



Issue Date: 17 November 2014

In the Matter of:

DENNIS J. HOLIFIELD
COMPLAINANT

v.

2014-SOX-00017

ISRAMCO, INC.
RESPONDENT

Dennis J Holifield, Esquire
For Complainant
Joanne Ray, Esquire
For Respondent
Before: Daniel F. Solomon
Administrative Law Judge

DECISION AND ORDER

AWARD OF DAMAGES

This case arises under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002 (“the Act” or “SOX”), 18 U.S.C. § 1514A, enacted on July 30, 2002, as further amended. This law includes an employee protection provision that protects employees who report violations of U.S. Security and Exchange Commission rules and regulations and other laws relating to preventing fraud against shareholders. Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, P.L. No. 107-204. Section 806 is codified as 18 U.S.C. § 1514A.

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

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

If Complainant proves that protected activity was a contributing factor in the personnel action, Respondent may nevertheless avoid liability if it proves by “clear and convincing evidence” that

¹ *Sylvester v. Parexel Int’l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011); see 29 C.F.R. § 1980.109(a).

it would have taken the same adverse action in the absence of the protected activity.²

Complainant filed with the Occupational Safety and Health Administration (OSHA) on January 20, 2014. On January 22, 2014, the OSHA investigator stated in a letter that the Complainant failed to make a prima facie case and dismissed the complaint. On February 24, 2014, Complainant timely filed an Objection to the Finding, requesting a *de novo* hearing.

Complainant contends that Respondent filed a lawsuit against him in retaliation for Complainant filing whistleblower allegations with the Securities and Exchange Commission and with the 55th Judicial District Court for Harris County, Texas, in 2011. At that time, he was General Counsel and Vice President of Respondent, then engaged in a shareholder derivative lawsuit. Complainant seeks back pay with interest, front pay in lieu of reinstatement, and special damages.

On June 10 and 11, 2014, a hearing was held in Houston, Texas. I admitted Joint Exhibit 1, "JX" 1, stipulations(at Transcript, "TR" 10); Complainant's exhibits, "CX"1 - CX 6, 6B - CX 14, 16 - CX 21, and CX 24 - CX 38 and Respondent's exhibits, "RX" 1-4, 6-21, 23-38. The following witnesses testified: Complainant Dennis James Holifield, Edy Francis, for Respondent, Amir Sanker, for Respondent, Tracy LeRoy, Esquire and Anthony James, Esquire. Based on an unopposed Respondent motion to admit a better copy of CX 14 as RX 39, I admit it into evidence.

Post hearing I received a series of briefs and proposed findings of fact from the parties. Respondent asks me to compel Complainant to remove certain findings of fact which lack citations to the record; to provide citations to a specific page of the record for each and every proposed finding and to provide a "pinpoint citation" with page and line numbers each time he cited the transcript of the hearing in this case or any deposition that has been admitted as evidence in this case. I agree that it is frustrating to have to search the record, but I am experienced in dealing with pro se parties, and decline to prolong the process.

STIPULATIONS

1. Respondent, Isramco, Inc. ("Respondent" or "Isramco"), is a corporation organized under the laws of the State of Delaware.
2. Respondent, Isramco, Inc. ("Respondent" or "Isramco"), is a publicly-traded company listed on the NASDAQ stock exchange under the trading symbol "ISRL".
3. Respondent, Isramco, Inc. ("Respondent" or "Isramco"), is a company that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781).
4. Respondent, Isramco, Inc. ("Respondent" or "Isramco"), is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)).
5. Complainant was employed as Vice President and General Counsel of the Respondent, Isramco, Inc., beginning March 3, 2011, and ending September 21, 2011.
6. During Complainant's employment with Respondent, Complainant communicated

² *Halliburton, Inc. v. Admin. Review Bd.*, No. 13-60323 (5th Cir., November 12, 2014); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); see 29 C.F.R. § 1980.109(b).

with the CEO and other members of the board of directors in the normal course of his duties as General Counsel.

7. On September 15, 2011, Complainant met with Haim Tsuff, Respondent's CEO and Chairman of the Board of Directors, and Edy Francis, CFO of the Respondent.
8. Complainant resigned as Vice President and General Counsel of Isramco on September 21, 2011.
9. On September 22, 2011, Complainant electronically filed a 4-page complaint about Isramco with the SEC and page 4 included 7 questions under the heading "Whistleblower Declarations".
10. On October 3, 2011, Complainant filed a Motion to Withdraw as attorney of record for Isramco, Inc., and the Court signed its Order Granting Permission to Withdraw on October 24, 2011.
11. On or about October 5 or 6, 2011, Complainant filed with the SEC a document entitled "Summary Report of Legal/Compliance Deficiencies of Isramco, Inc., (ISRL) and Affiliates".
12. On November 13, 2011, Complainant filed with the 55th Judicial District Court of Harris County, Texas, an "Amicus Curiae Brief" ("Friend of the Court" brief).
13. On November 15, 2011, Complainant testified in camera in the 55th Judicial District Court of Harris County, Texas, in which deposition all parties, including Respondent Isramco, were represented by legal counsel.
14. Complainant was contacted via telephone by Mark K. Glasser, an attorney with the law firm of Baker Botts L.L.P., who indicated that he and his firm had been retained by a Special Investigative Committee of Respondent to investigate the allegations contained in Complainant's reports to the SEC.
15. Marc Kalton was an independent director of Respondent.
16. On September 10, 2013, Respondent filed a Petition in the 270th Judicial District Court of Harris County, Texas, alleging professional malpractice against Complainant.³
17. On January 20, 2014, Complainant filed a Complaint with OSHA alleging he was a whistleblower and that Isramco had retaliated against him.
18. By letter dated January 22, 2014, the OSHA investigator dismissed the Complaint.
19. Complainant's salary during the time of employment with Isramco was \$150,000 per year, paid twice-monthly.
20. Prior to becoming General Counsel of Isramco Inc. in March 2011, Complainant had never before served as General Counsel of a publicly traded company.
21. Prior to becoming General Counsel of Isramco Inc. in March 2011, Complainant had never before been employed as an attorney by a publicly traded company.
22. During 2011, Isramtec. Inc. was a wholly-owned subsidiary of Isramco Inc.

I accept these stipulations.

STATUTE OF LIMITATIONS

A complaint filed under the Sarbanes-Oxley Act must be filed with the Department of Labor in writing within 180 days of the time an employee learns that he or she will be, or has been, subjected to discrimination, harassment, or retaliation. 18 U.S.C.A. § 1514A(b)(2)(D). Sections 922(c) of the Dodd-Frank Act, P.L. 111-203 (July 21, 2010), amended Section 806 of

³ The Amended version filed in state court October 13, 2013, was entered into evidence as CX 14.

SOX, 18 U.S.C.A. § 1514A, to lengthen the time for filing a complaint to 180 days.⁴

In this case, I am directed to two time lines:

1. Events that occurred in 2011
2. Events surrounding the filing of a state civil action against Complainant on or about September 10, 2013.

Based upon the above stipulations, and especially Stipulation Number 16, I find that the Complainant failed to file a viable complaint with the Department of Labor regarding any of the matters alleged against Respondent prior to September 10, 2013, when Respondent filed the state court civil complaint, CX 14, RX 39, against Complainant.⁵

For reasons set forth below, I discuss whether the Complainant has evoked a viable claim of blacklisting for having to defend the civil action for negligence, negligence per se, gross negligence, and breach of fiduciary duty. CX 14, RX 39 at 2. The Complainant is a former employee of Respondent. Stipulation Number 5. Although blacklisting is not mentioned in the statute, it is specifically listed in 29 CFR §1980.102, obligations and prohibited acts. The statute and regulations extend protection to former employees in limited circumstances, e.g., blacklisting. *Earwood v. Dart Container Corp.*, 1993-STA-016 (Sec'y Dec. 7, 1994).⁶

Section 806's "critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law." *Villanueva v. United States Department of Labor*, 743 F.3d 103 (5th Cir., 2014); *Sylvester, supra*. In this case, I must decide whether blacklisting occurred on or about September 10, 2013, and if so, the consequence.

FINDINGS OF FACT

As set forth above, testimony was presented from Edy Francis, for Respondent, Amir Sanker, for Respondent, Tracy LeRoy, Esquire, who was a member of a team of lawyers that

⁴ 29 CFR §1980.103 Filing of retaliation complaints, in part:

(d) Time for filing. Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

⁵ Complainant did not evoke any basis to toll the statute of limitations for activities that occurred in 2011.

⁶ Whether the Complainant was constructively removed from his position as Vice President and corporate counsel in 2011 may be viable in the state counterclaim but was withdrawn on the record. TR 475. Although Respondent is seeking to prove that alleged blacklisting is dependent on activities that may have occurred in 2011, and that Complainant's credibility can be impeached by his conduct, prior statements and other inconsistencies from that period of time, and I am directed to sworn testimony in this case or in related proceedings that he purportedly: (1) later contradicted under oath, (2) contradicts tape recordings of meetings (and transcripts of the tape recordings) that were admitted into evidence in this case without objection, (3) contradicts the report he filed with the SEC, and/or (4) contradicts the Findings and Conclusions he proposed, the Department of Labor scheme requires that I strictly observe the burdens of proof. Credibility is less crucial in the liability phase of deliberation than it may be in the remedy phase.

performed an internal investigation for Respondent and Anthony James, Esquire, Respondent's current corporate counsel. The bulk of that testimony and the related exhibits are not relevant to the issue whether the filing of the civil action on September 10, 2013 blacklisted the Complainant, and if so, whether there may be consequences from that.⁷ The civil complaint states in part that the Complainant's correspondence with the SEC is a basis for its claim for relief.

PRIMA FACIE CASE

To allege facts sufficient to demonstrate a *prima facie* case, Complainant must demonstrate that:

(1) he or she engaged in activity or conduct that the SOX protects;

⁷ In the record, Complainant alleges that on September 22, 2011, the day after his resignation, Complainant electronically filed his first "Whistleblower Declarations" with the SEC. Complainant contends that filing this initial Whistleblower Declaration with the SEC was a "protected activity" within the meaning of SOX 18 U.S.C. §1514A and Dodd-Frank 15 U. S. C. §78u-6(a)(6), (b)(1), (h).

Respondent objects to many of these allegations as to manner and accuracy. It does not deny that Complainant communicated with the SEC. Respondent argues that a finding as to the accuracy of the 2011 filing is a condition precedent to the viability of the blacklisting complaint. Although Respondent argues I should consider whether an attorney licensed under Texas law, committed a "lawful act" when he filed a report with the SEC alleging 27 "deficiencies" of his former client, as stated above, since matters relating to 2011 are no longer timely and I find that the alleged whistleblowing events are not a condition precedent to blacklisting in this fact pattern, as Complainant failed to file a claim within 180 days of that activity, I choose not to render findings regarding these matters.

Respondent argues:

Complainant made an additional filing on October 6, 2011. On October 3, 2011, he withdrew as attorney of record in the derivative litigation, citing conflict of interest. The District Court granted the Motion to Withdraw on October 24, 2011. He alleged that as an attorney he could no longer represent Respondent in the matter. Complainant also testified, that, although he initially approved the Stipulation of Settlement of the shareholder derivative lawsuit on behalf of his client, Complainant now had what he felt was clear and convincing evidence of fraud. He alleges that under the Rules of Court and under the Texas Disciplinary Rules of Professional Conduct, Complainant testified that he was required by law to disclose to the Court and to the other parties to the litigation the matters constituting the fraud upon the Court and upon the shareholders. He maintains that to do so within the bounds of the law, on October 6, 2011, Complainant filed with the 55th Judicial District Court of Harris County, Texas, an "Amicus Curiae Brief" ("Friend of the Court" brief) bringing those matters which he had come to learn to the attention of the Court and to the other parties, as he was required by law to do. Respondent provided the applicable regulation which "permits, but does not require" an attorney "under specified circumstances" to disclose his client's confidential information to the SEC (emphasis added).

He now alleges that in a Form 8K Current Report dated January 7, 2013, filed by Respondent with the SEC, it was stated that:

"The SIC [Special Investigative Committee] has determined that Mr. Holifield's allegations are not supported by any available documentary evidence or by any statements made by former or current Isramco, Inc., directors, management, or employees interviewed by the SIC or its counsel. The SIC also determined that the Company has not engaged in wrongdoing of any sort, including any unlawful or unethical business practices, any lapses in financial controls or any governance issues that require redress or reform."

He did not file a claim within 180 days of that date, I find that the circumstances surrounding the SEC filings are irrelevant to blacklisting, and the viability of that matter is moot in this proceeding.

I note that on cross examination, Complainant admitted that he had demanded \$900,000.00 from the Respondent to withhold information. TR 302, 303, 363.

I find that although all of this may very well be relevant in the state civil action, but in this jurisdiction it is not relevant to whether Complainant has established a *prima facie* case.

- (2) the respondent took unfavorable personnel action against him or her; and
- (3) the protected activity was a contributing factor in the adverse personnel action.⁸

29 C.F.R. § 1980.104(e)(2).

Because this case has been fully tried, theoretically there is an inference that a prima facie case has been made. *Kester v. Carolina Power & Light Co*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-8 (ARB Sept. 30, 2003) (“[W]e continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried.”). *Kester* has been cited as authority in many recent cases, i.e. *Barrett v. e-Smart Technologies, Inc.*, ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013).⁹ Most recently, in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014), the court discussed the several burdens of proof in SOX cases, specifically, mentioning *Kester*,¹⁰ and in whistleblowing cases generally, to determine that proof by a complainant of the elements of a prima facie case of retaliation by a preponderance of the evidence, including proof of “contributing factor” causation, shifts to the employer the burden of proving by “clear and convincing evidence” not only the existence of a legitimate, non-retaliatory basis for the contested personnel action but also that the employer would have taken the contested action on that basis alone had the complainant not engaged in protected activity.¹¹

⁸ *Sylvester* at 9 (ARB May 25, 2011); see 29 C.F.R. § 1980.109(a).

⁹ See also *Hoffman v. Nextera Energy*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 12 (ARB Dec. 17, 2013) (prima facie showing irrelevant once case goes to hearing before ALJ); *Barry v. Specialty Materials*, ARB No. 06-005, ALJ No. 2005-WPC-003, slip op. at 7 n.32 (ARB USDOL/OALJ Nov. 30, 2007) (same); *Journey v. Barry Smith Transp.*, ARB No. 01-046, ALJ No. 2001-STA-003, slip op. at 3 n.5 (ARB June 25, 2001) (same); *Zinn v. American Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 10 (ARB Mar. 28, 2012) (equating prima facie case with inference of causation); *Jordan v IESI PA Blue Ridge Landfill*, ARB No. 10-076, ALJ No. 2009-STA-062, slip op. at 2 (ARB Jan. 17, 2012) (same); *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (equating prima facie case with inference of discrimination); *Spelson v. United Express Sys.*, ARB No. 09-063, ALJ No. 2008-STA-039, slip. op at 3 n.3 (ARB Feb. 23, 2011) (identifying investigatory stage before OSHA as the “prima facie level of proving a case”).

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

¹¹ The ARB noted that in whistleblower cases, as in Title VII discrimination cases, evidence is typically in the possession of the employer and direct evidence of retaliation for whistleblowing is rare. As the legislative history of the 1992 ERA amendments demonstrate, Congress unambiguously sought to benefit whistleblowers by altering the existing burdens of proof. At 36-37. In a dissent, one ARB member argued against “the majority’s new view that requires the ALJ to ignore essential facts in ultimately deciding after an evidentiary hearing whether the complainant proved that her alleged protected activity contributed to her administrative leave and termination of employment.” At 38.

However, additionally, I render the following findings:

Protected Activity

In CX 14, RX 39, Respondent avers in part improper disclosure of confidential and attorney-client privileged information by Complainant:

“...Defendant improperly disclosed Plaintiff’s privileged information to third parties in an effort to stop the settlement of the derivative action...” Id at 2.

and,

“...Defendant then again improperly disclosed Plaintiff’s privileged information in an unsolicited report he filed with the Securities & Exchange Commission and NASDAQ, upon which Plaintiff’s shares are traded, complaining of various alleged improprieties.” Id.

and,

“In making his SEC Report, Defendant sought, but was denied ‘whistleblower status.’” Id.

There is no dispute that this language is accurate. Stipulation 9 states: On September 22, 2011, Complainant electronically filed a 4-page complaint about Isramco with the SEC and page 4 included 7 questions under the heading "Whistleblower Declarations". Stipulation 11 states: On or about October 5 or 6, 2011, Complainant filed with the SEC a document entitled "Summary Report of Legal/Compliance Deficiencies of Isramco, Inc., (ISRL) and Affiliates".

I accept that the pleading allegations constitute an admission as to Complainant’s status in protected activity. Respondent argues that Complainant’s filing of his report and attached records with the SEC was not protected activity because it was “unlawful,” and therefore in violation of the Act.¹² I am referred to Texas Disciplinary Rules of Professional Conduct (the “Texas Disciplinary Rules” or “TDRPC”) as a basis for this allegation.¹³ I was not asked to enter a protective order regarding any privileged matter in this case. Without a ruling from a state court of other disciplinary authority I do not have jurisdiction to decide whether the filing to the

¹² Section 1514A(a). Respondent also directs me to 17 C.F.R. §205.3(b), the SEC “attorney conduct” rule and argues that it does not apply to Complainant, citing to references. In *Jordan v. Spring Nextel Corporation*, the ARB allowed an in-house attorney to assert claims of retaliation under SOX, despite the fact that bringing the claim entailed disclosure of privileged and confidential information. 2006-SOX-41 (ARB Sept. 30, 2009). The ARB reasoned that the mandatory disclosure requirements for counsel set forth in the Code of Federal Regulations title 17, section 205.3, which are described further below, and the whistleblower protections under SOX, should be read together to provide a remedy for attorneys alleging that they have been retaliated against for making a required disclosure. The ARB also noted that the SEC regulation regarding attorney disclosure of material violations was modeled on the American Bar Association’s (ABA) Model Rules of Professional Conduct, Rule 1.6, which “allows an in house attorney to use privileged information to establish a retaliatory discharge claim against the attorney’s employer.” Consequently, “if an attorney reports a ‘material violation’ in-house in accordance with SEC’s Part 205 regulations, the report, though privileged, is nevertheless admissible in a SOX Section 806 proceeding as an exception to the attorney-client privilege in order for the attorney to establish whether he or she engaged in SOX-protected activity.” The ARB observed, however, that it remained within the ALJ’s discretion to issue a protective order to preserve the confidentiality of the privileged communications offered to support the retaliation claim.

¹³ I note that the state claim sounds in malpractice, which usually requires verification. The record does not contain any affidavit from Mr. Wagner, who signed the document that the information was accurate, or from an expert witness that Complainant had breached a duty of care owed Respondent in an attorney-client relationship.

SEC or other declarations of purported whistleblowing violate state privilege rules. In fact if the allegations regarding the ethics were true I assume that I would have been provided a record of any claim or proceeding brought against the Complainant on this issue. Typically preliminary matters are handled through a motion for summary decision, and this issue arises after a full trial on the merits.¹⁴

Although Respondent argues that there is no proof of a protected activity, this argument is premised on allegations surrounding the circumstances prior to the September 10, 2013 filing.¹⁵ Blacklisting is a distinct violation, independent from other forms of retaliation. Blacklisting is “quintessential discrimination,” that is often “insidious and invidious [and not] easily discerned.” *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059; ALJ No. 2001-ALJ-018. “Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment.” *Id.* at 5.

Respondent argues further that Complainant must prove harm. However, I reject that argument. The fact that a blacklisted complainant was not refused employment or did not suffer an actual employment injury does not shield a respondent from liability. *Leveille v. New York Air National Guard*, 94-TSC-3 and 4 (Sec'y Dec. 11, 1995). In the context of the facts in *Leveille*, blacklisting was simply marking an employee for avoidance in employment because she engaged in protected activity; communication of an adverse recommendation is evidence of the decision to blacklist the employee. See also *Earwood v. Dart Container Corp.*, *supra*, that “effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result.”

Unfavorable Personnel Action

Again, at face, CX 14, RX 39, filed by Respondent in state court against Complainant in essence states that Respondent is asking for more than a million dollars, for activities that occurred while Complainant was an employee, in large part, for having filed charges with the SEC:

Defendant then again improperly disclosed Plaintiff's privileged information in an unsolicited report he filed with the Securities & Exchange Commission and NASDAQ, upon which Plaintiff's shares are traded, complaining of various alleged improprieties.

¹⁴ I also note that some of Respondents allegations go to the acts of whistleblowing, rather than the blacklisting issue. The argument regarding “reasonable belief” and whether the Complainant's perception regarding whistleblowing was subjective or objective is not relevant where the Complainant filed a claim at the SEC.

¹⁵ Respondent argues that at the time Complainant filed his SEC report, he did not have a reasonable belief that the matters he complained of violated one of the six enumerated provisions of §1514A(a). I am advised that in his report to the SEC, the word “shareholders” appears only once, and that is in the context of a passing reference to the shareholders derivative action. When his report discusses “fraud,” it is invariably in the context of fraud on the directors or fraud on the court. Although the words “bank” and “wire” appear a few times, they do not appear in the context of “bank fraud” or “wire fraud.” “Bank” appears only in connection with the Swiss bank account that Holifield claims Isramco never disclosed to regulators even though it was publicly disclosed in Isramco's 10-K reports and filings with the Department of the Treasury. “Wire” appears in connection with transfers to the Swiss bank account but no allegation is made that the transfers are fraudulent. However, I find that there is no dispute that he filed with the SEC. This case involves blacklisting, and at this point whether or not the SEC filings were viable may be relevant only to the state of mind of Respondent at the time it filed CX 14, RX 39.

Defendant's SEC report also included many baseless and false allegations. In making this SEC report, Defendant sought, but was denied "whistleblower" status.

Id at 3. I find that the effect of this allegation is that the claim for relief is an unfavorable personnel action.

Moreover, Claimant maintained that he is "judgment proof." The record shows that Complainant had no malpractice coverage. The Respondent did not have Director's and Officer's coverage for its corporate officers. Apparently, there is no liability coverage. These facts are undisputed. The Respondent apparently does not have any monetary reason to have filed the civil action. I find that this filing goes to the prior employment relationship. I also find that this action was designed to blacklist the Claimant.

Respondent argues that it is difficult to prove an "unfavorable personnel" element and cites several cases. However, all of the cases cited are other administrative law judge determinations prior to a 2010 change in the regulations, prior to Dodd Frank (2010), prior to *Sylvester* and prior to *Fordham*.¹⁶ These cases are factually interesting, but do not reflect current DOL policy.¹⁷ The most recent 5th Circuit decision, *Halliburton v. ARB*, *supra*, discusses this issue at length. "Material adversity" is a matter of law. The *ad damnum* clause in the complaint seeks recourse against Complainant for his disclosures to the SEC. I find that language of the civil damage complaint is proof of a material adversity.¹⁸

Contributing Factor

Again, the face of CX 14, RX 39, states that the action was filed, in large part because of the charges Complainant made to the SEC. Again, the parties stipulated:

9. On September 22, 2011, Complainant electronically filed a 4-page complaint about Isramco with the SEC and page 4 included 7 questions under the heading "Whistleblower Declarations".
10. On October 3, 2011, Complainant filed a Motion to Withdraw as attorney of record for Isramco, Inc., and the Court signed its Order Granting Permission to Withdraw on October 24, 2011.
11. On or about October 5 or 6, 2011, Complainant filed with the SEC a document entitled "Summary Report of Legal/Compliance Deficiencies of

¹⁶ *Moldauer v. Canandaigua Wine Co.*, 2008-SOX-73 (ALJ Dec. 29, 2008), *Vodicka v. Dobi Medical*, 2005-SOX-111 (ALJ Dec. 23, 2005), *Pittman v. Siemens AG*, 2007-SOX-15 (ALJ July 26, 2007), and *Halpern v. XL Capital, Ltd.*, ARB 04-120 (ARB Apr. 4, 2006). Likewise, see *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-36 (ARB July 31, 2006).

¹⁷ I also note *Farnham v. International Manufacturing Solutions*, ARB No. 07-095, ALJ No. 2006-SOX-111 (ARB Feb. 6, 2009), when the ARB found that Respondent's filing of a civil suit against the Complainant alleging tortious interference with the Respondents' loan transactions, slander, and intentional infliction of emotional distress, was not an adverse employment action under SOX. The ARB wrote: "The SOX defines adverse action as discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in the terms and conditions of his or her employment. [The Complainant] has failed to establish how [the] filing [of the] civil suit against [him]... injured him in any way in relation to 'the terms and condition of his employment.'"

¹⁸ Whereas most other decisions involving adversity require application of circumstantial evidence and application of inference, the civil complaint language with reference to the SEC constitutes a "smoking gun."

Isramco, Inc., (ISRL) and Affiliates".

12. On November 13, 2011, Complainant filed with the 55th Judicial District Court of Harris County, Texas, an "Amicus Curiae Brief" ("Friend of the Court" brief).

13. On November 15, 2011, Complainant testified in camera in the 55th Judicial District Court of Harris County, Texas, in which deposition all parties, including Respondent Isramco, were represented by legal counsel.

The damages section states:

Regarding the causes of action and conduct alleged above, Plaintiff sustained pecuniary losses that were proximately caused by Defendant's conduct.

CX 14, RX 39 at 7.

The conduct includes the SEC filings. Stipulation 9 and Stipulation 11. I find that CX 14, RX 39, implicates contribution to the claim for relief, which I find is a basis for protected activity.

"[A] whistleblower need not demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected conduct] was a contributing factor to the personnel action." *Hallibuton v. ARB, supra*.¹⁹ "Regardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing."²⁰

Accordingly, I find that the Respondent has admitted in its state civil pleadings that a prima facie case has been made.

I accept that these allegations are sufficient to invoke a prima facie case for blacklisting. However, I also find that most of the allegations relating to the 2011 claim, including the internal investigation by Baker Botts is now moot, as Complainant did not file a whistleblower complaint until after the September 10, 2013 filing.²¹

SHIFTING BURDEN OF PROOF

Once a complainant has established a prima facie case, the burden of proof shifts to the Respondent to show by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. 18 U.S.C.A. § 1514A(b)(2)(C) provides that SOX whistleblower actions shall be governed by the legal burdens of proof set forth under AIR 21 at 49 U.S.C.A. § 42121(b)(2)(B)(Thomson/West 2007), which requires that once the complainant has demonstrated that his or her protected activity was a contributing factor in the adverse personnel action at issue, the respondent must prove its

¹⁹ Citing to *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993). "Regardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." *Id.*

²⁰ *Id.*

²¹ Again the Complainant did not invoke (or even argue) a basis for equitable tolling of the statute of limitations.

affirmative defense by “clear and convincing evidence.” See also *Allen v. ARB*, 514 F.3d 468, 475-76 (5th Cir. 2008).

Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard.

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

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

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

Respondent alleges that it would have taken the same adverse employment action regardless of the alleged whistleblowing. Respondent reminds me that within 30 days after he filed his SEC Report, Complainant demanded \$900,000 in exchange for a “confidentiality and silence clause.” RX-1. “[W]e are willing to discuss a quick, quiet, and amicable resolution to this matter, which could include a confidentiality and silence clause... for \$900,000.” The demand letter threatened, unless Respondent paid Complainant \$900,000 within 14 days, to “shine as bright a light as possible on Isramco’s shady business dealings to ensure that justice is done.” See p. 2 of RX-1. Respondent also directs me to Anthony James, Respondent’s current inside legal counsel, who testified that, even if Complainant had never filed the SEC report, “there’s a very good chance” that Complainant would have been sued for the claims he made in the state court action. James testified:

Q: (by Ms. Ray) If Mr. Holifield had confined his claims to the state court proceeding and not filed the SEC proceeding, would Isramco still have sued him for legal malpractice?

A: I think there’s a very good chance of that, and I think probably, and not just because of the derivative case. The letter, the demand he made prior to giving his deposition in the derivative case, I know -- or, it’s my understanding that the officers of Isramco and everyone up there was kind of appalled at the demand Mr. Holifield’s attorney made prior to -- for the \$900,000.00. There was issues associated with, you know, the Cimarex matter that came along later with the forwarding e-mails to Cimarex rather than giving such information to, say, our outside counsel, Mike Robbins.

I find that the demand made by Complainant was made for settlement purposes and does not bear on whether this is evidence of clear and convincing grounds to sue. I also find that “there’s a very good chance” is not definitive and does not meet the “clear and convincing” test.

Respondent also alleges that in fact, Complainant made a false accusation to the SEC and that he refused to cooperate with a special investigative committee (“SIC”) composed of two of the company’s independent directors to investigate the allegations in the SEC report. I note that, if proven, these may have been viable affirmative defenses, had Complainant sued Respondent within the statute of limitations, but again, that matter is not a condition precedent to blacklisting.

Applying the factors:

1. How ‘clear’ and ‘convincing’ the independent significance is of the non-protected activity: The Respondent has the burden of proving by clear and convincing evidence that the non-protected activity is independently viable. The language of the civil action invokes the alleged whistleblowing as a basis for the claim. CX 14, RX 39. I note that the attorney who filed the civil action for Respondent was not called to testify by either party. No evidence is proffered in the record that but for the SEC filing, this case is viable. The Respondent did not provide expert opinion on this issue. I find that this argument is unpersuasive. Conversely, it is just as reasonable that the viability of the SEC filings are necessary components to the allegations of state claims of gross negligence, negligence per se, and breach of a fiduciary duty.
2. The evidence that proves or disproves whether the employer ‘would have’ taken the same adverse actions: Even if I credit Mr. James’ testimony, he was not the person who decided to pursue the civil action, was not employed by Respondent during the 2011 controversy, did not file the civil action, and considering that the SEC filings are pled as factors of negligence, negligence per se, gross negligence, and breach of fiduciary duty in the civil damage action, his testimony is not persuasive.²² The burden is on Respondent. I find that the “clear and convincing” burden is not met.
3. The facts that would change in the “absence of” the protected activity: I also find that the facts pled regarding disclosure to the SEC are apparently necessary to maintain the cause of the civil action. As set forth above, the Respondent did not call its Chief Executive Officer or the lawyer who filed the complaint that contains references to the filing with the SEC to explain why the state case was filed with reference to the SEC filings. The burden is on the Respondent. See *Barrett v. e-Smart Technologies, Inc.*, ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB, 2013).²³ This undermines any argument that

²² I asked the parties whether civil actions must be verified in Texas. They did not supply me with any law on this issue. In some jurisdictions facts alleging malpractice should be plead only if they are based upon true knowledge, information and belief and are notarized. The Respondent CEO and the lawyer who signed the pleadings did not testify.

²³ Also see *Underwriters Labs., Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) (“[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.”). In this case, as the burden is on the Respondent on this issue, I need not take an adverse inference, but merely note that there is no explanation how the whistleblowing may be divorced from the state civil action for damages.

respondent can prove its affirmative defense by “clear and convincing evidence.”

Moreover, Claimant maintained that he is “judgment proof.” There is no malpractice coverage. The Respondent did not have Director’s and Officer’s coverage for its corporate officers. Apparently, there is no liability coverage. These facts are undisputed.²⁴ To a reasonable degree of probability, the Respondent apparently does not have any monetary reason to have filed the civil action.

Therefore, I find that Respondent has not met its “clear and convincing” burden. I further find that the Complainant was blacklisted when Respondent filed the civil action for damages against him alleging, in part that disclosures to the SEC are a basis of the claim for relief.

DAMAGES

The statute provides:

- (1) In general.—An employee prevailing in [an antiretaliation action] shall be entitled to all relief necessary to make the employee whole.
- (2) Compensatory damages.—Relief for any action under paragraph (1) shall include—
 - (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
 - (B) the amount of back pay, with interest; and
 - (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

18 U.S.C. § 1514A(c). Under the Dodd Frank Act, "no employer may discharge . . . a whistleblower because of any lawful act done by the whistleblower" in providing information to the SEC. 15 U.S.C. § 78u-6(h) (1) (A). Any individual who alleges "discharge or discrimination" as a result of providing information to the SEC may bring an action in the district court. 15 U.S.C. A. § 78u-6(h) (1) (B) (i). A prevailing plaintiff is entitled to be reinstated and to recover "2 times the amount of back pay otherwise owed to the individual, with interest; and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees." 15 U. S . C. § 78 u - 6 (h) (1) (C) (i) - (i i i).

REINSTATEMENT

18 U.S.C. § 1514A(c)2(A):
reinstatement with the same seniority status that the employee would have had, but for the discrimination.

As of September, 2013, the date he was blacklisted, the Complainant was employed by Preston Exploration, where he worked in land development from June, 2013 until the first week of January, 2014. TR 132, 331. He does not allege that he lost his job with Preston as a result of the blacklisting. He was not corporate counsel.

In his proposed findings and briefs, Complainant seeks front pay in lieu of reinstatement. I find that in this fact pattern, reinstatement would not make Complainant whole as of the date of

²⁴ On cross examination, Complainant was questioned whether he had family wealth, whether he owned an airplane, whether he had funds from sale of a business, etc. but Respondent does not allege any other motive for its filing of the complaint.

blacklisting.

BACK PAY

Complainant alleges that he is entitled to back pay from September 21, 2011 until the time of trial, \$422,110.59 in total. However, I find that Complainant failed to timely file a claim as to the 2011 incidents and that the statute of limitation bars any recovery.²⁵

FRONT PAY

Complainant seeks an award of \$620,000, to be paid monthly for front pay, based on an earning capacity of \$155,000 per year. Complainant requests that I consider the following factors:

- (1) the plaintiff's age,
- (2) the length of time the plaintiff was employed by the defendant employer,
- (3) the likelihood the employment would have continued absent the discrimination,
- (4) the length of time it will take the plaintiff, using reasonable effort, to secure comparable employment,
- (5) the plaintiff's work and life expectancy,
- (6) the plaintiff's status as an at-will-employee,
- (7) the length of time other employees typically held the position lost,
- (8) the plaintiff's ability to work,
- (9) the plaintiff's ability to work for the defendant employer,
- (10) the employee's efforts to mitigate damages, and
- (11) the amount of any liquidated or punitive damage award made to the plaintiff

Citing to *Ogden v. Wax Works, Inc.*, 29 F.Supp.2d 1003, 1012-15 (N.D. Iowa 1998) (collecting cases from the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits).

Complainant testified that since the filing of the lawsuit, he has been unable to secure further employment as a corporate attorney or a general counsel. Complainant also testified that he had been recently denied placement by a professional legal recruiting firm and also denied legal malpractice insurance coverage due to the filing of the lawsuit against him.

The record shows that Complainant earned a salary of \$90,000 per year at Preston Exploration. He remained on salary until at least three months after the blacklisting occurred.

Respondent argues that the relevant earnings, if any, would be those he received after he resigned in 2011 and prior to January 2014, when he lost his last job.

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

²⁵ Complainant reminds me that under Dodd-Frank, any person who provides information regarding an issuer to the SEC regarding shareholder fraud, and who is retaliated against by any person for doing so, shall be entitled to a recovery of double back-pay. However, that claim is also time-barred.

35 (ARB Aug. 6, 2004).

Complainant also testified that, under the terms of his Employment Contract, he was to receive an increase in annual salary of \$155,000 per year, effective after three months of his employment, and that he never received this contracted-for increase. He argues that as an attorney practicing corporate law, with a good track record, the absence of claims and malpractice insurance coverage are critical and indispensable to employment for any attorney. Respondent argues that if Complainant's salary with Respondent were considered for any purpose in connection with his alleged damages, the figure that should be considered is the \$150,000 per year he actually earned.

At hearing, I inquired:

JUDGE SOLOMON: Have you been looking for work?

THE WITNESS: Yes, I have.

JUDGE SOLOMON: Where have you been looking for work?

THE WITNESS: Well, again, it's one of my exhibits, I was contacted by a Denver firm in an effort to be recruited or be presented to a law firm in Denver, and, again, they sent the letter which speaks for itself. I had been contacted by another recruiter in Miami to become an attorney for an international company -- I think it's called World Fuel -- that delivers fuel to aircraft, airline companies, shipping companies all over the world. I haven't heard anything back from that. I routinely check in a publication called Land News that has to do with employing of analysts and lawyers in the oil and gas industry in land management.

And I routinely look at the state bar e-mails regarding positions available. And I also have a search agent online with the state bar to look for jobs that I might be qualified for. So, yes, I've been actively trying to find a job.

JUDGE SOLOMON: You have a law license?

THE WITNESS: Yes.

JUDGE SOLOMON: Have you tried to get any clients on your own?

THE WITNESS: No.

JUDGE SOLOMON: Why not?

THE WITNESS: At this point, I would rather not try to represent individuals. I'd rather work in a corporate capacity or an institutional capacity.

TR 332-333.

Respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. See *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000) (citing *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986) (it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages)).

Respondent argues that Complainant had a duty to set the motion for summary judgment he filed in the malpractice case for hearing. I asked the parties to provide me some understanding of state law on this issue, and although I am not in a position to analyze the state claim, I find that this argument is unpersuasive as to mitigation.

However, Respondent argues more persuasively that the record “conclusively” establishes that:

Holifield has failed to avail himself of the opportunity that his law license provides him to serve the public as a sole practitioner. As the old adage says: “There’s no such thing as an unemployed lawyer.” A lawyer with even one steady client will be busy at least part of the time. A lawyer with even a few clients may have periods when he is fully occupied. Yet, since losing his last job in January 2014, Holifield has never even tried to engage in the solo practice of law—despite the fact that he supported himself as a solo practitioner [sic] for over 15 years when he lived in Mississippi.

See Brief. I am also directed to the following colloquy:

Q [Ms., Ray] Okay. And for a time you worked for -- from 1981 to 1996 did your practice involve real estate closings, stand up title opinions, title exams, title formation of corporations, advising business on corporate law and accounting and banking?

A Yes.

Q And you were a sole practitioner in Ocean Springs, Mississippi. Is that correct?

A That's correct.

TR 124.

Again, he also “would rather not try to represent individuals.” TR 328.

Respondent argues that Complainant should be denied “any relief.” The benefit of the doubt ordinarily goes to the complainant. *Hobby v. Georgia Power Co.*, 2001 WL 168898, ARB Nos. 98-166 and 98-169, ALJ No. 90-ERA-30 (ARB Feb 9, 2001).

At the time of the filing of the civil damage action, the Complainant was not earning a living as a corporate attorney or a general counsel, but he was earning \$90,000 per year in law related activities. In many instances I receive documents or I am asked to take administrative notice as to billing rates in various jurisdictions throughout the country. Sometimes, I am provided expert testimony as to hourly rates under the lodestone concept used in various fee shifting statutes at the Department of Labor. In this case, I do not take administrative notice of Texas billing rates. There is no evidence to show that there is a distinct market for corporate attorneys or for general counsel and that Complainant could take advantage of his background in such a market if it does exist. Other than an allegation by Complainant, there is also no substantiating evidence to show that Complainant’s earning capacity has been diminished by the blacklisting.

From January to the present, Respondent reminds me that the Complainant has not sought

referrals and has not made any attempt to obtain them. Although many of Respondent's claims about the Complainant's credibility are overly contentious and merely arguable, I accept that no foundation has been laid to determine more than nominal value and that Respondent is correct that there is no basis for comparison.²⁶

Therefore, although I find that Complainant may be entitled to front pay, I find that the Respondent has proven that Complainant has failed to mitigate his loss and any recovery must be reduced. He did not prove the extent of the loss. However I find that at a minimum, the Complainant has been harmed and I find that he is entitled to a nominal award of \$1.00 as a lump sum to put him into a position to seek work.²⁷

COMPENSATORY DAMAGES

Reputation

Complainant argues that Respondent intended to cast the Complainant in a false light and damage his reputation in a highly public forum. Complainant proffered an article from the *Texas Lawyer* about the filing of the lawsuit by Respondent against Complainant to show that such matters are read "not only by other lawyers and law firms, but by corporate hiring personnel, legal recruiters, and liability insurers across the country." CX 25.

Respondent cites to *Murray v. TXU Corp.*, 2005-WL-1356444 (N.D.Tex. June 7, 2005) and *Hemphill v. Celanese Corp.*, NO. CIV.A.3:08CV2131-B, 2009 WL 2949759, at 5 (N.D. Tex. Sept. 14, 2009), when district courts dismissed the SOX plaintiffs' claims for "mental anguish damages, future earnings and benefits, and exemplary and punitive damages," holding that they were not available under SOX as a matter of law. However, I find that these cases are not precedent and other courts have found differently. In *Mahony v. Keyspan Corp.*, No. 06CV00554 (E.D.N.Y. Mar. 12, 2007) (case below 2004-SOX-24), the court reviewed *Murray*, and found that the statute does provide for reputation damages. None of these cases were decided after the passage of Dodd Frank, in 2010.

Although there is no explicit provision for the recovery of non-pecuniary damages, such as emotional distress or loss of reputation damages in either SOX or Dodd Frank, I find that a fair reading of "compensation for any special damages sustained as a result of the discrimination," does permit reputation damages.

I accept that the Complainant is entitled to recover for his loss of reputation. I am not provided any guidance as to the value. However, the Complainant is a lawyer and "his reputation

²⁶ A failure to succeed in establishing "actual injury" based on sufficient evidence will result in the award of only nominal damages, typically one dollar, *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); Dan B. Dobbs, "Damages-Equity-Restitution," *Law of Remedies 2d.* (1993), pp. 221-222.

²⁷ Compensatory damages are intended to redress the concrete loss suffered by reason of the wrongful conduct. Restatement (Second) of Torts § 903. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 60 Fed. R. Evid. Serv. 1349 (U.S. 2003). Actual damages are not limited to out-of-pocket losses, but encompass all the elements of compensatory awards generally, including those such as impairment of reputation, personal humiliation, and mental anguish and suffering. *Rasor v. Retail Credit Co.*, 87 Wash. 2d 516, 554 P.2d 1041 (1976).

is his stock and trade.” Therefore, I award a nominal amount: \$1.00.²⁸

Medical and Mental Anguish

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

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

Complainant testified to severe depression since terminating his employment with Respondent. Complainant testified that he sought the services of a psychiatrist and is taking medication for depression and mood stabilization.

However, this allegation was not part of his complaint and he failed to place Respondent on notice as to this issue. Complainant did not describe any symptoms. He alleges that I may infer that he was depressed as a result of Respondent's conduct. He allegedly had a pre-existing condition and had been in treatment. There are no medical bills proffered. There are no treatment records. Usually I hear testimony about symptoms and I am provided medical records. In order to adjudicate credibility I usually rely on substantiation of symptoms, by documented signs and laboratory findings as to complaints.

The Complainant bears the burden of proof on this issue. I can understand how the state claim may have been depressing for the claimant but I can find no proof of symptomology to justify an award of monetary damages.

²⁸ See *Carey*, supra.

PUNITIVE DAMAGES

Although the Complainant had requested punitive damages, he did not include them in his proposed findings. Moreover the Act does not include a right to punitive damages. Therefore, I do not award punitive damages.

ATTORNEY'S FEES

Complainant made no demand for attorney's fees. Therefore I do not award attorney's fees.

COSTS

Complainant testified as to his out-of-pocket expenses in bringing the complaint and preparing for the hearing. Prior to the close of the hearing, Complainant submitted Exhibits CX-36 and CX-37, representing expenses totaling \$1,469.77. Complainant has also borne the expense of \$1,903.95 for a transcript of the hearing.

These were submitted to the Respondent in briefing and the Respondent did not object to the amounts.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Respondent will pay Complainant \$1.00 for front pay and \$1.00 for loss of reputation.²⁹
2. Respondent will pay Complainant's reasonable expenses: \$3,373.72.

SO ORDERED

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

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

²⁹ Pre- and post-judgment interest must also be paid. The interest rate shall be the rate charged for underpayment of federal taxes, as specified in 26 U.S.C. §6621.

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).