



Issue Date: 08 December 2020

Case No.: 2019-SOX-00005

In the Matter of:

ANTONIO BRASSE
Complainant

v.

**CITIGROUP, INC. and
CITIBANK, N.A.**
Respondents

Appearances: For the Complainant:
Joseph D. Nohavicka, Esq.
Gregory A. Nahas, Esq.
Eleni Melekou, Esq.

For the Respondents:
Michael Delikat, Esq.
Anna Matsuo, Esq.
Lisa Lupon, Esq.

Before: **LYSTRA A. HARRIS**
Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises from the complaint of retaliation by Antonio Brasse (“Complainant”) against Citigroup, Inc. and Citibank, N.A. (“Respondents” or “Citi”) under the employee-protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (“SOX” or “the Act”), and its implementing regulations, 29 C.F.R. Part 1980. A hearing was held in this matter from November 4, 2019 through November 7, 2020 in New York, New York.

I. PROCEDURAL HISTORY

Complainant filed his SOX complaint with the Occupational Safety and Health Administration (“OSHA”) on April 10, 2017. (JX 2.) Complainant alleged that Respondents retaliated against him for engaging in protected activity by placing him on a performance improvement plan (“PIP”). In addition to the PIP, Complainant also alleged that Respondents declined to award an annual performance bonus because of his protected activity.

OSHA investigated and dismissed his complaint on September 25, 2018. (RX 1.) On October 25, 2018, Complainant, through counsel, objected to OSHA’s determination and requested a formal hearing from the Office of Administrative Law Judges (“OALJ”). (CX 3.)

This matter was subsequently assigned to the undersigned on November 5, 2018. A Notice of Hearing and Prehearing Order was issued on November 8, 2018.

A. Evidence Submitted and Witnesses Presented

Both parties were represented by counsel at hearing and afforded a full opportunity to present evidence and argument as provided in the Rules of Practice and Procedure for Administrative Hearings Before the OALJ. *See* 29 C.F.R. Part 18, subpart A. At hearing, the undersigned admitted in evidence ALJX 1-3; JX 1-6; CX 2-4; and RX 1-23, 25-30, 32-42.¹ (Tr. at 10-11, 14, 16, 28, 250, 385.)

Complainant testified in his own behalf. (Tr. at 49-415.) To support their case-in-chief, Respondents called the following witnesses to testify: Jason Ng, Yagmur Kanbas-Campbell, Richard Yeong, Timothy O’Grady, Matthew McIntyre, and Paul Ricci. (Tr. at 420-446, 449-470, 478-507, 509-566; November 7, 2019 Tr. at 478-582, 587-597.)

At the close of the hearing, Respondents were given until January 8, 2020 to inform the undersigned if it wished to conduct further discovery and submit additional evidence in this matter, in light of the allowed waiver of Complainant’s Fifth-amendment privilege prior to the hearing. (Tr. at 603.) On January 8, 2020, Respondents indicated that no additional discovery or submission of evidence was desired and requested that the hearing record be closed. By order dated January 16, 2020, the undersigned closed the hearing record and set April 3, 2020 as the deadline for post-hearing briefs.

Due to the pandemic, Chief Administrative Law Judge Stephen Henley issued several administrative order extending previously set deadlines and schedules in cases pending before OALJ. Based on those orders, the deadline for post-hearing brief submission was extended to June 12, 2020, as the parties agreed. The parties timely submitted their closing briefs.

B. Positions of the Parties

Complainant argues that he engaged in activities protected under the Act during two separate audits –first during the Kuala Lumpur Audit (“the KL Audit”) when he raised concerns about a potential violation of Swiss data privacy laws, and then again during the Chief Data Office Audit (“the CDO Audit”) when he identified data quality issues. (Complainant’s Brief at 11-16.) Because of his protected activity, Complainant alleges that Respondents initiated a process that would end with his termination. (Complainant’s Brief at 16-52.)

¹ This Decision and Order uses the following abbreviations: “ALJX” refers to Administrative Law Judge’s Exhibits; “JX” refers to Joint Exhibits; “CX” refers to Complainant’s Exhibits; “RX” refers to Respondents’ Exhibits. “Tr.” refers to the transcripts the first three days of the hearing in this matter (November 4-6, 2019.) The transcript from November 7, 2019, the day Matthew McIntyre and Paul Ricci testified, is incorrectly paginated. The page numbers on the transcript from November 6, 2019 (day three of the hearing) end at page number 569. The page numbers on the transcript from November 7, 2019 (the fourth and final day of the hearing) should begin with page number 570, however, it begins with page number 473. Because of this, the undersigned will cite to the transcript of the final day of the hearing as “November 7, 2019 Tr.” followed by the page number as it appears on that transcript.

Complainant claims that his supervisors began to “build a case” to remove him. This process started with his placement on a PIP and culminated with his termination. Complainant also denies any involvement with a series of profane and derogatory emails sent from fictitious email accounts to Citi’s supervisors and employees (“the burn emails”).

Respondents, conversely, argues that Complainant did not engage in protected activity. (Respondents’ Brief at 43-51.) Specifically, Respondents claim that Complainant’s actions were not protected under the Act; that Complainant’s co-workers, and not Complainant, identified the data quality issues during the CDO Audit; and, more generally, that Complainant did not believe he was reporting any potential violations covered by the Act.

In the alternative, assuming that Complainant did engage in protected activity, Respondents also argue that the alleged protected activity was not a contributing factor in the decision to place Complainant on a PIP or to terminate his employment. (Respondents’ Brief at 52-55, 60-63.) Moreover, Respondents argue that clear and convincing evidence shows that they would have taken the same adverse action against in the absence of the alleged protected activity because of his involvement with the burn emails. (Respondents’ Brief at 57, 66.)

The undersigned bases this Decision and Order on a comprehensive review of the entire body of evidence, including all documentary evidence, witness testimony, and the parties’ argumentation. While all admitted evidence has been considered, the undersigned found cumulative or of little probative value, any testimony or exhibits not specifically discussed herein.

II. PARTIES’ STIPULATIONS

The following stipulations reached prior to the hearing were entered into the record:

1. Respondents hired Complainant in August 2014 as a Data Governance Audit. Manager in Citi's Global Functions Technology Department within Internal Audit.
2. Complainant was employed by Citi from September 2014 until his termination on August 14, 2017.
3. Citi’s Internal Audit (“IA”) Department is a global organization covering Citi’s global businesses in over 180 countries.
4. Among his job responsibilities, Complainant was tasked with performing and leading audits within budgeted timeframes, developing a strong understanding of the Enterprise Data Management processes, developing effective working relationships with the staff and management of the businesses being audited, developing knowledge of the key regulations influencing audit scope, and “[c]onsistently produc[ing] quality work papers evidenced by minimal review notes, no quality assurance concerns and no post review notes.”
5. IA provides independent assessments of Citi’s governance, risk management and internal control environment. The Global Functions Technology Department in particular, provides technology coverage within Finance and other Corporate Functions, including Tax, Human Resources, Payroll, Treasury, Compliance and AML.

6. Complainant was based in Citi's 111 Wall Street building in New York City. Although he initially reported to Senior Vice President of IA- Data Governance, Timothy O'Grady, in or about January 2017, he began reporting to Senior Vice President and Audit Director, Yagmur Kanbas-Campbell, who in turn reported to Managing Director and Chief Auditor, Barry Sears.
7. Complainant was provided with Citi policies and procedures as part of his onboarding process, including its Code of Conduct and Employee Handbook. He was expected to read and acknowledge receipt of those policies, which he did on August 27, 2014.
8. During the KL Audit, Complainant raised a concern regarding certain information stored on a database in Singapore. During the process of determining what would be in the scope of the audit, Complainant learned that a local Singapore database team had the ability to "break glass" in case of an emergency to access data of Swiss customers, which Complainant believed could be considered personally identifiable data ("PII") of the customers. Complainant claimed that this ability to access Swiss PII in Singapore by the technology team could violate Swiss law.
9. Complainant received an overall rating of "3" with 1 being the best and 5 being the worst in his 2015 Year End Evaluation.
10. O'Grady issued a PIP to Complainant in late October 2016. The PIP addressed four main areas of improvement. These areas of improvement included ownership of tasks; time management; audit quality in documentation; and proper knowledge of department tools and workflow procedures.
11. The PIP explained that Complainant would not be eligible for promotion, transfer, or merit increase while he was on the PIP.
12. Complainant was rated a "4" or "Partially Effective" on his 2016 Year End Evaluation.
13. Complainant did not receive a raise or a discretionary bonus for 2016.
14. In his challenge to the PIP, Complainant started by writing, "I always appreciate all feedback and constructive criticisms designed to only help me improve. I will continue to work on the areas referenced in the PIP, as I take it as an opportunity to continue learning from others and growing."
15. In his response to the formal PIP, Complainant submitted a formal response to his PIP in December 2016, complaining to HR and Citi's Ethics Office that his placement on a PIP was "retaliatory and discriminatory because it arose as a result of [his] immediate team inadvertently exposing potential fraudulent or illegal dealings around the company's internal audit department covering up issues with global regulatory or reputational impact that should have been reported to senior management/audit committee/audit leadership within the firm as well as the hiring practices within the TCTP/ GFTS audit team."
16. Complainant further wrote that he had been harassed "with the threat of a PIP" for what "we learned on the A8408 audit in Singapore/Malaysia and the final straw was our additional discoveries in the A121265 Chief Data Office ("CDO") audit, which then led to the cited part of audit senior management deciding that they would formally put a PIP in my file."
17. With respect to the 2015 AML Data Governance- AML Kuala Lumpur Audit (A84084) ..., Complainant stated that "[t]his all started with the acting audit director in Singapore back last year around November 2015 roughly initiating false complaints about me

because of potential regulatory findings we uncovered' that represented data privacy violations across multiple countries.”

18. With respect to the Data Quality and Issue Management Resolution Audit (A121265) ..., Complainant stated, “we had the CDO audit where we discovered that the Chief Data Office was potentially providing misrepresentations to regulators, which was subsequently also brushed under the rug ... I believe there is a culture in Internal Audit at Citi of covering up serious issues based on audits I’ve worked on and offline conversations that we have had with various audit teams· and this is likely tied to the audit methodology.”
19. In his challenge to the PIP, Complainant wrote, “Because the immediate team I am on and I tried to sound the alarm on potentially serious data quality and data privacy global issues, we’ve been targeted and I’m specifically the first to be formally targeted with this PIP.”
20. During October and November 2015, Complainant worked on the 2015 AML Data Governance- AML Kuala Lumpur Audit (A8408) ... along with Richard Yeong, the Audit Owner, and Barry Sears, the Chief Auditor. Complainant’s manager, O’Grady, also served as a senior manager on the KL Audit.
21. The purpose of the KL Audit was to review the operations function that supported Citi’s anti-money laundering efforts in the Asia Pacific region to ensure proper controls and processes were being followed. The specific focus of the KL Audit was the Kuala Lumpur Anti-Money Laundering (“AML”) Hub (the “Hub”) based in Kuala Lumpur, Malaysia.
22. The Hub serves as the regional service center that provides initial investigations of alerts for various cash accounts to Citi customers in 17 countries in the Asia Pacific region. Among other functions, the Hub conducts initial investigations of alerts generated, refers alerts for further investigation or inquiry to the countries’ relationship managers and compliance officers and recommends potential suspicious activity reporting.
23. The KL Audit focused on assessing controls in place to address risks associated with data governance, which included data quality, privacy and confidentiality for the Hub operations.
24. The final audit report for the KL Audit, issued December 18, 2015, stated, “controls in relation to data quality and privacy were not completely identified, monitored and assessed for key risks to their businesses for Regional Compliance and AML KL Hub Operations”; required that the “Regional AML Compliance and Regional KL Hub Operations will perform an assessment in consultation with AML Tech, Chief Data Office and Privacy Office” to adequately monitor the potential data privacy risks.; and stated that “the scope of the [KL Audit] excluded alert generation in Mantas which will be covered in a separate audit (A15958- AML Monitoring and Reporting System Processes) scheduled for Q2 2016.”
25. In preparation for a team call regarding the KL Audit, O’Grady advised Complainant, “I’m not concerned about the database issue at the moment, let’s prioritize what’s due this evening [t]here *is* no Switzerland update. Adding ‘Swiss/Switzerland’ to my list with MANTAS- don’t want to hear about it again. I want them to focus on the controls here that failed. In this case it's the cross-border data clearing and the access and requirements of their data.” Complainant replied, “[s]ounds good.”

26. In early 2016, Complainant worked on the Data Quality and Issue Management Resolution Audit (A121265) Complainant, along with colleague Jason Ng were both co-auditors on the audit, along with SVP on the CDO Audit, O'Grady. The CDO Audit's Audit Owner was Kanbas-Campbell and Barry Sears was the audit's Chief Auditor.
27. The Chief Data Office which was the subject of the CDO Audit, is responsible for Citi's Data Management Policy. Citi's Data Management Policy identifies core criteria for assessing data quality such as comprehensiveness, completeness, conformity, validity, and accuracy, among other criteria. The CDO Audit focused on providing assurance on the effectiveness of controls relating to monitoring and understanding data quality for Citi's businesses, including ensuring accurate and complete critical data elements (CDEs). The results of data quality measurements were provided to the CDO for consolidated reporting, with scorecards representing data quality measurement of CDEs of significant business processes.
28. In early 2016, Complainant and others on the CDO Audit team discussed concerns regarding the way that businesses were measuring data quality, noting that the CDO could not have full visibility into the state of data quality. Complainant and others had raised concerns that, in reviewing sampled scorecards in connection with the audit, only a small proportion of CDEs were measured across all five dimensions of data quality. For example, in an email to O'Grady, Ng, and IA colleague Calista Nasser, Complainant wrote, "while I go through each area to repeat this type of assessment, is that it shows in a major way that the overall DQ strategy for this firm really is ineffective compared to other ways of identifying errors." In a further email to the team, Complainant wrote, "Best case on an individual scorecard, at most 20% of CDEs are being measured...[i]n most cases, no more than 20 to 40% (or 1 to 2) dimensions are being measured...[b]ased on these percentages, it's hard to see how the scorecarding process gives relevant visibility into the state of DQ [data quality] within AML TM." O'Grady also requested that Complainant pull the raw scorecards and "compare to CDE listing and dimensions."
29. On June 7, 2017, Complainant forwarded an email to members of the IA team that he claimed to have received at 11:58 p.m. on June 6, 2017 at his personal Gmail email account, antoniobrasse718@gmail.com from "Bas Lion" from the burn email address, bas.lion@yandex.com.
30. Citi's Security & Investigative Services ("CSIS") was engaged to investigate the source of various burn emails received by Citi employees between March 14 and July 10, 2017.
31. CSIS Security Group Manager, Karl Smith met with Complainant on June 8, 2017 to discuss his safety concerns. During the meeting, Complainant reported that he believed someone was trying to smear his name around the office by sending the burn emails because he was involved in litigation with Citi and had raised an ethics complaint.
32. Complainant sent various IA email distribution lists from his work email to his personal Gmail email address, antoniobrasse718@gmail.com.
33. CSIS interviewed Complainant on July 5, 2017. This interview lasted approximately four hours.
34. Following his interview with CSIS Complainant was placed on paid administrative leave.
35. At his May 28, 2019 deposition, represented by his attorney, Complainant refused to answer any questions with respect to the burn emails, asserting the Fifth Amendment privilege.

36. Complainant filed his OSHA complaint on April 10, 2017, alleging that he was placed on a PIP and denied a bonus in retaliation for reports of “violations of various laws and regulations relating to data encrypting and unfair shareholder representations.”
37. On or about August 14, 2017, Complainant was notified that his employment with Citi was terminated.

See ALJX 1.

III. ISSUES

It is undisputed that Citi is a company within the meaning of 18 U.S.C. § 1514A and that Complainant was an employee of Citi from August 2014 through August 14, 2017. (ALJX 1 ¶¶ 1, 37.) Additionally, based on the positions taken by the parties and the undersigned’s review of the evidentiary record, there is no dispute that Complainant experienced at least two adverse employment actions –his placement on the PIP and his termination.² Accordingly, the following issues remain for adjudication:

1. Prior to the PIP, did Complainant engage in protected activity under the Act? That is to say, did Complainant engage in protected activity during the KL Audit or CDO Audit?
2. If so, was such activity a contributing factor to Respondents’ decision to place him on the PIP?
3. At any time prior to his termination, did Complainant engage protected activity under the Act?
4. If so, was such activity a contributing factor to his termination?
5. Have Respondents established, by clear and convincing evidence, that they would have terminated Complainant’s employment regardless of any protected activity?
6. What damages, if any, are appropriate?

IV. FINDINGS OF FACT

Based on the parties’ stipulations, the documentary evidence and the witness testimony presented in this case, the undersigned finds as follows:

A. Testimonial Evidence and Witness Credibility Determinations

As stated above, Complainant, Jason Ng, Yagmur Kanbas-Campbell, Richard Yeong, Timothy O’Grady, Matthew McIntyre, and Paul Ricci all testified at hearing. In deciding the issues presented, the undersigned considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, all relevant, probative, and available evidence has been taken into

² An administrative law judge has the authority to consider issues not raised by the parties before OSHA. See *Merten v. Berkshire Hathaway, Inc.*, ARB No. 09-025, ALJ No. 2008-SOX-00040 (ARB Jun. 16, 2011); *Brookman v. Levi Strauss & Co.*, ARB No. 07-074, ALJ No. 2006-SOX-00036 (ARB Jul. 23, 2008). Here, Complainant’s termination was not raised before OSHA.

account, in attempting to analyze and assess its cumulative impact on the parties' contentions. *See Frady v. Tennessee Valley Auth.*, ALJ No. 1992-ERA-00019 at 4 (Sec'y Oct. 23, 1995).

The Administrative Review Board ("ARB") has explained that an administrative law judge is tasked with "delineat[ing] the specific credibility determinations for each witness," though it is not required to do so. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-00008 (ARB July 2, 2009). In weighing the testimony of witnesses, the judge as fact finder, may consider: the relationship of the witnesses to the parties; the witnesses' interest in the outcome of the proceedings; the witnesses' demeanor while testifying; the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony; and the extent to which the testimony was supported or contradicted by other credible evidence.³ *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-00038, slip op. at 4 (ARB Jan. 31, 2006). It is well settled that a judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-00024 (ARB Jan. 31, 2007); *see also Altemose Constr. Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

Here, Complainant's credibility is wanting. During his hearing testimony, Complainant presented the undersigned with numerous justifications to question to the veracity of his assertions and his version of the relevant happenings.

For one, Complainant alluded to emails that he claimed supported his case generally or a specific contention he had made. However, these emails were not included in the record. (*See, e.g.*, Tr. at 73, 191-192.) He also alleged that certain personnel were blind carbon copied (or "bcc'd") on other emails, but presented nothing to support his assertion. (Tr. at 191.)

Furthermore, Complainant often provided irrational and borderline nonsensical explanations for some of his actions. For example, Complainant alleged that during an interview with Citi's investigators, the investigators deployed a "bait-and-switch" tactic to trick him into admitting that he drafted or sent some of the burn emails. (Tr. at 151.) He explained that an investigator would show him an innocuous, internal email that Complainant had sent from one of his email accounts. Then, a second investigator would distract him while the first investigator swapped out the innocuous email with a burn email. Complainant would then admit to sending the burn email, thinking it was an innocuous email. The undersigned acknowledges that employee discipline-related investigations and interviews like those in this case may be stressful and that an employee may have difficulty focusing and maintaining his composure. However, Complainant's account of this interview strains credulity.

Moreover, the documentary evidence contradicts Complainant's "bait-and-switch" allegation. Complainant never accused Citi's investigators of deploying such a tactic until his September 17, 2019 opposition to Respondents' motion for summary decision. Complainant made no mention of the investigators' alleged tactics in his August 2, 2017 email to human resources or during his May 28, 2019 deposition. (RX 4, RX 42.) Based on these contradictions,

³ Based on the unique advantage of having heard the testimony firsthand, the undersigned has observed the behavior, bearing, manner, and appearance of witnesses. The garnered impressions of the witnesses' demeanor at hearing also contribute to the credibility assessment made in this case.

the undersigned cannot conclude that someone of Complainant's education and experience would fall prey to such an unsophisticated tactic. The undersigned cannot find that Citi's investigators employed a deceptive "bait-and-switch" type tactic.

Complainant also made several strange and conspiratorial accusations. For example, he claimed that Citi's investigators forced him to shake hands and that they touched his arm a few times during the interview. (Tr. at 268.) He also claimed that a former co-worker had told him that Respondents' counsel had drafted and sent the burn emails in an effort to frame him. (Tr. at 166, 175-177.) Complainant did not name this former co-worker or call him or her in support of his case, and offered no other support for this accusation. All of these types of unsupported and outrageous accusation diminish Complainant credibility on all issues.

At hearing, Complainant also denied that he had sent any of the burn emails and denied he admitted to sending them during his interview with Citi investigators. (Tr. at 153-155.) However, in an email to human resources, Complainant contradicted his own testimony. In that email, he acknowledged that he admitted to sending some of these emails during the interview, but claimed that his admissions somehow related to his own efforts to help investigators find the true culprit. (RX 42.) This is an example of the type of contradiction in Complainant's testimony that further diminishes his credibility.

With respect to his demeanor during cross-examination, Complainant was evasive and highly defensive. He avoided answering questions from Respondents' counsel directly and often responded to a question with a question of his own. On occasion, the undersigned had to direct Complainant to respond to the question posed by Respondents' counsel. (*See, e.g.*, Tr. at 272-273, 396.)

In addition, it also bears mentioning that Complainant refused to answer questions from Respondents' counsel relating to his involvement with the burn emails at deposition. (RX 4.) Complainant refused to answer these questions and invoked his Fifth Amendment privilege against self-incrimination. However, at hearing, he denied that he ever believed that he had engaged in any criminal conduct. (Tr. at 177-178.) Rather, he stated that he was wary of Respondents' counsel and believed that he would trick him in some way. (Tr. at 166.)

Thus, Complainant's hearing testimony included unsupported claims about the documentary record; strange and outrageous accusations; and inconsistent and contradictory statements. His demeanor was evasive and did not support a positive conclusion regarding his credibility. Complainant's refusal to answer certain questions at deposition also weighs against his credibility. For all of these reasons, the undersigned finds that Complainant is not a credible witness and that his hearing testimony is generally unreliable.

With respect to the remaining witnesses, the undersigned finds the testimonies of Jason Ng, Yagmur Kanbas-Campbell, Richard Yeong, Timothy O'Grady, Matthew McIntyre, and Paul Ricci to be credible. These witnesses each appeared to be objective and did not express a discernable bias toward Complainant or Respondents. Moreover, their testimonies were internally consistent, generally consistent with the contemporaneous documentary evidence, and largely corroborated by one another.

B. Relevant Factual Background

The following constitute the factual findings made in this matter:

- In August 2014, Citi hired Complainant as a Data Governance Audit Manager in its Global Functions Technology Department within the Internal Audit Department. (ALJX 1 ¶ 1.) Complainant remained in this role from his date of hire until his termination on August 14, 2017. (ALJX 1 ¶ 2.)
- Citi's Internal Audit department ("IA") provides independent assessments of various departments within Citi global corporate structure, particularly related to technology coverage within finance and other corporate functions, including tax, human resources, payroll, treasury, compliance, and anti-money laundering. (ALJX 1 ¶¶ 3, 5.)
- As an audit manager, Complainant worked with other auditors to audit – that is to review and scrutinize- the governance, management, quality, and privacy of data used by a Citi department. (ALJX 1 ¶ 4.)
- When he was hired, Citi provided Complainant with its Policies and Procedures as part of his onboarding process, including its Code of Conduct and Employee Handbook. (RX 6, RX 7.) Among other things, these policies and codes prohibited unauthorized use of the company's electronic communications and required that all employees fully cooperate with internal and external investigations. Complainant read and acknowledged receipt of those policies and codes on August 27, 2014. (ALJX 1 ¶ 7.)
- Complainant worked out of Citi's Wall Street office in New York, New York. (ALJX 1 ¶ 6.)
- Complainant is a certified public account, a certified internal auditor, a certified financial services auditor, a certified information systems auditor, and a certified anti-money laundering specialist. (Tr. at 49.)
- Prior to joining Citi, Complainant worked in the auditing field for 12 years and had some experience with audits related to fraud and personal identifiable information ("PII"). (Tr. at 53-54, 57.)
- Beginning in March 2015, Complainant began reporting directly to senior vice president Timothy O'Grady. (ALJX 1 ¶ 6; Tr. at 59.) Complainant continued to report directly to O'Grady until January 2017, when O'Grady's employment with Citi ended. (ALJX 1 ¶ 6; Tr. at 60, 290.) After O'Grady's employment with Citi ended, Complainant began reporting to Yagmur Kanbas-Campbell. (ALJX 1 ¶ 6.) At all relevant times, both O'Grady and Kanbas-Campbell reported to Barry Sears. (ALJX 1 ¶ 6; Tr. at 89, 530.)
- At the outset of an audit, the audit team meets and discusses the scope of the audit, which may be limited by various factors such as time constraints, budgetary constraints, and the objective of the audit itself. (Tr. at 549, 555.) After the completion of this planning stage, the audit's "lead" is responsible for determining whether issues and concerns discovered during an audit are within the scope. (Tr. at

519-520, 555.) If so, the issues are brought to the attention of the audit's senior managers. (Tr. at 555.)

- Each audit resulted in a final report to be submitted to the department within Citi that was the subject of the audit. (*See, e.g.*, RX 28, RX 29, RX 30.) In his role as an audit manager, Complainant also played a role in the development of the audit's final report. (*See* RX 34.)

C. Kuala Lumpur Audit

- Complainant began working on the KL Audit in September 2015. (Tr. at 61, 291-293.) He served as the audit's lead and reported to O'Grady. (ALJX 1 ¶ 20; Tr. at 61, 63-64, 291-293, 333-334.)
- The purpose of the KL Audit was to review the operational function of Citi's Anti-Money Laundering effort in the Asia Pacific region, with specific attention paid to data governance, data quality, data privacy, and data confidentiality. (ALJX 1 ¶ 21, 23, Tr. at 63.)
- Auditors from Citi's Wall Street and Singapore offices performed work on the KL Audit. (Tr. at 63-64.) Juliette Patricia, was an auditor who worked on the KL Audit and reported to Richard Yeong. (Tr. at 65.478.) Both worked out of the Singapore office. (Tr. at 65, 478.)
- Yeong was the head of Citi's Global Functions Technology unit in the Asia Pacific region, had oversight over the day-to-day operations of the KL Audit. (ALJX 1 ¶ 20; Tr. at 478-479.) He reported directly to Sears, who served as the audit's "owner." (ALJX 1 ¶ 20; Tr. at 65-66, 214, 291, 479.)
- During the planning stages of the KL Audit, Complainant raised a concern regarding certain data stored in Singapore. (ALJX 1 ¶ 8.) Complainant believed that Citi employees in Singapore had the ability to access the data associated with Swiss banking customers (which he further believed to be PII) through an emergency or "break glass" feature. (ALJX 1 ¶ 8; Tr. at 68-69.) Complainant claimed that such access could violate Swiss data privacy law. (ALJX 1 ¶ 8.)
- The audit team's concerns about Citi employees in Singapore having access to the data of Swiss customers was addressed in an email initiated by Juliette Patricia on November 5, 2015. (JX 1.) Complainant was copied on this email chain. On November 24, 2015, Complainant replied to Patricia's email, copying O'Grady and Yeong and explaining the reasons he was concerned by Swiss data privacy laws. On December 2, 2015, Patricia responded to Complainant and informed him that the concerns with Swiss data privacy laws were outside of the scope of the KL Audit. On December 3, 2015, O'Grady responded to Patricia and Complainant and directed them not to pursue their concerns with Swiss data privacy any further. Complainant responded to O'Grady on December 3, 2015 and stated: "sounds good." (JX 1; ALJX 1 ¶ 25.)
- The final report of the KL Audit was issued on December 18, 2015. (RX 28.) This report stated that "controls in relation to data quality and privacy were not completely identified, monitored and assessed for key risks to their businesses for [Citi's Asia Pacific Anti-Money Laundering effort]." The report also advised that the Anti-Money Laundering effort "perform an assessment in consultation with [other Citi

departments]” to adequately monitor the potential data privacy risks; and stated that the scope of the [KL Audit] excluded certain alerts that were to be covered in a separate audit scheduled for the following year. (RX 28; ALJX 1 ¶ 24.)

- On December 20, 2016, in an email to O’Grady and Citi’s Human Resources Department, Complainant alleged that Citi was retaliating against (by being placed on a performance improvement plan) and that it “all started with the acting audit director in Singapore [presumably referring to Yeong] back last year around November 2015 roughly initiating false complaints about me because of potential regulatory findings we uncovered that represented data privacy violations across multiple countries.” (RX 23; ALJX 1 ¶ 17.)

D. Chief Data Office Audit

- In early 2016, Complainant worked on an audit of the Chief Data Office (the “CDO Audit”). (ALJX 1 ¶ 26.) The CDO is responsible for Citi’s Data Management Policy and identifies core criteria for assessing data quality such as comprehensiveness, completeness, conformity, validity, and accuracy, among other criteria. (ALJX 1 ¶ 27.) The CDO Audit focused on providing assurance on the effectiveness of various controls relating to monitoring and understanding data quality for Citi’s businesses, including ensuring accurate and complete critical data elements (“CDEs”). (ALJX 1 ¶ 27.) The results of data quality measurements generated by the audit team were provided to the CDO for consolidated reporting as “scorecards” representing data quality measurement of CDEs of significant business processes. (ALJX 1 ¶ 27.)
- Complainant and Jason Ng were both co-auditors on the audit. (ALJX 1 ¶ 26.) O’Grady, who was the senior vice president on the audit, supervised by Complainant and Ng.
- The CDO Audit’s audit owner was Kanbas-Campbell. (ALJX 1 ¶ 26.) Barry Sears was the audit’s chief auditor.
- In early 2016, the CDO audit team discussed concerns about the way some of Citi’s departments were measuring data quality and concluded that the CDO could not have full visibility into the state of data quality. (ALJX 1 ¶ 28.) Complainant and others believed that only a small proportion of CDEs were being measured, leading to concerns with the CDO’s data quality. Complainant expressed these concerns in an email to O’Grady and Ng on March 30, 2016. (RX 25; RX 26; ALJX 1 ¶ 28.)
- On December 20, 2016, in an email to O’Grady and Citi’s Human Resources Department, Complainant claimed that the audit team had “discovered that the Chief Data Office was potentially providing misrepresentations to regulators, which was subsequently also brushed under the rug” and that “he believe[d] there is a culture in [IA] of covering up serious issues based on audits.” (RX 23; ALJX 1 ¶ 18.)

E. Complainant’s Performance Evaluations and Performance Improvement Plan

- As Complainant’s direct supervisor, O’Grady was responsible for conducting Complainant’s performance evaluations. (Tr. at 60.) The performance evaluation process involved soliciting feedback from managers and co-workers who had worked

with Complainant throughout the evaluation period and a discussion with Complainant about his performance. (Tr. at 84-88, 439-440, 512.)

- **Complainant's 2015 mid-year evaluation:** O'Grady noted that Complainant "need[ed] to be more attentive to his commitments and time management." (JX 3.) By way of example, O'Grady stated that "[o]n several occasions, there have been deadlines committed to which were more aggressive than achievable." O'Grady also opined that Complainant's performance issues "created challenges with [Complainant's] credibility and can undermine the valuable contributions [Complainant] has made." Complainant's comments indicated that he agreed with O'Grady's assessment. (JX 3; Tr. at 286-290.)
- **Complainant's 2015 year-end evaluation:** O'Grady noted that Complainant's performance with respect to delivering independent assurance and insight was "partially effective" and explained that Complainant "should seek opportunities to evaluate standards of those he works with to ensure he is meeting minimum expectations." (JX 4.) O'Grady deemed Complainant to be "partially effective" "proactively collaborat[ing] with ... colleagues to foster an inclusive, engaging and constructive working environment which supports [IA's] Vision and Mission and promotes sharing of ideas, best practices and communication." He also noted that Complainant "needs to develop his partnership with internal stakeholders ... [s]pecifically, [Complainant] should develop a proactive detailed status reporting communication with each internal team he works with and should actively seek feedback (formal and informal) throughout the engagements." O'Grady also rated Complainant's ability to "work as partner" as "partially effective" and explained that "[Complainant] does make a point to listen and reacts calmly to feedback ... [t]his strength will serve him well as he also incorporates proactive communication into his relationships." Overall, O'Grady rated Complainant's as "consistently strong," and assigned Complainant a rating of "3," with "1" being the best and "5" being the worst, in his 2015 year-end evaluation. (JX 4; ALJX 1 ¶ 9.)
- **Complainant's 2016 mid-year evaluation:** O'Grady noted that Complainant has demonstrated improvement since his last evaluation and acknowledged that he received an internal award for his work on the CDO Audit. (JX 5.) Nevertheless, he opined "there remain important areas of concern for functioning at his level." Specifically, O'Grady stated that Complainant "does not demonstrate ownership and accountability consistently" and provided the following examples: "missed deadlines;" "short notification that deadlines would be missed;" "tasks not being completed in a timely manner;" and "quality concerns" in Complainant's audit work, business monitoring plans and quarterly summaries.
- **Performance Improvement Plan:** O'Grady began the process of placing Complainant on a PIP in July 2016, around the time of Complainant's 2016 mid-year performance review. (Tr. at 103-105; CX 2.) O'Grady formally placed Complainant on a performance improvement plan on October 31, 2016. (RX 8.) The plan addressed four main areas of Complainant's performance - ownership of tasks; time management; audit quality in documentation; and proper knowledge of department tools and workflow procedures. (RX 8; ALJX 1 ¶ 10.) O'Grady also cited to specific examples of Complainant's poor performance, including a missed deadlines during the KL Audit and the CDO Audit. (RX 8.) The plan indicated that Citi would

monitor and reassess Complainant's progress over the next 90 days. Complainant understood that he was not eligible for a promotion or a discretionary bonus while on the PIP. (ALJX 1 ¶ 11.)

- On December 20, 2016, Complainant submitted to human resources a formal response to the PIP. (RX 23.) Complainant sent an email informing both Citi's human resources and legal departments that Citi's decision to place him on a PIP was "retaliatory and discriminatory because it arose as a result of [him and the audit team] inadvertently exposing potential fraudulent or illegal dealings around the company's internal audit department covering up issues with global regulatory or reputational impact that should have been reported to senior management/audit committee/audit leadership within the firm as well as the hiring practices within the TCTP/ GFTS audit team." (RX 23; ALJX 1 ¶ 15.) In this response, Complainant further stated that he had been harassed "with the threat of a PIP" because of his work on the KL Audit and that his work on the CDO Audit was the "final straw," leading management to place him on the PIP. (RX 23; ALJX 1 ¶ 16.)
- **Complainant's 2016 year-end evaluation:** O'Grady noted that Complainant "should focus on his timely delivery, and work quality" and added that Complainant should try "[k]eeping to dates committed, early communications, and quality work papers should be his focus to realize his full potential." (JX 6.) In a section for employee comments, Complainant noted that the managers who provided feedback to O'Grady did not do so in good faith and that their "purpose was to push me out the door so they can continue to cover up issues with regulatory and reputational impact." O'Grady rated Complainant as a "4" and "Partially Effective" on his 2016 year end evaluation. (JX 6; ALJX 12.)
- Complainant did not receive a discretionary bonus in 2016. (ALJX 1 ¶ 13.)

F. Complainant's OSHA Complaint

- On April 10, 2017, Complainant filed a complaint with OSHA. (JX 2; ALJX 1 ¶ 36.) He alleged that Citi placed him on a PIP and denied his annual bonus in retaliation for engaging in protected activity in October or November of 2015. (JX 2.) Complainant claimed that Citi's stated reason for taking these actions was related to a "delay in publishing an audit." Complainant also alleged that he raised "concerns of unfair representations to shareholders and the general public" to Yeong, Sears, and Kanbas-Campbell who all refused to "disclose the violations." (JX 2; ALJX 1 ¶ 36.) He also noted that he had filed an internal complaint with Human Resources and had spoken with Citi's legal department in mid-January and February 2017 about his concerns. (JX 2.)

G. Burn Emails and Citi's Investigation

- Between March 14, 2017 and July 9, 2017, at least 13 emails from anonymous and/or fictitious senders ("the burn emails") were sent to Citi employees. (RX 9-RX 21.) The content of these emails included aggressive, profane, and threatening language.
- Citi's Security and Investigative Services ("CSIS") investigated the source of the burn emails. (ALJX 1 ¶ 30.)

- On June 7, 2017, Complainant forwarded an email to members of the IA team that he claimed to have received at 11:58 p.m. on June 6, 2017 at his personal G-mail email account (i.e., “antoniobrasse718@gmail.com”) from “bas.lion@yandcx.com.” (RX 20; ALJX 1 ¶ 29.) CSIS Security Group Manager, Karl Smith, met with Complainant on June 8, 2017. (ALJX 1 ¶ 31.) During their meeting, Complainant reported to Smith that he believed someone was sending the emails and making it appear that he was the sender in order to damage his reputation because he had filed an internal complaint. (ALJX 1 ¶ 31.)
- Complainant sent various IA email distribution lists from his work email to his personal Gmail email address. (ALJX 1 ¶ 32; Tr. at 143-144, 199.) These lists included the contact information (email addresses and phone numbers) of Citi employees.
- CSIS interviewed Complainant on July 5, 2017. (ALJX 1 ¶ 33.) This interview lasted approximately four hours. Complainant mentioned his OSHA complaint during this interview. (Tr. at 536.)
- Based on its investigation and interview, CSIS concluded that Complainant had either drafted or sent some of the burn emails. (Tr. at 511, 569.) Following his CSIS interview, Citi placed Complainant on paid administrative leave. (ALJX 1 ¶ 34.)
- While on administrative leave, Complainant was barred from entering Citi’s Wall Street Office, ineligible for a promotion or pay raise, and no denied access to his Citi email account. (Tr. at 167-168, 244.)

H. Disciplinary Panel

- CSIS shared its conclusion with Citi’s legal department which convened a disciplinary review panel. (Tr. at 518-519.) The disciplinary panel was comprised of three Citi employees, none of whom worked in IA. (Tr. at 520.) CSIS presented its findings and conclusions to the disciplinary panel. (Tr. at 520-521; RX 22.) CSIS’s presentation did not refer to Complainant by name, but only as “employee” or “EE.” (Tr. at 522; RX 22.) After considering CSIS’s presentation, the disciplinary panel voted unanimously to recommend terminating Complainant’s employment with Citi. (Tr. at 535.)
- The disciplinary panel’s recommendation was then forwarded to IA. (Tr. at 535.)

I. Complainant’ Termination

- Due to an organizational restructuring, Paul Ricci assumed management responsibilities over IA and its employees in June 2017. (November 7, 2019 Tr. at 587-588.) Ricci worked out of Citi’s Park Avenue Office. (November 7, 2019 Tr. at 594.)
- Ricci ultimately decided whether to accept the disciplinary panel’s recommendation. (November 7, 2019 Tr. at 590.) Ricci accepted the disciplinary panel’s recommendation and decided to terminate Complainant’s employment. On August 14, 2017, Ricci terminated Complainant because of his involvement with the burns email and his conduct during the CSIS interview. (ALJX 1 ¶ 37, November 7, 2019 Tr. 590.)

V. PRINCIPLES OF LAW

The Act protects employees of publicly traded companies from employment-related retaliation for engaging in certain whistleblower activities. The purpose of the law is fraud detection and prevention. See *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, slip op. at 9, 22 (May 25, 2011). Specifically, the Act provides in pertinent part:

- (a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee
 - (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by... (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).
 - (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholder.

18 U.S.C. § 1514A(a)(1)-(2).

Complaints under the Act “are decided using the legal burdens of proof set forth in the employee-protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121. *Zinn v. Am. Commercial Lines Inc.*, ARB No. 13-021, ALJ No. 2009-SOX-00025, slip op. at 5 (ARB Dec. 17, 2013); 18 U.S.C. § 1514A(b)(2)(C). Accordingly, to prevail on a claim under the Act, Complainant must prove, by a preponderance of the evidence, (1) he engaged in protected activity, (2) he experienced an

adverse employment action, and (3) his protected activity was a contributing factor in the adverse employment action. If Complainant succeeds, Respondents may avoid liability by proving, by clear and convincing evidence, that they would have taken the same adverse employment action even absent the protected activity. *See, e.g., Id.; Sylvester*, ARB No. 07-123 slip op. at 9-10; *see also* 49 U.S.C. § 42121(b)(2)(B)(iii)-(iv); 29 C.F.R. § 1980.109(a)-(b). Clear and convincing evidence is evidence that shows “that the thing to be proved is highly probable or reasonably certain.” *See e.g., DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015); *see also Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-00006, slip op. at 11 (Apr. 25, 2014); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (“[f]or employers, this is a tough standard, and not by accident.”).

VI. DISCUSSION

Broadly speaking, the Act prohibits employers from taking the following actions against an employee in retaliation for engaging in protected activity: “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). The ARB has further explained that an action taken by an employer is considered an “adverse employment action” if it “could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Perez v. BNSF Ry. Co.*, ARB Nos. 17-0014, 17-0040, ALJ No. 2014-FRS-00043 (ARB Sep. 24, 2020); *see also Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-00004 (ARB Dec. 29, 2010) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)).

There appears to be no dispute that Complainant experienced adverse employment actions in this case.⁴ First, Complainant experienced an adverse employment action when Citi placed him on a PIP. (RX 8.) In July 2016, O’Grady initiated the process to place Complainant on a PIP. (Tr. at 103-105; CX 2.) The process completed on October 31, 2016, when he formally placed Complainant on a PIP. (RX 8.) The PIP included not just a negative performance evaluation, but also meant that Complainant suffered other tangible job-related consequences –that is, he was ineligible to receive a promotion, pay increase, or performance bonus.⁵ (ALJX 1 ¶ 11; Tr. 113, 371-372.) Thus, by placing Complainant on a PIP, Citi took an adverse employment action against Complainant. *See, e.g., Dolan v. EMC Corp.*, ALJ 2004-SOX-00001 (ALJ Mar. 24, 2004) (negative performance evaluation alone is not an adverse employment action unless it also causes “tangible job detriment”); *Reynolds v. Dep’t of the Army*, 439 F.App’x 150, 153 (3rd Cir. 2011) (“a PIP is not an adverse employment action absent accompanying changes to pay, benefits, or employment status”).

⁴ Neither party addressed this element in their closing briefs.

⁵ Complainant seems to suggest that Citi decision to place him on a PIP and deny a performance bonus were separate adverse employment actions. (Complainant’s Brief at 6.) While it is true that Complainant did not receive a bonus in 2016, (ALJX 1 ¶ 13), the denial of the bonus appears to be a direct effect of being placed on a PIP. (ALJX 1 ¶ 11.) Because of this, this decision and order will not address these two action separately. (Tr. at 167-168, 244.)

Additionally, Citi terminated Complainant's employment on August 14, 2017. (ALJX 1 ¶¶ 2, 37.) There is no doubt that Complainant's termination was an adverse employment action.⁶ See 18 U.S.C. § 1514A(a) (an employer "may not discharge"); 29 C.F.R. § 1980.102(a).

Because an employer may not take adverse action against an employee because that employee engaged in activity protected under the Act, this decision and order will first address if Complainant engaged in protected activity prior each adverse action. If Complainant did engage in protected activity, it must then be determined if his doing so contributed to Citi's decision to take adverse action against him. Finally, if Complainant is able to establish these elements, it must be addressed if Respondents can show, by clear and convincing evidence, that they would have taken the same action regardless of any protected activity.

A. The Performance Improvement Plan

Complainant alleges that he engaged in protected activity on two separate occasions before Citi placed him on a PIP. First, he claims that he engaged in protected activity when he raised the issue related to a potential violation of Swiss data privacy laws during the KL Audit. (Complainant's Brief at 11-14.) Second, Complainant contends that he also engaged in protected activity during the CDO Audit by identifying and reporting issues related to the Chief Data Office's data quality. (Complainant's Brief at 14-15.) Because of his actions during the KL Audit and CDO Audit, Complainant claims that Citi began to "build a case" against him. (Complainant's Brief at 20.) This process, which began with the PIP and ended with his termination, was retaliation for his protected activity. (Complainant's Brief at 16-27.)

Respondents, conversely, argue that Complainant did not engaged in protected activity during either audit. With respect to his work on the KL Audit, Respondents claim that a potential violation of foreign data privacy law is not protected under the Act. (Respondents' Brief at 45-46.) In addition, even if it were, Complainant's belief that such a violation had occurred was not reasonable. (Respondents' Brief at 47.)

Respondents also argue that Complainant did not engage in protected activity during the CDO Audit. They claim that Complainant's co-workers, not Complainant, raised data quality issues during this audit. (Respondents' Brief at 47.) Furthermore, to the extent that Complainant was involved in discussions related to the Chief Data Office's data quality, Respondents assert that Complainant never alleged that a violation of securities law or other relevant laws and regulations had occurred. (Respondents' Brief at 47-48.) Rather, Respondents posit that the concerns expressed by Complainant during the CDO Audit amounted to nothing more than a difference of professional opinion and were too vague and non-specific to constitute a reasonable belief of unlawful conduct. (Respondents' Brief at 47-51.) Finally, Respondents also claim that the concerns raised by Complainant during both the KL Audit and the CDO Audit "had nothing

⁶ Prior to his termination, Citi placed Complainant on administrative leave. (ALJX 1 ¶ 34.) Although Citi continued to pay Complainant's salary, he barred from the workspace and did not have access to his company-issued electronic device (laptop computer). Thus, by placing Complainant on administrative leave, Citi took an adverse employment action against Complainant. See *Perez, supra*. However, because Citi terminated Complainant for the same reasons it placed him on administrative leave, the undersigned will also consider these two actions to be part of the same adverse employment action.

to do with financial accounting or financial reporting matters,” and therefore cannot be protected activity under the Act. (Respondents’ Brief at 51-52.)

i. Protected Activity

As the ARB has explained: “[t]o 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” in the Act. *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, slip op. at 14 (ARB May 25, 2011). The ARB interprets the “reasonable belief” standard to include both a subjective and an objective component. *Id.*

To satisfy the subjective component, “the employee must actually have believed that the conduct he complained of constituted a violation of relevant law.” *Id.* To satisfy the objective component, the employee’s actual belief also must be objectively reasonable, which is evaluated “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* at 15 (quoting *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

Notwithstanding the above, a violation of a law cited in 18 U.S.C. § 1514A need not actually occurred. *Sylvester*, ARB No. 07-123, at 16. A complainant’s conduct may be considered protected activity if his or her belief that a violation occurred or was likely to occur was mistaken or incorrect, so long as the complainant’s conduct was based on a reasonable belief that a violation had occurred or was likely to occur. *See, e.g., Sylvester*, slip op. at 16; *Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-00007, slip op. at 6 (ARB Jan. 31, 2006); *Vannoy*, ARB No. 09-118, ALJ No. 2008-SOX-00064 (ARB Feb. 17, 2011).

a. Kuala Lumpur Audit

The KL Audit began in September 2015. (Tr. at 61, 291-293.) Work on the audit concluded upon the completion and distribution of the KL Audit’s final report on December 18, 2015. (*See* RX 28.) The parties agree that Complainant raised concerns relating to potential violations of Swiss data privacy laws during this audit. (ALJX 1 ¶ 8.) Complainant explained that the PII of Citi’s Swiss banking customers was being transferred from Switzerland to Singapore and ultimately being stored in Singapore. (Tr. at 73, 295.) He believed that Citi’s employees in Singapore could access this data. (Tr. at 68-69, 73.) Complainant believed that the employees in Singapore could access the data in two ways: while transferring from Switzerland to Singapore and while being stored in Singapore. (Tr. at 68-69, 73.) Complainant testified that he believed this process to be a violation of Swiss data privacy laws. (Tr. at 71-73.)

Complainant claims that he first became aware of the potential violation of Swiss data privacy laws during the planning stage of the audit. (Tr. at 69, 293.) He testified that he raised the issue with his supervisors in emails, phone calls, and during meetings. (Tr. at 73.) The documentary evidence shows that Complainant raised this issue in an email discussion on November 24, 2015. (JX 1.)

Based on the record in this case, however, the undersigned concludes that Complainant did not reasonably believe that Citi's process of transferring and/or storing Swiss banking customer's PII data in Singapore where it could be accessed by Citi's Singapore employees was a violation of any federal law, rule, or regulation as required under 18 U.S.C. § 1514A.

As set forth above, the undersigned recognizes that Complainant need not specifically allege the elements of fraud to prove that he engaged in protected activity. Additionally, the undersigned also recognizes that the purpose of the Act is to detect and prevent corporate fraud generally, and not only fraud against shareholders. However, the record does not support a finding that Complainant reasonably believed the process for transferring and storing Swiss banking customer's PII could have constituted a violation of any of the laws, rules, or regulations enumerated in 18 U.S.C. § 1514A. Thus, Complainant has not established that he engaged in protected activity during the KL Audit.

The ARB has held that any allegation of some sort of illegal conduct not enumerated in 18 U.S.C. § 1514A does not, in and of itself, constitute protected activity under the Act. *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, slip op. at 8-11 (ARB Mar. 30, 2016). By way of example, the ARB explained that an allegation that an employer has violated state or federal wage laws (such as failing to pay minimum wage or failing to an overtime premium), is not protected activity under the Act. *Id.*

Rather, the ARB explained that a complainant must allege something more than illegal activity. *Id.* A complainant must alleged that the employer took some additional action to hide the conduct in order to establish that the employer engaged in fraudulent behavior. *Id.* The ARB held that "some form of trickery, of deception, a knowing misrepresentation or knowing concealment of a material fact" must also be alleged. *Id.*, at 10 (citing to Black's Law Dictionary (10th ed. 2014) (internal quotations removed); *cf. Harvey v. Home Depot*, ARB No. 04-115, ALJ No. 2004-SOX-00036, slip op. at 14 (ARB June 2, 2006) ("[p]roviding information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws . . . , standing alone, is not protected conduct under the SOX.")).

Accordingly, Complainant's allegation that Citi's processes for handling the data of Swiss banking customers potentially violated Swiss data privacy laws, even if substantiated, does not establish that Citi engaged in the type of corporate fraud contemplated in 18 U.S.C. § 1514A. In addition to this allegation, Complainant must show that some sort of concealment or misrepresentation by Citi or its employees. Prior to July 2016, the beginning of the PIP process, Complainant never made such an allegation.

The record shows that Complainant did not believe that any such behavior took place prior to the PIP. Complainant's insinuation at hearing that Citi's Singapore employees attempted to cover up his concerns is not credible and contrary his own actions during the KL Audit. Moreover, the record would suggest that the audit team proper raised the issue of Swiss data privacy and Citi employees (specifically O'Grady and employees from the European Region)

addressed it. Based on this, the undersigned concludes that Complainant did not believe that Citi was attempting to conceal its data handling processes and did not allege as much prior to the PIP.

At hearing, Complainant testified that Citi employees in Singapore treated him with hostility and warned him about raising these types of issues. (Tr. at 64.) He suggested that their behavior towards him was an attempt to intimidate him in order to prevent him from reporting the potential violation of Swiss data privacy law. To make him understand that it would be “too much of a fight.” In a broad and unspecific way, Complainant described an organizational culture that in the Singapore office that would dissuade auditors from taking appropriate actions. Thus, if substantiated, Complainant’s assertions concerning the hostility and resistance he faced during the KL Audit could be considered an effort to conceal or “cover up” potential legal violations. However, other than his bare assertions in his hearing testimony, Complainant has offered no evidence to substantiate this claim.

For the reasons discussed above, Complainant’s testimony is not credible. Not only is his allegation unreliable, the record shows that Complainant did actually raise the issue with Citi’s Singapore office. In emails sent between November 24, 2015 and November 26, 2015, Complainant expressed his concern that data being transferred from Switzerland and stored in Singapore might contain PII, which could conflict with Swiss regulations. (JX 1.) Complainant copied Richard Yeong, the head of Citi’s Global Functions Technology unit -Asia Pacific Region, on these emails. In this correspondence, Complainant made no mention of the any resistance he had encountered. The fact that Complainant copied Yeong on these emails along with Complainant’s general lack of credibility is sufficient for the undersigned to conclude that Citi’s Singapore employees did not pressure Complainant to keep quiet about potential violations of Swiss data privacy law.

Moreover, the record also shows that Complainant had several opportunities to alert other Citi personnel (other than those based in the Singapore office) that there was an effort to conceal the issue of Swiss data privacy. But, he did not do so. As stated above, Complainant was included on and participated in an email chain where the audit team and Citi’s management discussed the very issue. (JX 1.) Many of Complainant’s supervisors and other managers were on this email chain – O’Grady, Yeong, Juliette Patricia, and others. Yet, Complainant never mentioned any efforts made by Citi employees in Singapore to conceal the Swiss data privacy issue.

Furthermore, Complainant did not claim that anyone with Citi had attempted to cover up the Swiss data privacy issue during the drafting of the KL Audit’s final report. Although the issue identified by Complainant was not explained in detail in the final report, the report stated that “data quality and privacy were not completely identified, monitored and assessed.” (RX 28.) The process of drafting the final report of an audit involved circulating a draft amongst the audit team members and supervisors for review and comment. (*See* RX 34; Tr. at 329-300.) However, Complainant did not allege that Citi was somehow concealing the potential violation during the process that produced the draft of the KL Audit’s final report.⁷ During this process,

⁷ At hearing, Complainant claimed that he raised the issue of Swiss data privacy laws again with O’Grady during the report drafting process. (Tr. at 329-300.) However, due Complainant’s lack of credence on other matters as found herein, his hearing testimony on this issue is not credited: it is uncorroborated by O’Grady’s testimony who has been

Complainant did not claim anyone had excluded his concerns with Swiss data privacy laws from the final report. Neither did he complain that the report did not sufficiently address his concerns.

Lastly, contrary to Complainant's current assertions, the record strongly suggests that the issue of Swiss data privacy laws was identified and raised in the ordinary course of the KL Audit and properly addressed by Citi's audit team. O'Grady testified that after the audit team alerted him to the issue, he determined that the issue was not a concern of the KL Audit and would be properly addressed by Citi's European region, specifically by John Butters. (Tr. at 548-551.) Accordingly, O'Grady instructed Complainant and Patricia discuss the matter with Butters and Citi's European region. (Tr. at 548.)

Complainant and Patricia appear to have followed O'Grady's advice and relayed their concerns to Graham Cleather, an IA employee in Citi's European region, on November 5, 2015. (JX 1; Tr. at 294.) Their concerns were eventually passed along to other European region employees (Butters) and Citi's Swiss technology team (Figueiredo, Thatikonda, and Krishnankutty). Thus, the issue appears to have been referred to the proper Citi personnel for resolution. This does not support a finding that Citi sought to hide the potential violation of Swiss data privacy laws.

Complainant also implies that O'Grady did not want to fully address the issue. (Tr. at 307-309.) Complainant cites O'Grady's December 3, 2015 email response as support. (JX 1.) In that email response, O'Grady told Complainant to stop bringing up the Swiss data privacy law issue and directed him to focus his attention on other, more pressing issues. Despite Complainant's contention, this exchange does not compel an inference that O'Grady sought to "cover up" the issue of Swiss data privacy. Rather, it is entirely consistent with O'Grady determinations that the issue was outside of the scope of the audit and would be properly addressed by Citi's European region.

What's more, Complainant responded to this direction cooperatively and stated: "sounds good." (JX 1.) This is not the response that would be expected of someone who reasonably believed that O'Grady was attempting to "cover up" potential illegal conduct. Rather, his response suggests that Complainant believed that the issue was properly addressed.

For all of these reasons, the undersigned finds that Complainant and the audit team raised concerns with Citi's data handling processes that may have constituted a violation of Swiss law. However, the undersigned also concludes that Complainant has not established that Citi attempted to conceal or misrepresent the issue. *See Cypress Semiconductor Corp.*, ARB No. 15-017, slip op. at 10 (ARB Mar. 30, 2016). Because of this, Complainant's internal complaints relating to Swiss data privacy law cannot form a basis for protected activity under the Act. Moreover, the record does not reflect any factual basis on which a reasonable person in Complainant's position (with his knowledge, experience, and training) could have concluded that Citi was engaging in the type of fraud contemplated in the Act (or of any kind for that matter). Rather, the record suggests IA properly addressed the issue raised by Complainant in accordance with its usual practice. Therefore, the undersigned concludes that Complainant's belief that Citi

found to be a more credible witness than Complainant and unsubstantiated by any documentary evidence Complainant has proffered in this matter.

was engaging in fraud –even if subjectively held in good faith, was not objectively reasonable and his work during the KL Audit does not constitute protected activity under the Act.⁸

b. Chief Data Office Audit

Complainant began working on the CDO Audit in early 2016. (ALJX 1 ¶ 26; Tr. at 88.) IA issued final reports of its findings on April 20, 2016 and June 30, 2016. (RX 29, RX 30.) Throughout this audit, Complainant worked alongside Jason Ng, with each serving as auditors. (ALJX 1 ¶ 26.) The Chief Data Office (the subject of the CDO Audit) is the Citi business unit responsible for managing and monitoring the company’s data. (ALJX 1 ¶ 27.)

During the course of this audit, Complainant and other members of the audit team identified a “data quality issue,” *i.e.*, they determined that the Chief Data Office was only capturing a small portion of the data it intended to capture. (ALJX 1 ¶ 28.) Because of this data quality issue, Complainant believed that the Chief Data Office could not effectively meet its objectives. (Tr. at 90-92, 99.) Complainant claims that he, Ng, and O’Grady discussed this issue in person during the course of the CDO audit. (Tr. at 92-93.) Complainant ultimately expressed his concerns in an email sent to O’Grady and Ng on March 30, 2016. (RX 25; RX 26; ALJX 1 ¶ 28.) On April 8, 2016, Ng echoed Complainant’s concerns about data quality in an email to Sears, with Complainant copied. (RX 34.)

Complainant stated that he reported this issue to his supervisors Sears and Kanbas-Campbell, but that they excluded it from the final reports of the CDO Audit. (Tr. at 93-94; Complainant’s Brief at 15.) At hearing, Complainant claimed that because the final report excluded this issue, the April 30, 2016 report was inaccurate and constituted a misrepresentation to regulators. (Tr. at 94-98.) Thus, Complainant suggests that by identifying and reporting the problems with the Chief Data Office’s data quality, he engaged in protected activity under the Act.

Respondents deny that Complainant engaged in protected activity during the CDO Audit. (Respondents’ Brief at 47-52.) First, Respondents argue that it was Ng, and not Complainant, who identified and reported the problem with data quality. (Respondents’ Brief at 47.) Because of this, Respondents claim that Complainant cannot demonstrate that he had a reasonable belief that Citi was engaged in some sort of illegal activity. Respondents further claim that Complainant’s alleged protected activity amounts to nothing more than a difference of professional opinion. (Respondents’ Brief at 48-49.) Additionally, Respondents argue that Complainant’s concerns were too vague and non-specific to constitute protected activity under the Act. (Respondents’ Brief at 49-51.)

⁸ Complainant later alleged that Citi was engaged in a “cover up.” (CX 4.) However, Complainant first made this allegation on October 10, 2016, in an email to O’Grady. O’Grady had sent Complainant his final draft of the PIP on September 28, 2016. Because this allegation was first made after O’Grady had decided to place him on a PIP (in July 2016) and after O’Grady had completed the final draft of the PIP (September 28, 2016), it could not have been a contributing factor to O’Grady’s decision, even if true. That being said, based on Complainant’s general lack of credibility, the timing of this allegation first being raised, and the numerous email discussions concerning the KL Audit that are silent on this issue, the undersigned finds that Complainant did not subjectively believe that Citi was then engaging in some sort of “cover up.”

Respondents incorrectly assert that it was Ng, and not Complainant, who raised the concerns related to data privacy. Ng informed Barry Sears of this issue in his April 8, 2016 email. (RX 34.) However, prior to this email, on March 30, 2016, Complainant had emailed O’Grady and Ng, along with others, and alerted them to the problem. (RX 25, RX 26.) Under the Act, a complainant need only report information concerning potential fraudulent activity to a “person with supervisory authority.” 18 U.S.C. § 1514A(a)(1)(C); *see also* 29 C.F.R. § 1980.102(b)(1)(3). Although it is not entirely clear whether Ng had supervisory authority over Complainant, there is no question that O’Grady did. At the time of the CDO Audit, O’Grady served as Complainant’s direct supervisor. (ALJX 1 ¶ 6; Tr. at 60, 290.) Thus, regardless of which Citi employee reported this issue to Sears, Complainant’s March 30, 2016 email to Ng and O’Grady could suffice under 18 U.S.C. § 1514A(a). Nonetheless, for the reasons set forth below, the undersigned finds that Complainant’s conduct during the CDO Audit does not constitute protected activity under the Act.

Complainant claims his actions relating to the Chief Data Office’s data quality were protected activity under the Act. However, Complainant has not established that the complained-of activity could form the basis of a violation or potential violation of a law, rule, or regulation enumerated under 18 U.S.C. § 1514A. Moreover, Complainant has failed to demonstrate that he reasonably believed that Citi was engaged in illegal or fraudulent activity.

The Chief Data Office was not capturing all of the data it believed it was capturing. (ALJX 1 ¶ 28.) Neither party disputes this fact. Because of this, Complainant believed that the Chief Data Office was functioning ineffectively. (ALJX 1 ¶ 28; Tr. at 90-92, 99.) There is no dispute that Complainant was aware of the Chief Data Office’s data-related shortcomings and that he shared his concerns with his supervisors prior to his PIP. (ALJX 1 ¶ 28; Tr. at 92-93; RX 34, RX 35, RX 37.) However, at no point prior to the PIP did Complainant allege that the Chief Data Office was engaging in any sort of illegal activity.

During the CDO Audit, Complainant claims that he discussed the data quality issue with O’Grady and that the two contemplated alerting Kanbas-Campbell. (Tr. at 92-93.) He also claimed to have raised this issue with Ng prior to Ng’s March 9, 2016 email to O’Grady and Kanbas-Campbell. (Tr. at 353-354; RX 35.) He never, however, alleged that the data quality issues affecting the Chief Data Office were illegal or fraudulent.

Complainant testified that his concerns with the Chief Data Office’s data quality were “somehow excluded” from the CDO Audit reports. (Tr. at 93.) He further claimed that the April 30, 2016 final report’s description of the Chief Data Office’s data quality issue “excluded a lot of stuff” and was, therefore, insufficient. (Tr. at 93.) Thus, at hearing, Complainant intimated that the final reports of the CDO Audit were a “misrepresentation” and “out of compliance.” (Tr. at 94-95.)

As explained above, the undersigned found Complainant’s testimony to be generally unreliable. And, contrary to Complainant’s testimony, the evidence in the record does not support a finding that Complainant ever raised concerns about a misrepresentation or any other sort of illegal activity. At hearing, Kanbas-Campbell denied that Complainant ever reported that he had discovered any illegal activity. (Tr. at 460-461.) She also claimed that Complainant

never told her that he believed the final reports of the CDO Audit misrepresented the Chief Data Office's operations. (Tr. at 461.) Kanbas-Campbell's account, unlike Complainant's, is supported by the documentary evidence in the record. (See RX 25-26, 28-29, 34, 38.)

Moreover, Complainant's actions belie his hearing testimony. Ng copied Complainant on an email to Suzanne Nolan on March 9, 2016.⁹ (RX 35.) In this email, Ng explained the problems uncovered during the CDO Audit, including the data quality issue. Ng did not claim that any sort of illegal activity occurred. There is no evidence in the record showing that Complainant responded to this email from Ng to apprise either Ng or Nolan of any alleged illegal activity or to supplement Ng's account to include any allegation of illegal activity.

In April and May of 2016, IA employees, including Complainant, circulated a draft of the final reports of the CDO Audit via email. (RX 34, RX 38.) Throughout this process, various employees discussed the issue of data quality but, once again, Complainant did not contribute to the conversation and never alleged that any sort of illegal activity had been uncovered. To the contrary, after the group of employees agreed on how the data quality issue would be addressed in the April 30, 2016 final report, Complainant responded to O'Grady on May 10, 2016 and stated: "[s]ounds like the issue in spirit has been accepted finally." (RX 38.)

Because of his general lack of credibility and because his own actions contradict the claims made in his testimony, the undersigned finds that Complainant never raised any concerns or allegations relating to illegal activity during the CDO Audit. Thus, he did not engage in protected activity under the Act during the CDO Audit.

Moreover, even if Complainant had made such an allegation regarding illegal activity on the part of Citi during the CDO Audit, he did not, prior to his PIP, allege that Citi sought to conceal such activity. As stated above, reporting illegal conduct, in and of itself, does not constitute protected activity under the Act. *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, slip op. at 8-11 (ARB Mar. 30, 2016). Even assuming that Complainant had made an allegation of illegal or fraudulent activity during the CDO Audit prior to the PIP (which he did not), he must also establish that Citi made some effort to conceal or hide its conduct. *Id.* Complainant has failed to establish Citi engaged in any such effort.

For the reasons discussed above, Complainant's hearing testimony on this issue lacks credence. He testified that his concerns about data quality were "somehow excluded" and that the final reports insufficiently described the extent of the problem. (Tr. at 93.) However, Kanbas-Campbell's testimony and Complainant's own actions contradict these assertions. (Tr. at 461; RX 34; RX 35.) For these reasons, Complainant has not established that his complaints could somehow form the basis of a violation under 18 U.S.C. § 1514A.

Alternatively, even if the issues raised by Complainant could be related to a violation enumerated in 18 U.S.C. § 1514A, at no point prior to his PIP did Complainant articulate his concerns with sufficient specificity to constitute protected activity under the Act. While a complainant need not establish that a violation of one of the laws enumerated in the Act,

⁹ Mrs. Nolan's title and work location is unclear. However, based on the documentary evidence and Ng's hearing testimony, she appears to be a Citi employee and "stakeholder" in the CDO Audit. (See RX 35; Tr. at 342.)

Sylvester v. Parexel Int'l LLC, ARB No. 07-123, slip op. at 14 (ARB May 25, 2011), in order for his activity to be protected under the Act, he must state his particular concerns, which, reasonably identify conduct that he believes to be illegal or fraudulent. *Welch v. Chao*, 536 F.3d 269, 276-77 (4th Cir. 2008); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995); *see also Lerbs v. Buca Di Beppo, Inc.*, ALJ No. 2004-SOX-00008, slip op. at 13-14 (ALJ Jun. 15, 2004).

Complainant did not identify the conduct that he believed to be illegal or fraudulent at any time prior to his PIP. The only time Complainant appears to have remarked on the Chief Data Office's data quality was on May 10, 2016, in his response to an IA email chain discussing the best way to present the data quality issue in the final reports. (RX 38.) Complainant's replied only to O'Grady and appeared satisfied with the way the final report represented the issue. Complainant's response to this email does not constitute protected activity. He never identified his concerns about Respondents' conduct that he may have believed to be illegal or fraudulent.

Lastly, Complainant has also failed to establish that he had a reasonable belief that the complained-of conduct was illegal or fraudulent. There is no evidence in the record to suggest that a reasonable person with Complainant's education, knowledge, and experience would have believed that the Chief Data Office's data quality issue or IA's final reports of the CDO Audit constituted the type of illegal activity or fraud contemplated by the Act. Apart from Complainant's unreliable hearing testimony, he has presented no evidence to suggest that his belief was objectively reasonable.

Even if the undersigned were to consider the documentary evidence in a light most favorable to Complainant, his communications regarding the Chief Data Office's data quality issue appear to be nothing more than a difference of professional opinion. Complainant may have believed that the issue was more significant than his supervisors did and that the final reports should have explained it in greater detail or highlighted it in some other way. However, this type of disagreement about the proper course of action is not protected activity under the Act. *See, e.g., Day v. Staples, Inc.*, 555 F.3d 42, 57 (1st Cir. 2009) (disagreement about corporate efficiency not protected activity); *Mann v. Fifth Third Bank*, 2011 U.S. Dist. LEXIS 44853, at *32 (S.D. Ohio Apr. 25, 2011) (dismissing a claim where complainant only alleged that the respondent provided the appraisal department inadequate resources). And again, Complainant's May 10, 2016 response to O'Grady (RX 38) does not even suggest that he disagreed with IA's final expression of the data quality issue.

For these reasons, Complainant has failed to establish that his belief was objectively reasonable. Therefore, Complainant has not demonstrated that he engaged in protected activity during the CDO Audit.

ii. Contributing Factor

Even assuming that Complainant had engaged in protected activity prior to the PIP, the undersigned concludes that Complainant has not demonstrated that his alleged protected activity was a contributing factor to Citi's decision to place him on a PIP.

A complainant must prove, by a preponderance of the evidence, that his protected activity was “a contributing factor” in the adverse personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii); *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, slip op. at 9 (ARB May 25, 2011) (explaining that the “legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) govern SOX Section 806 actions”). The ARB has held that “there are no limitations on the evidence the factfinder may consider in making that determination.” *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, slip op. at 15 (ARB Sep. 30, 2016). Rather, the ALJ must consider all relevant evidence to determine whether “it is more likely than not that the employee’s protected activity was a contributing factor in the employer’s adverse action.” *Id.* at 52.

A “contributing factor” is any factor that (alone or in combination with other factors) played any role, even an insignificant or insubstantial role, in affecting the outcome of the adverse personnel action. *Id.* at 53. A complainant need not prove that his employer’s non-retaliatory reasons for the adverse personnel action were pretextual. *Id.* The ALJ need only be persuaded, by a preponderance of the evidence, that the employee’s protected activity played some role in the adverse personnel action. “Importantly, if the ALJ believes that the protected activity and the employer’s non-retaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.” *Id.* “[T]he ALJ should not engage in any comparison of the relative importance of the protected activity and the employer’s non-retaliatory reasons. As long as the employee’s protected activity played some role, that is enough.” *Id.* at 55.

The ARB has emphasized that “an employee may meet [his] burden with circumstantial evidence,” in part because “employees are likely to be at a severe disadvantage in access to relevant evidence.” *Id.* at 55-56. Thus, a judge is permitted, but not required, “to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity.” *Id.* at 56. Ultimately, an ALJ must believe, based on a preponderance of the relevant evidence, that the employee’s protected activity played some role, however small, in the adverse personnel action. *Id.*

Complainant argues, generally, that his PIP was in retaliation for protected activity during the KL and CDO Audits. (Complainant’s Brief at 16-53.) He claims that the PIP was just the beginning of a pretextual process that ultimately resulted in his termination.

On the other hand, Respondents argue that Complainant’s alleged protected activity could not have affected its decision to place Complainant on a PIP because there is no evidence that any of the relevant decision maker understood Complainant’s actions to be protected activity under the Act. (Respondents’ Brief at 52-53.) Respondents also state that many of the same performance-related concerns listed on the PIP are also listed in Complainant’s prior performance reviews and, therefore, could not have been a contributing factor. (Respondents’ Brief at 53-55.) Respondents further claim that Complainant has not presented any evidence of personal animus against Complainant and that other employees who raised similar concerns were not subject to discipline. (Respondents’ Brief at 56-57.)

Initially, Respondents incorrectly claim that Citi, specifically the decision maker (in our case O’Grady), must have known or should have known that Complainant’s activity was protected under the Act. Complainant is not required to establish that Citi or O’Grady had knowledge of his protected activity. He need only present evidence sufficient to allow the judge to draw a causal inference between the protected activity and the adverse employment action. *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, slip op. at 56 (ARB Sep. 30, 2016). Drawing such an inference would necessarily require concluding that the employer had knowledge of the protected activity.

Moreover, Respondents conflate the causation and protected activity elements of proof in this matter. Complainant is not required to establish (nor is the judge required to find) that the management official responsible for the adverse employment action against an employee understood the employee’s activity to be protected activity under the Act. The judge determines if Complainant’s conduct constitutes protected activity. And if so, it must then be determined if such activity contributed to the adverse employment action. The decision maker’s understanding of or familiarity with the Act and its contours is not relevant to the analysis in this section.

Apart from his bare assertions, Complainant has not presented any direct evidence that supports finding a causal connection between O’Grady’s decision to place him on a PIP and any alleged protected activity he engaged in as discussed above. Therefore, Complainant’s assertions alone are insufficient to establish a causal link between his alleged protected activity and his PIP. He must then rely on the circumstantial evidence in the record to establish causation. For the reasons set forth below, such circumstantial evidence would not support a finding of causation.

The undersigned recognizes that temporal proximity is sufficient to raise an *inference* that a complainant’s alleged protected activity contributed to his adverse employment action. *See, e.g., El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931 (2d Cir. 2010).¹⁰ However, such an inference alone may not be sufficient to establish, by a preponderance of the evidence, that a complainant’s alleged protected activity was a contributing factor in the employer’s decision to take an adverse employment action. *Bechtel v. Admin. Review Bd.*, 710 F.3d 443 (2nd Cir. 2013); *Zinn v. Am. Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-00025 (ARB Mar. 28, 2012). When another legitimate reason or reasons exist for the adverse employment action, the inference raised by temporal proximity may be insufficient proof to demonstrate that a complainant’s alleged protected activity was a contributing factor in the adverse action. *See, e.g., Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ Case No. 2002-AIR-00019, slip op. at 6-7 (ARB Apr. 28, 2006).

Both O’Grady and Complainant testified that O’Grady decided to place Complainant on a PIP in July 2016. (Tr. at 105-108, 531-532.) Citi’s human resources employee Jennifer Wolfe’s handwritten notes corroborate this date. Wolfe’s notes show that O’Grady called her to discuss the PIP on July 12, 2016. (CX 2.) Complainant alleged that he engaged in protected activity during the KL and CDO Audits. His work on these audits occurred from September 2015

¹⁰ In their briefs, both parties erroneously apply a *prima facie* framework. However, under the Act, a complainant must establish each element by a preponderance of the evidence. There is no burden shifting scheme and no need for a *prima facie* showing of discrimination. *See, e.g., Zinn v. Am. Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-00025 (ARB Mar. 28, 2012); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443 (2nd Cir. 2013).

through December 2015 and from early 2016 until at the latest June 30, 2016, respectively. (Tr. 61, 88, 291-293, RX 28; ALJX 1 ¶ 26, RX 29, RX 30.) Because Complainant's alleged protected activity occurred prior to O'Grady's decision to place him on a PIP, there is temporal proximity between the two events.

However, because of the months separating Complainant's alleged protected activity and O'Grady's decision, the probative value of this connection (and the inference it supports) is diminished. When weighed along with the creditable non-discriminatory reasons advanced by Respondents, this diminished connection based on temporal proximity is not sufficient to establish that Complainant's alleged protected activity was a contributing factor in O'Grady's decision to place Complainant on a PIP.

Complainant insinuates that the decision to place him on the PIP did not come from O'Grady. (Tr. at 106-108, 352; Complainant's Brief at 19.) Rather, he claims that Sears and Kanbas-Campbell directed O'Grady to take the action. However, this assertion is not supported by the credible evidence in the record.

O'Grady testified that he decided to place Complainant on a PIP on his own. (Tr. at 530, 538, 542, 557-558.) He claimed to have contemplated placing Complainant on a PIP several times prior to July 2016. (Tr. at 529.) However, he acknowledged that his ultimate decision was affected by Sears, his supervisor.

Sears had expressed to O'Grady concerns with Complainant's performance during the KL Audit. (Tr. at 530-531.) Sears' concern stemmed from a meeting held at the outset of the KL Audit. (Tr. at 530-531, 561-562.) Complainant was supposed to lead this meeting and discuss the audit's scope but was not adequately prepared to do so. (Tr. at 519-520.) After this meeting, O'Grady explained that Sears identified Complainant as a poor performer and pressured him to place Complainant on a PIP. (Tr. 530, 538.) Because Complainant was under O'Grady's direct supervision, O'Grady believed Complainant's poor performance would ultimately reflect poorly on him as a manager. (ALJX 1 ¶ 6; Tr. at 561.) O'Grady claimed that Sears' comments led to "a sense of urgency" to improve Complainant's job performance and place him on a PIP. (Tr. at 530.) O'Grady also acknowledged that Sears reviewed a draft of PIP and provided comments, but claimed that Sears' input had no significant effect on the PIP. (Tr. at 535, 553-554.)

O'Grady also explained that Kanbas-Campbell had no influence on his decision. (Tr. at 536-537.) At time of the PIP, neither Complainant nor O'Grady reported to Kanbas-Campbell. (Tr. at 537.) Thus, O'Grady testified that she was not "privity to the document or discussion." (Tr. at 537.) Kanbas-Campbell also denied having any role in the O'Grady's decision. (Tr. at 453-454, 461.) Additionally, Wolfe's notes of her discussions with O'Grady do not indicate that either Sears or Kanbas-Campbell directed O'Grady to place Complainant on the PIP. (*See* CX 2.)

Based on a review of the pertinent evidence, the undersigned concludes that O'Grady decided to place Complainant on a PIP. Both O'Grady and Kanbas-Campbell were credible witnesses. Their testimonies demonstrate that O'Grady decided to place Complainant on a PIP.

Although Sears' concerns about Complainant performance during the KL Audit affected his decision, O'Grady ultimately made the decision was to place Complainant on the PIP.

Moreover, even if Sears influenced O'Grady's decision, the undersigned does not find that such influence to be improper. There is also no indication, apart from Complainant's unsupported assertions, that Complainant's alleged protected activity influenced Sears' action in any way. Complainant does not dispute that he was unprepared for the meeting at the outset of the KL Audit. Sears attended the meeting (although not present in person) and would have been witness to Complainant's performance. (Tr. at 521.) According to the un rebutted testimony of O'Grady, after the meeting, Sears discussed Complainant's performance with O'Grady and suggested that O'Grady take remedial action. (Tr. at 521, 527.)

Complainant's alleged protected activity was not a contributing factor in O'Grady's decision to place him on a PIP. Instead, the record demonstrates that O'Grady decided to place Complainant on a PIP because of his poor job performance. In Complainant's formal PIP, issued on October 31, 2016, O'Grady explained that Complainant needed to improve his performance. (RX 8.) Specifically, O'Grady informed Complainant that he had to improve in the following areas: ownership of tasks; time management, and audit work quality. To support his statements, O'Grady cited to missed deadlines and commitments during the KL and CDO Audits.

At hearing, O'Grady explained that the areas of improvement he identified were "descriptive of the patterns" of performance that he discussed in Complainant's evaluations. (Tr. at 539.) The performance evaluations in the record support O'Grady's testimony. O'Grady conducted each of Complainant's performance evaluations. (JX 3-6; Tr. at 512.) In each evaluation, O'Grady discussed at least one of the areas of improvement identified in the PIP. (JX 3-6.)

In his 2015 mid-year evaluation, O'Grady noted that Complainant struggled meeting his commitments in a timely manners. (JX 3.) Complainant signed this evaluation and explicitly indicated that he agreed with O'Grady's assessment. O'Grady conducted and completed this evaluation prior to the start of the KL Audit (in September 2015) and the CDO Audit (in early 2016). (See Tr. at 61; ALJX 1 ¶ 26.)

In Complainant's 2015 year-end evaluation, O'Grady discussed his concerns with the quality of Complainant's work. (JX 4.) He stated that Complainant's work was not meeting minimum standards and that he needed to improve his ability to "work as a partner." As far as his overall evaluation, O'Grady rated Complainant as a "3," on a scale of one to five, with five being the worst. (ALJX 1 ¶ 9.)

The last time O'Grady evaluated Complainant's performance prior to the PIP was Complainant's 2016 mid-year evaluation. (JX 5.) O'Grady conducted this evaluation after the completion of the KL and CDO Audits and after the completion of the final reports for each. Here, O'Grady echoed many of the same concerns expressed in his 2015 evaluations. He opined that Complainant was not functioning at the anticipated level and was not demonstrating

ownership or accountability. O’Grady specifically mentioned Complainant’s inability to meet deadlines and “quality concerns” with his work.

Each of the relevant areas of poor performance identified by O’Grady in the PIP had previously been in Complainant’s performance evaluations. Moreover, Complainant signed each evaluations and indicated that he agreed with O’Grady’s assessment of his performance. (JX 3, JX 4, JX 5.) In addition, at hearing Complainant did not dispute O’Grady characterization of his time management abilities.¹¹ (*See, e.g.*, Tr. at 363, 391.)

Thus, O’Grady documented the specific issues identified in the PIP prior to any alleged protected activity and continued to document them after the alleged protected activity. Complainant also contemporaneously agreed with O’Grady’s assessments and did not credibly deny the factual bases for O’Grady’s assessment. This tends to favor a finding that O’Grady’s decision to place Complainant on a PIP related to Complainant’s job performance.

O’Grady also evaluated Complainant after the alleged protected activity and the PIP. In his 2016 year-end evaluation, O’Grady discussed many of the same performance issues including “timely delivery” and “work quality.” (JX 6.) O’Grady rated Complainant’s overall performance as a “4.” (ALJX 1 ¶ 12.) Although this evaluation occurred after O’Grady placed Complainant on the PIP, because it was consistent with the prior evaluations, it lends further support to a finding that O’Grady’s decision to place Complainant on a PIP was due to Complainant’s performance issues, and not any alleged protected activity under the Act.

Furthermore, each time Complainant alleges that he engaged in protected activity, other Citi employees engaged in the same conduct. During the KL Audit, Complainant worked alongside fellow auditor Juliette Patricia. (Tr. at 63-64.) In fact, Patricia initiated the November 2015 email in which Complainant discussed the problems that he and the audit team had identified relating to Swiss data privacy. (JX 1.) During the CDO Audit, Complainant worked with Jason Ng. (Tr. at 333.) Complainant claimed that he and Ng discussed the problems they had identified during that audit with O’Grady and Kanbas-Campbell. (Tr. at 92-93.) Ng was also copied on emails discussing the data quality issue. (RX 25, RX 26.) However, there is no evidence in the record to suggest that Citi took any sort of adverse employment action against either Patricia or Ng experienced. To the contrary, Ng received a promotion after the CDO Audit. (Tr. at 423-426.)

The lack of comparator evidence and the relevant evidence in the record demonstrates that other employees engaged in substantially similar conduct and were not disciplined or mistreated by Citi. This fact also tends to support a finding that Complainant’s alleged protected activity was not a contributing factor in the decision to place Complainant on a PIP.

¹¹ At hearing and in his brief, Complainant claimed that he could not have missed deadlines during the KL Audit because the entire audit finished ahead of schedule. (Tr. at 86, 113; Complainant’s Brief at 13, 22.) However, this fact does not compel a finding that Complainant’s work was not late. It is possible that Complainant’s work was late but that audit was still completed on time. Moreover, the evidence in the record contradicts Complainant’s assertion. (*See* RX 8, JX 4, JX 5, Tr. at 512-514, 524-526, 542.)

Based on the foregoing analysis, the undersigned is not persuaded that Complainant's alleged protected activity was a contributing factor in the decision to place him on a PIP. The performance related concerns listed in the PIP predate any of Complainant's alleged protected activity. Complainant did not credibly dispute O'Grady's assessment of his performance or the factual allegations that supported them. Complainant's performance evaluations are consistent throughout all periods relevant to this case and Citi did not discipline other similarly situated employees who engaged in similar conduct.

All of this supports a finding that O'Grady placed Complainant on a PIP because of Complainant's past performance issues. The combined probative value of each of these findings outweighs the diminished probative value of the inference of causation based on the temporal proximity of Complainant's alleged protected activity and O'Grady's decision to place Complainant on a PIP. Accordingly, the undersigned concludes that Complainant has not established that his alleged protected activity was a contributing factor in O'Grady's decision to place him on a PIP.

B. Termination

Citi terminated Complainant's employment on August 14, 2017. (ALJX 1 ¶¶ 2, 37.) There is no dispute that this action constitutes an adverse employment action. *See* 18 U.S.C. § 1514A(a); 29 C.F.R. § 1980.102(a). Thus, it must be determined if Complainant engaged in protected activity prior to his termination and, if so, did that protected activity contribute to Citi's decision to terminate Complainant. If Complainant is able to establish these elements, the undersigned will then determine if Respondents can show, by clear and convincing evidence, that they would have terminated Complainant regardless of any protected activity.

The undersigned determined that Complainant did not engage in protected activity during the KL Audit or the CDO Audit as alleged. However, the record shows (and Respondents do not contest) that Complainant engaged in protected activity after his work on these audits was complete and prior to his termination. Namely, Complainant filed a complaint with OSHA on April 10, 2017. (JX 2.) In his complaint, he alleged that he had raised "concerns of unfair representations to shareholders and the general public" with his supervisors and that Citi retaliated against him for doing so. Assuming Complainant reasonably believed that he was providing information relating to a potential violation of a law or regulation listed in 18 U.S.C. § 1514A, this accusation could constitute protected activity under the Act. *See* 18 U.S.C. §§ 1514A(a)(1)(A), 1514A(a)(2); 29 C.F.R. §§ 1980.102(b)(1)(i), 1980.102(b)(2).

Additionally, Complainant appears to have lodged similar complaints internally during the same period. On December 20, 2016, Complainant sent an email to Citi's human resources department, styled as his formal response to the PIP. (RX 23.) In this email, Complainant stated that he believed that Citi placed him on the PIP because he had "inadvertently expos[ed] potential fraudulent or illegal dealings." Furthermore, he claimed that he discovered "potential data violations across multiple countries" during the KL Audit and that Citi was "potentially providing misrepresentations to regulators" during the CDO Audit.

The record also includes a report of an internal ethics complaint filed by Complainant that appears to address Complainant's alleged protected activity during the CDO Audit and subsequent retaliation. (RX 31.) The exhibit does not include Complainant's actual complaint. Rather, it appears to be a report compiled by Citi addressing the merits of Complainant's ethics complaint. Of note, the report indicates that Complainant filed his ethics complaint on December 20, 2016 (perhaps referring to Complainant's formal response to the PIP) and that he maintained Citi placed him on a PIP because he raised concerns about unethical behavior by Yeong.

Complainant's formal response to the PIP (RX 23) and the report of his ethics complaint (RX 31), thus, could also constitute protected activity under the Act. *See* 18 U.S.C. § 1514A(a)(1)(C), 29 C.F.R. § 1980.102(b)(1)(iii). However, even if the undersigned were to assume as much, Complainant has failed to establish that either his protected activity contributed in to Citi's decision to terminate his employment. Moreover, even if Complainant's protected activity was a contributing factor to this decision, Respondents have established, by clear and convincing evidence, that they would have taken the same action regardless.

i. Contributing factor

As stated above, a "contributing factor" is any factor that (alone or in combination with other factors) played any role, even an insignificant or insubstantial role, in affecting the outcome of the adverse personnel action. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, slip op. at 53 (ARB Sep. 30, 2016). Complainant need not establish that his protected activity was the sole or primary factor in Respondents' decision. *Id.* Rather, he need only establish that his protected activity played some role. *Id.* at 55.

In his brief, Complainant does not argue that he engaged in protected activity after the KL Audit and CDO Audits. He argues instead that all of the adverse employment actions he experienced causally related to his work on the audits. (Complainant's Brief at 16-27.) Complainant claims that his termination was the culmination of a process that began when Citi placed him on the PIP.

Respondents argue that any alleged protected activity that Complainant may have engaged in was not a contributing factor in the decision to terminate his employment. (Respondents' Brief at 60-61.) Specifically, Respondents aver that Paul Ricci, the ultimate decision maker, had no knowledge Complainant's alleged protected activity. Thus, Complainant's protected activity could not have affected his decision.

Citi placed Complainant on administrative leave on July 5, 2017 and terminated on August 14, 2017. (ALJX 1 ¶¶ 2, 34, 37.) He filed his OSHA complaint in April 2017. (JX 2.) He formally responded to the PIP and filed an internal ethics complaint in December 2016. (JX 2, RX 23, RX 31.) The timing of his protected activity and his adverse employment actions could support an inference of a causal relationship. Nonetheless, even if the temporal proximity of these events provided a sufficient basis to infer that Complainant's protected activity was a contributing factor to Citi's decision to take adverse action against him, the intervening events relating to the burn emails and Citi's subsequent investigation vitiate the probative value any

such inference. *See, e.g., Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-00019 (Apr. 28, 2006) (an intervening cause may undermine an inference based on temporal proximity); *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 1997-WPC-00001 (ARB July 31, 2001).

Citi determined that Complainant was involved with sending inappropriate, harassing, and threatening emails (“the burn emails”) to several Citi employees. The burn emails were sent between March 2017 and July 2017. (*See* RX 9-21.) After conducting a thorough investigation, Citi ultimately concluded that Complainant was involved with some of the emails on July 5, 2017. (ALJX 1 ¶ 34.) The intervening investigation and determination of Complainant’s involvement could independently account for Citi’s decision to terminate Complainant’s employment and significantly reduces the probative value of any inference drawn based on temporal proximity.

Additionally, Complainant has not shown that those who recommended or decided to terminate his employment had any actual knowledge of his protected activity. Because of this, he has not established that his protected activity was a contributing factor in Citi’s decision to terminate his employment.

Complainant has alleged that he informed Kanbas-Campbell and Sears of his OSHA complaint and suggested that “everyone in the office” knew. (Tr. at 138-140.) He also claimed that he copied (blind carbon copied) Citi’s “managing directors” on an email in which he discussed his OSHA complaint. (Tr. at 191-192.) Complainant further stated that he believed Ricci was aware of his complaint because he informed another employee under Ricci’s supervision (Sean Bert) of the complaint. (Tr. at 139-140, 192.) Complainant’s assertions, however, are nothing more than allegations. The documentary evidence does not support his claims. Because of this, and because Complainant’s testimony is unreliable, the undersigned concludes that Complainant has not established that these individuals had knowledge of his protected activity.

McIntyre did state that Complainant brought up his OSHA complaint during the CSIS interview on July 5, 2017. (November 7, 2019 Tr. at 536.) Therefore, McIntyre had knowledge of Complainant’s OSHA complaint. Paul Ricci, who ultimately decided to terminate Complainant’s employment, based his decision on the recommendation of a disciplinary panel. This panel based its recommendation on the conclusion and findings of Citi’s internal investigation. Thus, it is possible that McIntyre’s knowledge of Complainant’s OSHA complaint could be imputed to the panel and then to Ricci. *See e.g., Heinrich v Ecolab, Inc.*, ALJ No. 2004-SOX-00051 (ALJ Nov. 23, 2004); *Platone v. Atlantic Coast Airlines*, 2003-SOX-00027 (ALJ Apr. 30, 2004) (a complainant’s protected activity may be imputed on high-level managers or supervisors based on the actual knowledge of other, more immediate supervisors). However, for the reasons discussed below, the undersigned concludes that McIntyre’s actual knowledge of Complainant’s OSHA complaint cannot properly be imputed on to the disciplinary panel or to Paul Ricci.

After several Citi employees began receiving burn emails, Citi’s Security and Investigative Services unit (“CSIS”) began an investigation. (November 7, 2019 Tr. at 482.)

CSIS investigators Matthew McIntyre and Matt Margolis conducted the investigation on behalf of CSIS. (November 7, 2019 Tr. at 481, 538.)

Before interviewing any employees, CSIS first developed a list of employees who it believed could have been involved with the burn emails. (November 7, 2019 Tr. at 485.) CSIS compiled this list based on the recipients of the burn emails and the names and other information referenced in the emails. (November 7, 2019 Tr. at 485.) CSIS deduced that one or more of the following employees were involved with drafting and sending the burn emails: Sears, Kanbas-Campbell, Nick Cox, Yeong, and Complainant. (November 7, 2019 Tr. at 489.)

CSIS then searched all of the internal communications (emails, instant messages, etc.) of the five employees for language phrases and grammatical anomalies that it considered peculiar or unique. (November 7, 2019 Tr. at 493.) CSIS also performed a similar search on “open source material,” such as social media accounts, blogs, and other publically available information. (November 7, 2019 Tr. at 489, 580.) CSIS then compared the information gleaned from both searches and identified similarities and consistencies. (November 7, 2019 Tr. at 556-557.)

In addition, CSIS also reviewed the browser and call histories from each of the five employee’s company devices and a log showing every time each employee entered Citi’s Wall Street Office. (November 7, 2019 Tr. at 491.) CSIS then compared the log to the time each of the burn emails was sent. (November 7, 2019 Tr. at 491.) Finally, CSIS began interviewing the employees. (November 7, 2019 Tr. at 493-494.)

Even before interviewing Complainant, CSIS suspected that he was involved. (November 7, 2019 Tr. at 494-495.) CSIS based their suspicion on the “significant correlation between [Complainant’s] public postings on social media, his internal Citi emails and the burn emails” along with information obtained through interviews with other Citi employees. (November 7, 2019 Tr. at 495.) Specifically, CSIS found the use of certain language phrases and grammatically anomalies common to Complainant’s internal emails, in his social media postings, and in the burn emails to be compelling evidence. (November 7, 2019 Tr. at 495-497.)

CSIS noticed that many of Complainant’s emails and postings and the burn emails contained “self-censored” profanity. (November 7, 2019 Tr. at 495.) Both Complainant and the sender of the burn emails also used a number of expressions that McIntyre found to be peculiar, such as “game over,” “the corporate game,” and “karma and the golden rule.” (November 7, 2019 Tr. at 495-496.) CSIS also identified an odd grammatical structure common to Complainant’s communication and some burn emails. Both included sentences ended with a period, followed by a double space, followed by an ellipsis. (November 7, 2019 Tr. at 495-496.)

McIntyre and Margolis interviewed Complainant on July 5, 2017. (November 7, 2019 Tr. at 498-499.) CSIS informed Complainant that he was required to fully cooperate with their investigation and that failure to do so could result in discipline. (November 7, 2019 Tr. at 501-502.) The interview last about four hours and CSIS did not recorded it. (November 7, 2019 Tr. at 503, 548-549.)

During the interview, McIntyre and Margolis showed Complainant print outs of several the burn emails which contained the language and grammatical similarities. (November 7, 2019 Tr. at 500-501.) Complainant initially denied that he was involved with the burn emails. (November 7, 2019 Tr. at 503-504.) However, as McIntyre and Margolis showed him more his communications and highlighted the similarities with the burn emails, Complainant began taking long pauses, sometimes between five and ten minutes, before answering. (November 7, 2019 Tr. at 504-505.) McIntyre testified that Complainant then admitted to being involved with the sending some of the burn emails. (November 7, 2019 Tr. at 509.)

At the conclusion of this interview, CSIS determined that Complainant was involved with at least three of the burn emails.¹² (November 7, 2019 Tr. at 509-511, 569.) Accordingly, CSIS immediately placed Complainant on administrative leave. (November 7, 2019 Tr. at 511-512.)

The three emails that CSIS determined Complainant had drafted or sent were the Morris Britton email (RX 10), the Allen Wyatt email (RX 19), and the Internal Audit JV email (RX 12). (November 7, 2019 Tr. at 509, 514-515, 526; RX 22.) McIntyre testified that Complainant admitted to his involvement with the Morris Britton and Internal Audit JV emails. (November 7, 2019 Tr. at 509, 527-528.) In addition to Complainant's admission, CSIS had additional support for its conclusion regarding the Internal Audit JV email and Allen Wyatt email. The Internal Audit JV email was sent at time when Complainant was out of the office and included references to a meeting with Sears and Kanbas-Campbell known only to himself, Sears, and Kanbas-Campbell. (November 7, 2019 Tr. at 527.) CSIS also determined that Complainant was involved with the Allen Wyatt email because that email contained a screenshot that appeared to show part of Complainant's personal email address in the background. (November 7, 2019 Tr. at 514-515.)

Because CSIS had determined that Complainant was involved with these emails, it was also able to deduce that Complainant was involved with the Harry Scissor email (RX 17) and the Mags Simpson email (RX 19). The sender of the Allen Wyatt email claimed to have come across evidence exposing Sears as the sender of the Harry Scissor's burn email. (RX 19.) The sender included a screenshot of "Harry Scissors'" yahoo email account. (November 7, 2019 Tr. at 530.) Thus, CSIS concluded that whoever sent the Allen Wyatt email had access to "Harry Scissors'" email account, and, therefore, likely been involved with the Harry Scissors email. (November 7, 2019 Tr. at 530.)

CSIS similarly deduced that the sender of the Mag Simpson email must have known of the Harry Scissors email. The Mag Simpson email refers to a "fake email" sent by Sears under the guise of "Harry Scissors." (RX 17.) Because only Sears and CSIS knew of the Harry Scissors email, CSIS concluded that the sender of the Mags Simpson email had likely sent the Harry Scissors email or was involved with that email. (November 7, 2019 Tr. at 533-534.)

¹² In his brief Complainant argues that his termination was pretextual because Citi did not have "evidence beyond a reasonable doubt of [Complainant's] guilt." (Complainant's Brief at 40-41.) Complainant's argument is erroneous. An employer is not required to satisfy this standard of proof when disciplining an employee. No inference whatsoever can be draw from an employer's failure to meet this standard.

McIntyre and Margolis presented CSIS's conclusions and findings to a global disciplinary review panel (the "panel"). (November 7, 2019 Tr. at 519.) Citi convened the panel for the express purpose of deciding whether Complainant ought to be disciplined and, if so, what discipline was warranted. (November 7, 2019 Tr. at 520.) The panel was not aware of Complainant's identity. Rather, CSIS's presentation referred to Complainant simply as "employee" or as "EE." (November 7, 2019 Tr. at 522; RX 22.) After the presentation, the panel voted unanimously to recommend terminating Complainant's employment. (November 7, 2019 Tr. at 535.) The panel then forwarded its recommendations to IA. (November 7, 2019 Tr. at 535.)

In August 2017, Ricci received the panel's recommendation from human resources. (November 7, 2019 Tr. at 588-589.) He was aware that CSIS was investigating someone in IA but did not know that Complainant had filed an OSHA complaint. (November 7, 2019 Tr. at 592-593.) Based on the panel's recommendation, Ricci understood that CSIS had conducted an investigation and concluded that Complainant was involved in sending several burn emails. (November 7, 2019 Tr. at 591-595.) After review, Ricci agreed with the panel's recommendation and terminated Complainant's employment. (November 7, 2019 Tr. at 590.)

Based on the steps taken after CSIS's investigation was complete, the undersigned concludes that McIntyre's knowledge of Complainant's OSHA complaint cannot properly be imputed to any member of the panel or to Ricci. CSIS did not include Complainant's identity in the presentation to the panel. Nor was there any mention of Complainant's OSHA complaint in the presentation. (RX 22.) Thus, the undersigned concludes that the panel was not aware that Complainant had engaged in any sort of protected activity.

Ricci denied that he was aware of Complainant's OSHA complaint. (November 7, 2019 Tr. at 590, 592.) Complainant suspected that he was. (Tr. at 139-140.) However, as stated above, the undersigned concluded that Complainant's testimony was generally unreliable and Complainant did not present any documentary evidence to support his assertions. Therefore, the only way in which Complainant can establish that Ricci knew of his OSHA complaint is to impute McIntyre's actual knowledge of the complaint. There is no evidence in the record that McIntyre had any communications with Ricci. Ricci's constructive knowledge of Complainant's OSHA complaint could only then come through the panel. However, CSIS shielded the panel from this information. Complainant has not established that the disciplinary panel or Ricci had knowledge of his protected activity.

Weighing all of the evidence together, the undersigned concludes that Complainant's protected activity was not a contributing factor to Citi's decision to terminate his employment. The only evidence that suggests a causal relationship between his protected activity and Citi's decision to terminate his employment is the temporal proximity of the two events. While Citi's adverse employment action followed Complainant's protected activity, that inference of causation alone is insufficient to establish that his protected activity was a contributing factor to his termination. In the time between the protected activity and his termination, Citi's became aware that Complainant was involved with the burn emails. This intervening event substantially diminishes any probative value inferred through temporal proximity.

Additionally, Complainant has not established that the relevant personnel knew of his protected activity. He established that McIntyre knew of his protected activity. However, the process employed by Citi ensured that both the disciplinary panel and Ricci were shielded from such knowledge.

Based on the foregoing, the undersigned concludes that Complainant has not established that his protected activity was not a contributing factor to Citi's decision to terminate his employment.

ii. Same-Decision Defense

Because Complainant did not establish that his protected activity was a contributing factor in Citi's decision to terminate his employment, Complainant's claim necessarily fails. However, in the interest of a complete review, the undersigned will review Respondents' same decision defense.

Assuming Complainant had successfully established his claim under the Act, Respondents may still avoid liability if they can demonstrate, by clear and convincing evidence, that, in the absence of the protected activity, they would have taken the same adverse action. *Palmer v. Canadian Nat'l Ry*, ARB No. 16-035, slip op. at 52 (Sep. 30, 2016); *see also* 29 C.F.R. § 1980.109(b). This is essentially a hypothetical analysis: in the absence of the protected activity, would the employer, nonetheless, have taken the same action?

"Clear" evidence refers to a situation where the employer has "presented evidence of unambiguous explanations for the adverse action in question." *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, slip op. at 11 (Apr. 25, 2014). "Convincing" evidence is that which demonstrates that a proposed fact is "highly probable." *Id.* Taken together, clear and convincing evidence is evidence that shows "the thing to be proved is highly probable or reasonably certain." *See e.g., DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, slip op. at 8 (Sep. 30, 2015); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (explaining that "[f]or employers, this is a tough standard, and not by accident").

Respondents assert that they would have terminated Complainant's employment regardless of his protected activity because of his involvement with the burn emails and his behavior during the CSIS interview. (Respondents' Brief at 61-63.) Respondents explain that Complainant was untruthful during an internal investigation, sent internal email distribution lists to his personal email account, and sent several burn emails to Citi employees containing threats and offensive language. Respondents explain these actions constitute serious violations of Citi's policies and justify his termination.

McIntyre testified that Complainant initially denied that he was involved with the burn emails, but then admitted limited involvement after he confronted Complainant with inculpatory evidence. (November 7, 2019 Tr. at 503-504, 509, 526.) Additionally, McIntyre stated that Complainant claimed that other employees were involved with the burn emails, but would not divulge their names. (November 7, 2019 Tr. at 509.) McIntyre's account of the CSIS testimony is consistent with his presentation to the panel. (RX 22.)

Complainant denies that he was untruthful during his interview with CSIS. Instead, Complainant claimed that CSIS investigators were coercive and deceptive. (Tr. at 145-151.) Complainant testified that the investigators engaged in a “bait-and-switch” and tricked him into admitted to sending certain emails. (Tr. at 151, 278.) Complainant also generally disputes the veracity of McIntyre’s telling of the CSIS interview because neither McIntyre nor Margolis recorded it. (Complainant’s Brief 36-38.)

While on administrative leave, on August 2, 2017, Complainant emailed Citi’s human resources department. (RX 42.) Complainant inquired on his employment status and alleged that Citi had retaliated against for uncovering “unethical behavior.” Jennifer Wolfe responded to Complainant the following day and informed him that he was on administrative leave because he had admitted to sending burn emails during his CSIS interview. Complainant acknowledged these admissions, but claimed that the “general theme behind any admissions” related to his own efforts to discover who was sending the burn emails. In this email, Complainant did not allege that he had somehow been deceived into admitting his involvement. Thus, this email supports McIntyre’s version of the CSIS investigation. Accordingly, the undersigned finds that Complainant was not deceived during the CSIS interview; that he admitted to being involved with certain burn emails during the CSIS interview; and that he was less than forthcoming concerning his involvement.

Irrespective of Complainant’s admissions, the undersigned finds that it was reasonable for Respondent to conclude Complainant was involved with drafting and sending burn emails. The basis for this finding is CSIS’s investigation, its conclusion and findings, and McIntyre testimony. Specifically, the undersigned finds the use of certain words, phrases, and grammatical anomalies common to Complainant’s internal emails, his social media posts, and the burn emails compelling. The undersigned also finds the Allen Wyatt and Internal Audit JV emails to be particularly persuasive of Complainant’s involvement.

The Allen Wyatt email included a screenshot that showed a partial email account in the background matching Complainant’s personal Gmail account. (RX 19.) While Complainant denied that the screenshot showed his address, (Tr. at 159), his personal email address matches the partial email address visible in the screenshot. (ALJX 1 ¶ 29; RX 20.)

At the time the Internal Audit JV email (RX 12) was sent, McIntyre explained that Citi’s entry log records showed that Complainant was not in the Wall Street Office. (November 7, 2019 Tr. at 527.) This email was also sent prior to Complainant’s scheduled meeting with Sears and Kanbas-Campbell. (Tr. at 527.) It was addressed to Sears and Kanbas-Campbell and strongly suggested that they should not meet with Complainant later that day. (RX 12.) McIntyre testified that only Complainant, Sears, and Kanbas-Campbell knew of this meeting.

Finally, there is also the matter of the odd use of punctuation and self-censored language in the burn emails and in Complainant’s internal emails. McIntyre testified that CSIS identified the use of a period, followed by a double space, followed by an ellipsis in two of the burn emails and fourteen of Complainant’s internal emails. (November 7, 2019 Tr. at 496.) Similar to Complainant’s internal emails and social media posts, several emails also included self-censored

profanity. It is true that none of these factors alone establishes that Complainant was involved with the burn emails. However, when considered together, they support finding Complainant was involved in drafting and/or sending some of the burn emails, particularly the Allen Wyatt and Internal Audit JV emails.

Having concluded that Complainant was not truthful and forthcoming with CSIS during his interview and that Complainant was most likely involved with some of the burn emails, the undersigned can easily conclude that Citi would have terminated Complainant regardless of any protected activity. Citi's employee handbook clearly prohibits these actions. (RX 7.) The handbook prohibits employees from using the company's email system for any activity that "may be detrimental to the reputation and interests of Citi." The burn emails used profanity and aggressive and threatening language, all directed at Citi employees. Because of this, there can be no doubt that the sending burn emails to Citi employees using their company email addresses would be detrimental to Citi's interests.

The handbook also requires all employees to fully cooperate with internal investigations and states that failure to do so may result in termination. (RX 7.) Complainant's conduct during the CSIS investigation could be described as any but fully cooperative. McIntyre's account of the interview shows that Complainant was evasive and defensive and that he was not initially forthcoming about his involvement with the burn emails. Thus, it is clear that Complainant violated this company policy as well.¹³

Accordingly, the undersigned concludes that Respondents have established, by clear and convincing evidence, that Complainant would have been terminated, even absent his protected activity. In other words, the undersigned finds it highly probable that Citi would have terminated Complainant's employment because of his involvement with the burn emails and his behavior during the CSIS interview, regardless of whether Complainant engaged in protected activity. *See Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, slip op. at 52, 56-57 (Sep. 30, 2016).

VII. CONCLUSION

Complainant has failed to establish a claim under the whistleblower protections of the Act with respect to his placement on a PIP or his termination.

By placing Complainant on a PIP and, thereby making him ineligible for promotion or discretion bonus, Citi took an adverse employment action against Complainant. However, Complainant has not established that he engaged in any protected activity under the Act prior to this action. Moreover, even if Complainant had established that he engaged in protected activity

¹³ Respondents also claim that Complainant violated company policy by downloading and sending employee contact information to this personal email account. (Respondents' Brief at 61.) Company policy prohibits employees from disclosing confidential information. (RX 6.) Complainant does not dispute that he sent the contact information to his personal account, but claims that he did not violate the company policy because the information was not confidential. (Tr. at 196-19.) The undersigned has determined that Respondents established that Complainant has otherwise violated company policy and that these violations warranted his termination. Thus, it is not necessary to separately determine whether Complainant violated company policy by sending himself the employee contact information. That is, it not necessary to decide if the information was confidential.

prior to the PIP, he has failed to show that it was a contributing factor in Citi's decision to take action.

Citi also took adverse employment action against Complainant when it terminated his employment. And, Complainant engaged in protected activity prior to his termination. However, although his protected activity predated his termination, Complainant has not established that his protected activity was a contributing factor in Citi's decision to terminate his employment. Additionally, Respondents have established, by clear and convincing evidence, that they would have terminated Complainant's employment regardless of any protected activity.

VIII. ORDER

Complainant is not entitled to relief, and his complaint is hereby **DENIED**. *See* 29 C.F.R. § 1980.109(d)(2).

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey