to 4 years. At first Mr. Folger did not tell Mr. Brydge what he meant by this. Over time, Mr. Brydge learned from other people that there was a rumor of a dispatcher named Dan billing calls before they were done in order to maximize revenue (Tr. 310). This allegedly occurred a few years before Mr. Folger’s termination. John Collins was the supervisor at that time, before Jim Drenning took over the position (Tr. 311). At one point, Mr. Brydge was present during a conversation between Mr. Folger and Mr. Collins about overdue inspections. Mr. Brydge did not remember what Mr. Collins’ response was.

Mr. Brydge did not tell Mr. Folger, “keep your head down and don’t say anything” with respect to the book cooking allegations (Tr. 312). No one at the company told Mr. Brydge he needed to keep his head down (Tr. 313).

Mr. Brydge’s opinion about the veracity of Mr. Folger’s allegations is as follows:

My opinion was, is that it was his go-to thing. Whenever things weren’t going his way, then he can say hey, you guys are cooking the books. And I think that he kind of built up a - - he was kind of like building up almost like a case; that way whenever things don’t go his way, then he could say you guys are cooking the books. (Tr. 312).

Mr. Brydge also addressed Mr. Folger’s thoughts on being the only nurse call technician at the company:

I thought that Mr. Folger thought that he could – you know, he was very important to the company, he was the last one, and if anything was to happen to him, the nurse call business would not survive. So, he would’ve been – he
thought that he was a very important person in the service department, keeping
the nurse call business alive, so to say. (Tr. 313). When asked if he thought Mr. Folger was “onto something” with his allegations, Mr. Brydge responded, “I think that there were some concerning issues, but I think he was . . . he was kind of overboard on it . . . I started to feel that . . . he was trying to make something out of nothing at a certain time” (Tr. 324).

Mr. Brydge testified that he was aware of the rumor of Doug Beamon falsifying inspections and being fired as a result (Tr. 319).

Mr. Brydge overheard a manager discussing a remediation plan involving issuance of vouchers for overdue inspections (Tr. 324).

Mr. Brydge was familiar with Sergio Victores, but did not know why he left the office (Tr. 340).

Leah Henderson

Ms. Henderson has worked at Respondent’s Baltimore office for 6 years; her current position is inspection scheduler (Tr. 342). She described her interaction with Ms. Folger as friendly, at least in the beginning (Id.).

Ms. Henderson previously worked at the billing department and did some billing and invoices for Mr. Folger’ assignments (Tr. 344). Mr. Folger’s service tickets were generally longer and more detailed compared to those of other technicians. Mr. Folger spent more time in the office than other technicians (Tr. 345). According to Ms. Henderson, Mr. Folger’s frequent socializing became a distraction to the staff:

He would sit down and talk about personal issues and things like that, and it became a problem where people were telling him, supervisors . . . you can’t be in here. He was distracting people in the office that work there, but also just not having any billable time. He was just kind of sitting around talking. (Tr. 345).

Ms. Henderson was familiar with the issue of inspections not being completed on time. At one point, Sergio Victores told her that the company missed its inspection forecast on a contract with the Library of Congress. Ms. Henderson opened up a heat ticket, which raised the issue up the chain of command. When generating a heat ticket, Ms. Henderson was able to see the “footprints” for all previous work on the contract in the database. She saw that the contract was closed 2 months beforehand, which led her to suspect that someone closed it out prematurely (Tr. 347). Ms. Henderson explained the issue to Mr. Maymon, who visited the office to figure out what went wrong (Tr. 348). Doug Beamon was fired as result of mishandling the Library of Congress contract (Tr. 362). Ms. Henderson later heard rumors that Mr. Beamon had closed out other inspection contracts that he wasn’t supposed to (Id.). On cross examination, Ms.
Henderson explained that when she was an employee at the billing department, she would not have been aware of any problems concerning missed inspections:

Q. If there was a problem with inspections not being done on various facilities, would that be something that probably you think would've come to your attention if it was happening on a widespread basis?

A. No. It would now because of the role that I play at the office, but at that time I wasn't even anywhere near that department, so, no, I wouldn't know.

(Tr. 361).

Mr. Folger did not bring up the problem of missed inspections to Ms. Henderson (Tr. 348). He did not bring up allegations of book cooking with her (Tr. 356, 366).

On September 9, 2011, Mr. Folger walked over to Ms. Henderson’s desk and said that some people were making fun of him. At first Ms. Henderson did not pay attention to him and focused on her work. After a while, she asked who was making fun of him. Ms. Folger responded that it didn’t matter, but that Kevin Brydge made him mad (Tr. 349). Ms. Henderson elaborated:

I just remember him saying, if I were 20 years younger, I would’ve beat him up. And I kind of froze in my – like, okay, now you got my attention. And then he said, one of these day[s] I just might, or something like that. And so then that’s when I kind of looked up at him, and I saw someone mentally, physically, deteriorating in front of me. He just looked full of rage.

Which isn’t the first time that I’ve seen Keith look like that, but this looked worse. His face was shaking and he was furious. And so I was – I looked up at him to see what was going on, and then he said, and one of these days I might just come back and – And so that’s when I said, Keith, you can’t say things like that. You know, I was upset and I was scared at that point. And I’m looking at him and I’m feeling fearful now because he’s standing over me and he was looking furious. And it felt like, I guess violent. I don’t know how to explain it, but I was definitely nervous. And then when I said you can’t say things like that, he walked off mumbling and yelling and whatever he was saying. I don’t remember the rest because I think in my mind I’m just sitting there frozen, like I don’t know what to do.

(Tr. 349-350). Ms. Henderson tried to go back to work but Mr. Folger’s comments kept going through her mind, and suddenly “a light bulb turned on” (Tr. 350). She was concerned that if she didn’t say anything, Mr. Folger might come back and do “something violent in this day and age of people shooting and carrying on like they do” (Tr. 351).
She decided to contact Joyce Peugh to discuss the issue. She met with Ms. Peugh and Greg Patton the following week, on September 13, 2011, and recounted Mr. Folger’s statements (Tr. 351). Ms. Peugh and Mr. Patton asked Ms. Henderson to prepare a written narrative of what transpired (Id.; RX-2). They did not tell her what to write and did not express a desire to get back at Mr. Folger for anything (Tr. 351). Ms. Henderson did not fabricate the written statement (Tr. 353). She explained that she felt the need to report Mr. Folger’s behavior even though she considered him a friend: “I care about Keith. I cared about him at the time. I just knew that he was getting angrier and angrier. And caring about someone doesn't mean that you can't be fearful of them also and watching what's going on” (Id.).

Mr. Folger later called Ms. Henderson. He sounded angry and upset. Ms. Henderson did not tell him she made a complaint because she was scared. He expressed displeasure about having to go to counseling and said he would not be signing the document. She told Mr. Folger she thought counseling might be a good idea (Tr. 352). Ms. Henderson explained that Mr. Folger’s father had recently passed away and that his mother was ill. She figured the stress with his family situation was contributing to his anger and that counseling could help him (Tr. 353). She did not report his call to anyone (Tr. 384).

After Mr. Folger was terminated, Ms. Henderson heard from a co-worker that he had been making allegations about cooking the books (Tr. 356). At some point when Mr. Folger still worked at the company, Ms. Henderson overheard him saying that there were a lot of missed inspections. This was at the time when some of the Baltimore territory was being split into the Northern Virginia office (Tr. 357).

**Gregory Patton**

Mr. Patton is currently the district general manager of Respondent’s Baltimore office (Tr. 391). He assumed this position on January 2011. Before his disciplinary proceeding, Mr. Folger did not inform Mr. Patton of any issues concerning book cooking or missed inspections (Tr. 392).

Mr. Patton became aware of the problem of missed inspections because he participated in conference calls with the D.C. Metro office general manager who was implementing the voucher program. Mr. Patton explained that on November 2010, before his arrival, 60 percent of the customers in the Baltimore office were transferred to the D.C. Metro office (Tr. 393).

On September 13, 2011, Joyce Peugh contacted Mr. Patton and asked him to come to her office to discuss an employee complaint. Ms. Henderson was already in the office when Mr. Patton arrived (Tr. 394). Ms. Henderson said that she witnessed a particular type of behavior from Mr. Folger she had not seen before. Ms. Henderson relayed Ms. Folger’s comment as follows, “someday I may come into this office and--” (Tr. 395). Mr. Folger’s statement and the look on his face made Ms. Henderson nervous. Mr. Patton asked Ms. Henderson to write and sign a statement of what transpired because “I wanted to know how serious she was about

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14 Ms. Henderson told Ms. Peugh she wanted to meet with her on Monday, September 12th. Ms. Peugh advised her to wait until Tuesday, the 13th, because Mr. Patton would also be available to attend the meeting that day (Tr. 375-376).
bringing these concerns” (Tr. 395). Mr. Patton and Ms. Peugh did not tell Ms. Henderson what to write. Mr. Patton did not communicate with Mr. Brydge about the allegations and kept Ms. Henderson’s statement confidential for the time being (Tr. 421).

As Ms. Henderson was writing her statement, Mr. Patton turned to Ms. Peugh and asked what she thought of the situation (Tr. 396). Mr. Patton works on the second floor of the building and does not interact with the service employees on the first floor. Ms. Peugh said, “I’d hate for something to happen and we’ve done nothing” (Tr. 396). Mr. Patton agreed with this sentiment. He decided to contact Hayes Baker for more guidance on the matter (Id.).

Mr. Patton initially stated that aside from getting Ms. Henderson’s oral and written testimony, he did not speak to other witnesses or employees to learn more about Mr. Folger’s demeanor (Tr. 424). On redirect, Mr. Patton testified that he also spoke to Rene Gottermeyer and Kevin Brydge (Tr. 446). Ms. Gottermeyer told Mr. Patton that she spoke to Mr. Folger about family issues, and did not think he behaved in an extreme manner. Mr. Brydge shared some frustration about Mr. Folger’s attitude (Tr. 447).

Mr. Patton could not reach Mr. Baker right away and sent him an email (Tr. 397; RX-7). After the meeting with Ms. Henderson, Mr. Patton also emailed Ms. Peugh, Rick Aggerall, his boss, and Ed McDonough, head of security, instructing them to prepare for Mr. Folger’s disciplinary process (RX-4). Mr. Patton explained that he planned for “an all hands meeting” where everyone would be involved, because he was not familiar with the staff and the business (Tr. 397-398). In preparation for the meeting, Mr. Patton and Mr. McDonough made arrangements for a police officer to be nearby “in case there was any issue” (Tr. 400).

On September 14th, Mr. Patton met with Mr. Folger in a common area office (Tr. 400). Mr. Drenning and Ms. Peugh were also present. Mr. Patton handed Mr. Folger the written warning and the EAP referral form (Tr. 400). Mr. Patton stated:

A. Keith was upset. And I recall telling him that, you know, a condition of employment is just to get assistance, right? That’s what the company wants to make sure that he’s getting some assistance with whatever has caused his behavior.

Q. OK. And did he say whether he had made a threat or partial threat or anything like that, or did he deny—

A. He did not. I believe he denied it.

Q. Okay. Did he express any emotions while you were in the meeting?

A. Oh, yeah.

Q. Tell the Judge.

A. He was distraught, very upset and frustrated and angry, you know, that we were questioning his integrity.

(Tr. 401). Mr. Folger wanted to leave the office to smoke outside, and Mr. Patton told him to hand in any remaining company property in his possession. Mr. Folger gave him a company cell phone. Mr. Patton followed Mr. Folger outside towards the back of the building. Mr. Folger “became angry, then turned around, told me to stop following him, he’s not an animal” (Tr. 402).
At this time, Mr. Patton called Mr. Baker and described the situation. Mr. Hayes informed Mr. Patton that Mr. Folger needed to understand that if he left the building and did not agree to the EAP counseling, he had made a decision and would be terminated. Mr. Patton asked Mr. Baker to allow the meeting to continue outside while Mr. Folger smoked (Tr. 403).

The conversation outside with Mr. Folger continued for another 45 minutes. Mr. Folger kept “recalling a lot of historic events and talking about his frustration” (Tr. 404). Mr. Patton tried to reassure him and said, “look, Keith, you can keep your job if you just make this decision, go get some assistance” (Id.). Mr. Patton called Mr. Baker again at this time. Mr. Baker instructed Mr. Patton to provide Mr. Folger with contact information for the ombudsman’s office, the Concern Line, and other resources. Ms. Peugh handed Mr. Folger this information and Mr. Patton gave Mr. Folger an additional day to make the decision on whether to sign the EAP referral paperwork (Id.).

Mr. Patton knew that after the meeting, Mr. Folger contacted Kate Kadis. Mr. Patton did not know if Mr. Folger contacted any other employee (Tr. 405, 406).

Mr. Patton was not aware of any previous complaints of book cooking or fraud on Mr. Folger’s part (Tr. 406). Mr. Patton did not have a motive to get back at Mr. Folger for any issues Mr. Folger may have raised internally (Id.).

According to Mr. Patton, Sergio Victores left the Baltimore office because he and his family wanted to return to Florida. Mr. Victores received a severance package, and employees who leave for performance reasons are not given severances (Tr. 408-409).

Mr. Patton was aware that the Baltimore office implemented a voucher program. According to Mr. Patton, past due inspections occur in every office for a number of reasons. Sometimes there is staff turnover or employees get sick and take leave. Sometimes customers push off an inspection for whatever reason (Tr. 411). Mr. Patton did not know the specifics of why the voucher program was put in place in Baltimore (Tr. 412).

Mr. Patton stated that the company releases monthly reports of past due inspections. It is typically the job of the total service managers in each office to monitor these reports (Tr. 415).

Mr. Patton stated that some law enforcement were in the area during Mr. Folger’s disciplinary process. His receptionist phoned him and asked if they were still needed. The police did not intervene and Mr. Patton did not see them personally (Tr. 442-443).

Mr. Patton did not try to dissuade any employees from using the Concern Line or any other company resources (Tr. 447).

**EXHIBITS**
The following exhibits were admitted.\(^{15}\)

*Complainant’s Exhibits:*

**CX-1**

This is an email chain from Christopher Macola, SimplexGrinnell technical rep. to Jim Drenning. On December 30, 2011, Mr. Macola emailed Mr. Drenning, writing, “You all need to get Keith back!” and “Things are bad and they’re only going to get worse as time goes on.” On January 3, 2012, Mr. Drenning replied, noting that it was unlikely that Mr. Folger would be reinstated but asking to hear more specific reasons for the “grim assessment of the present and future situation.” Mr. Macola responded, writing that nurse call is a difficult field to be in and that increasing workload and a reduced staff necessitated Mr. Folger’s reinstatement. On January 4, 2012, Mr. Macola forwarded the email chain to Mr. Folger, asking him to keep the information private.

**CX-2**

This is a set of emails involving Mr. Folger and various SimplexGrinnell representatives. The email chain starts on October 7, 2011 and ends on October 11, 2011. On October 7th, Mr. Folger emailed Mr. Patton, asking for a meeting “so we can hopefully straighten everything out and I can get back to work doing what I love doing.” Mr. Patton forwarded the correspondence to Kate Kadis, asking for guidance on how to proceed. Ms. Kadis sent the inquiry to Hayes Baker, noting that “[u]nless it’s regarding the term process, etc., I would not think Greg needs/should meet with him.”

**CX-3**

This is a set of emails involving Mr. Folger and several SimplexGrinnell representatives. On January 10, 2012, Mr. Folger emailed Mr. Patton, with a copy to Mr. Drenning and another individual, asking to “talk about the possibility of reinstating my employment.” Mr. Folger laid out several reasons for reinstatement, including the urging of “many concerned Nurse Call customers who feel that they are not getting the high level of service,” as well as his continued dedication and experience. On January 11, 2012, Mr. Patton forwarded the email to Mr. Baker, expressing a worry that Mr. Folger might be soliciting Respondent’s clients “as there is no way they would have his personal contact information.” Mr. Patton also noted that he had not received customer feedback that would support Mr. Folger’s claims. Mr. Baker replied to Mr. Patton the same day, indicating the following: “Recommend a response outlining that the matter of his employment in Baltimore has been settled and that we ask that he not contact our customers or employees. Believe this is best handled by local management to ensure that he understands that the decision is final at the local level.” A copy of this correspondence was forwarded to Respondent’s counsel on October 19, 2012.

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\(^{15}\) At the hearing, Complainant introduced 24 exhibits but subsequently proffered 26 exhibits. On September 19, 2014, my law clerk confirmed with the parties that all exhibits have been exchanged and that neither party had any objections. As such, I have not issued a supplemental evidentiary order.
This is an email exchange between Kate Kadis, Greg Patton, and Hayes Baker. On October 13, 2011, Ms. Kadis emailed Mr. Patton, copying Mr. Baker, writing that she spoke to Mr. Folger the day before and that he reiterated his desire to return to work and participate in EAP. She wanted clarification on the finality of Mr. Folger’s termination. Mr. Baker responded, noting that he did not recommend a contingent return “due to the implications this would have on the perceptions of your current population.” Mr. Baker added that “We provided Mr. Folger ample opportunity to make a different decision, but he chose termination.”

This is a copy of a handwritten letter prepared by Leah Henderson describing the interaction with Mr. Folger. The letter is signed by Ms. Henderson and is dated September 13, 2011. The letter states the following: “Keith Folger came to my desk on Friday, Sep 9, 2011. He was very agitated and said that everyone is making fun of him. He said Kevin Brydge made him so mad that if he were 20 years younger he would have beat him up. He also said he still may do that. I asked him who was making fun of him and he said that it wasn’t important. He then said it was Renee and Kevin and he may just come in this office and gave me a look without finishing his sentence. I got the feeling that Keith may do some harm to any of us. His face was shaking and he had a look of rage.”

This is a copy of Respondent’s Guide to Ethical Conduct – Do the Right Thing. Page 28 of the guide includes a list of “Speak Up Resources.” It provides phone numbers for the company’s Concern Line and includes contact information for the ombudsman’s office.

These are copies of Mr. Folger’s handwritten notes to OSHA. They include his rebuttals to Respondent’s position statement.

The first page of this exhibit is a copy of the written warning Mr. Folger received on September 14, 2011. The warning is signed by Greg Patton and contains the subject “Threatening Behavior.” Hayes Baker is carbon copied on the letter. The letter notes that on September 9, 2011, Mr. Folger was observed making a statement threatening physical harm to a team member and potentially others. Mr. Folger was required to participate in the EAP program or face immediate termination. The employee signature line, indicating receipt of notice, was left blank.

The second page is a generic Aetna EAP Statement of Understanding. The statement notes that EAP maintains confidentiality, with three exceptions: (1) information concerning child abuse or abuse of disabled adults; (2) if an EAP provider determines that the employee is a
danger to himself or others (suicidal or homicidal); and (3) if there is a court order to produce records. The document notes that there is no cost incurred for participation in EAP, subject to the limits of the program with the employer.

**CX-9**

These are copies of Mr. Folger’s W-2 Wage and Tax Statements for 2008 and 2010. In 2008, Mr. Folger earned a reported salary of $65,441.13. In 2010, he earned a reported salary of $71,133.34.

**CX-10**

This is an email from Mr. Folger to his counsel, dated June 12, 2014, with the subject line “Re: lost wages.” Mr. Folger calculated his average annual income between 2008 and 2010 and included a projected severance amount. The total amount based on his calculations is $196,630.53.

**CX-11**

This exhibit is composed of Mr. Folger’s previous evaluations. One appraisal is dated July 1, 2002 and signed by Tim Gioutlos on December 3, 2002. Mr. Folger received positive reviews for each performance factor and his overall assessment was listed as “outstanding.” A handwritten notation indicates that he received a 6 percent raise for merit and a 3 percent raise for promotion to senior tech. It is unclear who made the notation.

Another appraisal, dated and signed by Tim Gioutlos on October 10, 2003, also contains positive reviews for every performance factor. A handwritten notation shows that Mr. Folger received a 4 percent raise. The notation includes the letters T.G., presumably referring to Mr. Gioutlos. A subsequent review on July 2004 similarly shows positive work performance and a 2.4 percent salary increase.

A review for June 2005 concludes that Mr. Folger exceeded expectations and notes strengths in functional/technical skills, customer focus, informing, and priority setting. It identifies the following development needs: work/life balance, patience, dealing with ambiguity, and composure.

**CX-12**

This exhibit is composed of Mr. Folger’s more recent evaluations. Based on an October 2006 survey, Mr. Folger exceeded expectations. The survey notes the following strengths: functional/technical skills, customer focus, informing, and priority setting. It identifies the following development needs: work/life balance, patience, dealing with ambiguity, and composure.

According to an April 2006 review, Mr. Folger’s performance was marked unsatisfactory in several areas. The inventory in his van was too excessive and not organized. Additionally, it
was noted that he needed to take direction on district objectives. Finally, he was written up for his interactions with customers. Based on the review, he had several incidents, including an incident on March 10, 2006, where he was argumentative. In the space provided for employee comments, Mr. Folger wrote that he never raises his voice or argues “out of disrespect to anyone.”

A review dated December 5, 2007 was positive in every category. Another review dated April 10, 2009 was also positive in every category.

CX-13

This exhibit includes Mr. Folger’s commendations and awards.

CX-14

This is a copy of an email from Greg Patton to Hayes Baker, sent on September 13, 2011. The subject line is “Employee Issue – Safety Concern.” Mr. Patton referenced a complaint against Mr. Folger by a fellow employee following an event on September 9, 2011. Mr. Patton and Ms. Peugh met with the complaining employee, who was concerned and provided a written statement. Based on subsequent conversations with other employees who also interacted with Mr. Folger the same day, Mr. Patton expressed concern that Mr. Folger might pose a threat to the district. Mr. Patton was requesting guidance on how to proceed with protection of staff as well as providing any assistance to help Mr. Folger deal with whatever issues he was experiencing.

CX-15

This is a copy of OSHA’s partial disposition report, dated February 27, 2013. The document notes that Mr. Folger’s complaint against Respondent was dismissed.

CX-16

This is an email between Mr. Folger and Richard Weitzman, an OSHA supervisor. Mr. Folger contacted Mr. Weitzman on February 25, 2013 asking to speak with him before his OSHA complaint was dismissed.

CX-17

These are copies of Mr. Folger’s performance reviews at Executone, the company that was subsequently bought out by Respondent. A 1994 review described his overall performance as superior. A 1995 review described his overall performance as satisfactory. His reviews in 1997 and 1998 were positive and he was deemed to have met or exceeded every requirement as a technician.

This exhibit also includes Mr. Folger’s diploma in computer and communications electronics from the Arundel Institute of Technology. It is dated April 9, 1993.
CX-18

This is a copy of Mr. Folger’s whistleblower application with OSHA, filed on March 7, 2012.

CX-19

This is a copy of Respondent’s Ethics Violation Log for Mr. Folger, dated September 15, 2011. The log includes the following description of the suspected violation: “9-9-11 made statement threatening physical harm to one team member and potentially others.” The log notes that four individuals were interviewed in connection with the investigation, but their identities were not listed.

CX-20

This is a copy of the Problem Resolution section of Respondent’s Employee Handbook. It is undated. According to the handbook, the first “and best” way for an employee to resolve a problem is to discuss it with a direct supervisor. At the employee’s request, the supervisor will arrange an interview with additional levels of management, including the location manager. An employee who does not wish to contact his immediate supervisor can report the problem directly to the location manager. If the previous methods do not resolve the concern, the employee can contact the Employee Voice Line for additional information.

CX-21

This is a copy of an email from Leah Henderson to Greg Patton on September 13, 2011 asking if they can meet for 10 minutes to touch base “really quickly.” This email was forwarded by Ms. Henderson to Respondent’s counsel on July 25, 2014.

CX-22

This is a copy of Aetna’s Employee Assistance Program (EAP), a Manager’s Guide. It includes some warning signs of workplace violence. The exhibit also includes additional background information on the EAP plan.

CX-23

This appears to be a copy of the cigarette case on which Mr. Folger handwrote some information. One side of the case has the following written information: “Jim Mayman is now a DGM in Boston. Horner now work at Reliance Fire Protection.” The other side of the case notes the following: “in a phone conversation with Jim H on 7-14-14 he said that Jim Mayman from Corp knew about the book cooking.”
This is the transcript of James Drenning’s deposition, taken on July 21, 2014. It is outlined at length below as RX-27, one of Respondent’s exhibits.

CX-25

This is a service request form Mr. Folger prepared on September 9, 2011. The client is Prince George’s Hospital in Cheverly, Maryland. The form notes that several pieces of machinery needed to be ordered for Mr. Folger to perform his work in the hospital’s cardiac rehab unit. The exhibit also includes several cover letters with different fax numbers. A list of projects, signed by Mr. Folger and dated September 15, 2011, is also attached as part of the exhibit.

CX-26

This is the transcript of Mr. Folger’s deposition, taken on July 21, 2014. It is discussed in more detail as RX-25, one of Respondent’s exhibits.

Respondent’s Exhibits:

RX-1

This is a letter addressed to Mr. Folger from Kate Kadis, Human Resources Manager, dated October 5, 2011. The letter memorializes Mr. Folger’s call to the Concern Line on September 15, 2011. During the call, Mr. Folger alleged that he was bullied, harassed, and accused of a violent threat and threatened with termination.

Ms. Kadis noted that Mr. Folger’s employment was being terminated, as discussed pursuant to a conversation on October 5, 2011. Mr. Folger’s concerns had been reviewed by the Compliance Committee and the investigation was closed.

RX-2

This is a copy of a handwritten letter prepared by Leah Henderson describing the interaction with Mr. Folger. The letter is signed by Ms. Henderson and is dated September 13, 2011. It states the following: “Keith Folger came to my desk on Friday, Sep 9, 2011. He was very agitated and said that everyone is making fun of him. He said Kevin Brydge made him so mad that if he were 20 years younger he would have beat him up. He also said he still may do that. I asked him who was making fun of him and he said that it wasn’t important. He then said it was Renee and Kevin and he may just come in this office and gave me a look without finishing his sentence. I got the feeling that Keith may do some harm to any of us. His face was shaking and he had a look of rage.”

RX-3

This is a copy of SimplexGrinnell’s Policies and Procedures on workplace violence. Respondent’s employees are prohibited from engaging in workplace violence and are expected to
report all incidents. The document provides guidance on the different methods of reporting such incidents. It also notes that employees can use the Concern Line either as a first step or as an additional step if a previous attempt to make a complaint has not been adequately addressed.

Managers and supervisors must report allegations of violence to their general manager or human resource representative even if the reporting employee requests that the information be kept confidential. In such circumstances, the manager or supervisor should inform the employee that the information will be handled as confidentially as possible, but that it must be disclosed to the extent necessary to conduct an appropriate investigation.

According to the policy, any employee who, in the sole discretion of Respondent, is found to have engaged in workplace violence will be subject to appropriate disciplinary action, up to and including termination. Respondent may also take legal action as deemed necessary and appropriate. Respondent maintains in an employee’s personnel file any records of workplace violence and the resulting disciplinary measures, subject to local law.

RX-4

This is a copy of an email from Greg Patton to Joyce Peugh on September 13, 2011, with the subject line “Keith Folger Meeting.” In the email, Mr. Patton noted that he spoke to Hayes Baker, someone named Rekha, and Ed McDonough from the corporate security group regarding the planned approach with Mr. Folger. They decided that since a number of days passed since the incident with no additional concerns, they would have Keith attend the meeting on Wednesday, and sit with him on Thursday or Friday to address his behavior. Mr. Baker recommended a mandatory EAP participation for Mr. Folger. Mr. Patton needed Ms. Peugh’s assistance in preparing for the meeting by providing contact numbers for EAP and a pre-arranged heads up with an EAP counsellor, a written warning letter go to into Mr. Folger’s file, and a phone number for the police department “just in case.”

RX-5

The first page of this exhibit is a copy of an email chain with the subject line “Release of Information Forms.” James Greer, an Aetna EAP management consultant, forwarded Greg Patton a blank form that AETNA uses for employees. Mr. Patton forwarded this email to Ms. Peugh and asked her to print it out for his signature upon his return. There are two handwritten notes on the upper right hand corner of the page. One is a phone number for “Jim”, a dedicated management consultant. The other is a phone number for HoCo PD [presumably Howard County Police Department] with the notation “will sit in lot [ . . . ] Call when/if required at that time.”

The second page of the exhibit is a Manager’s Guide for Aetna’s EAP program.

RX-6

The first page of this exhibit is a copy of the written warning Mr. Folger received on September 14, 2011. The warning is signed by Greg Patton and contains the subject
“Threatening Behavior.” Hayes Baker is carbon copied on the letter. The letter notes that on September 9, 2011 Mr. Folger was observed making a statement threatening physical harm to a team member and potentially others. Mr. Folger was required to participate in the EAP program or face immediate termination. The employee signature line, indicating receipt of notice, was left blank.

The second page is a generic Aetna EAP Statement of Understanding. The statement notes that EAP maintains confidentiality, with three exceptions: (1) information concerning child abuse or abuse of disabled adults; (2) if an EAP provider determines that the employee is a danger to himself or others (suicidal or homicidal); and (3) if there is a court order to produce records. The document notes that there is no cost incurred for participation in EAP, subject to the limits of the program with the employer.

RX-7

This is a copy of an email from Greg Patton to Hayes Baker, sent on September 13, 2011. The subject line is “Employee Issue – Safety Concern.” Mr. Patton referenced a complaint against Mr. Folger by a fellow employee following an event on September 9, 2011. Mr. Patton and Ms. Peugh met with the complaining employee, who was concerned and provided a written statement. Based on subsequent conversation with other employees who also interacted with Mr. Folger the same day, Mr. Patton expressed concern that Mr. Folger might pose a threat to the district. Mr. Patton was requesting guidance on how to proceed with protection of staff as well as providing any assistance to help Mr. Folger deal with whatever issues he was experiencing.

RX-8

This is a copy of a Report Detail prepared by Kate Kadis in connection with the investigation made after Mr. Folger called the Concern Line. September 15, 2011 is listed as the “report initiated” date and September 22, 2011 is listed as the “follow-up date.”

According to the report, Mr. Folger said that Kevin Brydge, Renee Gottermeyer, and Jim Drenning bullied and harassed him, and Greg Patton and Joyce Peugh unfairly accused him of a violent threat he never made and threatened to terminate him.

According to the report, on September 5, 2011, Kevin Brydge came into the office and started to interrupt Mr. Folger. Mr. Folger said Mr. Brydge repeatedly asked him why he was in the office and whether he did not have somewhere else to be. Mr. Folger said he politely asked Mr. Brydge to leave him alone and Mr. Brydge walked out of the office.

On September 9, 2011, Mr. Brydge and Ms. Gottermeyer started to disturb Mr. Folger when he was doing billing and clerical work. He asked Ms. Gottermeyer and Mr. Brydge to leave him alone but only Ms. Gottermeyer complied. Mr. Brydge told him to leave the office to go out and make money for the company. Mr. Brydge also said, “Everybody in the office hates you.” Mr. Folger repeated that he wanted to be left alone.
On September 14, 2011, during a lunch break after a meeting, Jim Drenning told Mr. Folger that everyone hated him. After the meeting, Mr. Drenning asked Mr. Folger to join him in his office. They then walked to another office where Mr. Patton and Ms. Peugh were waiting. They told him they were aware of a partial threat he made based on the statement, “One of these times when I come into the building,” which they interpreted as a partial threat. Mr. Folger denied making the statement. Mr. Patton and Ms. Peugh forced him to sign an EAP counseling form or be terminated. He had to decide by the following day.

Mr. Folger said that he suffered harassment and that his co-workers hated him as part of a conspiracy to sabotage him and cause him to resign. Mr. Folger said Mr. Patton and Ms. Peugh accused him of making the threat because they wanted to terminate him and avoid paying him 20 years of severance and unemployment.

The report notes some follow-up activity on September 21, 2011. It appears that Mr. Folger called again and denied making the threatening statement. He also remembered that Ms. Peugh said someone wrote and signed a statement about his threat. Mr. Folger asked Ms. Peugh and Mr. Patton for a copy of the written statement but they said no.

The exhibit also includes a Concluding Report prepared by Ms. Kadis. In the course of her investigation, Ms. Kadis interviewed Mr. Patton, Ms. Peugh, Ms. Henderson, Mr. Drenning, Ms. Gottermeyer, and Mr. Brydge.

According to the Concluding Report, Ms. Gottermeyer recalled that Mr. Folger appeared to be in a bad mood and said, “I’m 52 and I don’t need to be harassed.” She also overheard him say, “I’m 52 and I don’t need to take this. If I was 20 years younger…” Ms. Gottermeyer did not overhear the rest of the comment. She said she noticed a change in his behavior that week and was unsure why.

According to the Concluding Report, Mr. Brydge was filling in for Mr. Drenning on the date of the incident. On September 6th, Mr. Folger expressed concern about being overworked and Mr. Brydge tried to coach Mr. Folger on how to be more efficient. Mr. Folger resisted Mr. Brydge’s help. Mr. Folger continued to spend time in the office and told Mr. Brydge that no one in the office liked him. Mr. Brydge told Mr. Folger this was not true; employees were very busy and might not have a lot of time to communicate with him because they were focusing on completing their tasks. Mr. Brydge said that after Mr. Folger left the office, he called and asked why Mr. Brydge said that everyone hated him. Mr. Brydge explained that he did not make this comment, but Mr. Folger argued with him and insisted that he did in fact make the statement. Mr. Folger told him that he felt there was a target on his back, and that management wanted him out of the office. Mr. Brydge reassured him that this was not true. Mr. Brydge said that during the phone conversation, Mr. Folger stated, “If I was 25 years younger I wouldn’t put up with this” and “do I need to call some of my friends to let you know the kind of guy I used to be.” Mr. Brydge dismissed what Mr. Folger was saying and ended the phone call.

Ms. Kadis concluded that disciplinary action, with a written warning and an EAP referral, was appropriate. She contacted Mr. Folger on September 23, 2011 with the results of her investigation. Mr. Folger refused the EAP referral. Mr. Folger also accused Ms. Kadis of not
disclosing her position within the company. Ms. Kadis insisted that she informed him several times of her role in the organization, including during their first conversation. Mr. Folger asked for a referral to the ombudsman’s office. Ms. Kadis replied that she would forward his request to the appropriate parties. Mr. Folger indicated that he would be contacting a private attorney as well as the Labor Department to prove his innocence.

On September 30, 2011, Carrie Smith, Corporate Human Resources Manager, informed Ms. Kadis that the Compliance Committee reviewed Mr. Folger’s case and agreed with HR’s recommendation. On October 4, 2011, Ms. Kadis called Mr. Folger and updated him. She reaffirmed the outcome of the investigation. Mr. Folger called Ms. Kadis on the same day and inquired about her interview with Mr. Brydge. Ms. Kadis told him it was confidential.

RX-9

This is a copy of Respondent’s Guide to Ethical Conduct – Do the Right Thing. Page 28 of the guide includes a list of “Speak Up Resources.” It provides phone numbers for the company’s Concern Line and includes contact information for the ombudsman’s office.

RX-10

This is a copy of a 2004 certification of Respondent’s Guide to Ethical Conduct, signed by Mr. Folger on October 21, 2004. The first page includes the following language: “I’m not aware of any violations of these principles other than those that I have raised with management, the human resources, law and/or audit departments, the Concern Line, the ombudsman, or set forth in the comments box below.” The comments box is left blank.

RX-11

This is a copy of Respondent’s Employee Handbook. Page 10 of the handbook refers to the prohibition on violence in the workplace.

RX-12

This is a copy of the May 13, 2013 Secretary’s Findings for Mr. Folger’s OSHA complaint. The Secretary determined that Mr. Folger did not establish that he engaged in protected activity and that there was no evidence of reported fraud or falsified inspection reports. The Secretary further found that, based on Mr. Folger’s behavior, Respondent would have made the same decision to terminate him even if he had engaged in some form of protected activity.

RX-13

This is a summary of Jim Drenning’s October 24, 2012 sworn interview with an OSHA investigator. He said that Mr. Folger did not complain of billing or inspection fraud during the 6 months Mr. Drenning supervised him. Mr. Drenning was aware that Mr. Folger brought up issues like this in the past. Mr. Folger “was never for a loss of words, [was] always vociferous, and complained about a lot of things.” Mr. Drenning only recently moved from the operations
Mr. Drenning never witnessed an employee intimidate, harass or badge Mr. Folger. If anything it was the “other way around.”

Mr. Drenning’s narrative of the September 14, 2011 disciplinary meeting with Mr. Folger is consistent with his subsequent deposition testimony.

RX-14

This is a summary of Hayes Baker’s October 24, 2012 sworn interview with an OSHA investigator. Mr. Baker was never advised or made aware by any manager or employee of any concerns Mr. Folger may have had involving any financial improprieties.

Mr. Baker’s narrative of the events surrounding and following Mr. Folger’s disciplinary meeting is consistent with his hearing testimony. After the September 14, 2011 meeting, Mr. Folger called Mr. Baker. Mr. Baker made the EAP requirement “crystal” clear and repeated it half a dozen times.

Mr. Baker explained that Respondent’s compliance committee is made up of legal counsel and HR professionals who review the recommendations of the company’s Concern Line investigator. The committee can agree, disagree, or request additional information. In Mr. Folger’s case, the committee agreed that the choice of mandatory EAP participation or termination was valid. Had the committee disagreed, “they would have gone a different direction.”

RX-15

This is a summary of Greg Patton’s October 24, 2012 sworn interview with an OSHA investigator.

Mr. Patton interacted with Mr. Folger on two occasions. The first time was around June 2011 when Mr. Patton introduced himself. Mr. Folger spoke quickly and the conversation revolved around his nurse call customers, where customer service was headed, and to share concerns. Mr. Patton felt that Mr. Folger had a “different” and “quirky” personality. Mr. Folger did not articulate any specific concerns about inspections, testing, revenue, compliance, billing or other related matters. This interaction did not raise any red flags or issues for Mr. Patton. Prior to September or October 2011, no manager ever came to Mr. Patton regarding concerns involving Mr. Folger’s performance or conduct.

Mr. Patton’s narrative of the events surrounding Mr. Folger’s September 14, 2011 disciplinary meeting is consistent with his hearing testimony. Mr. Patton additionally noted that he was not involved in the decision on how to proceed with Mr. Folger or whether to recommended EAP counseling. However, Mr. Patton did perform some “discovery” of
information and had some conversations with the people involved during the day in question, including Kevin Brydge, Leah Henderson, and Renee Gottermeyer, who sat near Jim Drenning.

RX-16

This is a summary of Renee Gottermeyer’s October 24, 2012 sworn interview with an OSHA investigator. Ms. Gottermeyer worked in the accounts payable department from February 2000 until she was laid off on September 26, 2011. She was laid off because her boss was also let go. In accounts payable, she handled invoices, processed expense reports, and performed other clerical tasks.

Ms. Gottermeyer knew Mr. Folger and interacted with him every few days in the office. Their work contact centered around processing his expense reports and some materials bills/paperwork. Her desk was near an outside exit so she would see Mr. Folger as he passed by.

Ms. Gottermeyer had no issues with Mr. Folger’s work performance, conduct, or behavior. Mr. Folger never raised any SOX-related compliance matters with her. The only work-related concern he brought up was about not receiving a commission and not being paid what he felt he was owed. Ms. Gottermeyer recalled some previous behavioral issues with Mr. Folger, where he seemed particularly agitated and had a loud tone of voice as he walked by. The interview notes do not specify a timeline for these previous behaviors.

When asked if she ever felt threatened by Mr. Folger, Ms. Gottermeyer replied, “absolutely not.” At some point toward the end of September 2011, Mr. Folger came by her office but she did not remember the reason. Mr. Folger appeared especially agitated. Usually she would be able to joke with him calm him down, but this time she “could not get him out of his bad mood.”

Ms. Gottermeyer did not observe any employee harass, intimidate or make fun of Mr. Folger. She did not hear anyone say that they hated him and did not make such a statement herself. She explained that she had a good working relationship with Mr. Folger and they often engaged in “good natured teasing” with each other. This week, however, their interaction was different and something “obviously was bothering him.”

Mr. Patton and Ms. Peugh met with Ms. Gottermeyer the following day and mentioned that Mr. Folger may have made a threat toward someone. No one mentioned any compliance or regulatory issues in connection with Mr. Folger.

RX-17

This is a summary of Kevin Brydge’s October 24, 2012 sworn interview with an OSHA investigator. Mr. Brydge has worked as a service technician for the past 10 years. Before that, he worked in the inspection department. He does not supervise anyone and his immediate supervisor is Jim Drenning.
Mr. Brydge has known Mr. Folger in and out of work, and they have been friends for the past 7 or 8 years.

Mr. Brydge described Mr. Folger’s job performance in customer care and fixing equipment as “very good.” In the office, Mr. Folger spent more time with paperwork than any other technician. According to Mr. Brydge, Mr. Folger had multiple confrontations with different managers and employees over the years, mainly dealing with the computerization of records.

Mr. Folger frequently complained about book cooking and issues with billing, inspections, credits, and similar matters. Mr. Brydge stated that Mr. Folger had been making these types of complaints for the past 2 or 3 years, and possibly even earlier. These were generalized complaints and “nothing ever came out of it.” Mr. Brydge did not come across any questionable issues and only heard the rumors. Mr. Folger continued to make complaints frequently – “even more so toward the end of his employment.”

Mr. Brydge had no knowledge of any manager or employee ever taking any types of action against Mr. Folger for his complaints or concerns. He did not witness anyone harass, threaten, or intimidate Mr. Folger for voicing his concerns. Mr. Brydge heard a rumor that an inspections manager (possibly Doug Beamon) was let go for some of the same concerns Mr. Folger referenced. However, Mr. Beamon took the position after Mr. Folger made his complaints.

Mr. Brydge’s narrative of events surrounding his interaction with Mr. Folger on September 2011 is generally consistent with his hearing testimony. He recalled Mr. Folger feeling bullied and saying, “if I was 10 or 15 years younger, you can ask my friends what I would do to them” or something to that effect. Mr. Brydge thought these comments were directed at him. He did not feel threatened by Mr. Folger and wrote it off as “Keith being Keith.” Mr. Brydge did note that if this comment came from anyone else, he would have considered it threatening.

RX-18

This a summary of Catherine “Kate” Kadis’ October 24, 2012 and October 25, 2012 sworn interview with an OSHA investigator. Ms. Kadis was interviewed via conference call and telephone. Ms. Kadis has worked for Respondent for about 5.5 years and her area of responsibility is the Northeast region. She is involved in various aspects of human resources, including employee engagement investigations and reviews. Her supervisor is Hayes Baker, HR Director. Part of her role is to investigate complaints that are generated on the Concern Line, which is the company’s hotline that employees can use to report any concern by email or phone.

Ms. Kadis did not know Mr. Folger before being assigned his Concern Line call. She never received any complaint of any kind from Mr. Folger or anyone associated with Mr. Folger involving his performance or conduct.
Ms. Kadis spoke to Ms. Peugh, Ms. Henderson, Ms. Gottermeyer, Mr. Drenning, Mr. Brydge, and Mr. Patton during her investigation. Mr. Folger’s call to the Concern Line occurred after his disciplinary action. After Mr. Folger continued to refuse to participate in EAP, Ms. Kadis recommended termination to the compliance committee.

Mr. Folger never made any complaint of a SOX-related nature, or anything related to compliance, inspections, billing, or other related matters. The only complaint Mr. Folger made was in a follow-up call, where he stated that the whole office was “corrupt.” He did not provide any details and refused to provide any additional information when asked to do so.

After encouraging Mr. Folger several times to accept the EAP referral, on October 4, 2011, Ms. Kadis advised Mr. Folger that he was being terminated. On October 5, 2011, Mr. Folger called Ms. Kadis claiming that company staff was picking up his work van and he did not understand why he was being fired. At that point, he stated he wanted to go through the EAP. Ms. Kadis asked why he did not disclose this earlier and he did not provide a response. A decision to terminate was already made and approved. Ms. Kadis had no subsequent contact with Mr. Folger, though she was aware that he tried to reach out to Mr. Patton and requested reinstatement.

RX-19

This is an affidavit of Ed McDonough, signed on January 22, 2013. On September 2011 he was contacted regarding threatening remarks Mr. Folger was reported to have made to other employees. He never learned of any allegation by Mr. Folger that any fraud or wrongdoing was taking place before Mr. Folger’s termination. Mr. McDonough did not participate in the decision to terminate Mr. Folger.

RX-20

This is an affidavit of Frank Peluso, signed on January 25, 2013. Mr. Peluso was the total service manager for the Baltimore district from October 2004 until November 2006. At that time, he was the second-line supervisor to Mr. Folger. Put differently, Mr. Folger reported directly to one of 8 managers who, in turn, reported to Mr. Peluso. During that time period, Mr. Peluso did not engage in, nor did Mr. Folger report, any fraud or improper billing. Mr. Peluso had no knowledge of Mr. Folger reporting any improper record-keeping, billing or any other activity that could be construed as fraudulent. Any time Mr. Peluso witnessed any potential wrongdoing, he reported those issues to Tyco’s Audit Group. As a result of one such referral, he is aware that an employee was terminated.

RX-21

This is an affidavit of Joyce Peugh, signed on January 22, 2013. At the time of Mr. Folger’s termination she was the human resources manager for Respondent at its Baltimore district office. On or about September 13, 2011, Leah Henderson approached Ms. Peugh after hearing Mr. Folger reportedly make the open-ended threat: “I could come in here one day....” Ms. Peugh also learned that, on the same day, Mr. Folger had threatened Kevin Brydge, saying
that “if he were twenty years younger he would teach Mr. Brydge a lesson.” Ms. Peugh elevated the concern and a meeting with Mr. Folger took place on September 15, 2011. Later during a meeting attended by herself, Mr. Patton, and Mr. Drenning, Ms. Peugh asked to have security (Howard County Police) present in the building in case Mr. Folger became violent. Hayes Baker was consulted by telephone during the meeting. Ms. Peugh and Mr. Patton told Mr. Folger that he needed to participate in EAP to deal with his threatening comments. Mr. Folger refused to comply and was notified that his refusal would result in termination.

RX-22

This is Respondent’s position statement to OSHA, dated June 22, 2012.

RX-23

This is a copy of Respondent’s job description of the position of nurse call technician. The description appears to be dated October 13, 2006.

RX-24

These are copies of Mr. Folger’s handwritten notes to OSHA. They include his rebuttals to Respondent’s position statement.

RX-25

This is the transcript of Mr. Folger’s deposition, taken on July 21, 2014. Mr. Folger’s deposition testimony is generally consistent with his statement at the hearing, with the following additional information:

Mr. Folger first noticed an issue with test and inspection sometime between late 2010 and early 2011 (Id. at 24).

Mr. Folger did not tell Ms. Kadis that he thought the company fabricated the threat allegation as a way to remove him because they did not want to pay him severance (Id. at 35-26). He did mention severance to her but said that she memorialized their conversation inaccurately.

Mr. Folger was not upset on or around September 9, 2011. He did not behave in a way that would cause people to be concerned about his stress level (Id. at 41).

According to Mr. Folger, at some point when he raised the issue of book cooking to Ms. Henderson, Ms. Henderson referred to a young administrative employee named Jenna Meinl and said that Ms. Meinl “did it”, apparently implying that Ms. Meinl was involved in fraudulent activity (Id. at 132-133). Mr. Folger did not speak to Ms. Meinl about these issues (Id. at 150).

Mr. Folger told Brian Smith, an engineer sales rep, about his suspicions concerning book cooking and invoice fraud (Id. at 147).
After his termination, Mr. Folger received unemployment compensation. He did not remember when his unemployment stopped (Id. at 154-155).

RX-26

This is a set of emails involving Mr. Folger and various SimplexGrinnell representatives. In an email chain that starts on October 7, 2011 and ends on October 11, 2011, Mr. Folger emailed Mr. Patton on October 7, asking for a meeting “so we can hopefully straighten everything out and I can get back to work doing what I love doing.” Mr. Patton forwarded the correspondence to Kate Kadis, asking for guidance on how to proceed. Ms. Kadis sent the inquiry to Hayes Baker, noting that “[u]nless its’ regarding the term process, etc., I would not think Greg needs/should meet with him.” She also emphasized that Mr. Folger had “more than enough time” to agree to the EAP counseling. On October 11th, Mr. Baker emailed his agreement to Ms. Kadis.

The exhibit also includes a second email chain. On January 10, 2012, Mr. Folger emailed Mr. Patton, with a copy to Mr. Drenning and another individual, asking to “talk about the possibility of reinstating my employment.” Mr. Folger laid out several reasons for reinstatement, including the urging of “many concerned Nurse Call customers who feel that they are not getting the high level of service” as well as his continued dedication and experience. On January 11, 2012, Mr. Patton forwarded the email to Mr. Baker, expressing a worry that Mr. Folger might be soliciting Respondent’s clients “as there is no way they would have his personal contact information.” Mr. Patton also noted that he had not received customer feedback that would support Mr. Folger’s claims. Mr. Baker replied to Mr. Patton the same day, stating: “Recommend a response outlining that the matter of his employment in Baltimore has been settled and that we ask that he not contact our customers or employees. Believe this is best handled by local management to ensure that he understands that the decision is final at the local level.” A copy of this correspondence was forwarded to Respondent’s counsel on October 19, 2012.

RX-27

This is a transcript of James Drenning’s deposition, taken on July 21, 2014 (CX-24, RX-27). He is employed by Respondent as a service supervisor (RX-27 at 5). On January 2011, when Mr. Drenning worked with Mr. Folger, he served as an electronics service supervisor. In that capacity, he supervised the daily activities of the section of the department that was tasked with repairing electronic equipment, such as fire systems, access control, nurse call, and CCTV (Id. at 7). He supervised between 14 and 26 employees (Id. at 14). Mr. Drenning reported to Sergio Victores, who was the total service manager (Id. at 21). Mr. Victores in turn reported to Greg Patton. Before Mr. Patton came onboard, Mr. Victores was supervised by Greg Frankhouser (Id.).

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16 The parties agreed to use Mr. Drenning’s deposition testimony in lieu of the witness’s participation at the hearing as Mr. Drenning was out of the country when the hearing took place (RX-27 at 6). Counsel for both parties were present during the deposition. The parties submitted a transcript and a video recording of the deposition.
Mr. Drenning did not directly deal with the inspections department but was generally familiar with its framework. He explained Respondent’s mechanism for conducting inspections. When an inspection contract is booked, it goes into an ACE computer system, which tracks the information. Inspection service requests are automatically generated ahead of time, according to the frequency specified under the contract (Id. at 18-19). An inspection scheduler has a book and keeps track of the information (Id.). Upon completion, the inspection report is uploaded to the computer system, with a copy sent to the client. Before the computer system, inspectors submitted paper copies of the reports (Id. at 21).

Mr. Drenning had heard of Doug Beamon. He could not put a face to the name because they worked in different departments. According to conversations with other staff, Mr. Drenning was told that Mr. Beamon falsified inspection records and was subsequently fired as a result. Mr. Drenning did not remember who he spoke to about Mr. Beamon (Id. at 36, 38).

Mr. Drenning was not familiar with the circumstances surrounding Mr. Victores’ departure from the company (Id. at 24). Mr. Drenning opined that maybe Mr. Victores “didn’t fit the role” of total service manager of the Baltimore branch office (Id.). Mr. Victores and his family also missed Florida, where they were from (Id. at 26). Mr. Victores did not personally tell Mr. Drenning why he was leaving.

Mr. Folger shared his concerns about book cooking with Mr. Drenning two times (Id. at 6, 28). Each conversation likely occurred in Mr. Drenning’s office. According to Mr. Drenning, “we would be talking and, you know, if the subject matter would work its way around to what was going on, it could become agitated and it obviously bothered him a lot” (Id. at 29). Mr. Folger complained about inspections that were written off. Mr. Folger’s complaints made it sound like the issue of missed inspections was a past problem and had already been resolved (Id. at 31-33). Mr. Drenning thought there were a lot of personnel changes, which may have ameliorated the situation. Mr. Drenning did not directly ask Mr. Folger if any book cooking was presently occurring (Id. at 34).

Mr. Drenning did not discuss Mr. Folger’s complaints with anyone else. However, Rene Gottermeyer and Leah Henderson told Mr. Drenning that Mr. Folger also broached the topic with them (Id. at 35):

Q. What did they tell you?
A. That Keith was – had come around—I mean, I could hear, when he went into Renee’s office, hers was right next to mine, so, I mean, I knew that he was –
Q. So was this kind of common knowledge in the office that Keith Folger was always talking about cooking of the books?
[Respondent counsel’s objection to form] . . .
A. You know, common knowledge. I don’t know. I just know that he used that in my presence.
Q. Well, was there a sense that this was like Keith being Keith and he’s always talking about these things and that’s just his thing?
[Respondent counsel’s objection to form] . . .
A. My speculation is that, yeah, it was—that was kind of the common—

(Id. at 35-36). Mr. Drenning did not bring up Mr. Folger’s concerns with Respondent’s legal department or compliance teams (Id. at 41).

Mr. Drenning admitted that he was disinclined to spend much time on Mr. Folger’s allegations:

Q. Well, was it your personal view that it really was, if there was a mess there, it really was the inspection department’s problem and not yours?

A. There’s a good chance that I might have said that because I was overwhelmed myself with my new position. So in this going on in the inspection department, I probably would not have welcomed taking that on as well.

(Id. at 47).

If he suspected that the inspections problems at the company had continued, Mr. Drenning “may have spoken up about it” (Id. at 53). He would have raised the issue with Mr. Victores, his immediate supervisor. Mr. Drenning stated that he “can’t say” what he would have done if Mr. Victores were unresponsive (Id. at 54).

Mr. Drenning overlapped with Mr. Maymon in the office. He did not know exactly what Mr. Maymon did or what Mr. Maymon’s official title was (Id. at 56-57).

Mr. Drenning was present at Mr. Folger’s disciplinary meeting on September 14, 2011 (Id. at 57). Mr. Drenning did not know what the outcome of the meeting would be, but he knew it involved an HR issue (Id. at 61). He did not recall having a conversation with Mr. Folger immediately before the meeting. He did not recall telling Mr. Folger everyone hated him. Greg Patton invited him to sit in on the meeting (Id.). Joyce Peugh was also in attendance.

The meeting took place in an office. Mr. Patton said that Mr. Folger made a statement that was perceived as a veiled threat and that he had to call the EAP line or lose his job (Id. at 63-64). Mr. Drenning described himself as an observer, who did not say much at the meeting (Id.). Mr. Drenning was not consulted before or during the meeting on his opinion of the disciplinary options available to Mr. Folger (Id.). After some time, Mr. Folger became distraught and walked out. Mr. Drenning did not recall how Mr. Folger ended up outside at the loading dock, but that was where they reconvened the meeting (Id. at 75-77). The conversation concluded after Mr. Patton gave Mr. Folger some time, possibly one week, to think over his options (Id. at 78).

Mr. Patton called a receptionist and asked her to call the police. Mr. Drenning thought he saw a police officer arrive but was not sure. If police arrived, they were not involved in the interaction with Mr. Folger (Id. at 77-78).

Mr. Drenning did not know that Ms. Henderson made the complaint against Mr. Folger that prompted the disciplinary proceeding. At some point, someone in the office said that a
female employee made the complaint, which “reduced the suspects to a smaller number of people” (*Id.* at 70).

**ISSUES**

1. Whether the Complainant engaged in activities that are protected by the Sarbanes-Oxley Act.

2. Whether the Respondent, actually or constructively, knew of, or suspected, such activity.

3. Whether the Complainant suffered an adverse personnel action.

4. Whether the Complainant’s activity was a contributing factor in the adverse personnel action taken against him.

5. Whether the Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse personnel action regardless of whether Complainant had engaged in protected activity.

**DISCUSSION**

The Sarbanes-Oxley Act states in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - -

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

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the
employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

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

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). Because of its recent enactment, the Sarbanes Oxley Act lacks a developed body of case law. As the whistleblower provisions of Sarbanes-Oxley are similar to whistleblower provisions found in many federal statutes, it is appropriate to refer to case authority interpreting these whistleblower statutes.

**The Complainant is Covered under the Sarbanes-Oxley Act**

The Sarbanes-Oxley Act provides whistleblower protection to “employees” of publicly traded companies. The interim regulations provide that the term “employee” includes an “individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.” Title 29 C.F.R. § 1980.1. “Company,” in turn, is defined as any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) as well as any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); “company representative” means any officer, employee, contractor, subcontractor, or agent of a company.

In this case, the parties do not dispute that Mr. Folger is covered as an “employee” under the Act, or that the Respondent is covered as a “company” under the Act.

**Merits of the Claim**

In a Sarbanes-Oxley whistleblower case, the complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity as defined by the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. Macktal v. U.S. Dep’t of Labor, 171 F.3d 323,327 (5th Cir. 1999). The foregoing creates an inference of unlawful discrimination, and with respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation.

When a whistleblower case proceeds to a formal hearing before an Administrative Law Judge, a complainant must demonstrate by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable action alleged in the complaint. See, Trimmer v. U.S. Dep’t of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999); Dysert v. Sec’y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). Once a complainant meets this requirement, he is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it
would have taken the same unfavorable personnel action in the absence of any protected behavior.

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).

If the complainant meets this burden of proof, the respondent may avoid liability by presenting evidence sufficient to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. *Yule v. Burns Int’l Security Serv.*, Case No. 1993-ERA-12 (Sec’y May 24, 1995). While there is no precise definition of “clear and convincing,” the Secretary and the courts recognize that this evidentiary standard is higher than a preponderance of the evidence, but less than beyond a reasonable doubt.

If the respondent is able to meet this burden, the inference of discrimination is rebutted. In order to prevail, the complainant must show that the rationale offered by the Respondent was pretextual, i.e., not the actual motivation. *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53, ARB Nos. 98-111, and 128 (ARB April 30, 2001). As the Supreme Court noted in *St. Mary’s Honor Ctr. V. Hicks*, 509 U.S. 502 (1993), a rejection of an employer’s proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination.

**Protected Activity**

“Protected activity,” as defined under the Act and regulations, includes providing to an employer information regarding any conduct which the employee reasonably believes constitutes a violation of various fraud provisions of Title 18 of the U.S. Code (18 U.S.C. §§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. The statutory language makes it clear that Mr. Folger is not required to show that the reported conduct actually constituted a violation of the law, but only that he reasonably believed that the Respondent violated one of the enumerated statutes or regulations. The standard for determining whether Mr. Folger’s belief is reasonable involves an objective assessment.

Here, Mr. Folger argues that he engaged in protected activity by reporting his allegations of “book cooking,” namely his complaints in 2006 about bogus invoices, and his subsequent concerns about missed inspections and improper credits. Mr. Folger claims that the Respondent
created false records to cover up missed inspections in a scheme to increase or “smooth out” revenue (Complainant’s Closing Brief at 30).

Respondent argues that none of Mr. Folger’s complaints amount to protected activity because they are vague allegations that do not specify the conduct he believed to be illegal or a violation of the Act (Respondent’s Closing Brief at 13-14). Respondent also notes that Mr. Folger did not specifically use the word “fraud” when discussing the issue of missed inspections to his co-workers.17

Viewing the evidence as a whole, and factoring in my determinations on the credibility of various witnesses at the hearing, I find that Mr. Folger’s allegations constitute protected activity. Mr. Folger testified that he first reported the inconsistencies between invoices and service tickets, and future credits, in 2006, to numerous individuals, who “blew him off.” It was Mr. Folger’s suspicion that this was a scheme to create the appearance of increased revenue.

Four or five years later, in 2010 or 2011, Mr. Folger again noted inconsistencies between the Respondent’s billing and inspections, and problems with missing inspection assignments. He brought his concerns to numerous persons, who also “blew him off.” Mr. Folger was concerned that the Respondent was “ripping the customers off.”

Multiple witnesses, including Mr. Brydge, Mr. Drenning, and Ms. Henderson, confirmed that they heard Mr. Folger speak about “book cooking,” missed inspections, or faulty invoices. As a longtime employee, Mr. Folger had extensive interaction with clients on installation and inspection assignments, and was in a position to notice when billing and invoice issues arose. Indeed, he stated that customers brought up billing mistakes when they saw him.

The record reflects that at some point, problems with significantly past due inspections at the Baltimore office resulted in Mr. Maymon being detailed to that office to resolve the situation. Mr. Maymon described the inspection system as faulty, and riddled with mistakes and sloppiness. With the legal team, he instituted a program to issue vouchers to customers for whom it was impossible to complete the inspection called for in a contract. There is some suggestion that Doug Beamon, an inspections supervisor, was terminated for cause, in connection with “performance problems” with his inspections assignments; Ms. Henderson testified that he was fired for mishandling the Library of Congress contract.18 All of this lends credence to Mr. Folger’s complaints that there were problems with the inspections and invoices. While there is no evidence to suggest that this situation was the result of any type of fraudulent scheme, as opposed to sloppy performance and mismanagement, which may have cost Mr. Beamon his job and been a factor in Mr. Victores’ departure, it is sufficient to serve as a basis for Mr. Folger’s belief, justified or not, that there was something awry in the inspections and billing system.19

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17 In its brief, Respondent cites to the following exchange during Mr. Folger’s deposition regarding his use of the word fraud: “I’m sure I did. Can I answer you in what instance? No, I can’t” (Folger dep. at 109).
18 Mr. Baker suggested that Mr. Victores may have been let go for “performance issues,” but his departure had no connection to any allegations of improper conduct, as reflected by the fact that he received a severance package when he left, which would not have happened if he had been fired.
19 Mr. Maymon, tasked with resolving this issue, did not find any evidence of alteration of any books or records in connection with the Respondent’s inspections. (Tr. 278). Nor did Mr. Folger produce any evidence, other than his
Respondent’s argument that Mr. Folger’s statements are not protected activity because he did not specifically use the word “fraud” misses the mark. Mr. Folger testified that he used the word in at least one of his grievances to the company, though he could not recall when this occurred. However, an employee need not raise an allegation of shareholder fraud to successfully engage in protected activity. 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. Adm. Review Bd., USDOL, 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.").

Thus, I find that Mr. Folger engaged in protected activity under the Sarbanes-Oxley Act.

**Respondent’s Knowledge of Complainant’s Protected Activities**

Respondent argues that it was not aware of Mr. Folger’s concerns about the faulty invoices and missing inspections, as required by the Sarbanes-Oxley Act, because the persons responsible for making the ultimate decision to issue a written warning and subsequently terminate him were not aware of his allegations. Respondent asserts that Mr. Baker, Mr. Patton, and Ms. Kadis were unaware of Mr. Folger’s protected activity when they presented him with the choice of entering EAP or facing termination (Respondent’s Brief at 14). Mr. Folger argues that he raised allegations concerning inspection failures to at least four supervisors: Mr. Drenning, Mr. Horner, Mr. Victores, and Mr. Beamon. He also argues that constructive knowledge of the protected activity can be imputed to the Respondent even if the decision-makers were not personally aware of his concerns.

A complainant is not required to prove “direct personal knowledge” on the part of the employer’s final decision-maker that he engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating “ layers of bureaucratic ignorance” between a whistleblower’s direct line of management and the final decision-maker. Deremer v. Gulfmark Offshore Inc., 2006-SOX-2, slip op. at 61-62 (ALJ June 29, 2007) (referencing Frazier v. Merit Systems Protection Board, 672 F.2d 150, 166 (D.C. Cir. 1982)). As a result, constructive knowledge of the protected activity can be attributed to the final decision-maker. Id.; See also Van Asdale v. International Game Technology, 498 F. Supp. 2d 1321, 1334 (D. Nev. 2007) (rejecting defendant’s contention that only complaints to those who made the speculation, and his claims of what he was told by Mr. Horner, who was not a witness, to suggest that the Respondent was fraudulently inflating revenues by its billing practices.
termination decision are actionable under the Act and noting that “the employee must show that he or she provided the information to some person at the company with supervisory authority over the employee.”) (Internal citations omitted).

There is no evidence that the persons directly involved in the decision to require Mr. Folger to undergo counseling as a condition of his continued employment – Mr. Patton, Mr. Baker, Ms. Kadis, or Ms. Peugh - had any knowledge of Mr. Folger’s complaints about “book cooking,” missed inspections or missing invoices. Indeed, Mr. Patton and Mr. Baker specifically denied any knowledge of Mr. Folger’s complaints. Mr. Drenning, Mr. Folger’s supervisor, acknowledged that Mr. Folger had made such complaints on a few occasions, but he did not act on them. Mr. Folger himself argues that he made these complaints to Mr. Drenning, but Mr. Drenning never reported these complaints to his supervisors, and stayed silent to “protect himself.” (Tr. 39). Mr. Drenning was asked to participate in the disciplinary meeting on September 14, 2011. But he did not know what the meeting was to be about, and he was not consulted about the decision to give Mr. Folger a written warning and to subsequently terminate him.

While Mr. Folger argues that it is “logical to presume” that his complaints about missed inspections would at some point reach Mr. Patton’s ears, that is not sufficient, in the absence of any actual evidence, to establish that the Respondent had knowledge, constructive or otherwise, of his protected activities. In short, there is absolutely no evidence in the record on which to base a finding that the decision makers had actual or constructive knowledge of Mr. Folger’s protected activities.

Adverse Action

There is no dispute that Mr. Folger suffered an adverse employment action – he received a written warning and was then terminated.

Contributing Factor

In order to sustain a claim of unlawful retaliation under the Act, the complainant must describe circumstances sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. Here, as in most cases of discrimination or retaliation, there is no direct evidence of intent. However, a complainant is not required to demonstrate specific knowledge that the respondent had the intent to discriminate against him. Instead, a complainant may demonstrate the respondent’s motivation through circumstantial evidence of discriminatory intent. See, Frady v. Tennessee Valley Authority, 92-ERA-19 and 34 (Mar. 26, 1996); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984).

The Board has noted that where a complainant’s allegations of retaliatory intent are founded on circumstantial evidence, the fact-finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action. The Board noted that there will seldom be eyewitnesses to an employer’s mental process, and that fair adjudication of whistleblower complaints requires a full consideration of a
broad range of evidence that may prove or disprove a retaliatory animus, and its contribution to the adverse action. *See, Timmons v. Mattingly Testing Services,* 95-ERA-40, 5-7 (ARB June 21, 1996).

The Secretary has noted that, when addressing a complainant’s proof of a *prima facie* case, one factor to consider is the temporal proximity of the adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.,* 93-WPC-7 and 8 (Sec’y Mar. 4, 1996); *Conway v. Instant Oil Change, Inc.,* 91-SWD-4 (Sec’y Jan. 5, 1993). Findings of causation based on closeness in time have ranged from two days (*Lederhaus v. Dona Paschen Midwest Inspection Service, Ltd.,* 91-ERA-13 (Sec’y Oct. 26, 1992), to about one year (*Thomas v. Arizona Public Service Co.,* 89-ERA-19 (Sec’y Sept. 17, 1993)). On the other hand, the lack of temporal proximity is a consideration, especially where there is a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply Sys.,* 95-ERA-52 (ARB Jul 30, 1996).

Furthermore, the complainant need not proffer direct evidence that unlawful discrimination was the real motivation. Instead, “it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation.” *Reeves v. Sanderson Plumbing Products, Inc,* 120 S.Ct. 2097, 2108 (2000).

Mr. Folger’s argument appears to be that he continued to make complaints about missed inspections up until September 2011, and that his complaints somehow implicated Ms. Henderson, leading her to fabricate the charge that he threatened her. According to Mr. Folger,

If there is something [Ms. Henderson] is hiding, and hoped to use her manufactured allegations . . . to distract attention from herself, then clearly Folger’s protected activity of bringing these matters to light might well have been a contributing factor in her retaliation, which became the company’s act when it accepted her accusations without reservation and without making any attempt to determine if she might have had some ulterior motivation to fabricate them.

(Complainant’s Brief at 40-41).

Mr. Folger’s attempt to cast Ms. Henderson as the villain is sheer speculation, not based on any evidence in the record. Mr. Folger suggests that Ms. Henderson may have been involved in improper activity in connection with the missed inspections, and that she denied any knowledge of Mr. Folger’s allegations “for fear of causing the inquiry to veer off into an examination of her motivations in accusing him.” Complainant’s Brief at 38. Mr. Folger speculates that Ms. Henderson feared that she might be linked to this issue if she revealed his repeated conversations with her, and her lack of responsive action. When she saw the friction between Mr. Folger and Mr. Brydge, it was the “perfect opportunity” to raise “bogus concerns”

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20 Complainant cites Mr. Brydge’s statement to an OSHA investigator that the frequency of his allegations only increased toward the end of his employment (EX-17 at 2).
21 In fact, Ms. Henderson acknowledged that she had overheard Mr. Folger state that there were a lot of missed inspections; she did not hear that he was making allegations about “cooking the books” until after he was fired (Tr. 356).
about Mr. Folger, and make a complaint that he made unspecified threats and appeared dangerous. According to Mr. Folger, her “hesitation” over reporting her concerns for four days was a sign of the uncertainty she felt in making an accusation that would destroy Mr. Folger’s career. But she “evidently concluded that it was necessary to do this in order to diminish his credibility in the event the inspection issue became a problem for her.” Id.

In other words, Mr. Folger claims that Ms. Henderson’s report was a complete fabrication, and that she lied under oath at the hearing, in order to divert attention from her involvement in a fraudulent scheme. This scandalous accusation is based on nothing but Mr. Folger’s imagination. Even assuming that there was some sort of fraudulent scheme afoot, there is no evidence that Ms. Henderson was aware of or complicit in any such scheme. To be sure, Ms. Henderson indicated that she was familiar with the issue of late inspections, primarily in connection with the mishandling of the Library of Congress contract, which she discussed with Mr. Maymon. She was aware that Mr. Beamon was fired for mishandling that contract, and heard rumors that he had closed out other contracts that he was not supposed to. But there is not a shred of evidence in the record to suggest that she was personally involved in any mismanagement, or that she tried to cover it up in any way. I had the chance to observe Ms. Henderson at the hearing, and I found her to be a fully credible witness. She offered a detailed, comprehensive account of her interactions with Mr. Folger before and during the incident in question. On cross examination, she plausibly testified that she felt the need to report Mr. Folger’s erratic behavior despite considering him a friend: “I cared about him at the time. I just knew that he was getting angrier and angrier. And caring about someone doesn't mean that you can't be fearful of them also and watching what's going on” (Tr. 353).

Ms. Henderson did not fabricate her report of Mr. Folger’s behavior in retaliation for his complaints about missed inspections and invoices, nor did the Respondent, by crediting and acting on her report, somehow adopt or join in any such retaliation by Ms. Henderson.

Mr. Folger also claims that he told Mr. Drenning about his suspicions, but Mr. Drenning did not report them to his supervisors, in order to protect himself. There is no evidence to suggest that Mr. Drenning had any need to “protect” himself, or in other words, that he was

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22 Ms. Henderson was not the only one who reported similar comments by Mr. Folger that day. Mr. Brydge testified that Mr. Folger, who seemed to be more stressed out and tired than usual, and claimed that everyone hated him and that he had a target on his back, stated that “if I was 10 to 15 years younger, you can ask my friends what I would do.” (Tr. 328).

23 Pointing to his claim that Mr. Horner told him just before the hearing that someone needed to look into Ms. Henderson’s behavior and involvement, Mr. Folger claimed that “It is also reasonable to conclude that she wanted to create issues for Folger in retaliation for what she may have perceived was his intention to draw her into the issue of the missed tests and inspections, the manipulating and falsification of the test and inspection reports, contracts and billing.” Complainant’s Reply at 3. Mr. Horner did not testify, and I find Mr. Folger’s hearsay account, which is unsupported by any evidence in the record, to be unreliable.

24 Mr. Folger makes much of the fact that Ms. Henderson did not speak with Ms. Peugh and Mr. Patten until four days later. Complainant’s Reply at 2. Ms. Henderson testified that she reached out to Ms. Peugh on September 9, and left a message that she needed to talk with her about something important. I find that the fact that Ms. Henderson waited until she met with Ms. Peugh four days later to report the specific details of a workplace threat by someone she considered to be a friend does not detract from her credibility, or suggest that she fabricated her account.
involved in any type of suspicious activity. There is not a shred of evidence to indicate that Mr. Folger’s complaints had any connection with Mr. Drenning’s involvement in Mr. Folger’s disciplinary meeting, or played any part whatsoever in the decision to require Mr. Folger to undergo counseling.

Mr. Folger’s attempt to show temporal proximity between his complaints and the adverse action is unconvincing, because it focuses on the overly narrow timeline of September 2011. Witnesses for both parties testified that Mr. Folger voiced concerns about some form of “book cooking,” whether related to flawed invoices or missed inspections (or nothing at all), for at least three or four years before his termination. Mr. Folger himself stated that he discussed possible invoice problems with Mr. Gioutlos as early as 2006. It is difficult to fathom that the Respondent would tolerate this activity for almost five years, and then end his employment because he was a whistleblower. Mr. Folger received exceedingly positive evaluations in 2007 and 2009 — after he began complaining about “book cooking” — undercutting the proposition that the company was on a mission to oust him from its ranks. The broader timeline of Mr. Folger’s allegations weakens the temporal connection between his protected activity and the adverse employment action.

There is no evidence, direct or circumstantial, to establish any kind of link between Mr. Folger’s several year history of complaining about missed inspections and billing errors, and generalized “book cooking,” and the Respondent’s decision to require him to undergo counseling because he made a threat to a fellow employee.

Based on the foregoing, I find that Mr. Folger has not established a prima facie case necessary to raise an inference of unlawful discrimination under the Act.

**Legitimate Nondiscriminatory Rationale for Adverse Action**

As outlined above, I have determined that Mr. Folger has failed to meet his prima facie burden to raise an inference of unlawful discrimination. However, even assuming that Mr. Folger has established each element sufficient to raise an inference of unlawful discrimination, I find, after viewing the record as a whole, that Respondent has established by clear and convincing evidence that it had a legitimate nondiscriminatory reason to fire Mr. Folger, which Mr. Folger has not shown to be a pretext.

The Respondent has offered substantial evidence on its official workplace violence policy and its rationale for disciplining Mr. Folger in response to a complaint that he threatened a co-worker. The Respondent’s policy clearly states that employees are prohibited from engaging in violent behavior, and that any staff member who violates the policy is subject to appropriate disciplinary action, up to and including termination (RX-3).

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25 Mr. Folger’s claim that Mr. Drenning, along with Mr. Baker, “tried their best” to avoid giving any testimony about the inspection issue or Mr. Maymon, in the hopes that Mr. Maymon’s investigation would not be revealed, is not persuasive. Complainant’s Reply at 4. Nor does the fact that the Respondent “declined to voluntarily produce” Mr. Maymon as a witness support a claim that Mr. Drenning and Mr. Baker were trying to cover anything up.

26 See CX-12.
Respondent’s decision to issue Mr. Folger a written warning, outlining a choice to enroll in EAP counseling or face termination, is consistent with its policy. After obtaining a written and verbal statement from Ms. Henderson about Mr. Folger’s angry demeanor and partial threat, apparently aimed at Mr. Brydge, and interviewing Mr. Brydge and Ms. Gottermeyer, Respondent decided to require Mr. Folger to participate in counseling through the EAP, an option that the Respondent has previously pursued in similar situations involving employees who act in an “agitated manner” (Tr. 223-224). Mr. Folger’s continued refusal to agree to the counseling resulted in his termination.

Mr. Patton and Ms. Peugh gave Mr. Folger the option to enroll in mandatory EAP counseling or face termination; he had more than two weeks, from the meeting on September 14th until his termination letter on October 5th, to make his decision. Mr. Folger characterizes this as a “Hobson’s choice,” claiming that he initially refused to enroll in EAP because the counseling would permanently “tarnish” his personnel record. There is nothing in the record to support a claim that participating in counseling would “tarnish” Mr. Folger’s record. Indeed, the counseling would have enabled Mr. Folger to remain employed. And apparently Mr. Folger was not worried about tarnishing his personnel record when he contacted Mr. Patton and Ms. Peugh after his official termination on October 5, 2011, asking to be able to participate in counseling so that he could be reinstated.

Whether Mr. Folger realistically posed a physical threat to the staff is immaterial -- Ms. Henderson’s written and verbal report on his behavior was detailed and sufficiently compelling to cause the Respondent to take appropriate measures. While there is some uncertainty as to whether a police unit actually arrived at the location during the September 14th disciplinary meeting, the fact that the Respondent entertained the notion of calling law enforcement in the first place underscores the Respondent’s reasonable view that Mr. Folger could pose a risk, and the Respondent needed to be prepared to deal with it. The Respondent’s response to Ms. Henderson’s report was measured and reasonable, and took into account the Respondent’s responsibilities for the safety of its employees, while providing Mr. Folger with the opportunity to participate in counseling through its established EAP, and retain his job.

Based on the foregoing, I find that Mr. Folger has established that he engaged in protected activity under SOX, when he reported his suspicions of fraud in connection with invoices and billing. Mr. Folger has also established that he suffered an “adverse action” when he was fired. But I find that Mr. Folger has not established that the Respondent was aware of his alleged protected activity. Even if he had, I find that Mr. Folger has not established that his alleged protected activities played any part in the decision to require him to undergo counseling as a condition of continued employment.

As the Secretary of Labor has previously noted, although whistleblowers are protected from retaliation for blowing the whistle, the fact that any employee may have done so does not

27 Mr. Baker described a previous situation where an employee acting in a violent manner agreed to the mandatory counseling and was able to remain employed (Tr. 224).

28 Mr. Folger’s claim that he was subjected to a “corporate Star Chamber in which he was summarily tried and convicted” is overblown. Complainant’s Reply at 6.
afford him protection from being disciplined for reasons other than his whistleblowing activities, nor does it give such an employee carte blanche to ignore the usual obligations involved in an employer-employee relationship. *Dunham v. Brock*, 794 F.2d 1037 (5th Cir. 1986). Thus, "[a]n otherwise protected 'provoked employee' is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct." 794 F.2d at 1041 (citations omitted). *Lopez v. West Texas Utilities*, 86-ERA-25 (Sec'y July 26, 1988).

I find no evidence to indicate that the Respondent’s decision to require Mr. Folger to undergo counseling as a condition of retaining his job was in any way motivated by Mr. Folger having engaged in any protected activity. Mr. Folger has not established that the Respondent fired him because of his reports of inspection and billing discrepancies, or his vague complaints of “book cooking.” Nor has Mr. Folger established that his termination was motivated by any prohibited reasons, as opposed to the Respondent’s concerns about the safety of its employees.

I find that not only did Respondent have a legitimate, non-pretextual rationale for Mr. Folger’s written warning and subsequent termination, but also that Respondent has established by clear and convincing evidence that it would have taken the same disciplinary action even in the absence of any alleged protected activity. 29 Respondent’s decision to discipline Mr. Folger reflects an appropriate assessment of his risk to other co-workers and comports with Respondent’s policy to safeguard against workplace violence.

In sum, Mr. Folger has not demonstrated by a preponderance of the evidence that his protected activities contributed to any adverse action taken against him. Because he has not met this burden, it is unnecessary to decide whether the Respondent has proven by clear and convincing evidence that it would have terminated Mr. Folger absent his protected activity. Nevertheless, I also find that the Respondent has established by clear and convincing evidence that it would have terminated Mr. Folger absent his protected activity.

Accordingly, I find that Mr. Folger is not entitled to relief under the Act.

**CONCLUSION**

Whether the Respondent actually violated, or intended to violate, any federal fraud statute or SEC ruling is not, and never has been, an issue in this case. All that the Sarbanes-Oxley Act requires is that Mr. Folger reasonably believed that the Respondent engaged in such conduct, that he disclosed that conduct to the Federal authorities or to her employer, and as a result, he suffered an adverse employment action. Title 18 U.S.C. § 1514A(a).

I find that Mr. Folger has demonstrated that he engaged in protected activity, and that he suffered an adverse action. But he has not established any connection between his alleged protected activity and the Respondent’s decision to require him to undergo counseling as a condition of employment. Thus, he has not established a *prima facie* claim under the Act.

29 Mr. Folger misconstrues the pretext analysis. It is not relevant whether the Respondent would or would not have taken the same action against him if the decision makers knew of the protected activity. Complainant’s Reply at 9. The question is whether the Respondent would have taken the same action *even in the absence* of protected activity.
But even assuming that Mr. Folger has established his *prima facie* claim, that is, that the Respondent was aware of his alleged protected activities, and that these protected activities were a contributing factor in the adverse action, I find that Respondent has shown by clear and convincing evidence that it would have taken the same action regardless of whether Mr. Folger had engaged in protected activity.

Accordingly, **IT IS HEREBY ORDERED** that Mr. Folger’s request for relief under the Act is **DENIED**.

**SO ORDERED.**

LINDA S. CHAPMAN  
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).