



Issue Date: 11 September 2017

Case No.: 2015-SOX-00036
OSHA No.: 6-2320-15-170

In the Matter of:

THOM THIBODEAU,
Complainant,

v.

WAL-MART STORES, INC.,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the Sarbanes-Oxley Act of 2002, as amended (“SOX” or “the Act”), codified at 18 U.S.C. § 1514A, and the implementing regulations at 29 C.F.R. § 1980, *et seq.* Complainant Thom Thibodeau seeks compensation for alleged retaliation by Respondent Wal-Mart Stores, Inc. As explained below, Complainant has not met his burden to establish that he engaged in protected activity, and even assuming *arguendo* that he did, Respondent has met its burden to establish that it would have taken the same adverse action in the absence of that allegedly protected activity. Accordingly, the complaint in this matter is dismissed.

Findings of Fact

Complainant began working for Respondent as a senior estimator in 2007. Tr. at 17. Prior to 2007, Complainant had spent roughly thirty years in the construction field, with seventeen of those years as an estimator for S&S Craftsman. *Id.* at 16. When he first started with Respondent, Complainant’s supervisor, David Sibert, explained that the estimating department had been “created in 2006 because it appeared there was [sic] a lot of opportunities to save money in the change order process, because [Respondent] was constantly bombarded with change orders, and there was no oversight.” *Id.* at 17-18.

Complainant worked under Mr. Sibert until 2010, when James Cantey took over the Estimating Department. Tr. at 244. Complainant and Mr. Cantey did not see eye to eye on the change order process. After entering the Estimating Department, Mr. Cantey noted that Complainant had communications issues. *Id.* at 244; *see also* CX¹ 25. Mr. Cantey consistently

¹ The parties’ exhibits were submitted by Complainant and marked as Complainant’s Exhibits (“CX”) 1-131.

flagged Complainant's communication issues in Complainant's annual and semi-annual performance evaluations. CX 25; CX 26; CX 27; CX 31; CX 37; CX 59; CX 113.

Part of Complainant's job was to analyze change requests in order to "mitigate costs of construction claims" for "validity and fair market value." CX 3; *see also* Tr. at 18, 21. The change request process began when a General Contractor ("GC") submitted a Proposed Change Order Request ("PCR") to one of the Respondent's Construction Managers ("CM"). Tr. at 429. The PCR outlined the scope of work that a GC believed needed to be done, providing a ball-park cost. Tr. at 490-92. If the CM (and potentially other construction supervisors) found the scope of work to be valid, the CM allowed the GC to start on the proposed work. The GC then submitted a Change Order Request ("CR") for the actual value of the work. *Id.* Where certain thresholds were met, or where the CM wanted more insight, the CM would pass the CR to the Estimating Department for review. *Id.* at 432-33. Though Estimating would offer an opinion on the validity of the alleged cost of the CR, the CM could ignore Estimating's advice when making the decision whether to approve a CR. *Id.* at 433-45.² For part of his employment with Respondent, Complainant performed CR evaluations for CMs in the Western United States region (nineteen states). Tr. at 25; CX 49.

In 2012, Complainant began to evaluate CR requests for the Marysville, Washington, construction project. CX 29-30. Complainant and Shawki Al-Madhoun, another estimator, worked together to analyze CRs for the Marysville store. Tr. at 537-41. In February 2013, Complainant and Mr. Al-Madhoun received recognition for their good work on the Marysville project. On April 17, 2013, Complainant sent a memorandum and summary regarding the Marysville project to Carl Crowe, a vice president for construction. CX 39. On May 21, 2013, Complainant forwarded an email to Mr. Cantey, containing a memo and attachments that he had sent to Mr. Crowe earlier. *Id.*

In November 2013, Mr. Cantey sent an email to Complainant regarding whether the Estimating Department should renew software licenses on certain estimating software. CX 43. The software was increasing dramatically in price. Tr. at 253. In evaluating whether the tools were still useful, Mr. Cantey found that the majority of estimators did not use the software that Complainant was using. *Id.* at 253-54 ("[p]robably four people out of the [twelve] people were using consistently the same tools that Thom was using.")

Complainant disagreed with Mr. Cantey on the necessity of the software licenses. Complainant sent multiple emails to Mr. Cantey explaining how much money the software programs helped at least him save Respondent per annum, and that the savings warranted the cost. CX 43; CX 44; *see also* Tr. at 46-49. Mr. Cantey determined that the software was unnecessary, and he cancelled the renewal. *Id.* at 254; CX 44. Mr. Cantey made it clear that the "decision ha[d] been made," but he offered Complainant the chance to address the issue in person. CX at 44. On January 10, 2014, Complainant brought the issue to the attention of Volker Heimeshoff, vice president for prototype and new format development,³ via Respondent's "Open Door Policy." CX 46; Tr. at 50-51.

² More information regarding the Change Order Process and its evolution can be found in Discussion Part I.C.1.b, *infra*.

³ This department, of which Estimating was a part, had some 132 employees.

Respondent's Open Door Policy is a company policy that allows "each associate an opportunity to bring suggestions, observations, or concerns to the attention of any supervisor or manager without fear of retaliation." CX 5. In his letter to Mr. Heimeshoff, Complainant noted his dissatisfaction with Mr. Cantey's cancellation of the estimating programs and how much he had saved per diem using the software. CX 45. Complainant specifically explained that "[w]ithout impartial third party resources[,] any analyses [Estimating] provide[s] for [CR] reviews become merely opinions that cannot be supported or validated." *Id.* Complainant went on to state that although Mr. Cantey assured him that "[he] would revisit the issue" in the future, Complainant's "many years of experience has taught me that that once a tool is gone it is rarely replaced." *Id.*

In February of 2014, the Estimating team received a "Behind the Scenes Award," which was given in recognition of "outstanding Customer Service without concern of personal recognition." CX 48; CX 59 (emphasis omitted). At this same time, the Estimating Department was reorganized. CX 49. As part of the reorganization, Estimating would review all CRs over \$50,000. *Id.* Further, Estimating was "partnering with Construction to reintroduce roadshows, standard procedures, identify best practices, and conduct comprehensive on-boarding for the Change Order Process." *Id.* This change was designed, in part, to "increase awareness" for CMs and GCs so as to "ensure an effective Change Order process." *Id.* Four people, Sara McKay, Mark Puente, Complainant, and Gary Young, were charged with supporting the new Change Order Process on the part of Estimating. *Id.*

In late February and early March, Complainant and Mr. Cantey again discussed the software licenses. Tr. at 132-33. Mr. Cantey asked Complainant to negotiate with the software providers, while also looking for alternative programs, to see if it was possible to get the software at a lower price. CX 50. After negotiating and discussing with his team, Complainant had managed to reduce the price of the software from roughly \$40,000 to \$4,500 per year. CX 52. Mr. Cantey then sent an email to Mr. Heimeshoff, requesting \$4,500 so as to pay for the programs. *Id.* In his email, Mr. Cantey explained the necessity of the tools to provide information on generic square footage costs, construction productivity rates, and electrical equipment prices. *Id.* Mr. Cantey acknowledged that Complainant had been key to the negotiating process. *Id.*

On March 20, 2014, Zachary Pearson, a CM, and Don Johnson, a sub-contractor, emailed each other about the status of a CR. CX 53. In response to one of Mr. Pearson's emails, Complainant replied with information on the status of the CR, including information on internal CR queues and submission dates. The email was copied to Mr. Johnson. *Id.* Mr. Cantey sent Complainant an email stating Complainant should not have copied that email to Mr. Johnson. *Id.*

The next day, Mr. Cantey engaged in a coaching of Complainant. CX 54. Mr. Cantey was accompanied by Kevin Ruehle, Cantey's immediate supervisor. *Id.* Tr. at 268-69. A coaching refers to "Coaching for Improvement," which is a process by which supervisors can work with an associate to identify areas of poor performance and formulate a plan to address those issues. Tr. at 564-65. The coaching process is disciplinary and rehabilitative. *Id.* There are three levels of coaching: first, second, and third. *Id.* Coaching levels may be skipped,

depending on the severity of the issue. Tr. at 565. Should an individual receive a third level coaching, any future misconduct results in termination. Tr. at 572-73.

Mr. Cantey explained that there were three reasons that prompted the coaching. Tr. at 211-219; CX 54. First, Mr. Cantey discussed the email to Mr. Pearson, stating: “[the email] ‘volley’ was not centered around cust[omer] serv[ice] [and] unfortunately the vendor was cc’d on all the volleys. This is typical behavior from [Complainant] and something I have discussed w[ith] him before.” CX 54; Tr. at 211-214; 256. Mr. Cantey explained that “estimating [could not] afford to be seen as [being] against construction.” CX 54; Tr. at 216. Second, Mr. Cantey explained that on March 14, 2014, he asked Complainant to “look into a labor rate question.” CX 54; Tr. at 257. Complainant refused to do so, and Mr. Cantey considered this insubordination. CX 54; Tr. at 257. Finally, Mr. Cantey recalled that Complainant had brought up the On Screen Take-Off program in a meeting with another department, despite Mr. Cantey deliberately stating that he should not address the issue at that meeting. CX 54; Tr. at 266-267.

During the coaching meeting, Mr. Cantey noted that Complainant had made inappropriate comments about Ms. McKay (calling her half an Estimator). CX 54; Tr. at 258-62. Complainant later admitted at the coaching that his statement about Ms. McKay was inflammatory and he apologized. CX 54. The conversation transitioned to discussing the estimating tools. *Id.*; Tr. at 267-69. Complainant then stated that Mr. Cantey was not qualified to make decisions regarding the estimating tools. CX 54. The conversation ended shortly thereafter, and Complainant stated that Human Resources (“HR”) should be involved. CX 54; Tr. at 133-34.

Cantey spoke with Laura Nelson in HR. Tr. at 269. Based on the situation, they concluded that the coaching should be entered as a second level coaching. *Id.* After receiving the second level coaching, Complainant open doored the coaching to Respondent’s Ethics Department and to Mr. Heimeshoff. CX 56. He specifically explained that he believed Mr. Cantey had retaliated against him for questioning Mr. Cantey’s decision to drop the software subscriptions. *Id.* Complainant included an equation summarizing his opinion of the software tool issue: “all CR’s over 50K + 3¹/₂ Estimators – validation tools = FAILURE.” *Id.*

Mr. Heimeshoff upheld the coaching. Tr. at 326. Mr. Heimeshoff did change the language of the coaching, however, by removing the words “seething” and “sarcastically.” Tr. at 326; CX 57. Beyond removing those two words, no other changes were made. CX 57; Tr. at 147. Complainant then provided a response to the Second Level Coaching on March 27, 2014, providing his side of the events and apologizing for his insubordination, the Pearson email, and his comment about Ms. McKay. CX 58.

In late March, Mr. Cantey had meetings with both Complainant and Mr. Puente, another estimator, to address unacceptably aged outstanding CRs. CX 55. Mr. Cantey explained that the goal was to have CRs done within 21 days or less. *Id.* Mr. Cantey noted that though Mr. Puente accepted the criticism and was receptive to improving his times, Complainant “didn’t like hearing he needed to improve.” CX 56 (internal capitalization omitted).

On April 5, 2014, Complainant underwent his Fiscal Year 2014 evaluation. Mr. Cantey praised Complainant for his diligence and “insight into the Change Order process.” CX 59. Mr. Cantey stated that Complainant “strives to provide customers with detailed analysis and insight” and that “[h]is experience in change order review continues to be an asset.” *Id.* However, Mr. Cantey explained that “[Complainant] struggled to meet expectations and never fully embraced the [Regional Estimating] role.” *Id.* Mr. Cantey again noted that “[Complainant] continues to struggle with communication with leadership and needs to improve his delivery in communication with customers and contractors.” *Id.* As part of the evaluation, Mr. Cantey gave Complainant a “development needed” rating⁴ in planning, communication, and adaptability. *Id.*

Complainant disagreed with his evaluation, specifically the “development needed” determination. CX 59. Complainant believed that Mr. Cantey had measured Complainant’s duties against his own, and that in so doing, Mr. Cantey had used the wrong metric. *Id.* Complainant also pointed to the Behind the Scenes Award as evidence that he was doing a good job. *Id.* Complainant sent a letter and email to Mr. Heimeshoff, open dooring the issue and requesting a change in his evaluation. CX 60; CX 61; Tr. at 55. After discussion with Ms. Nelson, Mr. Heimeshoff changed the evaluation from development needed to solid performer. CX 62; CX 63; Tr. at 56.

On June 2, 2014, the revised Second Level Coaching was issued and Complainant had a meeting with Messrs. Cantey and Ruehle to discuss their expectations for Complainant. CX 64-65. After this meeting, Complainant continued to evaluate CRs, including those from the Marysville store. In late June 2014, a construction lien was filed against Respondent for work done at Marysville. CX 66.

On July 29, 2014, Complainant had another meeting with Mr. Cantey. CX 68. At this meeting, Mr. Cantey discussed aged CRs that Complainant had yet to resolve. *Id.* More than 50% of Complainant’s CRs were over the Estimating Department’s 14 day goal. *Id.* Mr. Cantey explained that the other Estimators had been able to resolve CRs within the goal. *Id.* Later, on August 12, 2014, Daniel Weese, a Construction Director, expressed concern that Complainant would not review Mr. Weese’s CR. *Id.*; *see also* CX 65.⁵ Mr. Cantey addressed this with Complainant, explaining that he could not refuse to do a review. CX 68.

Throughout late August to September, issues continued to accrue with the Marysville project. CX 72. On September 4, 2014, Complainant sent an email with very detailed spreadsheets and other Marysville related documents to Messrs. Cantey, Ruehle, and Heimeshoff. CX 73. Upon receipt of the document, Mr. Cantey informed Complainant that he would have “liked to review it before you sent it out.” CX 74. Complainant acknowledged this, replying “ok[ay], next time.”

Shortly after this email, Mr. Cantey had a midyear discussion with Complainant. Tr. at 285; CX 81. During that discussion, Mr. Cantey explained that if Complainant wanted to

⁴ Respondent’s evaluations use a five-part rating scale: below expectations, development needed, solid performer, exceeds expectation, and role model.

⁵ This email, in which Complainant states “[t]his is my last communication on this matter,” appears to be the email at issue in CX 68.

communicate information to leadership, he should run it by Mr. Cantey first so that he could make the communication as effective as possible. *Id.* On September 16, 2014, after the midyear meeting, Complainant sent another Marysville email to Mr. Crowe and J.P. Suarez, senior vice president in the construction department. Tr. at 284-85; CX 75. Mr. Cantey was not included on this email. CX 75.

Upon receipt of the message, Mr. Crowe expressed uncertainty as to why Suarez had been given the information. CX 78. Mr. Heimeshoff stated that he had “[n]o idea what this [was] about . . . [.]” and he forwarded the message to Mr. Cantey. CX 76 (ellipsis in original). Mr. Cantey emailed Mr. Ruehle, stating “[t]his is a direct thumb in the eye to me. In his mid-year discussion, I was very clear that my expectation was that this kind of communication must go through me [Complainant] sent something similar to [Mr. Heimeshoff] a couple weeks ago.” *Id.* (ellipses in original).

In response to the September 16 email, Mr. Cantey approached Willa Ball, an HR manager, and Mr. Ruehle to discuss Complainant’s insubordination. Tr. at 286; CX 77. At Ms. Ball’s instruction, Mr. Cantey provided her a “free flow” of his thoughts on the matter. CX 81. In that document, Mr. Cantey explained that he informed Complainant not to send emails, like the September 4 email, without first having Mr. Cantey review it. *Id.* Mr. Cantey explained that Complainant had gone against his specific direction by sending the email. *Id.* He further stated that in so doing, Complainant had unduly taken up senior leadership’s time. *Id.*

Prior to any coaching, Ms. Ball wished to do an investigation. Tr. at 584. Based on her investigation, she agreed that Complainant was being insubordinate. *Id.* at 585. On the eve of the meeting addressing the coaching, Complainant sent a message to Mr. Heimeshoff with the subject line: “Concerned about my future.” CX 82. In that email, Complainant explained that he feared the meeting would be a third level coaching, and that Mr. Cantey was trying to “get rid of [Complainant] . . . sooner rather than later.” *Id.* Complainant tried to justify his actions, and he explained that Mr. Crowe had not been upset by receiving the email. *Id.*

On September 24, 2014, Complainant met with Ms. Ball, Mr. Ruehle, and Mr. Cantey for coaching. CX 83. The reasons for that coaching were listed as “Judgment – Poor Business Judgment, Insubordination, Respect for the Individual.” *Id.* The coaching specifically stated: “[Complainant’s] behavior showed willing disregard for direction given by leadership. This behavior undermines authority, challenges leadership’s trust in [Complainant’s] judgment and impacts his and his team’s credibility.” *Id.* The coaching explained that the next level of action if the behavior continued was termination. *Id.*

In response to the coaching, Complainant sent out a letter outlining alleged retaliation. CX 85. He spoke with Ms. Ball, explaining that Mr. Cantey was retaliating against him in response to his protests to the decision involving the software. CX 85; CX 86. Complainant further claimed that he was being denigrated or shunned by Mr. Cantey, and he listed a number of examples of such behavior. CX 86. Ms. Ball started to investigate the matter, treating the communication as an open door request. *Id.*

Ms. Ball interviewed roughly half of the Estimating Department. CX 90. Her interviews revealed that many individuals in the Estimating Department were unhappy with Mr. Cantey, particularly his lack of engagement with certain employees. CX 90. In her findings, Ms. Ball admitted that Mr. Cantey had areas where he needed to improve as a manager. CX 91. However, she determined that the coaching was still valid. CX 91. On October 21, 2014, Complainant sent a message to his personal email archiving the issues he had with the third level coaching. CX 93.

After the third level coaching, Complainant continued to review CRs. One project that generated multiple CRs was a store remodel at Glendora, California. *See, e.g.*, CX 88; CX 89; CX 94; CX 95; CX 96. Complainant often rejected many versions of Glendora CRs because he believed they did not provide adequate information. *See, e.g.*, CX 96; CX 100. Rejections and requests for more information were par for the course for Glendora, and these interactions continued through February 2015.

During this time, William Ross, a Senior Project Manager for Grant General Contractors, the GC at Glendora, typically submitted CR documents. Mr. Ross noted that he “never had unpleasant conversation with Thom.” Depo Tr. at 34. However, Mr. Ross recalled that Complainant had used harsh language in emails, which seemed different than other emails he had received from Respondent’s employees. Depo Tr. at 38; 40-41.

Things came to a head in early March 2015. Complainant had a conversation with Mr. Ross regarding CR documentation that Mr. Ross had provided.⁶ During this conversation, Complainant grew irritated. Depo Tr. at 34-35. Complainant questioned whether Mr. Ross was really worth the money he was requesting in the CR. *Id.* at 34-35; CX 109; Tr. at 521-22. Complainant critiqued Mr. Ross’s work, pointing out spelling errors and other mistakes in the CR. Depo Tr. at 34-35; CX 109. The phone call ended shortly thereafter. Another estimator, Cuyler Scates, who had overheard the March 4, 2015 call, was concerned that Complainant had not shown respect to the person on the other end of the line. Tr. at 514; 522-23; CX 109.

On March 4, 2015, the incident came to the attention of Jeffrey Todd Guin, the CM for Glendora, and Carol Baker, a director of construction.⁷ Ms. Baker sent an email to Mr. Cantey

⁶ Complainant alleges that he spoke with Mr. Ross about inadequacies in the work book and unsupported billing rates. Tr. at 87-88. Complainant claims that Mr. Ross argued that Complainant was holding up the job. *Id.* at 88-89. Complainant states that Mr. Ross was “getting pretty hot . . . [and] irritated,” and that he cursed at Complainant, leading to one party (Complainant cannot recall who) hanging up the phone. *Id.* at 90. Complainant’s version, however, is contradicted by both Mr. Ross and Mr. Scates. Mr. Scates, who could only hear Complainant’s side of the conversation, stated that Complainant was saying that “they weren’t worth what they were worth.” *Id.* at 522. Mr. Scates found those comments to be disrespectful. *Id.* at 521 (“I could tell by the tone of [Complainant’s] voice, that [the call] was different. And at that point, I knew I had to say something to him as the call ended, because it just didn’t feel right to me.”) Mr. Ross had no motive to provide an inaccurate description of this phone call because he would personally be unaffected by a finding as to what transpired during the phone call. Given that Mr. Ross had no reason to provide an inaccurate version of events concerning this phone call, and that he appears to recollect the phone call more completely than does Complainant, I find Mr. Ross’s version of events (which is corroborated by Mr. Scates) more credible than that of Complainant.

⁷ Mr. Ross stated at his deposition that he mentioned the call to Mr. Guin because he was frustrated with the slow pace of the CR under review. Depo Tr. at 28, 36-38. Mr. Ross repeatedly stated he bore no ill will against

regarding the alleged disrespectful comments made by Complainant. CX 106. Mr. Cantey, in turn, referred the matter to Ms. Ball. *Id.* He believed that, given Complainant's prior behavior, this incident "could move us to the next step." *Id.* Ms. Ball went to speak with her department's ethics manager to discuss how similar instances of disrespect had been handled in the past. *Id.* Ms. Ball began to consult Mr. Heimeshoff for his opinion on the matter. CX 107.

On March 11, 2015, Complainant was terminated.⁸ CX 108. Complainant's exit interview form states that he was terminated involuntarily due to "misconduct with coachings," and that Complainant was eligible for rehire. CX 108 (capitalization omitted).

On May 12, 2015, Complainant requested an open door discussion regarding his termination with Ms. Ball and Mr. Suarez. Complainant alleged that his termination was the culmination of multiple retaliatory acts taken by Mr. Cantey. CX 114. Specifically, Complainant alleged that Mr. Cantey had retaliated against him for protesting the loss of software licenses and refusing to grant invalid CRs. *Id.* Specifically, Complainant alleged that he had "been consistently retaliated against, harassed and now terminated since [he] raised the issue about cancelling [the] estimating software which removed the last vestige of any means to comply with the contract and government regulations." CX 114 at T0039. Mr. Suarez did not reinstate Complainant.

Procedural History

On August 27, 2015, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA"). On September 16, 2015, OSHA issued the Secretary's Findings dismissing the complaint. Complainant filed timely objections to the Secretary's Findings on September 22, 2015. I was assigned this matter on October 14, 2015, and on October 16, 2015, I issued a Prehearing Order.

On September 19, 2016, Respondent filed a Motion for Partial Summary Judgment. Complainant responded to that motion on September 21, 2016, and Complainant simultaneously filed his own Motion for Partial Summary Judgment. On September 28, 2016, I denied Respondent's Motion, and I granted Complainant's Motion only on the contributing factor issue. On January 10, 2017, I held a hearing on this matter in Fort Smith, Arkansas. At the hearing, Complainant and Respondent agreed to a joint exhibit list comprised of Respondent's Exhibits 6 and 21, and Complainant's Exhibits 3-13, 16, 19-21, 25-29, 32-36, 38-45, 49, 51-54, 56-57, 59-60, 62-63, 65, 67-68, 71-77, 79-81, 82-83, 86-87, 90-92, 94-96, 99-104, and 106-115. Tr. at 655-657.⁹ I admitted these exhibits into the record. *Id.* at 657.

On March 31, 2017, I received the Respondent's and Complainant's post-hearing briefs. I also received a combined list of exhibits labelled CX 1-121.

Complainant and that he did not intend to cause Complainant's termination. *E.g.*, Tr. at 34, 43. I find Mr. Ross's statements on this matter credible.

⁸ Though Complainant was effectively terminated on March 11, 2015, he was officially terminated March 17, 2015. *See* Tr. at 606; CX 109 (moving Complainant's termination date back a few days to allow his past earned equity to vest).

⁹ The parties included the Deposition Testimony of Mr. Ross, taken on August 24, 2016, with their closing briefs.

Legal Standard

SOX whistleblower claims are subject to a burden-shifting framework. *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 805 (6th Cir. 2015). A complainant must initially show, by a preponderance of the evidence, that: 1) she engaged in protected activity; 2) she suffered an adverse action; and 3) the protected activity was a contributing factor in the adverse activity. *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, 2016 WL 1389927 at *4, *4 fn. 24 (ARB Mar. 30, 2016); *Palmer v. Canadian Nat'l Ry.*, No. 16-035, 2016 WL 5868560 at *9 fn. 74, *31 (ARB September 30, 2016) (reissued Jan. 4, 2017); *Rhinehimer*, 787 F.3d at 805; *Beacom v. Oracle Am., Inc.*, 825 F.3d 376 (8th Cir. 2016).¹⁰ If a complainant meets this initial burden, the burden then shifts to the employer to show, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. *Palmer*, 2016 WL 5868560 at *31; *Beacom*, 825 F.3d at 876 (citing *Rhinehimer*, 787 F.3d at 811).

A complainant must first establish that she engaged in protected activity. *Palmer*, 2016 WL 5868560 at *9 fn. 74; *Rhinehimer*, 787 F.3d at 805. The ARB has stated that:

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

Sylvester v. Parexel, LLC., No. 07-123, 2011 WL 2165754 at *11 (ARB May 25, 2011) (en banc). An employee need not establish the reasonableness of his or her belief to each element of a fraud or violation, though the employee must establish that her belief is reasonable. See *Sylvester*, 2011 WL 2165854 at *18; *Beacom*, 825 F.3d at 380.

Determining the reasonableness of an employee's belief requires a two pronged inquiry. *Sylvester*, 2011 WL 2165854 at *11. The first prong covers the employee's subjective belief. *Id.* Subjective belief is "satisfied if the employee actually believed that the conduct complained of constituted a violation of relevant law." *Rhinehimer*, 797 F.3d at 811 (citing *Nielson v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014)); accord *Sylvester*, 2011 WL 2165854 at *11.

The second prong covers the employee's reasonable objective belief. Objective belief is satisfied if the totality of the circumstances known (or reasonably, albeit mistakenly, perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience, would lead a reasonable person to believe that the conduct complained of constituted a violation of relevant law. *Sylvester*, 2011 WL 2165854 at *12; *Rhinehimer*, 797 F.3d at 811-812.

¹⁰ The Eighth and Sixth Circuits list a four prong test, which the ARB has avoided. See *Folger v. Simplex Grinnell, LLC*, No. 15-021, 2016 WL 866116 at *1 fn. 3 (ARB Feb. 18, 2016) (adopting a three prong test). The ARB has specifically explained that SOX does not contain an explicit knowledge requirement, "though it might be implicit in the causation requirement." *Id.* (citing 18 U.S.C. § 1514(A)).

The complainant must then establish that she suffered an unfavorable personnel action. Under SOX, an employer may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.” 18 U.S.C. § 1514A(a). An unfavorable personnel action must be “harmful” to the employee. *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 259 (5th Cir. 2014) (citing *Burlington Northern & Santa Fe Ry. Co. v. White* [hereinafter *Burlington Northern*], 548 U.S. 53, 60 (2006)). “Harmful” means an action that is “materially adverse, which . . . means it well might have dissuaded a reasonable worker from [performing protected activity].”¹¹ *Id.* (quoting *Burlington Northern*, 548 U.S. at 60).

Finally, a complainant must show that the protected activity was a contributing factor in the adverse personnel action. The contributing factor standard is “broad and forgiving.” *Deltek, Inc. v. Admin. Rev. Bd.*, 649 Fed. App’x 320, 329 (4th Cir. 2016) (citing *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014)); accord *Palmer*, 2016 WL 5868560 at *31 (“[a]ny’ factor really means *any* factor. . . . The protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.”); see also *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Lockheed Martin Corp. v. Dep’t of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013). A complainant may satisfy this “rather light burden by showing that her protected activities tended to affect [her] termination in at least some way,” whether or not they were a primary or even a significant cause of the termination. *Deltek, Inc.*, 649 Fed. App’x at 329 (quoting *Feldman*, 752 F.3d at 348) (internal quotation marks omitted) (brackets in original).

If a complainant is able to establish these three elements by a preponderance of the evidence, the burden then shifts to the employer. The employer can avoid liability if it establishes, by clear and convincing evidence,¹² that it “would have taken the same unfavorable personnel action in the absence of the protected activity.”¹³ *Rhinehimer*, 787 F.3d at 805 (quoting *Feldman*, 752 F.3d at 345); accord *Dietz*, 2016 WL 1389927 at *4; *Palmer*, 2016 WL 5868560 at *31 (noting an ALJ must determine whether, “in the absence of the protected activity, would the employer have nonetheless taken the same adverse action anyway?”). “It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.” *Palmer*, 2016 WL 5868560 at *33 (citing *Speegle v. Stone & Webster Constr., Inc.*, No. 11-029, 2013 WL 499364 at *6 (ARB Jan. 31, 2013)) (emphasis in original). Should a respondent fail to meet its burden at this point, the complainant’s claim succeeds.

¹¹ Though the Fifth Circuit in *Halliburton* quotes *Burlington Northern*’s discrimination language, it clarifies shortly thereafter that the materially adverse standard applies under SOX to protected whistleblowing.

¹² The clear and convincing evidence standard is a higher standard of proof, lying in between preponderance of the evidence and beyond a reasonable doubt. *Palmer* 2016 WL 5868560 at *33 (citing *Addington v. Texas*, 441 U.S. 418, 423-24 (1979)).

¹³ The ARB has described this as the “same-action defense.” *Palmer*, 2016 WL 5868560 at *12.

Discussion

I. Complainant Has Failed to Establish that He Engaged in Protected Activity.

Complainant argues that he engaged in protected activity when he “reported and protested [Respondent’s] improper circumvention of internal controls governing the review and analysis of change requests.” Complainant’s Brief (“C. Br.”) at 41-42. Specifically, Complainant explains that Respondent was “improperly approving unjustified or invalid change requests,” which lacked “documentation to support the payments [Respondent] was making to the general contractors.” *Id.* at 42.

To have engaged in protected activity, Complainant must establish that “a reasonable person in his position, with the same training and experience, would have believed [Respondent] was committing a securities violation.” *Beacom*, 825 F.3d at 380 (*citing Rhinehimer*, 787 F.3d at 811); *Sylvester*, 2011 WL 2165854 at *12.. Thus, Complainant may only succeed in showing protected activity if he establishes that he subjectively believed the conduct he complained of was a violation of relevant law, and that such belief was objectively reasonable.

A. Complainant’s Alleged Protected Activity

Under SOX, “[n]o company . . . 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” in retaliation for certain acts performed by an employee. 18 U.S.C. § 1514A(a). SOX protects an employee who “provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation¹⁴ regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C.] section 1341 [mail fraud], 1343 [wire, radio, and television fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.” *Id.* § 1514A(a)(1).

In this case, Complainant does not allege that any party engaged in fraud, and his allegations of wrongdoing do not state that Respondent knowingly engaged in trickery, deception, misrepresentation, or any concealment of material fact. Rather, Complainant alleges that “[Respondent] retaliated against [him] because he engaged in a protected activity by reporting the lack of internal controls and potential for fraud.” CX 117. This allegation remained unchanged during the hearing. The record does not provide any instance of Complainant alleging that Respondent actually engaged in fraud.

Accordingly, the issue of protected activity turns entirely on the reasonableness of Complainant’s belief that Respondent violated a rule or regulation of the SEC or any provision of Federal law relating to fraud against shareholders. *See Dietz*, 2016 WL 1389927 at *5.

¹⁴ SOX specifically protects investigations by, or information provided to, Federal regulatory or law enforcement agencies, members of Congress or any Congressional committee, or persons with supervisory authority over the employee. 18 U.S.C. § 1514A(1).

Complainant argues, specifically, that Respondent violated 15 U.S.C. §§ 7241 and 7262 by failing to properly establish, evaluate the effectiveness of, or properly disclose adequate internal controls. *See* C. Br. at 42; *see also* CX 116 at 13-14. Complainant further alleges that Complainant failed to disclose any material weaknesses in its internal controls, as required under SEC regulations. C. Br. at 42.

B. Subjective Belief

“To satisfy the subjective component of the reasonable belief standard, [Complainant] must allege he ‘actually believed that the conduct complained of constituted a violation of relevant law.’” *Erhart v. Bofi Holding, Inc.*, No. 15-CV-02287, 2016 WL 5369470 at *11 (S.D. Cal. Sept. 26, 2016) (*citing Rhinehimer*, 787 F.3d at 811); *Sylvester*, 2011 WL 2165854 at *11 (*citing Melendez v. Exxon Chems.*, 1993-ERA-006, slip op. at 28 (ARB July 24, 2000)). The evidence is legion that Complainant believed that his job was part of an internal control required by SOX. At the hearing, Complainant testified multiple times that he believed the Estimating Department was an internal control of the Respondent. *See, e.g.*, Tr. at 29-30, 77-78, 155, 164. Complainant even drafted language to this effect to include in training slide shows, which accompanied presentations he made during his employment. Tr. at 79-80, 142-43. As Complainant explained, he believes that Respondent is required to review all its change orders and change requests, so as to allow outside auditors to properly investigate Respondent’s construction spend. Tr. at 144-45; *see also* CX 56; CX 119.

Complainant also believes that he was “consistently retaliated against since raising the issue about cancelling our estimating software,” which he alleges was necessary to ensure SOX compliance. Tr. at 97. He further alleges that this retaliation was due in part because he challenged a general contractor’s CR, which was granted in contravention of the internal controls. Tr. at 95-96. Complainant has also provided a detailed timeline of alleged retaliation that he relates to his protests of alleged violations of internal controls. CX 114.

Based on the foregoing, I find that Complainant subjectively believed that conduct he complained of constituted a violation of relevant law. Whether he was right or wrong, Complainant plainly and honestly believed that Respondent was violating an SEC rule or regulation or any provision of Federal law relating to fraud against shareholders.

C. Objectively Reasonable Belief

In addition to Complainant’s subjective belief, Complainant must establish by a preponderance of the evidence that, based on the facts known to him, he had an objectively reasonable belief the complained of conduct constituted a violation of relevant law. *Beacom*, 825 F.3d at 380-81 (*citing Rhinehimer*, 787 F.3d at 811); *Sylvester*, 2011 WL 2165854 at *12. The reasonableness inquiry depends on totality of the circumstances as rightly or wrongly perceived by the complainant at the time of the complaint. *Rhinehimer*, 787 F.3d at 811; *Sylvester*, 2011 WL 2165854 at *12. This objective component is evaluated based on the “knowledge available to a reasonable person in the same factual circumstances with the same training and experience” of the complainant. *Erhart*, 2016 WL 5369470 at*10 (*citing*

Rhinehimer, 787 F.3d at 811); *see also Prioleau v. Sikorsky Aircraft Corp.*, No. 10-060, 2011 WL 6122422 at *6 (ARB Nov. 9, 2011) (*citing Sylvester*, 2011 WL 2165854 at *12).

Determining the objective reasonableness of Complainant's belief requires a multi-part analysis.

1. Is the Estimating Department an Internal Control?

a. Legal Standard

The SEC regulations that Complainant alleges Respondent violated explain that certain issuers of securities "must maintain disclosure controls and procedures and . . . internal control over financial reporting."¹⁵ *See* 17 C.F.R. § 240.13a-15(a). A corporation must attest to having these internal controls in its periodic reports. 15 U.S.C. § 7241(a)(4). Internal controls over financial reporting are defined under the regulations as:

[A] process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
- (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
- (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

17 C.F.R. § 240.13a-15(f). Failure to establish, attest to, and assess such internal controls is a violation of securities law and the SEC regulations. 15 U.S.C. §§ 7241, 7262.

¹⁵ Neither party disputes that Respondent is within the class of issuers subject to this regulation. Such issuers must be registered under 15 U.S.C. § 78l and have been required to file an annual report pursuant to 15 U.S.C. §§ 78m(a) or 78o(d), in addition to not falling within categories of specific business types handled by other statutes or regulations. *See* 17 C.F.R. § 240.13a-15(a).

b. The Change Order Process

Complainant alleges that the Estimating Department, through its interactions with the Change Order Process, functioned as an internal control. Understanding the Change Order Process, and its evolution over time, is critical to determining its status as an internal control.

i. Evolution of the Change Order Process

The Change Order Process has changed since its inception. The Estimating Department's CR review function was originally created by Mr. Sibert in 2006. Tr. at 18. That same year, Respondent performed an audit of the construction department. CX 2. At that time, Estimating automatically reviewed CRs of \$100,000 or more. *Id.* at 2. As the audit explained, Estimating's review "serves as an advisory to CMs and not as an approval; CMs have final responsibility for negotiating the final change order price." *Id.* The auditors noted that the majority of CRs were for less than \$100,000, and as such CMs, alone, performed most of the review work. *Id.* at 2-3. However, CMs were often unfamiliar with the language of construction contracts, and they lacked sufficient valuation skills, which led to increased CR costs. *Id.* The internal auditors recommended: 1) that CMs receive more training on evaluating cost; 2) that Estimating review all CRs over \$25,000; 3) that Construction Directors have to approve CR requests over a certain value; and 4) that CMs have to document the reasons between the differences in what they pay and what Estimating recommends. *Id.* at 3-4.

Respondent implemented only the first and third suggestions. On March 13, 2013, Respondent issued another audit report on the Change Order Process. CX 6. Respondent had adopted the suggestion of having more oversight over the CM for higher value CRs, creating a hierarchy of authorities that had to sign off on a CR. *Id.* at 6. Regardless of a CM's spending authority, two CM authorizations were required for all CR approvals. *Id.* Additionally, authorization thresholds were worked into the PCR process. Tr. at 491. As the value of a PCR increased, additional approval was required before work could begin. *Id.* Each additional approval threshold required approval by a higher-level supervisor, culminating in approval by a vice president of construction. *Id.*; CX 6 at 6 (noting approval thresholds at the \$30,000, \$200,000, and \$500,000 level).

Estimating, however, still only reviewed 2% of CRs (amounting to 15% of the total CR spend). CX 6 at 15.¹⁶ CRs that were reviewed by Estimating paid out 12% less money on average compared to other CRs. *Id.* at 19. The auditors suggested that Estimating review all CRs over a set, unidentified value, while also requiring CMs to get senior management approval to use an amount different than what Estimating suggested. *Id.* at 22.

Respondent did not adopt the requested measures. The next year, on January 28, 2014, Respondent issued another report on the Change Order Process. For 2013, Estimating reviewed 18% of the CR spend and 3% of all CRs. CX 7 at 3. Again, the auditors determined that setting

¹⁶ It is unclear if Estimating still reviewed CRs over a certain value, or if they only reviewed based on CM requests. See CX 7 at 22 (recommending CRs review all changes over a yet-to-be-determined threshold); Tr. at 34 ("[Mr. Cantey] took us out of the change order business") and Tr. at 24 ("[i]n 2014 . . . we officially got back into the change order business").

a threshold value for estimating would increase savings. *Id.* at 4. In response to this audit, on February 27, 2014, the Change Order Process was modified so that all CRs over \$50,000 were to go through Estimating. CX 49. Despite the Estimating threshold, CMs still had total decision power over granting CRs. Tr. at 111-12.

The Estimating Department was reorganized such that four estimators handled CRs. The Change Order Process remained in this form at least until Complainant's termination.

ii. Perceptions of the Change Order Process

Complainant believed that the Estimating Department served as an internal control as required by SOX. *See* Discussion Part I.B, *supra*; *see also* Tr. at 77-79, 155-57, 164-67. Mr. Scates, who worked with Complainant and had reviewed the training materials prepared in part by Complainant, agreed that Estimating played a role in SOX compliance. Tr. at 502-504. As Mr. Scates said at the hearing: “[m]y understanding is simply put by what it said there,¹⁷ that as a publicly held company, we need to be able to show to our shareholders what our exposure is at any given time.” *Id.* at 529. Mr. Cantey, however, testified that he was unsure whether Respondent requires verification of information by the Estimating Department to be SOX compliant. *Id.* at 195.

CMs had a different understanding of the Estimating Department's role. Michael Swinnen, the CM for the Marysville project, explained that “our Estimating partners are there as an advisory position . . . to give us guidance on labor rates, to give us guidance on efficiency of work done, et cetera.” Tr. at 432. Mr. Guin also acknowledged Estimating's advisory role, explaining that Estimating was not privy to all of the information required to make an equitable business decision. *Id.* at 475-76. Mr. Weese, as a Construction Director, believed that Estimating served in an “advisory capacity for the value of [a] change order.” *Id.* at 388. Mr. Weese went so far as to state that “[i]n my opinion, at the point at which [GCs] are authorized to proceed [with the work], we are obligated to pay them a fair price for that scope, if it's approved to be outside the scope of the original contract.” Tr. at 404-05.

Mr. Heimeshoff also had a different understanding of Estimating's role. Mr. Heimeshoff explained that the part of the Estimating Department in which Complainant worked was a cost-saving tool, “set up in order to give our [CMs] guidance on what the value of change orders is. And it is meant to save us money.” Tr. at 353. He acknowledged that the Evoco workbook system, through which CRs were made, kept a record of the information provided, and that information regarding PCRs and CRs was accessible through the program. *Id.* at 353-54. Moreover, Mr. Heimeshoff stated that he did not believe that any evaluation made by the Estimating Department would affect the integrity of the construction numbers reported to upper management. *Id.* at 355-56. Mr. Heimeshoff explained, “an estimator is evaluating the value of a scope of the work or a claim that a general contractor is making, it is an advisory role to a [CM] to approve a change order or to negotiate with a general contractor about the value of a scope of work that we are actually paying. So we are paying and we report what we paid. So . . . there is, for me, . . . no connection.” *Id.* at 356-57.

¹⁷ Mr. Scates was referring to the training language added by Complainant.

iii. Factors Not Considered By Estimating

Estimating routinely lacked critical information necessary for making a cost-benefit analysis of a CR. Estimators, as cost analysts, are “limit[ed] . . . to working with the facts at hand and not making decisions based on extenuating circumstances.” CX 72 at 6-002297. Estimators were not privy to the cost of delay or the cost of litigation. Complainant, in fact, took the position that a GC could not delay a project over a contract dispute. Tr. at 163. Complainant took the same position in regards to legal risk. CX 28 (rejecting a CR approved in part to avoid litigation because “[t]here is no cost to proving [the breaching GC] wrong, it’s a simple case of physics. It is physically impossible to have that many men plus equipment working in such a small area for that long.”).

However, multiple extrinsic factors, of which Complainant as an estimator was unaware, played key roles in the construction process. *E.g.*, CX 67 (filing of a lien by a subcontractor in the Marysville issue while Complainant was working as an estimator on the project); CX 98 at 8 (“Why is this rejected? This is going to delay our power issue.”). These issues were crucial factors in the decisions of the CMs.

As Mr. Swinnen explained when discussing Marysville:

[w]e made some decisions from an operational standpoint that maybe some people didn’t agree with. But we made them to make sure that the project continued to run so we could eventually be making sales in that building. . . . So that we could get sales in the store, so that we could pay for the project.”

Tr. at 435. This refrain was repeated by Mr. Guin in his testimony:

Every day that construction is on site, we are costing [Respondent] money, and we are costing our stockholders money. It is imperative that the general contractor provide the information that is requested in the change order. I could not agree more. It is equally imperative for myself, as a [CM], that not only do I see that [CR] and . . . the steps that need to be taken in that CR, but [that] I also see the project as a whole. . . . [If, for example,] Estimating and [the GC] have . . . a disagreement of \$200,000 on this change order, and I see that, as a result of the delay that is happening on this job, that we are going to miss deadlines with the local power authority [and] the local municipalities that are going to push our schedule back literally weeks and weeks or months[,] . . . [i]n the simplest of terms, if we are arguing over \$200,000 and the delays resulting from that argument would ultimately result in the loss of \$500,000 . . . at some point[] an equitable business decision has to be made to keep things going. . . . Do I hold this up for another two weeks . . . or do I move forward and do I pay you what my professionalism and my experience tells me is an equitable price?

Id. at 436. As the CMs explain, the cost of Respondent’s large construction projects can be greatly affected by events that were not considered by Estimating. This information extrinsic to

that reviewed by Estimating is clearly relevant, if not absolutely necessary, for CMs to make any informed cost-benefit analysis concerning whether to approve a CR.

c. In Relevant Part, the Estimating Department's Work Is Not an Internal Control

With the above information, I can determine which, if any, functions of the Estimating Department are internal controls.

i. The Evoco System, on the Whole, Is an Internal Control

The Evoco system maintains records for all PCRs and CRs showing the amount of money requested, the reasons for the request, and the payment of monies made by Respondent. Tr. at 143-44, 353-54. This reflects the transactions and dispositions of the assets of Respondent. Though Complainant has complained about the accuracy of some of those documents, it is clear that the Evoco system at least provides the amount of money paid out, the amount of money requested, and the reason for that request. See Tr. at 436. As such, the Evoco system meets the first prong of the internal control definition of 17 C.F.R. § 240.13a-15(f).

The Evoco system also ensures that receipts and expenditures are made in accordance with authorizations of management, as required by the second prong of 17 C.F.R. § 240.13a-15(f). Authorization requires multiple signatures by CMs, and higher value requests require additional authorization from higher level managers. See CX 6 at 6. In so doing, the system maintains a record of who authorized what, sufficient to ensure that an auditor can determine who in the Construction Department was involved in the request.

Finally, the change orders appear to involve information that could have a material effect on the Respondent's financial statements. Respondent's total construction spend was \$946 million in 2011 and \$1.5 billion in 2012. CX 6 at 2. Complainant has stated that, based on his experience, Construction spend averaged \$3 billion per annum in the years prior to his termination. CX 120 at 2. In Fiscal Year 2011 and 2012, there were \$104 and \$133 million in change orders, respectively. CX 6 at 2. Respondent initiated 47% of the FY 2012 change orders. *Id.* at 4. In Program Year 2013, there were \$203 million in change orders. CX 7 at 3. These change requests range from roughly 7% to 10% of the total construction spend. This amount appears to be sufficient to cause a material effect on the financial statements concerning Respondent's construction spend.¹⁸

Accordingly, the Evoco system is an internal control.

ii. The Estimating Department's Evaluations Are Not an Internal Control

Upon review of the record, the Estimating Department's evaluations are not an internal control. From the outset, the Estimating Department's evaluations have served solely as

¹⁸ Respondent did not provide evidence of its total income and costs. The construction spend numbers are thus all I can rely upon when attempting to make a definite finding of materiality.

advisory statements regarding average values for certain services. Respondent's internal audits recognized that Estimating merely served an advisory role, and the auditors suggested that Estimating be granted more input and power over change order spend. *See* CX 6 and CX 7. Tellingly, Respondent did not implement these suggestions. *Compare* CX 6 (recommending CMs must explain why they did not adopt Estimating's suggestion) *with* CX 7 (noting CMs may summarily reject Estimating's analysis). Complainant also admits that his role "is strictly advisory." CX 65. At least up to Complainant's termination, Estimating had no say in a CM's final decision to approve a CR. Tr. at 111-12.

Additionally, Estimating only provided a review of costs, labor rates, and their opinion as non-lawyers of contractual terms. They lacked other important information, such as the cost of delay or the risk of litigation. *See* Tr. at 404-05; 431-35. Complainant's own emails acknowledge this missing information, noting that his role as a "cost analyst" limited him to considering only the "facts at hand and not making decisions based on extenuating circumstances." CX 72. Further, given that the PCR authorizes a contractor to start working, it is unclear whether the CR process had any role other than pure cost evaluation.

As such, Estimating's evaluations did not appear to affect the accurate and fair recording of the dispositions of Respondent's assets; rather, the evaluations were totally advisory. *See also id.* at 355-57 (Mr. Heimeshoff, the VP over Estimating, acknowledged that they did not affect the financial reports or accurate recording of dispositions). The Estimating Department was purely cost-cutting function, designed to provide estimates of the average expected price for certain types of work. *See* Tr. at 353-54 (Mr. Heimeshoff acknowledging that Complainant's department was essentially a cost-saving center meant to save Respondent money).

It is true that Estimating would often request additional documents from a contractor, claiming that their documents were insufficient to justify the contractor's CR. However, I am not persuaded that this was necessary to ensure that financial statements were made in accordance with generally accepted accounting principles, or that expenditures were made only in accordance with the authorizations of management. First, Construction had its own authorization system in place for PCRs and CRs. At the PCR level, Estimating was only involved if requested. As such, the authorization to begin work was independent and outside the purview of Estimating entirely. Additionally, business decisions made on extrinsic factors that Estimating was not privy to were also included in Evoco. *See* Tr. 436 (business decisions use the same approval process in Evoco, so "anybody could come back . . . and determine who, what, where, when, and why").

Additionally, it has not been established that Estimating's requests for additional information would affect the preparation of Respondent's financial statements. CMs initially received information filed by a contractor for purposes of PCRs. The CM then received additional information via the CR process. Though Estimating often requested more information to help with their evaluations, given the scale of the construction spend, no evidence was provided that lacking this additional information affected financial statements.

This is especially true given the relatively small amount (viewed in light of Respondent's total construction spend) of savings realized by the Estimating Department. In Program Year

2013, Estimating's review resulted in a saving of \$2,854,114 out of the \$35 million in CRs that they reviewed (or a savings of 8%). CX 7 at 3. In total, \$196,562,070 in CRs was approved out of an initial total of \$203,135,329 (roughly 3% savings). *Id.* Even assuming that Estimating reviewed every CR, realized roughly similar savings, and incurred no additional costs, Respondent would only realize \$16,250,826 in savings. Assuming the total construction spend was \$2 billion per year, Estimating's predicted savings would amount to only 0.81% in savings.¹⁹ At \$3 billion, this value would reduce to a savings of 0.54%.²⁰

The incomplete CR record for February 2014 through January 2015 showed slightly higher savings by estimating. Out of \$148.1 million in CRs, Estimating reviewed \$73.3 million worth of those requests. CX 101 at 1, 4. Estimating's review resulted in \$9.9 million in savings, or roughly 13% of the \$73.3 million it reviewed. *Id.* at 4. CRs that did not go through estimating showed a savings of 4%. *Id.* at 1. Assuming that Estimating could review all CRs, match its savings of 13%, and incur zero additional costs, Respondent would realize only an additional \$9.72 million in savings. Even in this scenario, Respondent would only realize \$22.92 million of savings across all CRs. *Id.* at 1 (noting a total savings of \$13.2 million for CM-only CRs). That would be only 1.1% of a total \$2 billion construction spend,²¹ and only 0.76% of a total \$3 billion construction spend.²²

Without even considering Respondent's other yearly costs, and assuming a best-case scenario where Estimating could provide equal savings at no additional cost to all CRs, Estimating's effect on Respondent's construction spend is slight. Moreover, while the record does not include evidence indicating how large or small a part Respondent's construction spend played in its operating costs, necessarily Respondent's construction spend was a subset of its total operating costs. As such, I find that even were I to assume *arguendo* that Estimating's evaluation served an internal control function, it would not have a material effect on the Respondent's financial statements.

Accordingly, Complainant's assertions that Estimating's evaluations served as an internal control are incorrect. Though Estimating's role vis-à-vis the Evoco system interacted with an internal control (Evoco), Estimating's actual evaluation of CRs was not an internal control. Additionally, Estimating's effect on Respondent's financial statements was not material. Moreover, I find that Estimating's role in the CR process was purely advisory, providing labor rate and cost comparisons to CMs who were charged with deciding whether to approve CRs based on information including not only Estimating's input, but also other information that Estimating did not consider. The Estimating Department existed only to help the CMs by providing estimations as to the value or scope of work in a CR; Estimating was not an internal control.

¹⁹ Estimating's actual Program Year 2013 savings would equal 0.14% of a total \$2 billion construction spend. *See* fn. 18 and accompanying text for a discussion of Respondent's total construction spend.

²⁰ Estimating's actual Program Year 2013 savings would equal 0.095% of a total \$3 billion construction spend.

²¹ Estimating's actual 2014-2015 savings would equal 0.49% of a total \$2 billion construction spend.

²² Estimating's actual 2014-2015 savings would equal 0.33% of a total \$3 billion construction spend.

2. Complainant's Belief Was Not Objectively Reasonable

Even though the Estimating Department's evaluations were not internal controls, Complainant may still have engaged in protected activity. If it was objectively reasonable for Complainant to believe that the Estimating Department's evaluations were internal controls, Complainant's complaints about Respondent's alleged failure to properly establish, evaluate the effectiveness of, or properly disclose adequate internal controls could be protected activity under the Act. *Beacom*, 825 F.3d at 380-81 (citing *Rhinehimer*, 787 F.3d at 811); accord *Sylvester*, 2011 WL 2165854 at *12.

Complainant alleges that “[b]ased on his expertise, his research into compliance issues, and his conversations with . . . [Mr. Sibert], he concluded that publicly traded companies could be held liable for all expenditures.” C. Br. at 45. Specifically, Complainant believed “the Estimating Department has a fiduciary obligation to the owner . . . to comply with the Sarbanes-Oxley Act of 2002 and ensure that all decisions and opinions made on its behalf are verifiable.” *Id.* (internal citation omitted). Upon review of the record in this case, I find that Complainant's beliefs were not objectively reasonable.

a. The Software

Complainant believed that Respondent performed “improper circumvention of internal controls governing the review and analysis of change requests.” C. Br. at 41-42. He contended that a reasonable person would view protests regarding the software used by certain estimators to be protected activity. *Id.* at 46-47. The evidence does not support this determination.

At the time of its cancellation, the software was only used by one third of the estimators. Tr. at 254 (four out of twelve estimators were using the software); *see also* Tr. at 136-37 (Complainant is unsure how others use the software, but he admits that “there were some [estimators] that didn't use [the software]” and that none of the estimators complained to the same level as he did). Complainant does not explain how losing software used by only a fraction of estimators would render an internal control ineffective. Perhaps it would render an individual estimator who relied on that software less effective, but it would not invalidate the alleged internal control. Thus, even assuming *arguendo* Estimating's evaluations were an internal control, Complainant's belief regarding the software is not objectively reasonable. Simply put, if two-thirds of the estimators could perform their jobs without using the software, the software could not be necessary to the internal control.²³ Accordingly, this factor would not lead a reasonable person to believe that the loss of the software would circumvent an internal control.

b. Marysville and Glendora

Complainant next alleges that his protests regarding the Marysville and Glendora projects were protected activity. Complainant asserts that unjustified CRs were being submitted, which lacked sufficient documentation of an issue. C. Br. at 48-49. Complainant states that he

²³ Other estimators met their CR goals without access to the software. *See* CX 55 (Mr. Cantey informs Mr. Puente and Complainant that the other estimators are meeting their deadlines); *see also* CX 56 (mentioning the lack of software four days after that meeting).

provided “unrebutted evidence that he reported and protested problems with unjustified [CRs].” C. Br. at 49. However, the evidence is not so cut and dry.

Not every CR made it successfully to Estimating. Estimating received documents after some initial vetting by construction. CMs (such as Mr. Guin) rejected CRs that were lump sum or lacked other documentation. *See* CX 102; CX 104. Initially, the PCR that preceded the CR had to include some justification for the work and a predicted cost of the work, which could then be approved by multiple members of construction. Then, to get to Estimating, the CM had to upload the information into the Evoco system. *See* Discussion Part I.C.1.c.i, *supra*.

Beyond that issue, Complainant’s assertion overlooks Estimating’s role in regards to construction. Estimating is a valuation system. *See* Discussion Part I.C.1.c.ii, *supra*. Estimating was used to cut costs by providing estimates of the average expected price for certain work, without considering – or even receiving – information regarding the cost of delay, the risk of litigation, or other factors. Tr. at 353-54, 404-05, 431-35; CX 96 at 8 (noting the delay that will result if the CR is not approved). Estimating’s only glimpse of the job site would come from pictures attached to a CR. *Id.* at 434-45 (noting CMs were “boots on the ground,” and thus CMs were able to get a complete picture of the situation). Estimating was like a database listing average prices for various construction goods and services. Estimating reviewed what a group was billing for work and compared that to average costs for that work.²⁴

Given this information, I find that a reasonable person with the same training and experience and in the same circumstances as Complainant would not conclude that CRs, which were approved by CMs despite the protests of Estimators, were bypassing an internal control. Estimators lack crucial data in determining whether a cost is reasonable. *See, e.g.*, Tr. at 476-77. Further, the information they are privy to is solely determined by the CM, who not only controls CRs via PCR approval, but is also a gatekeeper for submission to Evoco. These factors would not lead a reasonable person, well-trained in estimating, to believe that Estimating’s evaluations were an internal control.

c. The SOX Language in the Training Materials

Complainant drafted language for the Change Order Process training module for Estimating and Construction stating: “[w]e have a fiduciary obligation to comply with the Sarbanes Oxley Act of 2002 and insure that all decisions and opinions made are verifiable and reproducible.” CX 9; Tr. 79-80. Complainant alleges that the inclusion of this language in the training materials would lead a reasonable person to believe that Estimating functioned as an internal control.

The training language was included in the training materials Complainant prepared for February 2014. Tr. at 80. No evidence suggests that this statement was ever clarified or rejected by Respondent.

²⁴ Estimating would also provide opinions on the scope of the contract, but it is unclear what role these opinions played, given that estimators are not trained legal professionals. Further, it is unclear what legal effect Estimating could have, as the PCRs that preceded the CRs authorized contractors to begin their work. *See* Tr. at 490-92.

Failure to correct an inaccurate statement can create an inference that a person who failed to correct the statement, by remaining silent, believed the statement is accurate. In this case, Respondent allowed Complainant to continue to make this statement regarding SOX, despite Respondent's position that Estimating is not an internal control or other SOX-related service. This statement was used for training individuals involved in the CR process. At the very least, this would lead a reasonable person with Complainant's training and experience to assume that Respondent did not disapprove of the language. Accordingly, this factor would ordinarily lead a reasonable person to believe that Estimating functioned, at least in part, as an internal control. However, given that Complainant himself drafted this language for inclusion in the training materials, I find the probative value of the language is limited.

d. An Objectively Reasonable Person Would Not Believe that Complainant Engaged in Protected Activity

A reasonable person in the same factual circumstances as Complainant, with the same training and experience, and with the same information available, would not reach the conclusion that the Estimating Department's activity amounted to an internal control. As Complainant plainly stated, he believed Estimating was necessary to ensure that Respondent was held accountable for "all spend," by ensuring the decisions Respondent made were "verifiable and reproducible." Tr. at 164; CX at 97. However, it is unclear how Estimating, which lacked critical information on costs of change orders, could possibly provide such accountability.

Construction already had a CR review process in place, and used Estimating to check average costs of certain services and materials. This limited, cost-cutting purpose rendered Estimating utterly unable to properly account for Respondent's spent resources. Even the most basic cost-benefit analysis would be beyond Estimating, as they were not aware of the costs incurred in delaying construction or engaging in litigation. Moreover, as CMs served as the gatekeepers of Evoco, Estimating's non-binding suggestions might not have any effect on Respondent's records of its spending. Moreover, Complainant admits he was unaware of "any public filing" Respondent made to the SEC reflecting any information regarding CRs. Tr. at 141.

It is true that Complainant included language into a training presentation declaring that Estimating was an internal control. CX 9. However, given the clarity of Estimating's cost-cutting purpose, I find that the undisputed training language is not enough, in the wake of the other evidence, to persuade a reasonable person that Estimating was an internal control.

Additionally, the extent of Estimating's savings compared to Respondent's construction spend (*see* fn. 18-22 and accompanying text) renders it unreasonable to assume that Estimating had an effect on Respondent's financial statements. In an analogous case, the Eighth Circuit determined that it was not objectively reasonable for a vice president of Oracle America, Inc. to believe that a \$10 million discrepancy amounted to a violation of securities law. *Beacom*, 825 F.3d at 380-81. Specifically, the court noted that a \$10 million discrepancy in revenue projections is a "minor discrepancy to a company that annually generates billions of dollars." *Id.* at 381. The same logic applies here. Given the size of Respondent's construction spend, and the fact that its construction spend is a subset of its total operating costs, a reasonable person could

not believe that Estimating's savings would have a material impact on Respondent's financial statements.

Accordingly, no reasonable person with Complainant's nearly thirty years of estimation training and experience, with the same facts as Complainant, would conclude that Estimating was an internal control.

D. Conclusion

Complainant has failed to establish that he engaged in protected activity. Though Complainant believed that the Estimating Department functioned as an internal control, the preponderance of the evidence establishes that the Estimating Department merely served an advisory capacity to construction vis-à-vis the scope and average cost of work to be performed pursuant to CRs. Moreover, based on the record in this matter, no objectively reasonable person would believe that the Estimating Department's evaluations constituted an internal control. Accordingly, Complainant has failed to meet his burden to establish that he engaged in protected activity.

II. Alternative Finding that Respondent Would Have Terminated Complainant in the Absence of the Allegedly Protected Activity.

In the event an appellate body were to disagree with my conclusion that Complainant has not established that he engaged in protected activity, I find in the alternative that Respondent has shown, by clear and convincing evidence, that it would have terminated Complainant in the absence of any allegedly protected activity.

The parties do not dispute that Complainant suffered an adverse personnel action when he was terminated from his position. Additionally, I granted summary decision in regards to Complainant's allegedly protected activity serving as a contributing factor in his termination. *See* Order Denying Complainant's Motion for Summary Decision, Denying Respondent's Motion for Summary Decision, and Cancelling and Rescheduling Hearing at 10-11.

Thus, the remaining issue is whether Respondent can prove, by clear and convincing evidence, that it would have terminated Complainant in the absence of the allegedly protected activity. I find that Respondent has met its burden to establish that, based on Complainant's insubordination and communication issues, compounded with his conversation with Mr. Ross, it would have terminated Complainant regardless of his alleged protected activity.

A. Complainant's Other Causes for Discipline

Respondent has very specific discipline policies. Respondent uses coachings for improvement to discipline employees. Tr. at 564. These coachings have three levels, and supervisors disciplining an associate can skip levels if they deem the misconduct to warrant such action. *Id.* at 564-65. Patterns of behavior commonly warranted skip-level coachings. *Id.* at 566. When an individual has a third level coaching, further discipline results in termination. *Id.* at 573. Beyond any allegedly protected activity, Complainant was disciplined for two reasons:

issues with communication and issues with insubordination. Further, Complainant's termination was due, in part, for violating two of Respondent's three general principles: customer service, respect for the individual, and strive for excellence.

1. Complainant's Insubordination

a. Refusal to Look Up Labor Rates

In Complainant's second coaching, one of the issues raised by Mr. Cantey involved Complainant's refusal to look into a labor rate issue.²⁵ CX 54 at 1 (asking Complainant to "look into a labor rate question."); Tr. at 256-57. Complainant refused. CX 54 at 1-2; Tr. at 256-57. Mr. Cantey wrote in his notes at the time that "[Complainant] told me to get someone else. He didn't have time because he did not have Estim[ating] Tools. [He t]hen suggested that maybe I should do his Change Orders since I can do them w[ith]out tools." CX 54 at 1-2. Mr. Cantey reiterated this statement at the hearing.

In his response to the coaching, Complainant wrote that the request was "sent via email without a statement of urgency" and that "had he known that the labor rate was a priority I would have reviewed it." CX 59. Further, Complainant states that because the request was in the "Northeast" region, he suggested other estimators work on it. *Id.* In Complainant's email to Mr. Heimeshoff on the second coaching, however, Complainant provides no justification for the labor rate refusal, instead stating that the meeting was a "personal attack" on Complainant's character using only "anecdotal and subjective" evidence "with nothing in writing." CX 58 at 6-002038.

I find Mr. Cantey's explanation of events to be more credible than Complainant's. Mr. Cantey took notes close to the date of the coaching on the issue, and his description of the events that spurred the coaching, made prior to his reading of the notes at hearing, was consistent with the text of the notes. *Compare* CX 54 at 1-2 *with* Tr. 255-56. Complainant's more measured recollection of the labor rate issue, made as part of a response to his coaching a week after the event, is less credible.²⁶

b. Insubordination with Upper Management

Part of Complainant's third level coaching was based on insubordination, specifically communicating to upper management without first communicating with his supervisor. The coaching states: "[d]uring [Complainant's Mid-Year discussion on September 10, [2014,] [Mr. Cantey] outlined very specific direction regarding expectations. . . [Complainant was] expected to run all communications decisions by me before sending them to leadership and that it is disrespectful to continue to communicate outside of your direct supervisor's knowledge." CX

²⁵ Mr. Cantey also describes an instance of insubordination involving the discussion of software at a meeting. *See* CX 54; Tr. 266-67. However, this could be protected activity, were an appellate body to determine that Complainant's claim regarding software was legitimately protected under SOX.

²⁶ Complainant's May 2014 open door request goes so far as to state that "[e]verything in [the coaching] is false." CX 62. However, only a month earlier Complainant had admitted to doing some of those events and he apologized for them. *See* CX 57. At the very least, without further explanation of the disagreement in the evidence, Complainant's credibility on these events is diminished.

83. Mr. Cantey explained that despite this, Complainant, “less than a week from that mid-year communication . . . went against [his] specific direction by sending another email to the VP of construction and [Senior] VP of Real Estate” without engaging or copying his supervisor or skip level supervisor. *Id.* The coaching stated that from thenceforth: 1) “[a]ny business communication above [Complainant’s] supervisor’s level will require review and approval by [his] direct supervisor;” and 2) Complainant had to “follow directions from [his] supervisors.” *Id.*

Complainant asserted that Mr. Cantey deliberately told him not to talk to any supervisor above Mr. Cantey, for any reason, without first getting Mr. Cantey’s approval. Tr. at 61-62. Complainant stated that this was a violation of company policy. *Id.* at 62. Mr. Cantey testified that he told Complainant to run communications through him so that he and Complainant could “have that conversation and . . . turn [the communication] into something that could be the most effective it [could] be.” *Id.* 285; *see also Id.* at 581-83. Mr. Cantey explained that “[t]he information and the time that those individuals have available to them need to be streamlined as much as possible [W]e need to get to the point.” *Id.* at 283.

Complainant explained at the hearing that the memo he sent that sparked this coaching “was a celebration of the construction team working together. Estimating, the directors, the [CMs] had all worked together, and we realized the savings on a very difficult project with a difficult subcontractor and contractor. It wasn’t meant as anything else. It’s just a, Hey, this is it. We’re a team.” Tr. at 70. In an email Complainant sent to Mr. Heimeshoff concerning the matter, Complainant explained: “I sent out the same letter to [Mr. Crowe] and [Mr. Suarez] thinking they would also like the information. I sent it to [Mr. Crowe] because he hired me and I wanted to let him know he made the right choice, and to [Mr. Suarez] because I appreciated the he was the Keynote Speaker at one of our A.S.P.E. workshops and I wanted to make sure he had the information.” CX 82. It is clear from Complainant’s statement that this was not related to protected activity.

I find that the second email was not sent as an open door request, but rather to demonstrate Complainant’s worth to upper management, and to celebrate the work on the Marysville project. Claimant also alleges that, regardless of the email’s purpose, he did not believe Mr. Cantey’s statements applied to that email. *See* CX 82. However, the record establishes that Complainant was aware that Mr. Cantey’s instructions applied to that email.²⁷ Mr. Cantey’s instructions were clear: Complainant was asked to run future emails to upper management by Mr. Cantey before sending them out. Despite this plain instruction, Complainant sent an email touting his own performance to upper management without running it by Mr. Cantey. Accordingly, Complainant was insubordinate in sending the email.

²⁷ Complainant states that when he wrote “ok[ay], next time” in response to Mr. Cantey’s email on the subject, Complainant did not think that the statement “applied to this event because it was the same letter.” CX 82. The record establishes that Mr. Cantey’s instructions applied to the current email, as well as others.

2. Complainant's Communication Issues

a. Complainant's Fiscal Year and Mid-Year Evaluations

Complainant's communication issues were a long-standing problem. The first evaluation of Complainant in the record is for Fiscal Year 2011. CX 25. In that evaluation, though Mr. Cantey praises Complainant's attention to detail, he notes:

[Complainant] must continue to build relationships with customers, peers, and other business units. He must adapt quicker to obstacles and come up with solutions. [Complainant] must find a balance between CR age and maximum savings. [Complainant] should strive to build consensus for his ideas and influence the overall processes and expectations of estimating.

CX 25 at 3. Mr. Cantey's evaluation reflects this sentiment; though he gave Complainant some exceeds expectations ratings, he rated Complainant a solid performer for the majority of evaluation categories. *See id.*

Complainant's mid-year 2012 evaluation notes similar issues. Mr. Cantey praises Complainant's "great analytic skills[,] . . . attention to detail[,] " and his ability to "deep dive into details and make clear conclusions." CX 26 at 4. However, Mr. Cantey again notes that "Complainant must work to improve his communication with customers and stake holders." *Id.* Complainant states that "he no longer know[s] what the purposes and goals of this Department are," which matches Mr. Cantey's statement that "[Complainant] needs to strive to understand overall development processes, operations, and merchandising." *Id.*

The Fiscal Year 2012 evaluation of Complainant repeats the communication refrain. Mr. Cantey again praises Complainant's knowledge and focus, but he states that "[Complainant] must strive to have an understanding of the big picture," and that "[he] should improve on effectively communicating with customers, leadership[,] and peers." CX 27 at 2; *see also* CX 27 at 4 ("[Complainant] must work to improve his communication with customers and stake holders.")

The Fiscal Year 2013 evaluation continues this trend, and Mr. Cantey specifically comments: "[Complainant] must demonstrate improved communication skills with leadership. It is also imparitive [sic] that he improve how he communicates with customers and contractors." CX 31 at 4. Fiscal Year 2014 has much of the same, with Mr. Cantey noting that "[Complainant] continues to struggle with communication with leadership and needs to improve his delivery in communication with customers and contractors." CX 59 at 2.

b. Complainant's Communications With Others

Complainant testified that "I believe that my method of direct speak sometimes is misunderstood. I try to just state facts. That's my job. I state facts." Tr. at 161. Many of Complainant's communications demonstrate untactful speech. *See, e.g.*, CX 49 (responding to a business decision with "[c]onvolutd logic which I don't comprehend"); CX 65 (stating "[t]his is

my last communication on this matter so I'll be succinct on how I've reached my conclusion[,]” leaving the CM uncertain if Complainant would continue to work on the project); *see also, e.g.* CX 28; CX 96.

This communication style led to brusque email exchanges and, as Complainant acknowledged at the hearing, was a “primary reason” for his second level coaching. *Id.* For example, during his second level coaching, Mr. Cantey spoke to Complainant about inappropriate comments, such as insinuations that there were only three and a half estimators instead of four. CX 54 at 2. Mr. Cantey wrote in his notes that, when asked for clarification, Complainant stated that Ms. McKay only counted as half an Estimator. *Id.* at 53. Mr. Cantey then wrote that both he and Mr. Ruehle stated that the comment was unacceptable. *Id.* at 53-54. Mr. Cantey recalled that Complainant agreed and apologized. *Id.* at 54.²⁸

Complainant continued to speak in this manner even after his coaching. Mr. Swinnen testified that Complainant’s unwillingness to budge on positions, and the narrow view he took when looking at a project, could “be very difficult when . . . [in] a situation where you are sitting down with the contractor to discuss merits of a change or of something [the contractor] thought was compensable.” Tr. at 436; *see also id.* at 438-39 (noting that Complainant’s stances made negotiation difficult). Further, Complainant’s lack of communication with CMs, beyond issuing a decision, caused issues with CMs. Tr. at 393-96; *id.* at 289-90 (recalling CMs complaining of Complainant’s unwillingness to communicate); CX 96 at 8 (“Why is this rejected? . . . They didn’t even provide an explanation.”).

These communication issues came to a head with Mr. Ross in the Glendora project. The Glendora project contained multiple communications by Complainant that Mr. Ross felt were abnormal. Depo Tr. at 42. Many of these communications were antagonistic. CX 96. In one email sent on December 11, 2014, Complainant stated that “[the owner] must advise you that my time is valuable and I have a very sharp pencil. I am not sending this CR back today, because it just came in, but I must insist that you fill out the workbook exactly how it is presented.” Tr. at 291-92; Depo Tr. at 38-40. Mr. Ross found this remark combative, noting that “[n]ever had anyone else ever writ[ten] to that to me in an email that was quite that pointed. I’ve—I—I make mistakes, and I’ve had people point them out, and we work back and forth more as a team[;] . . . this was more of a threat.” Depo Tr. at 40-41. The Glendora issues culminated with a phone call between Mr. Ross and Complainant, during which Complainant contested that Mr. Ross was worth what he was being paid. *See Findings of Fact, supra.*

²⁸ Complainant asserted, after the meeting, that he did not call Ms. McKay half an estimator. CX 62. However, given that he later writes to Mr. Heimeshoff that “3½” estimators are doing the work, the evidence indicates that he did use that term. *See* CX 56. Perhaps Complainant did not mean his words to be derogatory (Complainant asserts that “I never said [Ms. McKay] is half an Estimator; my statement was about her working part time doing CR Evaluations,” CX 58), but his intent did not change their effect.

B. Respondent Has Established by Clear and Convincing Evidence that It Would Have Taken the Same Adverse Action Against Complainant in the Absence of His Allegedly Protected Activity

Complainant engaged in serious misconduct prior to his termination. As Ms. Ball explained at the hearing, insubordination is “more severe” than many other causes for discipline. Tr. at 646. She noted that insubordination is “very rare,” and that twice in her career she had terminated individuals for insubordination after only one instance of misconduct. *Id.* “[I]nsubordination for me and my history as an HR manager is a significant cross of the lines.” Tr. at 638. Ms. Ball’s unrebutted statements are strong evidence that, by itself, Complainant’s insubordination would at the least warrant coachings.

Moreover, Complainant had a clear record of repeated communications issues, which showed disrespect for the individual. *See, e.g.*, Tr. at 618-19 (noting “[Complainant] was disrespectful [to others] in . . . most of those communications that I had dealings with him in,” and that Complainant “struggled . . . tremendously, both internally and externally,” with communications and building relationships).

Given Complainant’s pattern of behavior regarding communication, and the severity of insubordination, I find that Respondent has established by clear and convincing evidence that Complainant would have received a second level coaching in the absence of his allegedly protected activity. Respondent has similarly established by clear and convincing evidence that Complainant’s third level coaching would have occurred regardless of his allegedly protected activity. Complainant was deliberately insubordinate, and the record shows that his communications issues had not been resolved since his prior coaching.

Finally, Respondent has established by clear and convincing evidence that it would have terminated Complainant regardless of his allegedly protected activity. Complainant engaged in plain misconduct when he spoke with Mr. Ross. His doing so justified terminating him under Respondent’s disciplinary policy, according to Ms. Ball. Tr. at 573.²⁹ As Mr. Heimeshoff explained, “if another disciplinable offense is affirmed [after a third level coaching], then the next step is a termination. And in this case, such an event occurred, and therefore Mr. Thibodeau was terminated.” Tr. at 345-46. Mr. Cantey’s testimony was consistent with that of Ms. Ball and Mr. Heimeshoff. Counsel for Claimant asked him, “because of that call on March 4 [*i.e.*, the call with Mr. Ross], that was done – that justified the termination under the third level coaching?” Mr. Cantey replied, “Yes.” Tr. at 234.

I recognize that both Mr. Cantey (*see* Tr. at 237) and Ms. Ball (*see* Tr. at 645) testified that Complainant’s conduct during the March 4, 2015 call with Mr. Ross would not, in and of itself, have justified termination. However, for the reasons stated above – most notably, the disciplinary action to be taken when an employee commits misconduct after a third level coaching – I find that Respondent has shown by clear and convincing evidence that, under its progressive discipline policy, Complainant’s conduct during the March 4, 2015 call would have resulted in termination regardless of Complainant’s allegedly protected activity.

²⁹ Counsel for Claimant asked Ms. Ball, “[i]f there’s a third-level coaching, what is the next step if behavior conduct continues?” She responded, “Termination.” Tr. at 573.

Accordingly, even assuming *arguendo* that Complainant had engaged in protected activity, Respondent has proven by clear and convincing evidence that it would have taken the same adverse action against Complainant in the absence of that allegedly protected activity.

CONCLUSION

Complainant has failed to establish that he engaged in protected activity. Even assuming *arguendo* that Complainant had engaged in protected activity, Respondent has established by clear and convincing evidence that it would have taken the same adverse action against Complainant in the absence of that allegedly protected activity.

Accordingly, the complaint in this matter is **DISMISSED**.

SO ORDERED.

PAUL R. ALMANZA

Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (“EFSR”) system. The EFSR for electronic filing (“eFile”) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service

("eService"), which is simply a way to receive documents issued by the Board through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs, can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 should identify the legal 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).

When 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 the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).