U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 April 2010

CASE NO.: 2008-SOX-00010

In the Matter of:

LAURIE HILLENBRAND,
Complainant,

vs.

COLDWATER CREEK, INC.,
Respondent.

Appearances: Laurie Hillenbrand, *pro se*
Complainant

Keller W. Allen, Esquire
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

INTRODUCTION

This case arises out of a retaliation complaint filed by Laurie Hillenbrand ("Complainant") against her former employer, Coldwater Creek, Inc. ("Respondent," "Company," or "Coldwater Creek"), pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, *et seq.*, ("Sarbanes-Oxley," "SOX," or "Act".) In her complaint, the Complainant alleged that the Respondent retaliated against her in reprisal for raising concerns about possible violations of internal controls over financial reporting ("ICOFR") in the Company's year-end SEC filing process.

This matter was heard in Spokane, Washington from July 8 through 10, 2008. The Complainant and counsel for the Respondent appeared and participated on each day of the hearing. Closing briefs were received on October 6 and 24, 2008, and the Complainant's Final Reply Brief was received on November 17, 2008.

For the reasons set forth below, I find the Claimant is not entitled to relief under the Act and that her complaint should be DISMISSED WITH PREJUDICE.

PROCEDURAL DISCUSSION

Procedural Background

On July 2, 2007, the Complainant filed a complaint with the U.S. Department of Labor alleging that the Respondent had constructively discharged her in violation of Section 806 of Sarbanes-Oxley. The Complainant alleged in her complaint that she had been retaliated against for reporting to her superiors concerning the inadequacy of internal accounting controls and the underreporting of income. (ALJX 3.) The Department of Labor's Occupational Safety and Health Administration ("OSHA") conducted an investigation. On September 27, 2007, the Secretary of Labor, through her agent the Regional Administrator of OSHA, dismissed the Complainant's OSHA complaint, finding that she had failed to demonstrate that she had suffered any form of unfavorable personnel action and that there was no reasonable cause to believe that the Respondent had violated SOX. (ALJX 2, pp. 1-2.) Specifically, the Secretary concluded that no constructive discharge had occurred because the Complainant had voluntarily resigned her position and had felt none of the effects of a denial of promotion. (ALJX 2, p. 2.)

This matter was initiated with the Office of Administrative Law Judges ("OALJ") when, by letter dated October 23, 2007, sent to the Chief Administrative Law Judge, the Complainant objected to the Secretary's findings and conclusions that she did not suffer an adverse employment action and requested a hearing before an Administrative Law Judge pursuant to 29 C.F.R. § 1980.106.

On November 13, 2007, I issued a Notice of Hearing and Pre-Hearing Schedule setting this case for hearing on January 29, 2008, in Portland, Oregon. On December 10, 2007, the parties filed a joint motion for change of venue to Coeur d'Alene, Idaho, in order to accommodate the location of most of the anticipated witnesses. On December 20, 2007, I rescheduled the hearing to February 13, 2008, in Spokane, Washington (less than 40 miles from Coeur d'Alene, Idaho.)

On December 31, 2007, the parties filed a Stipulated Protective Order regarding the handling of information and documents that were or would be produced in response to discovery requests which I granted on January 10, 2008. Subsequently, the Complainant filed an unopposed motion for continuance on January 22, 2008, asking that the hearing be continued until April 2008. On January 23, 2008, I granted the motion and rescheduled the hearing to April 24, 2008.

On January 24, 2008, Respondent filed a Motion for Summary Judgment, arguing that the Complainant did not engage in SOX-protected activity; specifically, that the alleged violation did not relate to fraud against shareholders, that the Complainant failed to show that the alleged fraud rendered Respondent's financial statements materially misleading; that the Complainant's belief that a violation occurred was neither subjectively nor objectively reasonable; that no unfavorable employment action occurred; and that the Complainant's alleged SOX protected activity was not a contributing factor in any employment action.

On March 31, 2008, the Complainant filed a second unopposed motion for continuance in order to accommodate a professional obligation that required her to be located overseas on the

scheduled date of the pre-hearing telephonic conference and in the days preceding the scheduled hearing. I granted this motion on April 7, 2008, and rescheduled the hearing for July 8 through 10, 2008.

On April 1, 2008, I issued an Order denying Respondent's Motion for Summary Judgment, finding that a genuine issue of material fact existed as to whether the Complainant engaged in SOX-protected activities; whether the Respondent knew of these protected activities; whether the Complainant suffered an unfavorable personnel action; whether the protected activities were contributing factors to the unfavorable action; and whether the Respondent would be able to demonstrate by clear and convincing evidence that it would have taken the same action despite the Complainant's protected activities.

The hearing was held in Spokane, Washington from July 8 through 10, 2008. At the hearing, the Complainant proceeded *pro se*, while the Respondent was represented by its attorney Keller Allen. Both parties were afforded a full opportunity to present testimony and offer documentary evidence. The parties agreed to submit simultaneous closing briefs following the hearing. On July 15, 2008, I issued an Order altering this agreement and setting an alternate briefing schedule, in order to facilitate a further briefing by both parties concerning two questions that I wanted the parties to address: 1) What specific protected activity or activities did the Complainant engage in, including the specific date of the protected activity; and 2) What was the basis for the Complainant's allegation of a hostile work environment that made her feel compelled to resign?

On September 8, 2008, the Respondent filed a Motion to Compel Return of Documents, requesting return of those confidential documents subject to the protective order. I granted this motion on September 25, 2008.

The Complainant's initial Closing Brief was received on September 15, 2008. She later made a telephonic request to amend her closing brief which I subsequently granted by Order on September 30, 2008.

On September 29, 2008, the Complainant submitted a Request for Official Notice of Adjudicative Fact, in which she asked that I take judicial notice of six Securities and Exchange Commission ("SEC") filings; the transcript of a November 21, 2006, conference call, and an American Institute of Certified Public Accountants ("AICPA") article concerning fraud prevention. On October 8, 2008, the Respondent filed its objection to the Complainant's motion. On October 28, 2008, I granted the Complainant's motion as to the six SEC filings, and denied it as to the conference call transcript and the article.

The Complainant's Amended Closing Brief was received on October 6, 2008. The Respondent's Closing Brief was received on October 24, 2008, and the Complainant's Final Reply Brief was received on November 17, 2008.

On November 26, 2008, the Complainant submitted a Second Request for Official Notice of Adjudicative Fact, to which the Respondent filed an objection on December 3, 2008. Once more, I granted the Complainant's request in part and denied it in part. In my Second Order Regarding Judicial Notice, issued December 15, 2008, I granted official notice of two more SEC

filings, and denied it as to the transcript of her telephonic interview with OSHA investigator Paul McDevitt; two articles from the U.S. Attorney's Office Press Room; a 2004 SEC Accounting and Auditing Enforcement Release; and a 2004 District Court complaint filed by the SEC. Furthermore, in my Order I advised the parties that in the interests of judicial economy, I would entertain no further requests for official notice.

Exhibits Admitted at the Hearing

At the hearing, the Complainant's exhibits ("CX") 1-14; pages 6-8, 24-30, and 48-67 of exhibit 17; exhibits 18-20; pages 1-8, 11, 20-22, 27-30, 35-39, and 48-57 of exhibit 21; pages 62-63 of exhibit 22; and exhibit 24 were admitted into evidence. The Complainant withdrew from the record exhibit 15; pages 1-5, 9-23, and 31-47 of exhibit 17; pages 9-10, 12-19, 23-26, 31-34, and 40-47 of exhibit 21; pages 1-61 of exhibit 22, and exhibit 23. The Complainant's exhibits 25-29, as well as page 41 of exhibit 21, were excluded from the record.

The Respondent's exhibits ("RX") A, C-F, J, N, P-Q, S-Y, and AA were admitted, as well as pages 4-6 and 9-40 of exhibit Z. The Respondent's exhibits B, G-I, K-M, O and R were withdrawn from the record.

ALJ exhibits ("ALJX") 1-3 were also admitted.

Stipulations

The parties have stipulated to the following:

A. Coldwater Creek, Inc. ("Coldwater Creek" or the "Company") is a multi-channel retailer of women's apparel, gifts, jewelry and accessories. Coldwater Creek's products are sold through direct mail catalogues, its e-commerce Website, and through select retail stores located primarily in metropolitan areas throughout the United States. Coldwater Creek operates approximately 300 full-line retail stores, and employs approximately 11,700 employees throughout the United States.

B. Coldwater Creek stock is traded on the NASDAQ Stock Exchange under the symbol "CWTR." The Company's total sales for fiscal year 2006 were $1.05 billion, and earnings for fiscal year 2006 were $55.4 million.

C. Ms. Hillenbrand applied for employment with Coldwater Creek on or about April 15, 2004. Ms. Hillenbrand was hired as Coldwater Creek's Tax Manager on June 1, 2004. Ms. Hillenbrand accepted an annual salary of $85,000. During the almost three years of her employment, Coldwater Creek increased her salary three times. She received a raise to $86,000 in approximately February 2005 and another raise to $97,500 in approximately June 2006. Her last increase was to $125,000 in December 2006. In the spring of 2005 Ms. Hillenbrand's title was changed from Tax Manager to Senior Tax Manager. Along with the pay raise in December 2006, her title was changed to Tax Director.

D. Beginning January 2006, Ms. Hillenbrand reported directly to CFO Melvin Dick.

E. Mr. Dick was the Executive Vice President and Chief Financial Officer at Coldwater Creek since June 2002. He was responsible for supervision and administration of the Company's Finance Department, including its Tax Department. Mr. Dick announced his plan to retire on May 24, 2007, effective June 30, 2008. He stepped down from his officer position effective September 1, 2007, and formally retired on February 1, 2008.

F. Tim Martin, who started at Coldwater Creek in August 2006, became the Company's Chief Accounting Officer in February 2007. Mr. Martin was responsible for overseeing the company's accounting, financial planning and reporting functions. Mr. Martin became the Company's Chief Financial Officer on September 1, 2007.

G. On April 9, 2007, Ms. Hillenbrand submitted her letter of resignation, dated April 8, 2007, to Mr. Dick. Ms. Hillenbrand addressed her letter to Mr. Dick and stated:

> "It is important that I turn my time and attention to the growth, well being and security of my family; to focus on what is ultimately most valuable. I have sincerely enjoyed working with you and appreciate both the professional and personal insights you've shared.
>
> I hope the work I have done to facilitate Company growth continues to flourish, and wish you success in obtaining the resources needed to move the tax function forward."

H. Ms. Hillenbrand continued to work after submitting her letter of resignation and offered to work out an independent contractor arrangement to help the Company with the transition. Ms. Hillenbrand and the Company did not reach an agreement on an independent contractor arrangement. Ms. Hillenbrand's last paid day of work was May 7, 2007.

I. In late March 2007, Ms. Hillenbrand received a call from an independent recruiter regarding the Director of Tax position at Merix Corporation ("Merix"), a company based in the Portland area with approximately $500 million of annual sales. Ms. Hillenbrand sent her resume to the recruiter within a few days of his call.

J. Ms. Hillenbrand interviewed with Merix by telephone on April 26, 2007, and in person on May 8, 2007. Merix offered her the Director of Tax position in the middle of June 2007.

K. Ms. Hillenbrand started as the Director of Tax at Merix on July 9, 2007. She is responsible for all tax related matters at Merix. Ms. Hillenbrand's salary at Merix is $130,000 per year with potential for bonuses based on company performance. She also has benefits including 401(k) and medical, dental, vision, and group life insurance.

(Hearing Transcript ["HT"], pp. 7-12.)

Issues

The issues to be decided in this case include the following:

1. Did the Complainant engage in activities protected under SOX on or about February 18, 2007, on or about April 3, 2007, or at any other time during her employment with Respondent?

2. Did any of the Complainant's superiors have knowledge of any such protected activity?

3. Did the Complainant suffer an unfavorable employment action?

4. Was any such protected activity a contributing factor in the unfavorable employment action taken?

5. Can the Respondent demonstrate by clear and convincing evidence that it would have taken the same employment action even in the absence of the Complainant's protected activity?

6. Is the Complainant entitled to compensatory damages?

FACTUAL BACKGROUND

The Respondent Company

The Respondent, Coldwater Creek, Inc., was founded in 1984 by Dennis and Anne Pence and initially run as a mail order business out of their two-bedroom condominium outside of Sandpoint, Idaho. (HT, p. 527.) By the time of the hearing in this matter, the Company had expanded its operations dramatically, with annual sales of more than $1 billion, approximately 300 stores and spa retailers, and a steadily growing internet and catalog mail-order business. (HT, p. 8.) Sandpoint, a small town in Northern Idaho with a population of approximately 7,500 residents, remains the site of the Company's corporate headquarters, where the Complainant and witnesses in this case were employed. (HT, p. 213.)

The Complainant's Employment History

The Complainant began working for the Respondent on June 1, 2004, as Tax Manager of a newly created tax department. (HT, p. 8.) After taking the position, the Complainant purchased a house in Sandpoint where she lived with her two teenage daughters. (HT, pp. 119, 150.) The Complainant became involved in the Sandpoint community and helped to establish the town's first after-school care program for working parents. (HT, p. 119.) During her time in Sandpoint, the Complainant also maintained possession of her former residence in Portland, Oregon. (RX AA, p. 10.)

Prior to beginning work for the Respondent, the Complainant held a series of positions in corporate tax departments in Portland, Oregon, ranging from one to three year durations. From 1988 to 1990, she held a position as a General Accountant for Marketor International Corp. in Portland. (RX AA, CX 1, p. 3.) From 1993 to 1996, she held the position of Tax Accountant in

the Portland office of Arthur Andersen LLP. (RX AA, CX 1, p. 3.) Between the years of 1996 and 1999, she worked as a solo tax practitioner in Portland, providing part-time temporary contract services. (RX AA, CX 1, p. 3.) Between 1999 and 2002, she held the positions of Senior Tax Analyst and Tax Manager for Electro Scientific Industries, Inc. (RX AA, CX 1, p. 2.) She resigned from this employer due to conflicts with her supervisor and concerns as to the competency of not only her supervisor, but also the entire leadership of the accounting department. (RX AA, p. 17.) From August 2002 until December 2003, the Complainant worked as the Tax Manager for TriQuint Semiconductor, Inc. in Oregon. She resigned this position as well, after a conflict developed between the Complainant and her immediate supervisor, the corporate controller. (HT, p. 151; RX AA, p. 16.) The Complainant testified in her sworn deposition that "he was not competent at his job. He was threatened by me. I reported to him. He was doing a significant number of things to undermine my work." (RX AA, p. 16.)

When she applied for the position at Coldwater Creek in 2004, the Complainant was working in a temporary, contract-based tax position with On-Site Financial, Inc. in Portland, Oregon. (RX AA, pp. 19-20.) She completed her final contract prior to commencing work with Coldwater Creek.

When the Complainant began her work for Coldwater Creek in 2004, its annual sales amounted to $550 million; when she left her position in 2007, its sales exceeded $1 billion. (HT, p. 152.) Prior to working for the Respondent the Complainant had never managed the tax department of a company with $1 billion in annual sales. At the time she left her employment with Electro Scientific and TriQuint, those companies had annual sales of $163 million and $312 million, respectively. (HT, pp. 150-52.)

When the Complainant was hired, the Company was in the process of forming its first tax department, and the Complainant's impression was that the management did not "really ha[ve] a vision of what it was going to be." (RX AA, p. 20.) The Complainant participated in bringing the Company's tax function in-house. During her employment her job duties included, *inter alia*: preparation of the Company's tax provision for the annual 10-K filing; filing of state and local tax returns; coordinating with insurance carriers and managing insurance data; coordinating the Company's risk management around "slip and fall" cases; and managing the two to three staff members in the Tax group. In the Complainant's estimation, the tax issues at Coldwater Creek were not complicated or challenging ones; rather, "the issues with Coldwater are in volume, not a technical challenge." (HT, p. 122.)

When she began her work in 2004, the Complainant's salary was $85,000.00, which she believed was "fair and competitive" at the time of her hire. (HT, p. 8; RX AA, p. 46.) She received her first raise to $86,000.00 in approximately February 2005, and a second raise to $97,500.00 in approximately June 2006. (HT, p. 8.) This second raise was triggered by "salary compression issues" which occurred when T.J. Eigler was hired in June 2006 as a Tax Manager at a higher salary than the Complainant. The Complainant's supervisor, Melvin Dick, decided "it was appropriate" to adjust the Complainant's salary upwards accordingly. (HT, pp. 225, 234; CX 22, p. 63.) Her final pay increase was to $125,000 in December 2006, again triggered by salary compression issues when Sam Roberts was hired as a Senior Tax Manager in November 2006 at a higher salary. (RX AA, pp. 42-43.)

The Complainant also received two title promotions during her nearly three years with the Company. In the Spring of 2005, after Ms. Eigler was hired as a Tax Manager, the Complainant's title was changed from Tax Manager to Senior Tax Manager. (HT, pp. 8-9; CX 22.) Similarly, after Mr. Roberts was hired in November 2006 as a Senior Tax Manager, along with her final pay increase in December 2006, her title was changed from Senior Tax Manager to Director of Tax. (HT, pp. 9, 654.)

In late March 2007, the Complainant was contacted by a recruiter concerning a job with Merix Corporation ("Merix"), an international manufacturer of printed circuit boards. (HT, p. 199; RX AA, p. 54.) The Complainant had interviewed with this recruiter two years earlier, during a period of conflict with her first immediate supervisor at Coldwater Creek, the former DVP of Finance. (HT, p. 491.) Within days of this March 2007 contact from the recruiter, the Complainant sent the recruiter her résumé. (HT, p. 199; RX AA, p. 65.) She testified that her reason for doing so was to conduct a salary comparison test, and that she informed the recruiter that she was not looking for work, and that even if she had been looking, she had a "six-month commitment minimum" to Coldwater Creek. (RX AA, p. 65; HT, p. 491.)

On April 4, 2007, the Complainant was informed by Mr. Dick of the Company's plans to conduct a reorganization which included creating a DVP of Tax position, that the Company would be issuing an advertisement for the position, that she would not be considered for the position, but that her salary and title would remain the same, and that Mr. Dick hoped she would stay during the reorganization. On April 9, 2007, the Complainant resigned from her position of Tax Director by letter dated April 8 to Mr. Dick, effective May 4, 2007. (RX A; RX W, p. 3.) The Complainant offered to continue to work on a contract-basis while they looked for a replacement, but no arrangement was agreed upon before the effective date of her resignation. (HT, p. 7; ALJ 3, p.3.) Her last paid day of work was May 7, 2007.

Soon after resigning in April 2007, the Complainant re-initiated contact with the recruiter with whom she had spoken in March 2007 concerning the available position with Merix. She successfully obtained the position, and began working for Merix in Portland in July 2007. At the time of hearing she was still employed in her position there as Tax Director with a salary of $133,000. (RX AA, p. 54.)

The Complainant's Supervisors in the Company

When the Complainant began her work for the Company in 2004 she reported directly to the Divisional Vice President ("DVP") of Finance, who was not identified at the hearing. When the DVP left the company in 2006, the Complainant began to report directly to Melvin Dick, the company's Chief Financial Officer ("CFO"). The Complainant's direct reporting relationship was scheduled to transfer over to Timothy Martin, then Chief Accounting Officer ("CAO") of the Company, in April to May 2007. (HT, p. 639.) The Complainant resigned her position with the Company in April 2007 before that transfer was made effective. (HT, p. 639.)

Mr. Dick was hired as the Executive Vice President and CFO of the Company in 2002. (HT, p. 9.) Prior to joining the Company, Mr. Dick was a Partner with Arthur Andersen LLP, where he had been employed since the beginning of his career in 1974. (HT, p. 203.) During his final year with Arthur Andersen, Mr. Dick was the partner assigned to oversee the Worldcom

audit in the same year that the Worldcom shareholder fraud was discovered and made public. (HT, pp. 24, 205.) To Mr. Dick's knowledge, five employees of Worldcom were imprisoned as a result of having "incorrectly accounted for certain expenses on their balance sheet, and overstated their income statement." (HT, pp. 205-06.) Within months of beginning his work for Coldwater Creek in June 2002, Mr. Dick was summoned to testify before Congress concerning the Worldcom fraud during the process that led to the passage of the Sarbanes Oxley Act in 2002. (HT, pp. 206, 208-09.) As a result of his involvement with Worldcom, Mr. Dick was also investigated by the SEC in the months that followed. (HT, pp. 206-7.) As part of a civil settlement with the SEC, he agreed to refrain from engaging in public accounting services for the next several years. (HT, p. 207.) Mr. Dick testified that his experiences with Worldcom reinforced his understanding of the importance of "focus[ing] very much on internal controls and on the proper implementation of . . . a good internal control system as required by Sarbanes-Oxley." (HT, p. 209.)

In his positions at the Company, Mr. Dick oversaw the Company's finance department, which included the Tax Group. In March 2007, Mr. Dick discussed with the Board of Directors the possibility of his retiring as CFO. (HT, p. 571.) On May 24, 2007, Mr. Dick announced to the Board his plan to retire from his position. (HT, p. 9.) He stepped down from his officer position on September 1, 2007, and formally retired on February 1, 2008. (HT, p. 9.)

Timothy Martin was hired in July 2006 to fill the open position of DVP of Finance, with a view to filling the position of CFO upon Mr. Dick's retirement. Prior to joining the Company, Mr. Martin was in executive management of Amgen, Inc., then a nine billion dollar retailer of pharmaceuticals. (HT, p. 629.) At Amgen he held the positions of CAO and Director of Finance for Global Commercial Operations. (HT, p. 631.) One hundred sixty employees reported directly to him, and he shared oversight responsibility for an additional 50 to 60 employees. (HT, p. 646.)

In addition to his CAO and Director positions at Amgen, Mr. Martin was also the Executive Sponsor and Chairman of Amgen's Task Force Project Management Team responsible for "rolling out Sarbanes Oxley for the company worldwide" after SOX became effective in 2003. (HT, p. 630.) In this role, Mr. Martin worked closely with the outside auditing firms of Deloitte & Touche and Ernst & Young to gain fluency in the matter of SOX compliance. (HT, p. 631.)

In 2006 Mr. Martin left Amgen to take his position with the Respondent in Sandpoint, Idaho, in order to relieve strains on his family resulting from his former professional obligations, and to position himself within a company in which he had prospects of swiftly attaining the position of CFO in light of Mr. Dick's upcoming retirement. (HT, p. 632.)

In February 2007 Mr. Martin was promoted to the position of CAO by the Board of Directors and became the Company's CFO on September 1, 2007. (HT, pp. 9-10.) In his role as CAO, Mr. Martin was responsible for financial planning, preparation of the financial statements, and preparation of budgets and forecasts. (HT, pp. 241, 639.) These responsibilities included ensuring that financial statements were "prepared timely, accurately, and in compliance with all of the appropriate rules, regulations, and generally-accepted practices and principles." (HT, p.

642.) As CAO, Mr. Martin was responsible under SOX for signing off on the 10-K and its underlying work papers, including the tax provision. (HT, pp. 642-43.)

Mr. Martin interacted with the Complainant on a regular basis; his Accounting Department relied heavily upon the Tax Department, which "feeds information to those functional areas in order to prepare financial statements and/or prepare budgets and forecasts." (HT, p. 639.) At the Complainant's and Mr. Dick's requests, Mr. Martin was also involved in the Complainant's work in a facilitative role, as he undertook to resolve some of the Complainant's ongoing concerns, such as a conflict between the Complainant and Carol Williams from the Controllership Group. (HT, pp. 640-41.) Soon after he began work as DVP of Finance the Complainant sent him an e-mail asking for help with a "laundry list" of specific concerns, including improving the Tax Group's access to "real time" communication, "making sure that she was more in the loop on information," and increasing her access to accounting files and information that she needed to ensure the success of her group's tax work. (HT, pp. 640-41.)

The Company's Recent History of Expansion

During the years of the Complainant's employment, the Company was engaged in a period of rapid and radical expansion, demonstrating "blowout earnings growth, revenue expansion for three solid . . . years." (HT, pp. 74, 415, 643.) When the Complainant began her work for Coldwater Creek in 2004, its annual sales amounted to $550 million, and the company had approximately 150 stores in operation. (HT, pp. 152-53.) When she left her position in 2007, its sales had reached $1.05 billion, earnings had hit $55.4 million, and its number of stores had doubled to approximately 300. (HT, pp. 8, 152.)

As a result of this swift expansion, the company was understaffed in certain key areas. The Complainant had repeatedly complained about staffing shortages during the approximately two years prior to resigning her position. (HT, p. 170.) Fred Halpin, DVP of Internal Audit, noted that understaffing problems were "a fairly common thread in all of Finance and Accounting," which he attributed largely to the competitive nature of retail in general. (HT, p. 415.) Mr. Martin and Mr. Dick also represented their belief that these understaffing problems were an inevitable result of the company's swift growth: "[A]ny time you have that kind of growth in a company, you're always challenged to stay ahead of the curve . . . and making sure you have sufficient resources[,] . . . things like your accounting systems, enough people, the right type of processes and procedures in place, and controls in place." (HT, pp. 211, 644.)

The company maintained a five-year plan for corporate growth which was reviewed annually in the early part (or first half) of each fiscal year (each fiscal year begins and ends in January to February); the Company's staffing plans therefore involved consideration of a five-year horizon. (HT, pp. 75, 210, 229.) Mr. Martin testified that hiring additional staff to deal with the Company's growth was a matter taken very seriously, involving a measured process of bringing in the right individuals to help guide the growth: "We had been working very, very diligently on upgrading talent, bringing the right people in with experience of managing large organizations." (HT, p. 651.) Between approximately 2006 and 2008, the Company increased staffing in the various Finance areas by approximately 20% to 25%, adding approximately 27 new staff. (HT, p. 644.)

During the Complainant's time with the Company, four[1] individuals were hired to work with her in the Tax Group. Jacob Styer and Mona Lang-Gillming were brought in immediately following the Complainant's hire, T. J. Eigler was hired in May 2006, and Sam Roberts was hired in November 2006. (HT, p. 223) The hire of Mr. Roberts would have increased the Tax staff to five, but a conflict between the Complainant and Ms. Eigler resulted in her termination right before Mr. Roberts began his work in late January 2007. (RX AA, pp. 79-80.) As an additional interim measure to increase the resources available to the Tax Department, the Company retained for the Complainant's use the services of Ernst & Young, an outside tax firm. (HT, pp. 179, 233-34.) The Company also retained the services of Mike Stone, a retired tax partner from KPMG, to serve as an outside tax "mentor." Mr. Stone was paid on a consultancy basis to assist the Complainant "from a leadership development perspective" and as a general resource for the Tax Department. (HT, pp. 119, 173, 233, 651.) The Complainant met periodically with Mr. Stone and used him as a "sounding board" for her concerns regarding the Company's tax department. (HT, p. 119.)

The Complainant's Discussions with Mr. Dick Concerning Her Longevity with the Company

In January 2007, during a tax mentorship meeting between the Complainant and Mr. Stone, Mr. Stone mentioned to the Complainant a conversation he had had with Mr. Dick during which Mr. Dick had questioned why "a single female in a small town . . . would want to stay here." (HT, p. 119) The Complainant was irritated by what she understood to be a deprecating undercurrent in Mr. Dick's comments. (HT, p. 119.) Following this conversation she:

> [S]pecifically went to Mr. Dick and said, "All right, let's just have a straight-up conversation here. Realistically, if things don't improve here, if I don't get some support and don't get some staff, and don't start getting compensated for what I'm truly worth, and there's not a career path for me here, then two-and-a-half years would be a natural break point for me.

(HT, p. 120.) She informed Mr. Dick that her older daughter would graduate from high school in approximately 2 1/2 years, which would be "a realistic time to reevaluate." (RX AA, p. 109.) The Complainant communicated to Mr. Dick her feeling that, "[i]f things are going to keep on keeping on like they are, you know, what realistic person is going to stay?" (RX AA, p. 110.) She believed it was clear to Mr. Dick that the purpose of her comments was a *positive* request to "give [her] what [she] need[ed], give [her] a path" to enable her to remain with the Company, and not a declaration of any plan to leave the company in 2 1/2 years. (HT, p. 120.)

Mr. Dick, on the other hand, took her comments at face value as indicating a lack of longevity with the company. Mr. Dick said to the Complainant on multiple occasions, "You can't leave. You can't leave. If you're going to leave, you need to give me six months notice." (HT, pp. 119-20.) Mr. Dick made such comments to the Complainant with enough frequency

[1] Although it is unclear in the record exactly when Mr. Styer and Ms. Lang-Gillming were hired, Mr. Dick's comments at the hearing concerning the formation of the tax department raised an inference that all four of the Complainant's tax employees were brought on after her hire. (HT, p. 223 ("[A]nd then Ms. Hillenbrand came on-board, and we started doing more of our tax work in-house as opposed to outsiders, and hired some staff at that time also, after Ms. Hillenbrand came on-board.").)

that these comments, and her responses, "kind of became like an ongoing joke." (HT, p. 120; RX AA, pp. 65-66.)

While the Complainant "took to heart" Mr. Dick's ongoing appeals to her to remain with the Company, and concluded "[she] wasn't going to walk out on him," she did not present clear testimony as to whether she ever voiced this intention to Mr. Dick following the discussion in January 2007 when she voiced her likely intent to the contrary. (HT, p. 120.) Rather, it appears from the record that she repeatedly voiced to him the possibility of her departure if the Company did not provide her Tax Group with the resources she desired. During a meeting with Mr. Dick on Saturday March 31, 2007, the Complainant told him: "[M]y six month commitment is to you . . . that doesn't mean I am getting up and walking out . . . but if I see something really go wrong, because I have been seeing these things that we already talked about . . . you know, there is gonna be . . . a problem." (RX AA, p. 146.)

Mr. Dick's belief in the likelihood of the Complainant's imminent resignation was further signaled by his comments to her on April 4, 2008, when he explained to the Complainant the plans for reorganization of the Tax Department. Mr. Dick began the conversation by saying, "Two-and-a-half years isn't long enough to build out a tax department." (HT, p. 118.) Mr. Dick reiterated at the hearing his belief that the Complainant did not intend to stay with the Company beyond her older daughter's graduation. (HT, pp. 229, 231.) This testimony is corroborated by the concern Mr. Martin expressed about the negative attitudes demonstrated by the Complainant during her interview of him in June 2006. Mr. Dick informed Mr. Martin that he "probably shouldn't worry about any perceptions that [he] had," as the Complainant "wasn't planning on staying around very long." (HT, p. 636.)

The Company's SEC Filings and Internal Control Processes

As a publicly-traded company, the Respondent is subject to a variety of periodic filing requirements, including annual filing of Form 10-K disclosures; and occasional filing of Form 8-K disclosures, in which the Company can report any "significant event that takes place between regularly scheduled filings." (HT, p. 544.) The Company's filings are reviewed for accuracy and compliance with SEC rules by a variety of individuals who jointly carry out the Company's system of internal controls over financial reporting ("ICOFR") required by SOX and the SEC regulations referenced in the Act. This group includes, *inter alia*, 1) the Audit Committee; 2) the external auditing firm, Deloitte & Touche; 3) the outside SEC counsel, John Hayes of the law firm of Hogan & Harson; and 4) a group of individual employees charged with ensuring the Company's compliance with SOX and all SEC regulations, including Fred Halpin, the DVP of Internal Audit, Robert Larson, Director of Financial Reporting & SOX, and Loni Knepper, Director of SOX Compliance. Mr. Hayes speaks to Mr. Martin "nearly every day about one thing or another" concerning the Company's disclosure requirements and scheduled filings. (HT, p. 546.)

The Company's Audit Committee consists of three members of the Board of Directors who are not employees of the Company and who have no other affiliation to the Company. (HT, p. 547.) Two of the committee members, Robert McCall and Mike Potter, are designated financial experts based on their knowledge of finance and accounting. (HT, p. 547.) These committee members are charged with oversight of the Company's SEC reporting, preparation of

the financial statements, the internal audit function, and the hiring and firing of external auditors, among other tasks. (HT, p. 547.) The Audit Committee holds eight regularly scheduled meetings during the year — every quarter to discuss the earnings release, and every mid-quarter — as well as an additional two to four "non-regularly scheduled" meetings "from time to time." (HT, pp. 548-49.) The eight scheduled meetings are "well formatted," generally last from three to four hours, and involve "very long, very rigorous reviews of accounting and auditing." (HT, pp. 552-53.) The agendas for these meetings are established in advance. John Hayes records the minutes of the meetings and circulates them afterward for review. (HT, p. 549.)

One aspect of the ICOFR procedures required under SOX involves evaluating and reporting any deficiencies in the design or operation of a control which could prevent management from timely detecting an error in the financial statements. (HT, pp. 607-08.) Once a deficiency is discovered, the Company must evaluate whether the deficiency is "significant," which involves an evaluation "left in the judgment of management and the auditors" as to the *likelihood* that the deficiency will impact the financial statement as well as the *magnitude* of such an impact. (HT, pp. 608-10.) If the likelihood and magnitude of impact are determined to be inconsequential to the financial statements, then a mere "deficiency" exists. (HT, p. 608.) If the impact "could be more than inconsequential," then a "significant deficiency" exists. (HT, p. 608.) If the impact could result in a material misstatement in the financial statements, then a "material weakness" exists. (HT, pp. 608-09.) "Deficiencies" and "significant deficiencies" must be reported internally to the company's Audit Committee and to the company's outside auditors, but these need not be disclosed in public filings to the SEC. (HT, p. 609.)

The quarterly Certification process is another of the internal controls that the Company maintains pursuant to SOX. (RX P, pp. 4-5.) As part of this process, all employees involved with finance and accounting are required to sign an internal Certification that states, in pertinent part,

> I know of no significant deficiencies or material weaknesses in the design or operation of the Company's internal controls which are reasonably likely to adversely affect the Company's ability to record, process, summarize, and report financial information.

(RX P, p. 2.) These Certifications are reviewed by the Company's CFO, who must take steps to confirm and document the finding that any concerns expressed on the internal Certifications "do not relate to any specific error or misstatement" in the financial statements. (RX P, p. 9.) Following the resolution of any such concerns, the CFO signs a final Certification that is filed along with the SEC disclosures.

The Company openly encourages employees to use the Certification process as an avenue for voicing complaints and concerns. When Mr. Hayes receives inquiries from employees concerning their Certifications, he asks them to list their concerns in their Certifications, since "the only way we can address that is if you put it in front of people so we can deal with it." (HT, p. 558.) The Company also welcomes employees to communicate their internal control concerns by calling Mr. Hayes personally, using an anonymous "hotline" process, and contacting the Internal Audit Department directly. (HT, p. 558.)

The Company's public earnings release occurs several weeks prior to the filing of the formal 10-K. (HT, p. 462.) For fiscal year-end 2006 (FY2006), the earnings release took place on March 7, 2007, and the formal filings took place on April 4, 2007. (HT, p. 131-32.)

The Complainant's 2006 COSO Survey

Another of the Company's internal control processes involves employees' periodic completion of a Management Control Environment Review Questionnaire (referred to as the "COSO"), which asks employees to rate on a scale of 1 (low) to 5 (high) various aspects of the professional control environment. The form provides a separate column for the express purpose of providing specific "Comments or Corroborating Evidence" to support the numeric responses. (CX 12.)

In October 2006, the Complainant completed her anonymous COSO survey and gave consistently poor scores with an average score of 2,[2] but entered no written comments or corroborating evidence in the column designated for that purpose. (CX 12.)

The Company received uniformly lower-than-average COSO scores in that year. Loni Knepper suggested to Mr. Dick that he speak with the Complainant concerning her survey as a way of gauging employees' rationales behind the lower scores. (Complainant's Pre-Hearing Statement, Att. A., p. 3.) The Complainant has suggested that this COSO, and her subsequent discussion with Mr. Dick, forms one of her protected activities during her employment with the Company. She described her interaction with Mr. Dick concerning the COSO in the following way: "I pulled it up on my computer screen, showed him what I had written and the scores that I had given, and we went through the various issues, just kind of briefly." (HT, p. 111.) At the hearing, however, immediately after discussing this interaction concerning the COSO, the Complainant stated that her case focused on the two instances of alleged protected activity occurring on February 18, 2007, and April 3, 2007: "the primary things, for me, are the February 18 tax rate issue and the worker's comp issue." (HT, p. 111.)

Mr. Martin's Use of a 39% Tax Rate in an Internal Analysis Spreadsheet

In November 2006, Mr. Dick announced publicly to financial analysts that the Company's "go forward tax rate" would be 39.5%, or "maybe a little bit higher for modeling." (Complainant's Request for Official Notice of Adjudicative Fact, Ex. 7, p. 33).

During the 2006 Christmas season the Company began to notice a clear slowing of its sales. (HT, pp. 74-75.) As a result, in mid-January 2007, the company released reduced earnings guidance for the fourth quarter of fiscal year 2006, which ended on February 3, 2007. (HT, pp. 74-75, 656.)

In early February 2007, the Corporate Controller Ms. Williams visited Mr. Martin's office to discuss with him a potential problem she had discovered when reviewing the preliminary close of the fourth quarter of fiscal year 2006 ("FY2006 Q4"). (HT, p. 656.) Ms. Williams believed that the numbers were approximately $4 million shy of the forecast at which

[2] The Complainant provided 71 numeric answers in the range of 1 to 4 with an overall average of 2. (CX 12.)

she expected the numbers to close. (HT, pp. 75, 656.) Mr. Martin believed it was far too early in the close process to generate broad concern, since, as he testified, Ms. Williams "wasn't even close to starting [her] reconciliation," and "there was a huge number of items that were very open, including some very sizeable items that were yet to be resolved." (HT, p. 657.) Mr. Martin instructed Ms. Williams to be patient while they waited for final figures to come through. Ms. Williams nonetheless contacted Mr. Dick, who became very concerned. (HT, p. 656.) In the days that followed, as the Complainant recounted, "there was a big panic, and the information had gone all the way up to Dennis [Pence], and heads were rolling. [I]t was just a big crisis." (HT, p. 75.) It was eventually determined that Ms. Williams' concerns were unfounded, as the final earnings were "in line with" the revised earnings guidance that had been issued in mid-January 2007. (HT, pp. 74, 656.)

Nonetheless, in the following weeks, an "[all] hands-on-deck process" ensued in which Ms. Williams, Mr. Dick, Mr. Martin, and the Complainant, among others, attempted to resolve the discrepancy in the FY2006 Q4 numbers. (HT, p. 659.) After the Complainant learned of the earnings discrepancy concern, she went to Mr. Martin's office,

> [T]o see what was going on, see if there was some way that I could help. . . . I asked Mr. Martin if . . . he wanted me to, you know, try to run him a quick-and-dirty rate calc, see where it was going to come in at as – you know, give him a best case, "This is the best you could hope for["] . . . so that if you can't – you know, [i]f that's not going to help you any, you know how to plan for – who to say that to, and information to provide." And so I did that.

(HT, pp. 76, 661.) On Thursday, February 15, 2007, the Complainant supplied Mr. Martin with a "quick-and-dirty," preliminary tax rate calculation to assist in the resolution of the FY2006 Q4 close process discrepancy (the "Estimated Rate Document" or the "Document"). (CX 16, p. 2.) The Complainant attached the Estimated Rate Document to an e-mail with a subject line that read, "DON'T BE MAKIN' ME REGRET THIS!!!" (CX 16, pp. 1-2.) The Document was entitled, "Coldwater Creek Inc., Effective Tax Rate Calculation, Estimated Annualized Rate for FY2006, Q4FY06." (CX 16, pp. 2.) Also at the top of the Document were the capitalized words, "QUICK ESTIMATE ONLY!!!! NOT TO BE RELIED UPON!!!" (CX 16, p. 2.)

The Estimated Rate Document included four distinct tax rates. In the middle of the Document was the phrase, "Q1 Rate[3] and Estimated Tax Expense," listing the rate 39.68% in bold text and highlighted in yellow. (CX 16, p. 2; HT, p. 333.) At the bottom of the Document were listed three tax rates from fiscal year 2006:

[3] Certain aspects of this pivotal document remain ambiguous, even post-hearing; I am left to assume that this "Q1 Rate" must refer to Q1 of FY2007, since Q4 of FY2006 ended February 3, 2007, and rate listings are provided for Q3 and Q4 of FY2006. (*See* HT, pp. 74-75.) Moreover, the listing of rates for "FY2006 *To Date*" and "FY2006 Q3 *To Date*" strongly suggests that the rate for Q1 of FY2006 is already included therein. (CX 16, p.2 (emphasis added).)

Stand Alone Quarter Rate	**Tax Rate**
FY2006 To Date	39.29%
FY2006 Q3 To Date	39.42%
Q4 Stand Alone	38.94%

(CX 16, p. 2.) FY2006 ended on February 3, 2007. (HT, p. 75.) Since this document was created on February 15, 2007, it was created at the beginning of Q1 FY2007. At the time of the Document's drafting, therefore, the most *recent* estimated tax rate provided on the Document was the "Q4 Stand Alone" rate of 38.94%. Notably, every rate the Complainant provided for FY2006 was *below* 39.5%, which the Complainant vigorously maintained was the Company's standard rate. (HT, p. 480.)

These estimated rate calculations were wholly preliminary to, and separate from, the Complainant's actual tax rate calculations for the Company's formal tax provision. (HT, p. 666.) While she sent this Estimated Rate Document to Mr. Martin on Thursday, February 15, 2007, the Complainant did not receive the trial balance from the Accounting Department which she required in order to *begin* her work for the tax provision until the following Sunday or Monday. (HT, p. 78.) Determination of the final tax rate required a "much more robust calculation . . . before this thing actually is recorded in the financial statements," taking into account a number of disparate, as yet undetermined elements, such as "income tax payable, long term, short term, the deferred tax assets, the deferred tax payables." (HT, p. 666.) The Company's internal process mandated that the final tax rate and provision were to be communicated directly from the Complainant, in her role as Tax Director, to the corporate controller, Ms. Williams. (HT, pp. 162, 662.) The final numbers that Ms. Williams eventually recorded for FY2006 came directly from the Complainant on this occasion, as well. (HT, p, 162.)

As part of the process of determining whether a major discrepancy existed in the earnings numbers for Q4 of FY2006, Mr. Martin and Ms. Williams made use of a spreadsheet for preliminary earnings analysis purposes (the "Spreadsheet") to determine where the numbers were likely to stand in relation to the reduced earnings guidance. Mr. Martin used this spreadsheet only for his private analytical use as he and the Controller attempted to discover the possible sources of the earnings discrepancy and to get a sense for the FY2006 close numbers. Mr. Martin referred to it as "this tally sheet that I use," and a "multi-state step calculation tool:"

> [T]his [wa]s really only for my informational purposes. It didn't go into any sort of financial statements. It didn't go to any management discussions. It wasn't circulated to anybody outside of Ms. Williams and myself as far as I know. I did not circulate it. I did have dialogue with Mr. Dick about what the number produced, but I don't believe he was actually ever provided the schedule that it was utilized in.

(HT, pp. 664-65, 667.) Mr. Larson called it "a spreadsheet [Ms. Williams] monitors to see how progress on the close is going and where they sit. It's nothing more than that." (HT, p. 613.) Ms. Williams' testimony largely corroborated these accounts of the Spreadsheet's limited use, and she noted that using this form of spreadsheet during the preliminary close was a standard

practice that she had routinely been involved with in her experience of having closed the books 110 times for the Company. (HT, p. 326.)

During the weeks prior to the Complainant's determination of the final tax rate on March 3, 2007, Mr. Martin's analysis of the potential earnings discrepancy was already ongoing. (HT, p. 475.) In the interim, Mr. Martin needed to use an estimated "holding place rate" in the Spreadsheet for the preliminary close analysis. After reviewing the "best case scenario" numbers provided by the Complainant in the Estimated Rate Document, Mr. Martin instructed Ms. Williams to use a 39% flat rate as a holding place rate in the Spreadsheet. (HT, p. 664.)

The February 18, 2007, Telephone Call

On Sunday, February 18, 2007, the Complainant went to the office where she met with Ms. Williams to obtain the trial balance she needed to begin her tax provision calculations. (HT, pp. 78-79.) Ms. Williams informed the Complainant that Mr. Martin had instructed her to use a 39% flat rate in the preliminary close analysis. (HT, pp. 79, 662.) The Complainant responded, "'Yeah right. You better not be counting on that.' . . . that was the absolute best case scenario from this e-mail that I gave him." (HT, p. 79.) The Complainant was "pretty ticked-off," but returned to her office, "hoping [that] no expectation had been set." (HT, p. 79.)

Approximately 30 minutes later, Mr. Dick visited the Complainant in her office and instructed her to call Mr. Martin at a phone number listed on a piece of paper he handed to her. Mr. Martin testified that the purpose of the conference call was to "ask[] Ms. Hillenbrand to explain issues related to the company's tax liability [as] Ms. Hillenbrand was having difficulty providing explanation and clarification on certain issues." (CX 19, pp.1-2.) Mr. Dick explained that the meeting began by "discussing the status of the tax provision, and trying to understand . . . what was left, and whether there were any significant issues that needed to be addressed." (HT, p. 237). The Complainant represented that Mr. Dick asked her at the beginning of the conference call, "What's this about not having a 39 percent rate?" (HT, p. 79.) Mr. Dick confirmed that discussion of the 39 percent rate "was part of the conversation." (HT, p. 274.)

Upon hearing this comment from Mr. Dick suggesting to her that Mr. Dick had developed an "expectation" that the tax rate would be 39%, the Complainant yelled into the phone at Mr. Martin, "I'm never giving you another single fucking number ever again." (HT, p. 79.) Mr. Martin recounts, "at one point she exploded and began blaming me for causing her to do more work." (CX 19, pp.1-2.) How long this heated interaction continued, and what other information was exchanged between them, is unclear; Mr. Martin's comments that the Complainant "basically started screaming profanities at me," and that she "used a number of four letter expletives during this phone conference," suggests that the interaction continued for several moments beyond this initial statement. (HT, p. 667; CX 19, p. 2.) The Complainant recounts, "I don't remember how long Mr. Martin stayed on the phone. I think there was maybe just a little bit of conversation after that." (HT, p. 80.) Mr. Martin testified that he was "shocked," and didn't remember uttering a single word in response. (HT, p. 668.)

After the telephone conversation ended, the Complainant showed Mr. Dick the Estimated Rate Document that she had supplied to Mr. Martin containing the "best case scenario" numbers

and her instructions to Mr. Martin not to rely on the numbers. Mr. Dick then asked her, "Well, what are the problems? What's the issue?" (HT, p. 80.) She also contends that during this discussion Mr. Dick asked her to "show [him] what is going on here," including the journal entries, but that she refused: "And I continued to repeat, no, you don't understand, you don't know what is going on here, and repeatedly, no, you just have to leave me do what I have to do." (RX AA, pp. 141-42; HT, p. 80.) Mr. Dick's testimony did not cover the content of the meeting with the Complainant following her outburst.

After Mr. Dick left her office, the Complainant tried to slam her door, but "wasn't quite successful," and became very emotional. (RX AA, p. 142.) Ms. Williams visited her office and asked if she had done something wrong. During the conversation, Ms. Williams stated that if the Complainant was truly concerned, she should speak with Fred Halpin, DVP of Internal Audit, about it.[4]

Following the incident, the Complainant informed colleagues that she "blew a gasket . . . and ripped into Tim and Mel with a vengeance." (RX Z, p. 8.) The morning after her outburst, the Complainant e-mailed an apology to Mr. Dick and Mr. Martin in which she wrote:

> In the event of occasional violent outbursts, you have my permission to say 'have you checked your personal calendar'—it works wonders in diffusion if used appropriately.
>
> i.e. Please accept my apologies for level of reaction.

(RX C.) Below the text, the Complainant posted images of two warning signs, stating "PMS: be afraid… be very afraid," and "WARNING: THE FOLLOWING ANGRY STATEMENTS ARE A RESULT OF PMS. PLEASE TAKE CAUTION WHEN RESPONDING SO THAT SHARP OBJECTS ARE NOT THROWN AT YOU." (RX C.) Mr. Martin found this apology e-mail to be "inappropriate," "offensive," and insincere, insofar as the Complainant "basically stopped talking to [him] for about a week subsequent to that evening." (HT, p. 669-70.) He testified that he "tried to have a dialogue with her on Monday. It was not an effective conversation. . . . She would stare at me and nod her head occasionally when I asked questions." (HT, p. 672.)

[4] The Complainant's direct testimony as to this interaction was considerably different from her later account during her examination of Ms. Williams. The Complainant initially testified that Ms. Williams visited her office, "very apologetic" and "in tears," and asked if she had done anything wrong and whether the Complainant wanted to talk to Fred Halpin about what had happened. (HT, p. 82.) Later, during her direct examination of Ms. Williams, the tone of the Complainant's story concerning this interaction shifted considerably; this time, it was the Complainant herself who was "very upset and crying," and Ms. Williams merely asked, in response to finding her thus, whether she had done anything wrong. (HT, p. 315.) In this more tame account, the conversation about Mr. Halpin merely contained the conclusion that "if [the Complainant] was really concerned, [she]'d go talk to Mr. Halpin." (HT, p. 315.) Ms. Williams confirmed that she recalled the conversation; she did not confirm whether or not she had, as the Complainant suggests, held a belief that Mr. Halpin would have had cause for concern about Mr. Martin's actions. (HT, pp. 315-16.) The Complainant nonetheless considered this conversation to have confirmed her belief that there had been something improper in Mr. Martin's actions. She testified, "It all culminated into that point to where when Ms. Williams came in and was concerned, and she asked me if I wanted to go talk to Fred, because she understood how highly inappropriate it was for this to have happened." (HT, p. 83.) I find the more subdued version of the story more convincing; the Complainant had a greater incentive to carefully speak the truth when faced with the witness herself.

The Complainant believed that Mr. Martin owed her an apology following the incident. (HT, p. 399.) When Loni Knepper later informed the Complainant that Mr. Martin believed the Complainant didn't like him, she responded, "It's not – I don't dislike him . . . if he would have at least apologized, something, and let me know that it wasn't intentional. . ." (HT, pp. 398-99).

The Complainant testified that she was "not personally happy" with her behavior, but she did not consider it to have been unprofessional. (HT, p. 167.) She testified that in her professional experience, her behavior and use of profane language was "common" and that she had witnessed similar behavior before. (HT, p. 167.) Mr. Martin testified, in contrast, that he had never been spoken to thus in his "15 plus years of professional experience . . . especially by another colleague in our finance group." (HT, p. 667.) Mr. Dick's concern following the outburst as to whether the Complainant would be able to maintain a positive working relationship with Mr. Martin in future further corroborates Mr. Martin's claim that the Complainant's behavior was not of a common genre at the Company. (HT, p. 238.)

In late February or early March 2007, the Complainant spoke with Fred Halpin regarding the incident and her underlying concerns as to Mr. Martin's behavior. (Complainant's Amended Closing Brief, p. 6.) Mr. Halpin recalls that the Complainant expressed general concerns with Mr. Martin during that meeting but she did not address any specific concerns as to fraud or any belief that Mr. Martin hoped to falsely inflate the Company's earnings. (HT, p. 407.)

The Potential Significant Deficiency Slide

A considerable number of problems were evident in the Company's tax processes "throughout the time frame of '06 and early '07." (HT, pp. 243, 282.) The Complainant referenced several of these problems, ranging from key numbers for Coldwater Creek not matching up; to systems failing and exposure to lawsuits; to the "imminent threat of material weakness due to historical errors in the fixed asset system;" to a pile of 125 incomplete state tax returns dating three years back. (HT, pp. 107-08, 334-36, 478.)

The Complainant viewed these tax provision problems as a result of chronic understaffing in the tax department. (HT, p. 336.)

At the March 5, 2007, Audit Committee meeting, Mr. Martin and Mr. Dick gave a presentation entitled "Sarbanes-Oxley Update," in which they presented a series of seven slides detailing the progress on the 2006 year-end close, four areas where they perceived potential significant deficiencies, and an update on an ongoing deficiency from 2005. (RX D, pp. 1-8.) The fourth slide was entitled, "Potential Significant Deficiency – Tax Provision Process." (RX D, p. 5.) The slide used four bullet points to highlight specific areas to be improved upon in the tax provision process:

- Tax provision software is not utilized by the company
- The complex nature of the existing Excel workpapers are difficult to review, which increases the risk of an undetected error
- The general ledger is not set up to segregate State and Federal tax payments or expenses
- The book to tax basis on fixed assets is not reconciled timely

(RX D, p. 5.) This slide was not discussed with the Complainant prior to its presentation to the Audit Committee on March 5, 2007. Following the meeting, Loni Knepper asked the Complainant if she had seen the slide, and expressed surprise to find that the Complainant had not seen it. (HT, p. 375.) On March 8, 2007, the Complainant forwarded the slide to Mike Stone, who commented, "At least there is nothing 'personal' about (sic). . . . It is always nice to be included in presentations that are related to your area of responsibility." (CX 21, p.35.)

The Complainant argued that this slide was further evidence of retaliation against her personally as the senior representative of the Tax Department. (HT, pp. 281, 375-76.) She alleges that the specificity of this slide (containing bullet points of particular problems in the tax provision process), when compared to the generic quality of the slides discussing potential significant deficiencies in other areas (without specific bullet points), demonstrates disparate treatment of the Tax Group, and by extension, of her personally. She also argued that there was little factual basis for the bullet points.[5]

Mr. Martin testified that the slide was created in order to fulfill the Company's legal obligation to communicate potential significant deficiencies with the Audit Committee, given his and Mr. Dick's concern that a potential significant deficiency possibly existed in the Company's tax preparation and close process. (HT, p. 683.) The Company's auditors later determined that a significant deficiency did *in fact* exist in the tax provision process. (CX 19, p. 2.) As noted above, Fred Halpin testified that following the Complainant's departure, the tax provision process was "completely redone." (HT, p. 428.)

Mr. Martin explained that Mr. Dick decided they should not discuss the slide with the Complainant prior to the Audit Committee meeting because he believed she would "view this as a personal slight against her" and that it would be disruptive of her work on finishing up the tax rate calculations in the subsequent days. (HT, p. 684.) The Complainant did complete her tax rate calculations around March 5, the date on which the slide was presented, which corroborates Mr. Martin's statement that in the days and weeks before the slides were created, Mr. Dick believed the Complainant was in a pivotal moment of finalizing her calculations. (HT, p. 475.)

The Reorganization Charts Presented on March 5, 2007

At the March 5, 2007, Audit Committee meeting Mr. Martin and Mr. Dick also gave a second presentation concerning their plans to reorganize and expand the Finance Departments in accordance with the Company's five-year plan for corporate growth. (HT, p. 236.) This presentation included a series of nine organizational charts for the Finance, Accounting, and Tax Departments. (RX F, pp. 1-10.) The final chart was entitled "Tax." At the top of the chart was a box labeled "TBD: DVP Tax." (RX F, p. 10.) Beneath this box were two boxes, labeled "Sam Roberts: Senior Tax Manager" and "Laurie Hillenbrand: Tax Director." (RX F, p. 10.) Beneath the Complainant's box were the two positions occupied by Jacob Styer and Mona Lang-Gillming

[5] To support the readability of her Excel spreadsheets, the Complainant stated that when Mr. Martin reviewed her tax provision work papers on March 26, 2007, he did not ask her any questions. (HT, p. 378). Ms. Knepper, however, was only willing to testify that she could follow the tax spreadsheets "when [the Complainant] walked us through them." (HT, pp. 129-30.) To support her claim as to the relative unimportance of her failure to use the tax provision software, the Complainant established that by the time of the hearing, the new DVP of Tax had not yet implemented the tax provision software. (HT, p. 441.)

as Tax Accountant and Tax Clerk. Beneath Mr. Roberts' box was a box labeled "Open: Tax Accountant." (RX F, p. 10.)

This information concerning the creation of the DVP of Tax position, for which the Complainant would not be considered, was not communicated to the Complainant until one month later, as soon as the 10-K was completed and filed on April 4, 2007. Mr. Martin testified that Mr. Dick made the decision to delay passing this information along to the Complainant and Ms. Williams, who was also to be impacted by the reorganization with a shift in duties as well as a pay reduction, because "Mr. Dick felt that both of them would react negatively and . . . probably not focus on their efforts to complete the 10K." (HT, p. 694.)

While it is clearly established from the timestamp of an e-mail on March 5, 2007, as well as by witness testimony concerning the meeting's content, that the reorganization charts were in existence by that date, testimony between Mr. Dick and Mr. Martin varies somewhat as to the *exact* dates when the organizational charts were drawn up. (RX F, p. 1; HT, pp. 518-19.) Mr. Dick testified that the charts were developed "in the February of '07 . . . in late February-early March."[6] (HT, p. 236.) Mr. Dick also stated in his sworn pre-hearing Affidavit that the new organizational chart was prepared "[a]fter discussions with Mr. Martin in late February and early March 2007."[7] (CX 18, p. 2.) Mr. Martin, however, pushed this timeframe forward in time toward early February 2007 when he testified:

> [T]hey were drafted over a couple of week (sic) period of time, whenever I had spare time between roughly the start of the close process [February 3, 2007] and before the Audit Committee meeting. We spend a good couple of weeks before an Audit Committee meeting prepping for it and making sure we have all of our materials pulled together.

(HT, p. 680.)

I find Mr. Martin's testimony credible on the general question of his gradual preparation for regularly scheduled Audit Committee meetings in the weeks beforehand. If, as the Complainant contends, the decision not to promote her to DVP of Tax was made following her

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[6] Respondent's counsel showed some signs of attempting to coax that date forward in time to early February 2007; following Mr. Dick's statement concerning a "late February-early March" timeframe, Respondent's counsel asked:

> [Mr. Allen]: So you think that was *sometime in February* 2007?
>
> [Mr. Dick]: Yes.

(HT, p. 236 (emphasis added).)

[7] It must be noted that Mr. Dick's grasp of dates has not been without error during these proceedings. At multiple points in his testimony, Mr. Dick made errors when referring to timeframes of events. For example, he testified that the Complainant's promotion to Director of Tax occurred in January of 2007, and that she received an *additional* pay increase and promotion "in early 2007." (HT, p. 225.) Mr. Dick's error here is clear, on the basis of the parties' stipulations that the Complainant's *final* pay increase and promotion to Tax Director both occurred concurrently in December 2006. (HT, p. 8.) A second example involves Mr. Dick's testimony that Ms. Eigler left the company in late 2006, while the Complainant testified with certainty that Ms. Eigler was not fired until January 17, 2007. (HT, pp. 171, 228, 594.) As a result of errors such as these, I decline to find Mr. Dick's testimony to be decisive on questions of the precise timeframes in which events transpired in this matter.

first instance of protected activity on February 18, this would still have left approximately two calendar weeks, or nine ordinary working days, between this date and the date of the March 5th meeting. This amount of time, between February 18 and March 5, 2007, could plausibly have been sufficient for Mr. Martin and Mr. Dick to draft the nine slides. Such a finding would be consistent with Mr. Dick's testimony as to the "late February-early March" timeframe.

However, a finding that the slides could plausibly have been *drafted* in late February following the February 18 incident does not dispose of the question of when the decision was made as to the *content* of the tax slide, particularly the portrayal of the Complainant's role in that slide. As I will discuss below, these decisions plausibly took place prior to February 18, 2007. (*See infra.*)

The First Draft of the Complainant's SOX Certification

On Thursday, March 29, 2007, the Complainant provided her first draft of her FY2006 SOX Certification (the "Certification") to Mr. Dick for his review. In each year that the Complainant worked for the company, she had verbally reported on perceived deficiencies in the tax processes and her related concerns during the Certification process. This was the first time that she provided her concerns to Mr. Dick in written format. (HT, p. 174.) The first draft of the Certification contained nine listed concerns, seven of which involved understaffing and under-resourcing in the Finance Department. The Complainant stated:

> My concerns with process, data, Executive/Board commitment and knowledge have been communicated to Finance Department Management. I am not asserting nor claiming knowledge of a material error. As respects significant deficiencies with the potential to impact financial data for FY2006 and prior or compromise controls, these concerns included, in part:
>
> 1. Chronic overextension and lack of personnel resources . . . to assure efficient, effective, and correct processing of data throughout the finance department . . .
>
> 2. Lack of resources and time to process data and information in reference to current year Q4. . .
>
> 3. Failure to adhere to closing and review processes, primarily as a result or those items mentioned above. In absolutely no way are the above concerns to be misconstrued to reflect other than systemic, environmental issues. All staff have been dedicated and conscientious beyond what circumstances have merited.
>
> 4. Specific to the tax provision process: continuous interference by the CAO, borne (sic) out of setting expectations with premature and unconfirmed use of a 'quick and dirty best case estimate,' which significantly impeded the process from inception through auditor review.
>
> 5. Historic lack of attention . . . to "core service resource needs". . .

6. In three years worth of provision work, the head and sole income tax professional in the company has only been asked to address the Audit Committee once . . .

7. Resource and systemic limitations which have inhibited or precluded progress . . . [on] sales and use tax audits.

8. Resource limitations which have precluded upgrading sales tax software . . .

9. Resource limitations which have precluded monitoring of Aspenwood activities . . .

(CX 13, pp. 1-3 (emphasis in original).)

Mr. Dick perceived the Complainant's concerns to center upon recurrent issues that he had discussed with the Complainant in prior years, including "the shortage of staffing in the financing and accounting area, lack of time to train the new staff, concern about the process review at year-end." (HT, pp. 256, 264.) After Mr. Dick spoke with the Complainant concerning her Certification, he asked three different individuals involved with the company's SOX compliance — Loni Knepper, the Company's Director of Sarbanes-Oxley Compliance; John Hayes, the Company's outside securities legal counsel; and Fred Halpin, the DVP of Internal Audit — to contact the Complainant to discuss her concerns and to ensure that there was nothing specifically wrong in the financial statements. (HT, pp. 184, 254.)

The following day, Friday, March 30th, Ms. Knepper contacted the Complainant. She reported to Mr. Dick in a written memorandum dated April 10, 2007, that the Complainant had raised two primary concerns: 1) understaffing leading to possibility of errors, and 2) "too much involvement and pressure for preliminary numbers early in the process. [The Complainant] felt that this slowed the process down and created questions about numbers that were not finalized." (RX P, p. 9.) The Complainant confirmed to Ms. Knepper that she "had not been asked to give or calculate a specific number" for the tax provision, and that she "did not know of any specific deficiencies, misstatements, or areas that needed further review at this time." (RX P, p. 9; HT, p. 385.) The Complainant contends that at the conclusion of this meeting, Ms. Knepper said to her, "Don't tell me any more . . . I don't want to have to write anything in my certification to get fired." (Complainant's Second Request for Official Notice, Ex. 2, p. 16). Ms. Knepper denied making this statement. (HT, pp. 378-79.)

On the same day, Mr. Hayes also spoke to the Complainant. He, too, reported to Mr. Dick that the Complainant "had raised staffing workload, morale concerns, but that she was not alleging a material error in the financial statements or any previously unidentified significant deficiency, or . . . deficiency in internal controls." (HT, p. 560.)

The following Saturday evening, the Complainant met with Mr. Dick at his invitation to discuss her concerns about Mr. Martin. (HT, p. 116.) She provided a list prepared in advance of specific examples of Mr. Martin's objectionable behaviors, and they "talked very extensively about [her] concerns about Mr. Martin." (HT, p. 116.) The Complainant said to Mr. Dick, "I'm not saying that I . . . can't work with the guy. I'm not saying that I think that he's done something illegal. . . . I'm just seeing things that are causing me concern." (Complainant's

Second Request for Official Notice, Ex. 2, p. 17.) At the conclusion of the discussion, Mr. Dick said, "Well, I think it's just a communication problem." (HT, p. 116.) The Complainant was "willing to accept that" conclusion at the time. (RX AA, p. 146.)

Mr. Halpin met with the Complainant on the following Monday, April 2, 2007. He reported to Mr. Dick later on the same day that the Complainant's concerns did not raise "anything new… concerns regarding work-loads, resources, etc." and that "she [was] not aware of any actual material or even significant errors that have not been addressed…only, in her view, that the risk is there that they have occurred and have not been detected." (RX J.)

These reports were also shared with the Audit Committee at the meeting on Tuesday, April 3, 2007, held to validate Mr. Dick's final SOX certification prior to submission of the 10-K. The official notes from that meeting state that "there were no concerns raised by the Tax Manager that indicated any previously unidentified deficiencies in internal controls, or any error in the financial statements, and that both [Mr. Dick] and the Tax Manager believe the current concerns expressed had been previously raised." (HT, pp. 266-67.) Robert McCall testified that Mr. Halpin's report to the Committee only expressed the Complainant's recurrent concerns and "certainly nothing with regard to fraud at all." (HT, p. 532.) Consistent with standard practice, the Complainant's concerns were also communicated to the outside auditors. (HT, p. 267.)

The Workers' Compensation Over-Accrual Issue

The Company uses third-party insurance carriers in most states to provide workers' compensation payments to employees injured at work. The policies are of the "fully insured" variety, in which the Company purchases a standard premium, and the carrier assumes the full risk of any claims. The premium is calculated on the basis of pre-established rates using an estimated payroll for the insurance year. At the conclusion of the insurance year, beginning July 1 and ending June 30, the carrier audits the payroll to "true-up" the premium that the Company ultimately owes based on actual payroll figures. (RX S, p. 1.)

The Complainant's duties included liaising with the Company's workers' compensation insurance carrier to input information from the carrier into the Company's financial records, and assist in the "true-up" and reconciliation of the final audited statement provided by the carrier. (HT, pp. 687-88.) She was therefore the Company's "point person" concerning insurance matters.

On Saturday, March 31, 2007, Caroline Fox, an auditor with Deloitte & Touche, e-mailed the Complainant, stating, "Hi Laurie, We are in the process of understanding Worker's Compensation, and I will need to get this wrapped up today, if at all possible. When you have an opportunity, will you be able to call me . . . ?" (CX 8, pp. 1-2.) The Complainant responded on the following day, providing Ms. Fox with basic information concerning the Company's Worker's Compensation insurance provider and policy term. She wrote, "This didn't come through until today – call me if there's something I can still do," and provided her telephone number. (CX 8, p.1.) She then forwarded the e-mail thread to Mr. Martin on the same day. He replied later that day, "Thank you." (CX 8, p.1.) That afternoon, the Complainant and Mr. Martin spoke and agreed to meet with Ms. Fox on Monday morning in Mr. Martin's office "to answer any questions possible." (HT, pp. 686-87.)

On Monday, April 2, 2007, Mr. Martin and the Complainant met with Ms. Fox. Ms. Fox explained to them that during their audit testing, she and the auditing staff had discovered a possible over-accrual of approximately $56,000 in the Company's worker's compensation insurance plan for the State of Michigan. (HT, p. 689.) During the remainder of that day, the Complainant and Ms. Fox attempted to discover the source of the discrepancy.

The Complainant represents that on Monday, April 2, 2007, she asked Mr. Martin whether he would like her to "go over and get the reconciliation binder," which she represents she could have used to resolve the matter definitively, and that he said "no." (RX AA, pp. 97-98.) The Complainant argues that as of this point in time, Mr. Martin demonstrated a desire to keep the auditors in ignorance of the extent of the error in order to avoid having to amend the financial statements, since "[a]s of Monday, we had the information to make a change" and determine the exact magnitude of the error, and this determination was not done until after the 10-K was filed. (RX AA, p. 98; *see also Complainant's* Second Request for Official Notice, Ex. 2, pp. 21-22.)

At approximately 6:30 p.m. on Monday, April 2, 2007, the Complainant submitted to Mr. Larson a second draft of her Certification in which she made no mention of a worker's compensation issue. (*See* CX 18, p. 3.)

That same night at 9:55 p.m., the Complainant sent an e-mail to Mr. Martin, Mr. Dick, Ms. Williams, and Todd Coumbe concerning her findings, and attached the audit information she had received that day from the insurance carrier. (CX 8, pp.7-9.) In the e-mail, the Complainant explained her belief that the over-accrual might be significantly higher than previously believed — closer to $450,000. She concluded that the numbers were "probably in line for FY06 year end. That still leaves the FY05 issue." At the conclusion of the e-mail, she stated, "This is what I ***think*** I know on all of this, I could be totally off – anyone chime in."[8] (CX 8, p. 7 (emphasis in original).)

It was later determined that the source of the over-accrual problem was the erroneous use of the wrong rate to calculate the Company's premiums. A higher "base rate" had been used, instead of a lower "adjusted rate" that took into account the Company's "experience modifier" and "premium discounts." (RX S, p. 2) As a result of the use of the higher base rate, the Company had "recognized too much premium expense" (i.e., paid too much for its premium); and at the end of the insurance year, the Company had an over accrual of approximately $515,000. (RX S, p. 2.) After taxes were calculated, this meant that the company had *underreported* its income by $309,000. (CX 18, p.4; RX S, p. 2.) The Complainant agreed that the problem was the product of human error, and not created intentionally by anyone. (HT, p. 176) The person responsible for this error was not clearly identified.

[8] The calm tone of this e-mail sent on Monday night undermines the Complainant's representation that she believed something improper or fraudulent had occurred earlier that day (concerning her suggestion to Mr. Martin that she retrieve the binders, and Mr. Martin's alleged instruction that she refrain from doing so). This was not the e-mail of a person who had witnessed misfeasance by Mr. Martin earlier in the day. (CX 8, p. 7.) Rather, the tone and content of the e-mail establishes that the inquiry was still a very live one in which the Complainant considered herself and Mr. Martin to be joint, good faith participants. (CX 8, p. 7.)

The following morning, on Tuesday, April 3, 2007, the Complainant contends a second meeting took place between Mr. Martin, the Complainant, Ms. Fox, and Doug Lieuallen, the Payroll Manager, to discuss the worker's compensation issue once more.[9] (HT, p. 117.) During this meeting, the Complainant alleges the e-mail she sent the night before was on the table in front of Mr. Martin, and he acknowledged having received it. (HT, p. 117.) However, the discussion of numbers during the meeting did not reflect the higher numbers the Complainant had produced in her Monday night e-mail; discussion continued to center in the range of the $60,000 suggested by Ms. Fox the day before.

The Complainant contends that during this second meeting on Tuesday, April 3, Mr. Martin instructed Ms. Fox to "put down the difference as a change in estimate." (HT, p. 117; RX AA, p. 92.) The Complainant interpreted this instruction as a direct attempt by Mr. Martin to fraudulently mislead the auditors. (RX AA, p. 113.) After hearing this instruction to Ms. Fox, the Complainant testified that she became "panicked – I didn't want to believe that. I knew it was huge." (HT, p. 118.)

According to the Complainant, the characterization of the error as either "error" or "change in estimate" held massive importance. She argued that the Company had a vested interest in avoiding restatements or revisions of its financial statements, given the Company's history of having had to do so in prior fiscal years and the harm such restatements can inflict on shareholder confidence. (HT, pp. 461-62.) She argued that if the over-accrual were characterized as an "error," the alteration of the final numbers would have to be reported in an amendment to the FY2006 financial statements, while, if it were characterized as a "change in estimate," the company would be subject to no such immediate amendment requirement. (RX AA, p. 96.)

In contrast, testimony from all other witnesses who discussed the matter, including Mr. Dick and Mr. McCall, indicated that it was the *materiality* of the error that determined whether a correction to the FY2006 10-K would have to be filed immediately. (HT, pp. 263, 532.) Mr. Dick testified that because the error was found to be immaterial, the change did not need to be corrected in the 2006 financial statements:

> [W]e . . . determined that it was not significant, and our . . . outside auditors agreed with us that it was not significant to our financial statement. *So we did not correct it* in the fiscal 2006 financial statements, we corrected it when the final worker's compensation audit was completed by our insurance company.

(HT, p. 263 (emphasis added).) This correction was filed with the Company's financial statements for Q1 of FY2007. (CX 4, p. 2.)

[9] This testimony by the Complainant as to a second meeting is in direct contradiction to her testimony given to OSHA investigator Paul McDevitt on August 27, 2007. During that interview, the Complainant stated that only a single meeting took place, on "either Monday or Tuesday." (Complainant's Second Request for Official Notice, Ex. 2, p. 25.) At that time, the Complainant did not recall if the meeting had taken place before or after she sent her e-mail on Monday night. *Id.* She later recalled (or decided) that there had been a second meeting, as reflected in her pleadings and testimony.

The Complainant has also argued that the Company had an incentive to understate Q4 in exchange for overstating Q1 of the following quarter, because Q1 is a lower quarter than Q4 due to the passage of the holiday season. (Complainant's Second Request for Official Notice, Ex. 2, p. 12.)

Mr. Martin denied giving any such an instruction to Ms. Fox during the Monday meeting; his testimony also made no reference to a second meeting on Tuesday, April 3. (HT, p. 689; CX 19, pp. 2-3.) He testified that during the Monday meeting he merely "asked Ms. Fox whether it was an estimate or an error, whether it was the payroll hours that were wrong, or the rate that was wrong." (HT, p. 689.) He testified that he did not recall instructing Ms. Fox "to do any sort of thing" other than the basic instruction to include the amount of the estimated over-accrual in their summary of audit findings. (HT, p. 689; CX 19, p. 3.) Mr. Martin also expressed disbelief that the auditors would accept instructions from him as to how to characterize a number in their report. (HT, p. 689.) The Complainant argued, in contrast, that Ms. Fox was likely to take instructions from Mr. Martin on how to characterize the over-accrual as a result of Ms. Fox's state of exhaustion and sleep deprivation in the days prior to the 10-K filing. (RX AA, pp. 99, 125.)

The question of whether a second meeting on Tuesday took place is an important one in light of the neutral and non-accusatory tone of the Complainant's e-mail sent on Monday night. (*See supra*.) As noted above, at the time of her August 27, 2007, interview with Paul McDevitt of OSHA the Complainant referred to there having been only a single meeting with Ms. Fox, and stated that she did not recall whether she had sent the Monday night e-mail before or after this meeting. (Complainant's Second Request for Official Notice, Ex. 2, p. 25.) In contrast, the Complainant later stated that she specifically recalled seeing her Monday night e-mail on the desk in front of Mr. Martin. The Complainant's statement to Mr. McDevitt was given within only a few months of the events at issue; I am therefore inclined to accord it greater factual weight than her later, contradictory account which appeared for the first time during litigation of this matter. I am not persuaded by the Complainant's account that a second meeting took place on the Tuesday following her Monday night e-mail, and I find that the record supports a finding that the single meeting with Ms. Fox occurred on Monday, prior to the non-accusatory e-mail sent by the Complainant on Monday night.

The over-accrual was, in fact, reported in the auditors' April 4, 2007, summary of findings as an *error,* which corroborates Mr. Martin's denial of the Complainant's allegation that he gave an alternative instruction. (CX 17, p.52.) The over-accrual was listed as a "credit" in a table entitled "Summary of Likely Errors (Extrapolated)." (CX 17, p.52.) The entry read: "Worker's Compensation – overaccrual" and was stated to amount to an income credit of $78,032. (CX 17, p.52.)

Although the error was determined eventually to be on the magnitude of approximately $515,000, too much uncertainty existed as to the higher numbers to which the Complainant pointed as of the date of filing the auditing report. At the time of the 10-K filing, the auditors "thought the over-accrual was in the $60K range, but they also knew at that time that it couldn't be higher than about $500K." (CX 8, pp. 3-4.) As a result of this uncertainty, the decision was made that the auditors could only "reasonably rely" on the lower numbers they had developed

during their testing.[10] (CX 18, p.3.) It was agreed that further investigation would be necessary to determine a final accurate number, but that "even if the over-accrual was in the $500,000 range it would still not be considered material to the Company's financial statements."[11] (CX 18, p.3; HT, pp. 690-91.) An SAB 99/108 produced by Mr. Larson in the months that followed confirms and explains the Company's ultimate satisfaction that the error was not a material one.[12] (RX S.)

The Complainant's Final Draft of the SOX Certification/The April 3, 2007, Instance of Alleged Protected Activity

On April 3, 2007, Mr. Larson contacted the Complainant to inform her that he needed the final draft of her SOX Certification prior to the Audit Committee meeting that would be held at 3:00 p.m. that day. (HT, p. 118; RX Q.) The Complainant wished to speak with Mr. Dick prior to adding a reference to Mr. Martin's alleged instruction to Ms. Fox, but she was unable to do so. (HT, p. 118.) She added a comment to the end of her Certification concerning the over-accrual problem and e-mailed the Certification to Mr. Larson at 2:17 p.m. that day. (HT, p. 118; RX P, pp. 1-3.) The e-mail stated, "I added one new item #8." (RX P, p. 1.) The addition stated, "8. Worker's compensation accrual and potential understatement of income." (RX P, pp. 1-3.) The final Certification also contained three additional changes from her initial draft. At the top of the statement, she added, "I acknowledge that efforts have been made to improve the environment over the last two years . . . we have clear Control Environment issues of a recurring nature which have not been adequately remedied." (CX 13, p. 6.) She also removed point number four, which had referenced Mr. Martin's "continuous interference." Finally, she added to the bottom of her Certification a set of "Terminology and Concept References," directing the reader to web addresses describing "Internal Control — Integrated Framework, COSO" and "SAS No.19 Understanding the Entity and Its Environment and Assessing the Risks of Material Misstatement." (CX 13, p. 6.)

The final Certification does not mention Mr. Martin, any specific incidents concerning Mr. Martin, any suspicions as to fraud, misrepresentations to auditors, misleading of auditors, or the like. (HT, p. 180.)

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[10] *See, e.g.*, the "principal evidence provision" of Auditing Standard No. 2, which provides that "the auditor's own work must provide the principal evidence for the audit opinion." AUDITING STANDARD NO. 2 – AN AUDIT OF INTERNAL CONTROL OVER FINANCIAL REPORTING PERFORMED IN CONJUNCTION WITH AN AUDIT OF FINANCIAL STATEMENTS at App. E, ¶ 31 (Public Co. Accounting Oversight Bd. 2004), *available at* http://www.pcaobus.org/Rules/Rules_of_the_Board/Auditing_Standard_2.pdf [hereinafter AS2].

[11] AS2 provides that the materiality determination involves both a quantitative and qualitative analysis, and that while a numeric may seem material at the "account-balance level," it may nonetheless be immaterial at the "financial-statement level," which has a higher standard for materiality. AS2, ¶¶ 22-23.

[12] The Complainant disagreed with the otherwise unanimous contention that the over-accrual never had the potential to have a material effect on the Company's financial statements. While evidence shows the Complainant agreed that $60,000 was an immaterial amount, she was unwilling to agree that $500,000 was immaterial. (HT, p. 414.) She stated during the OSHA investigation that she believed most investors, including herself, would consider $500,000 to be a material amount in relation to the Company's finances. (Complainant's Second Request for Official Notice, Ex. 2, p. 27.)

The Complainant expected that following her submission of this final version of her Certification someone would call her or inquire about her additional entry and the related web links, but no one contacted her. (HT, p. 118.) As discussed above, the record shows that she had been contacted earlier at Mr. Dick's request by three individuals to discuss her Certification. When Mr. Halpin contacted her to discuss the Certification on Monday, April 2, 2007, the worker's compensation over-accrual had already come to light, and the Complainant introduced the topic during her discussion with Mr. Halpin as an example of the kind of error that was likely to result from the overburdened conditions she complained of in her Certification. (HT, p. 414.) She discussed the error with Mr. Halpin and agreed with his conclusion that $60,000 (the amount in question at the time) was an immaterial amount. (HT, p. 414). During the Audit Committee meeting at 3:00 p.m. on April 3, an Executive Session with Management was held for the express purpose of discussing the Complainant's written Certification concerns, at which time Mr. Hayes and Mr. Halpin each reported on their conversations with her. (RX Q, p. 2.) The decision was made during this meeting to invite the Complainant to address the Audit Committee directly during the next regularly scheduled Audit Committee meeting on April 19, 2007, "to make sure that there was nothing else that she would like to say in a face-to-face meeting that was over and above . . . what she had provided in the written Certification." (HT, p. 523.)

Because the Audit Committee understood that 1) Mr. Halpin had discussed the over-accrual error with the Complainant on April 2, 2007; 2) Ms. Knepper, Mr. Hayes, and Mr. Dick had each discussed the Complainant's other enumerated Certification concerns with her in the previous days; 3) the Complainant had informed each of these individuals that she did not believe there was a danger of any material misstatements in the financial statements that were about to be filed; and 4) they had invited her to address the Audit Committee directly regarding any remaining concerns, I find credible the Complainant's superiors' belief that each of her Certification concerns, including her concern as to the worker's compensation over-accrual error, had been adequately addressed when they filed the 10-K on April 4, 2007.

Beyond her submission of this final Certification, which mentioned the worker's compensation error generally without hinting at any suspicions as to fraudulent behavior by Mr. Martin, the Complainant did not report to Mr. Dick or anyone else the alleged fraudulent instructions by Mr. Martin prior to her receipt on the following day of the information as to the change in her duties. She did not recall speaking to anyone concerning the event until April 18 and 19, 2007.

> [Mr. Allen]: . . . Did you talk to anybody else within the company or the auditors that, arguably, Mr. Martin had an intent to mislead the auditors?
>
> . . .
>
> [The Complainant]: Before the K was filed, no, other than having written what I did on my certification, because it was close there. I was expecting somebody would either pull me into the meeting or grab me or something and ask me to explain, but no one did.

> And after that, I am sure that I talked to my peers in my department, but I don't specifically recall . . . [until] the day of the Audit Committee meeting on the 19th of April, if that's the right date . . .

(RX AA, p. 102.) While she hoped to speak with Mr. Dick on April 3, prior to submitting her Certification, she was unable to do so. (HT, p. 118.) She met with Mr. Dick for a weekly meeting on April 4, during which Mr. Dick explained the reorganization plans and the DVP position to her. She has not claimed that she discussed her suspicions as to Mr. Martin's behavior during this meeting or before the discussion of the DVP position. Finally, two weeks after the alleged fraud, on or about April 18, 2007, the Complainant participated in a departmental meeting with Mr. Dick, Mr. Martin, Mr. Halpin, Mr. Larson, and others to explore the source of the over-accrual problem. (HT, p. 408; RX AA, pp. 92-3, 130.) During this meeting she showed Mr. Dick her April 2, 2007, e-mail and for the first time recounted to him the story concerning Mr. Martin and his alleged instruction to Ms. Fox. (RX AA, pp. 93, 117.)

At the time the Complainant submitted her final Certification, she did not have a clear belief that fraud had occurred, but she alleged she did have a subjective suspicion as to the impropriety of Mr. Martin's conduct. She represented that she felt at the time a "gut instinct" that there was an "ethical, moral issue" involved in Mr. Martin's conduct. (RX AA, p. 119-21). However, she failed to write anything concerning this feeling or suspicion in her final Certification on April 3, 2007, because she did not feel she had enough information to conclude that fraud had actually occurred:

> [Mr. Allen]: Can you explain why you wouldn't have put on there if you were so certain that some fraud had been committed by a high level finance department employee, why it would not be on your certification?
>
> [The Complainant]: Because that's a pretty huge thing to write down. I was not sure if there was . . . something I was missing, and I was not certain that my interpretation of error versus estimate was correct at that point.
>
> [Mr. Allen]: . . . [I]t sounds to me like then you didn't know if there was a fraud or not.
>
> [The Complainant]: At that point, no.

(RX AA, pp. 119-121.)

She explained that her failure to report the fraud in the final Certification was due to her ignorance of the legal definition of "fraud," as well as the possibility that she did not have the information Mr. Martin had: "Objectively, I didn't know what the technical criteria was (sic) to meet that definition." (RX AA, p. 121.) "And where I had doubt was not in what I saw or what happened, but . . . was there some other account out there that I didn't know about, because our accounting was not always as cut and dried as it could have been?" (RX AA, p. 98.) She did not develop a clear subjective belief that fraud had occurred until she met with Mr. Halpin after the departmental meeting on April 18, 2007, when they discussed the legal definition of fraud. (RX AA, p. 122; HT, p. 408.) She stated that on that date she was "really uncomfortable, unsure, and you know, kind of . . . didn't want to say the 'F' word, the 'fraud' word." (HT, p. 408.) She

claims that during this conversation with Mr. Halpin she "used the word 'misrepresentation' or something . . . and that's when [Mr. Halpin] responded with, 'And that would be the definition of fraud.'" (HT, pp. 408-09.) Mr. Halpin denied making this statement. (HT, p. 409.)

When given the opportunity to address the Audit Committee on April 19, 2007, concerning her SOX Certification, the Complainant did not discuss the April 3 incident or any suspicions as to fraud or misrepresentation by Mr. Martin. She did speak privately on that date with Ron Graybeal, a staff auditor with Deloitte & Touche, but her testimony made clear that she had not informed the auditors of her suspicions prior to that discussion:

> An auditor can sign off on financial statements even if there is fraud in there, if the result of the fraud does not make the financial statements materially misleading. However, at the time the . . . 10-K annual financial statements . . . went out the door April 4th, Deloitte and Touche did not have this particular knowledge that I am saying in here. They did not have that until I told Ron, walking on the stairway April 19th, long after that K went out the door.

(RX AA, pp. 116-17.) At the time of her deposition on January 8, 2008, the Complainant had not reviewed the auditors' April 4, 2007, report to discover whether or not the over-accrual error was, in fact, listed in their report as an "error" or as a "change in estimate." (RX AA, p. 118.)

I find that the Complainant has not presented adequate evidence to support a finding that prior to April 4, she provided her superiors with specific information concerning any incident involving Mr. Martin, instructions to the auditors, or any attempted fraud.

Moreover, the Complainant describes herself as outspoken with regards to her observations of unethical conduct. As she testified at the hearing, "[I]'m not shy about sharing my thoughts on when I see things wrong." (HT, p. 110.) Given her outspoken nature, her failure to speak out in this case until weeks after the event suggests that she did not, in fact, develop a subjective belief that a fraudulent or unethical action had occurred until well after she submitted her final Certification on April 3, 2007.

The April 4, 2007, Disclosure to the Complainant of the Company's Reorganization Plans

The official notes of the April 3, 2007, Audit Committee state that during the Executive Session with Management immediately following the discussion of the Complainant's SOX Certification concerns, Mr. Dick "also discussed proposed and pending staffing changes in the accounting and finance department." (RX Q, p. 2.) These changes included the change of duties which Mr. Dick planned to communicate to Ms. Williams and the Complainant in the following days, as well as other staffing changes in the Finance area. (HT, p. 267.)

On April 4, 2007, the Company's 10-K was filed. (HT, p. 691.) This was also the date of the Complainant's weekly meeting with Mr. Dick. Mr. Dick invited the Complainant out to lunch. During lunch, the Complainant recounts that Mr. Dick was "acting very strange," and commented to the Complainant that, "[t]wo and a half years isn't long enough to build out a tax department." (HT, p. 118.) The Complainant described that Mr. Dick continued to speak in vague terms during the lunch meeting, and "the conversation just kind of meandered around, and it was kind of bizarre." (HT, p. 121.)

Once they returned to the office after lunch, Mr. Dick began to draw on his white board a tax chart (the Complainant drew a reproduction of this chart to include in her exhibits). (CX 13, p. 2.) The Complainant contends that he drew a box at the top of the chart and told her, "You're top box." (HT, p. 121.) Beneath the upper box were four boxes he marked for Compliance, Planning, Sales & Use Tax, and Audits. (HT, p. 121; CX 13, p. 2.) The Complainant contends that he stated that she was currently responsible for three of the four lower boxes, as well as the upper box. (HT, p. 121.) He then asked the Complainant, "let's see, what are your strengths? You're really good at connecting the dots," and wrote the phrase "Connect the Dots" on the board. (HT, p. 121.) He then circled the lower box for Planning, and said to her, "This is where I think you belong." (HT, p. 121.) At this point, Mr. Dick informed the Complainant that they would be issuing a job announcement the following day for a new DVP of Tax position. (HT, p. 122; HT, p. 268.) He informed her that her title and salary would not alter, and that he wished she would stay on as Director of Tax. (HT, pp. 268-69, 611.) The Respondent did not materially dispute the Complainant's account of this conversation.

On either April 3 or 4, 2007, Carol Williams was informed that the reorganization would result in a change in her title and duties and a reduction in her salary. (HT, pp. 116, 317.) Mr. Dick reported at a regular Managers' Meeting on April 4, 2007, that Ms. Williams had already accepted her new position with the Company, and that he hoped the Complainant would also decide to stay with the Company during the reorganization. (HT, p. 611.)

After the reorganization, the Complainant's duties would have been reduced and reoriented primarily to one of the four areas of tax work: Tax Planning. Mr. Martin explained that the goal was for the Complainant to retain only her former work with insurance and risk management, and expand her work into the previously unaddressed area of tax planning, with the aim of reducing the Company's tax rate over time. (HT, p. 701.) Mr. Martin testified that he and Mr. Dick hoped she would spearhead the development of areas which the Tax Group had formerly not had the "bandwidth" to take on. (HT, p. 701.)

The Complainant contends that the new DVP of Tax position was essentially her Director of Tax position, retitled. Mr. Dick testified that the DVP position was in fact quite different, and required quite different skills, involving strong management skills and leadership of a much larger tax department as the company doubled in size over time. (HT, pp. 268-69.) The new design, according to Mr. Dick, envisioned strong directors in the four areas under the DVP's oversight, each director individually working on different aspects of the tax function, rather than requiring the same directors and senior managers to work in every area of the tax provision process, as had been the case during the Complainant's time (and the cause of the Complainant's repeated complaints of under-resourcing.) (HT, pp. 268-69.)

Corroborating Mr. Dick's explanation of the central importance of management skills to the DVP of Tax position, the job announcement for the position enumerated "strong communication skills" and a "[p]roven track recorded (sic) of building and developing a high-performing and motivated staff" among the basic job requirements. (RX X.) The qualifications and qualities of the individual the company eventually did hire to fill the DVP position, Michelle Carlone, also corroborate Mr. Dick's claim that the position required a candidate with different attributes than those the Complainant possessed. Ms. Carlone's résumé demonstrates that she possessed significant management experience (supervising teams of 10+ employees, leading a

committee composed of 25 employees, and formally serving as a "coach" and mentor to multiple employees), as well as longevity in her commitment to employers (having remained with her first and only tax practice employer for the thirteen years prior to her move to Coldwater Creek.) (RX U, p.1; HT, pp. 271-72.) Each witness who was questioned concerning Ms. Carlone, including Mr. Dick, Mr. Martin, Robert McCall, and Rob Larson, verified that her performance as a manager of employees and inter-departmental facilitator had proven to be excellent. (HT, pp. 272, 526, 612, 697.)

The Complainant's Formal Resignation

On or about April 5, 2007, the Complainant contacted Lesa Niemala, Manager of Employee Relations, to discuss "the change in [her] job duties and the relation to Sarbanes-Oxley." (HT, pp. 597, 704.) The Complainant did not discover until the OSHA investigation that the reorganization decision affecting her was made no later than the March 5, 2007, Audit Committee meeting. (RX Z, pp.10-11.)

On Monday April 9, 2007, the Complainant gave Mr. Dick a resignation letter dated April 8, 2007, with an effective date of May 4, 2007. When she gave Mr. Dick the resignation letter, Mr. Dick said, "[O]h, what's this? . . . [O]h, I didn't want you to quit." (RX AA, p.135.) The letter stated:

> Dear Mel,
>
> I am resigning my position as Tax Director of Coldwater Creek Inc. effective Friday May 4 2007.
>
> It is important that I turn my time and attention to the growth, well being, and security of my family; to focus on what is ultimately most valuable. I have sincerely enjoyed working with you and appreciate both the professional and personal insights you've shared.
>
> I hope the work I've done to facilitate Company growth continues to flourish, and wish you success in obtaining the resources needed to move the tax function forward.
>
> Best Wishes,
>
> Laurie Hillenbrand

(RX A.)

Mr. Dick testified that while he had hoped that the Complainant would remain with the Company through the reorganization, he was not "necessarily surprised" when he received her resignation letter three working days after their discussion of the DVP position. (HT, p. 269.) He asked her to consider staying on for six more months, and the Complainant "offered to work out an arrangement for a transition to the new head of tax." (RX Z, p. 10; ALJX 3, p. 3.) Mr. Dick failed to write up a contract for the Complainant's continued work with the Company, so she drafted a contract herself the day before he left on vacation. (RX Z, p. 10.) Mr. Dick wanted

to have the contract reviewed by the Company's employment law counsel before signing it, but no agreement was finalized before her effective departure date. (RX Z, p. 10.) Her last day of work was May 7, 2007.

The April 19, 2007, Audit Committee Meeting

The Complainant had already resigned by the time she appeared at the April 19 Audit Committee meeting. During the meeting, the Complainant did not mention fraud or misconduct by Mr. Martin. (HT, pp. 186-87, 562; RX AA, p. 129.) Mr. Halpin accompanied the Complainant to the meeting at her request. (Complainant's Pre-Hearing Statement, Att. A, p. 3.)

The Complainant recounted that during the meeting she told the group, "I'm probably going to cry," and "I've been effectively terminated." (HT, p. 407.) She alleged that Mr. McCall confirmed this latter statement, saying "I know." (HT, p. 407.) She communicated this interpretation of Mr. McCall's statement in an e-mail to a colleague the following day. (CX 21, p. 20.) Mr. McCall vigorously denied this portrayal of events, testifying that the Complainant's story had left him "mystified," that such an off-the-cuff determination would have been out of character for him, and that it was "absolutely not true." (HT, p. 524.) After he learned of the Complainant's representation of his statement, he individually asked every other participant in the meeting if they could confirm the Complainant's version of events, in case this was "something that I maybe did not remember," but he found that none of the other participants even heard her say that she had been effectively terminated. (HT, p. 524.) Mr. McCall stated the Audit Committee had

> [P]redetermined to really not agree or disagree with management or Ms. Hillenbrand but only to listen. And we felt that that is the way we would conduct ourselves within that meeting. And if we needed to comment later, we felt we would digest the information heard, and then give our opinions at a later time. . . . What I do remember is that she was very emotional and sobbing. And she initially said she was most likely going to cry. And I nodded and said, "That's okay." So I don't know if that's . . . really what she heard. But I did not say that "Yes, she had been constructively or effectively terminated" because I didn't ever hear her say that.

(HT, pp. 524-25.) Mr. McCall's version of events is corroborated by the testimony of Mr. Halpin, who said the people in the room were "politely nodding" as the Complainant spoke. (HT, p. 407.) While Mr. Halpin recalled the Complainant "making statements along those lines," he did not hear Mr. McCall use the words the Complainant alleges he used. (HT, p. 407.)

Given the failure of any witness to confirm the Complainant's account of the exchange, Mr. McCall's absolute denial that he made such a statement, and the delicate emotional context of the meeting, I find Mr. McCall's account of events more credible. The Complainant, emotionally charged by her convictions as to retaliation and wrongdoing, may easily have misinterpreted the "polite nodding" and gentle words of comfort from Mr. McCall as a confirmation of her view of events when they were intended only as a show of acceptance and kindness toward a person on the verge of tears who was already destined to leave the Company within two short weeks.

The Complainant's Denial of Unemployment Benefits

Following her departure from the Company on May 7, 2007, the Complainant submitted a claim with the Idaho Department of Commerce and Labor ("Department") for state unemployment benefits. (HT, p. 191; RX V.) She was interviewed by telephone by a claims examiner on June 4, 2007. (RX V.)

Her claim was denied on June 15, 2007, based on the Department's finding that she did not have good cause to resign her position. (Decl. of Tim Martin in Support of Respondent's Motion for Summary Judgment, Ex. K.) The Department found that: 1) the Complainant "quit when she felt, due to her company (sic) restructuring, that her position would eventually be eliminated;" 2) the Complainant's job was secure and that she would not have been replaced; and 3) both the Complainant and the Company agreed that she could have continued working. (Decl. of Tim Martin in Support of Respondent's Motion for Summary Judgment, Ex. K.)

The Complainant's OSHA Complaint Concerning Allegations of Protected Activity

On July 2, 2007, the Complainant submitted a complaint to OSHA for whistleblower protection under Sarbanes-Oxley (the "Complaint"), alleging that she had been constructively terminated. (RX W.) She alleged that her protected activity occurred on April 3, 2007, and that the retaliatory activity occurred on April 4, 2007. In this initial Complaint, she identified only the final instance of alleged protected activity involving her April 3 Certification as her protected activity. She described her protected activity as follows:

> [T]he last item on my final certification directly related to an error in reported income, arguably with the CAO's intent to mislead the auditors, having to do with the overstatement of the worker's compensation overaccrual, which resulted in an understatement of income.

(RX W, p. 2.) She explained to OSHA that the Company's retaliation against her in response to her Certification took the form of relegating her to a "second tier 'tax planning' role" and removing her from any involvement in the areas of tax compliance or tax accounting, for which she had formerly been responsible, and which most directly related to financial reporting. She explained her belief that the "planning role appeared to be so small that I believed I was being effectively terminated. I believe this action was retaliatory as a result of my certification." (RX W, pp. 2-3.)

Paul McDevitt, the OSHA investigator assigned to her complaint, conducted a recorded interview of the Complainant on August 27, 2007. (Complainant's Second Request for Official Notice, Ex. 2.) During the investigation, Mr. McDevitt informed the Complainant of his finding that the decision concerning the DVP position was made as early as March 5, 2007, on the basis of the slides presented to the Audit Committee on that date. On September 5, 2007, and September 24, 2007, the Complainant e-mailed Mr. McDevitt with additional information to support her claim of retaliation. (RX Z, p. 11; Complainant's Opposition, Ex. 21.) In these subsequent communications, the Complainant made an additional allegation of protected activity occurring on February 18, 2007. She explained:

> What happened that day was that I vehemently objected to [Mr. Martin's] efforts to manipulate the financial statement processes and set internal earnings expectations – which is exactly what SOX was designed to prevent.

(Complainant's Opposition, Ex. 21, p. 1.)[13]

OSHA's investigation found that the Respondent and the Complainant met the respective definitional requirements of "company" and "employee" under Sarbanes-Oxley, and that her OSHA complaint was timely, but that the Complainant was not entitled to relief under the Act. (ALJX 2, p. 2.) Specifically, OSHA found that the Complainant was involved in protected activity on both February 18 and April 3 "when she notified Respondent of her concern about underreporting of income and possible defects in internal accounting controls." (ALJX 2, p. 2.) The investigation also found that the Respondent had knowledge of the protected activity "because she discussed her concerns directly with management and submitted a written description of her concerns to Respondent." (ALJX 2, p. 2.) On the question of whether she had been subjected to an adverse employment action, OSHA found that "some of her job duties would change . . . because certain duties would be handled by the new deputy vice president;" that the Complainant was informed that neither her title nor salary would change; and that her supervisor had asked her not to resign. (ALJX 2, p. 2.) Given these factors, OSHA found that the Complainant could not establish that she had suffered an adverse employment action predicated on a theory of constructive discharge: "At the time she resigned, working conditions were not so intolerable that resignation was her only reasonable course of action. Therefore, Complainant's April 8, 2007, resignation does not constitute a constructive discharge." (ALJX 2, p. 2.) OSHA also found that the Complainant could not establish constructive termination on the theory of having been denied a promotion, since she resigned prior to feeling any of the effects of being denied a promotion. (ALJX 2, p. 2.) Consequently, her Complaint was dismissed. The Complainant timely appealed the OSHA determination to the OALJ.

APPLICABLE LAW

OALJ Jurisdiction

Title 29, Part 1980 of the Code of Federal Regulations prescribes the procedures for OALJ'S handling of discrimination complaints under SOX.

An employee who believes she has been discriminated against in violation of SOX has 90 days after the alleged violation occurs to file her discrimination complaint with the Department of Labor. 29 C.F.R. § 1980.103(d.) The regulation provides:

> Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated

[13] In my April 1, 2008, Order denying the Respondent's Motion to Strike this second allegation of protected activity, I held that these communications to Mr. McDevitt concerning the February 18, 2007, instance of protected activity properly supplemented the Complainant's original OSHA Complaint. (Order Denying Motion for Summary Decision and Motion to Strike, p. 3 (citing 29 C.F.R. § 1980.104(b)(1)).)

> against in violation of the Act may file . . . a complaint alleging such discrimination.

Id. As the regulation indicates, the 90-day statute of limitations is triggered by the employer's communication of the alleged discriminatory action to the complainant. Here, there is no dispute that Respondent's alleged discriminatory decision was communicated to the Complainant on April 4, 2007. (HT, pp. 118, 121.) There is also no dispute that the Complainant's July 2, 2007, written complaint filed with OSHA fell within the 90-day statute of limitations. The Complainant's OSHA complaint was therefore timely filed.

Objections to the findings of OSHA must be filed with the Chief Administrative Law Judge ("Chief ALJ") within 30 days of receipt of the findings and preliminary order. 29 C.F.R. § 1980.106(a). The Complainant filed her objections with the Chief ALJ on October 23, 2007, less than 30 days following her receipt of OSHA's September 27, 2007, dismissal letter. The Complainant's appeal to the OALJ was therefore timely as well, and jurisdiction in the OALJ is proper.

OALJ is not bound by the findings or conclusions of OSHA's investigation and conducts a *de novo* hearing on the allegations and evidence. *Id.* at § 1980.107(b).

Elements of a SOX Retaliation Claim

The whistleblower protection provision of Sarbanes-Oxley prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer, a Federal agency, or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A(a). The Act incorporates the rules and procedures set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") at 49 U.S.C. § 42121(b). *Id.* at § 1514A(b)(2)(C).

Generally, a complainant who alleges retaliation for whistleblowing has the burden of first establishing a *prima facie* case by showing that the employer is covered by the particular statute, and establishing the following four elements: (1) she engaged in an activity protected under the statute; (2) the respondent knew, actually or constructively, of the protected activity; (3) she suffered an unfavorable personnel action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. § 1980.104(b)(1)(i)-(iv); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009); *Bechtel v. Competitive Techs., Inc.,* ARB No. 06-010, ALJ No. 2005-SOX-33 at 7 (ARB Mar. 26, 2008); *see also* 29 C.F.R. § 1908.109(a). If the complainant meets this burden, she creates a rebuttable presumption of retaliation and the burden shifts to the employer to produce evidence that the complainant was subjected to the adverse action for a legitimate, non-discriminatory reason. *Martin v. Azko Nobel Chemicals, Inc.*, ARB No. 02-031, ALJ No. 01-CAA-16 at 3 (ARB July 31, 2003) (citing *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 255 n.10 (1981)).

This case has been fully tried on the merits. The ARB has stated that when a whistleblower case has been fully tried on the merits, the issue is not whether the complainant has established a *prima facie* case of reprisal for engaging in protected activity, but whether the complainant has proven by a preponderance of the evidence that the respondent retaliated against her because of her protected activity. *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059, ALJ No. 01-CAA-18, at 8 n.10 (ARB Nov. 28, 2003).

If the complainant has met her burden of proof by a preponderance of the evidence, the Respondent may still avoid liability if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action even in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1980.109(a); *Bechtel,* ARB No. 06-010 at 7.

Applying this framework to the matter at hand, the Complainant must prove by a preponderance of the evidence that the Respondent is covered by the Act; that she engaged in activity protected under the Act; that her employer knew, actually or constructively, about her activity; that she was subjected to an unfavorable personnel action following her protected activity; and that her protected activity was a contributing factor in the unfavorable action. *Van Asdale*, 577 F.3d at 996.

SOX Coverage

To assert a cognizable claim for protection under SOX, an employee must, as a threshold matter, establish the employer's coverage under the Act at the time of the alleged retaliation. The whistleblower provision of Sarbanes-Oxley protects "employees" of any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))." 18 U.S.C. § 1514A(a). It is undisputed that the Respondent meets this definition; the parties in this case entered into stipulations as to Respondent's status as a company publicly traded on the NASDAQ Stock Exchange. (HT, p. 8.) The parties also stipulated as to the Complainant's status as a salaried employee of the Company at the time of the alleged retaliation. (HT, p. 8.) Coverage of this matter under SOX is therefore proper.

Protected Activity

Employees of publicly traded companies engage in protected activity under SOX when they provide information regarding conduct they reasonably believe violates one of the laws enumerated in the Act. 18 U.S.C. § 1514A(a)(1). Section 806 of the Act specifically provides, in pertinent part, that covered employers may not retaliate against employees:

> . . . [B]ecause 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 and swindle], 1343 [fraud by wire, radio, or television], 1344 [bank fraud], 1348 [fraud "in connection" with "any security" or "the purchase or sale of any security"], 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 . . .
>
> > (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.)

Id.

The courts have further defined Section 806's imprecise threshold requirement — that the complainant "provide information" regarding challenged conduct in order to gain the Act's protection — to require that protected communications must demonstrate a significant degree of factual specificity, sufficient to "definitively and specifically" implicate one of the specific categories of fraud or securities violations listed in subsection 1514A(a)(1). *Van Asdale,* 577 F.3d at 996-97 (affirming the ARB's interpretation of section 1514A(a)(1) in *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 at 17 (ARB Sept. 29, 2006)); s*ee also Henrich v. Ecolab, Inc.*, 2004-SOX-51 at 8-9 (ALJ Nov. 23, 2004) ("The claimant must . . . plead specific incidents and material facts that give rise to the alleged violation."); *Lerbs v. Buca di Beppo, Inc*., 2004-SOX-8 at 14 (ALJ June 15, 2004) (finding that Complainant failed to establish that he had engaged in protected activity where he merely made general inquiries about the Respondent's conduct). "[T]he employee's communications must identify the specific conduct that the employee believes to be illegal," and the illegal conduct at issue must be one of the types of illegal conduct enumerated in Section 806 of the Act. *Welch v. Chao,* 536 F.3d 269, 276 (4th Cir. 2008); *see also Lewandowski v. Viacom, Inc.*, ARB No. 08-026, ALJ No. 2007-SOX-088 at 7-8 (ARB Oct. 30, 2009). As the ARB recently explained, "[n]ot all employee complaints to management are covered by . . . SOX."[14] *Lewandowski,* ARB No. 08-026 at 9. Complaints of illegal conduct by the employer which "do not directly implicate the categories of fraud listed in the statute" will not constitute protected activity under SOX. *Id.*

These specificity requirements notwithstanding, the employee is not required to "express a concern in every possible way or at every possible time in order to receive protection,"[15] and she need not be so legally specific as to "cite a code section [s]he believes was violated" in her communications to her employer. *Van Asdale*, 577 F.3d at 997 (quoting *Welch v. Chao,* 536 F.3d at 276). The relevant inquiry is not what the employee alleged in her OSHA complaint, but what she "actually communicated" to her supervisor prior to the alleged adverse action. *Platone*, ARB No. 04-154 at 17; *Lewandowski,* ARB No. 08-026 at 11.

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[14] In *Lewandowski*, the ARB noted that complaints to management of racial and employment discrimination, personnel actions, executive decisions and corporate expenditures with which the complainant disagrees are not protected activity under SOX "because they do not directly implicate the categories of fraud listed in the statute." *Lewandowski,* ARB No. 08-026 at 8. Moreover, a merely speculative or theoretical link to the enumerated categories of fraud or securities violations is not enough: "A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough." *Id.* (quoting *Smith v. Hewlett Packard,* ARB No. 06-064, ALJ Nos. 2005-SOX-88, -092, slip op. at 9 (ARB Apr. 29, 2008)).

[15] *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-11 at 17 (ARB May 31, 2006).

The employee need not prove an actual violation of one of the laws or regulations in order to be protected; only that she reasonably believed a violation occurred. *Van Asdale*, 577 F.3d at 992; *see also* S. Rep. No. 107-146, at 19 (2002). Communications based on a reasonable but mistaken belief that conduct constitutes a securities violation may still be protected. *Van Asdale*, 577 F.3d at 1001; *accord Halloum v. Intel Corp.*, ARB Case No. 04-068, ALJ No. 2003-SOX-7 at 6 (ARB Jan. 31, 2006). The employee's belief is evaluated under both subjective and objective standards, *i.e.*, she must actually believe that the employer's practice, condition, directive, or event violated a law enumerated in SOX, and her belief must be objectively reasonable. *Van Asdale*, 577 F.3d at 1000; *Melendez v. Exxon Chem. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-6 at 28 (ARB July 14, 2000)). Objective reasonableness "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." *Allen v. ARB*, 514 F.3d 468, 477 (5th Cir. 2008); *accord Welch v. Cardinal Bankshares Corp*., ARB No. 05-064, ALJ No. 2003-STA-15 at 10 (ARB May 31, 2007).

DISCUSSION AND ANALYSIS

The Complainant's Protected Activity

The Complainant has alleged multiple instances of protected activity at different times during the course of the processing of this case. I will separately address whether the Complainant has presented evidence sufficient to satisfy her burden of proof for each alleged protected activity.

The February 18, 2007, Telephone Incident and Subsequent Discussions with Mr. Dick

The Complainant contends that she engaged in protected activity on February 18, 2007, when, during a heated telephone conversation with the Respondent's CAO Mr. Martin, she "vehemently opposed . . . Martin's intentional and reckless action of instructing the Corporate Controller to record an erroneous tax expense at a rate of 39%." (Complainant's Amended Closing Brief, p. 2.)

According to the Complainant, Mr. Martin's instruction to the corporate controller to use a 39% flat rate in a preliminary document violated the Company's internal controls, which mandated that all information concerning the tax rate should be communicated to the Controller by the Complainant herself. She argued that this misuse of the Estimated Rate Document, if successful, would have rendered Respondent's financial statements materially misleading. She also considered his use of the 39% tax rate provided evidence of a plot by him to engage in shareholder fraud, to create "earnings expectations" throughout management and subsequently "search for earnings" to meet those expectations and falsely inflate the Company's earnings disclosures. (*See generally*, Complainant's Amended Closing Brief, pp. 2-6.)

The Complainant considers the outburst during the phone conversation, as well as the subsequent conversation with Mr. Dick concerning Mr. Martin's use of the 39% rate, the focal

points of her first instance of protected activity.[16] She contends that she engaged in a protected activity when she showed Mr. Dick the Estimated Rate Document that Mr. Martin had allegedly "misused" and "specifically and clearly addressed the blatant impropriety of his action, to include violation of the defined SOX process established for Internal Controls Over Financial Reporting ('ICOFR')." (Complainant's Amended Closing Brief, p. 3; Complainant's Brief In Support of Affirmative Defense, pp. 4-5.)

The Complainant contends that from the moment when she learned of Mr. Dick's alleged expectation concerning the 39% rate, she developed a subjective belief as to the impropriety of Mr. Martin's conduct: "I knew right then . . . that there was a big problem in a number of ways, not only because that was just such an absolutely wrong thing to do, but that he had set an earnings expectation." (HT, pp. 79-80.)

The Respondent does not deny that these communications with Mr. Martin and Mr. Dick occurred, but it contends that the Complainant's communications did not constitute protected activity because she did not possess an objectively reasonable belief that Mr. Martin's action constituted a violation of ICOFR, and she did not report her specific belief that a violation of ICOFR had occurred. (Respondent's Closing Brief, pp. 16-23.) In support, the Respondent argues that the record shows: 1) the 39 percent rate could not possibly have been "booked" at the time in question, 2) the 39 percent rate was an appropriate preliminary estimate to use in the internal Excel spreadsheet, 3) the use of the rate did not set earnings expectations which the Complainant would be pressured to meet, 4) the Company's SOX personnel all opined that the internal Spreadsheet was not a "record" within the meaning of the ICOFR rules, and 5) the Complainant never reported this event as a violation of ICOFR to the Audit Committee or in her SOX Certification. (Respondent's Closing Brief, pp. 16-23.)

Reasonable Belief

I first address whether the circumstances in which the Complainant found herself would have permitted a person of the Complainant's training and experience to form a reasonable belief that Mr. Martin's use of the 39 percent rate in the internal Spreadsheet constituted a violation of any of the SEC's rules or regulations, or a provision of Federal law relating to shareholder fraud.[17] While SOX does not require a complainant to specifically identify the code section that she believes was violated, at the time of her protected communication she must have held a reasonable belief that a provision of at least one enumerated law was violated. *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1377 (N.D. Ga. 2004). Under the objective standard,

[16] Throughout her hearing testimony, the Complainant focused on two alleged instances of protected activity taking place on February 18, 2007, and April 3, 2007. However, in her Amended Closing Brief, she identifies four additional moments of alleged protected activity. I will briefly address these four additional allegations later.

[17] As cited above, SOX protects employee communications relating to violations of, *inter alia*, "any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). The Complainant has alleged that she reasonably perceived a violation of a list of SEC regulations and rules, including 17 C.F.R. § 240.13a, 17 C.F.R. § 240.13b, 17 C.F.R. § 210.1-01, and 17 C.F.R. § 211 (SAB 99 and SAB 108); and provisions of the Securities and Exchange Act of 1934: 15 U.S.C. § 78m(b)(2) and 15 U.S.C. § 78m(b)(5). (Complainant's Closing Brief, pp. 10-12.) Communications concerning violations of the Securities and Exchange Act fit within SOX in the final catch-all category of "any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1).

the reasonableness of her belief will be evaluated on the basis of the knowledge available to a reasonable person in a similar situation with the Complainant's training and experience. *Van Asdale*, 498 F. Supp. 2d at 1333.

SEC rules require public companies to keep accurate books and internal records and to develop and maintain adequate internal controls. Section 13(b)(2)(B) of the Securities Exchange Act requires public companies to create internal accounting controls that are adequate to give "reasonable assurance" that their financial transactions are recorded accurately, fairly and in "reasonable detail," so that they can prepare financial statements that conform to generally accepted accounting principles. *See* 15 U.S.C. § 78m(b)(2)(B),[18] *codified at* 17 C.F.R. § 240.13a-15(a). The ARB has held that employee disclosures about efforts to circumvent those internal controls are protected activities, because they address violations of SEC rules. *See Klopfenstein*, ARB No. 04-149 at 17. In *Klopfenstein*, the ARB said:

> [W]e do not believe that activity is protected only when . . . the complainant believes he is reporting "fraud." SOX protection applies to the provision of

[18] The Securities and Exchange Act of 1934 provides, in pertinent part,

(b) Form of report; books, records, and internal accounting; directives

. . .

(2) Every issuer . . . shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that —

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary

(I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and

(II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences;

. . .

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

. . .

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

15 U.S.C. § 78m(b).

> information regarding not just fraud, but also "violation of . . . any rule or regulation of the Securities and Exchange Commission."

Id.; see also Allen v. Stewart Enters., Inc., ARB No. 06-081, ALJ No. 2004-SOX-60 at 10 (ARB July 27, 2006) (reporting violations of internal controls may constitute SOX protected activity); *Smith v. Corning, Inc.*, 496 F. Supp.2d 244, 250 n.3 (W.D. N.Y. 2007) (quoting Lynne Bernabei & Jason Zuckerman, *Protect the Whistleblower*, NAT'L L. J. (June 19, 2006) ("Contravening the plain meaning of the statute, some judges have held that an employee who has raised a concern to management about a violation of an SEC rule has not engaged in protected conduct unless the issue implicates fraud against shareholders . . . An employee who raises a concern about deficient internal controls should be protected from retaliation because these deficiencies can lead to false financial reporting. Under the narrow construction adopted by some judges, however, an employee who raises concerns about deficient internal controls would not be protected simply because the employee did not raise a concern about shareholder fraud.")).[19]

The Complainant alleges she reasonably believed Mr. Martin's use of the 39 percent rate violated the SEC's rules concerning ICOFR, as expressed in Section 13(b)(2) of the Securities and Exchange Act, and in the ICOFR regulation promulgated under the Securities and Exchange Act. (Complainant's Amended Closing Brief, pp. 10-12 (citing 15 U.S.C. § 78m(b) and 17 C.F.R. § 240.13a-15).)[20] She suggests that she reasonably believed that Mr. Martin's use of a 39% tax rate in an internal record was inaccurate to a degree of at least 0.5% and that it therefore violated the requirement, expressed in the above statutory and regulatory provisions, that the

[19] Article III trial courts have reached contrary conclusions about whether SOX complainants must show that the conduct they disclose implicates some sort of shareholder fraud. *Compare Reyna v. Conagra Foods, Inc.*, 506 F. Supp.2d 1363, 1381 (M.D. Ga. 2007) (supporting the complainant's contention that complaints do not necessarily have to relate to shareholder fraud) *and Collins,* 334 F. Supp.2d at 1378 (holding that "allegations . . . of violations of the company's internal accounting controls . . . were within the zone of protection afforded by Sarbanes-Oxley") *with Livingston v. Wyeth*, Case No. 1:03 CV 00919, 2006 WL 2129794, at *10 (M.D.N.C. July 28, 2006) (supporting the Respondent's contention that complaints must relate to shareholder fraud). The ARB however, whose precedent applies to this proceeding, has held that a specific allegation of shareholder fraud is not a necessary prerequisite to a finding of protected activity under SOX. *See Klopfenstein*, ARB No. 04-149 at 17.

[20] 17 C.F.R. § 240.13a-15(a) provides, in pertinent part, that an issuer of stock is required to maintain "internal control over financial reporting," as defined in subsection (f):

> (f) The term *internal control over financial reporting* is defined as a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:
>
> (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
>
> (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
>
> (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

internal records of the Company should "accurately and fairly reflect" the financial condition of the Company.[21] 15 U.S.C. § 78m(b)(2)(A); 17 C.F.R. § 240.13a-15(f)(1).

In support of her allegation, the Complainant represented that during her employment with the Company, its tax rate "hover[ed] right around 39.5%." (HT, p. 480.) She represented that the Company's tax rate is fairly static due to the Company's "simplistic corporate structure and the limited number of permanent items affecting the calculation." (Complainant's Amended Closing Brief, p. 5.) In her Brief she stated that only in one quarter did the tax rate "dip below 39.5% as a result of the discrete release of an interest accrual." (Complainant's Amended Closing Brief, p. 5.) She argued that the difference between her preferred rate of 39.5% and Mr. Martin's use of a 39% rate was significant, given the Company's $90 million earnings figures; use of a tax rate five-tenths of a percentile lower could result in an increase in the Company's earnings expectation to the order of approximately $450,000. The Complainant has also noted that the Respondent's controller, Carol Williams, saw fit to inform the Complainant that the CAO had instructed her to use a 39 percent tax rate in the internal record, suggesting that Ms. Williams shared her perception that Mr. Martin's instruction involved a violation. (HT, p. 79.)

Moreover, the Respondent's CFO, Mr. Dick, stated publicly in November 2006 that the Company's "go-forward" tax rate for the end of the 2006 fiscal year would be "39.5%, or possibly higher." (Complainant's Request for Official Notice of Adjudicative Fact, Ex. 7, p. 33.) The annual tax rates for the three prior fiscal years were all at or above 39.5% (39.9% for 2005; 40.5% for 2006; and 39.5% for 2007). (Complainant's Amended Closing Brief, p. 5.) In fact, the Company's final tax rate for FY2006 calculated by the Complainant was 39.528%. (Complainant's Opposition Brief, Ex. 15, p. 4.) Mr. Martin stated in his affidavit that a less than 1% differential in the tax rate is "a significant difference." (Decl. Keller W. Allen in Support of Respondent's MSJ, Ex. B, at 1.) Additionally, the SEC has determined that "whether [a] misstatement arises . . . from an estimate and, if so, the degree of imprecision inherent in the estimate," is a consideration which could render a qualitatively small misstatement material. U.S. Securities and Exchange Commission, *Staff Accounting Bulletin No. 99*, Release No. SAB 99 (Aug. 12, 1999), *codified at* 17 C.F.R. pt. 211, Subpart B.

Given this record evidence, I conclude that a Tax Director in the Complainant's position could reasonably have believed that the use of an estimated tax rate in internal records that was at least 0.5% below the expected tax rate (as evidenced by Mr. Dick's public statement concerning a 39.5% "go forward rate") constituted a violation of the ICOFR rules requiring accuracy in internal record-keeping.

The Respondent argues in rebuttal that the internal record at issue was merely a private tool used by Mr. Martin, not a formal "record" subject to GAAP or implicated by the ICOFR rules, and therefore not a proper trigger of the protections of SOX. This argument is unconvincing, for two reasons. First, as I discussed above, reasonable belief as to manipulation

[21] Although the Complainant, who proceeded in this matter *pro se*, does not enunciate her legal theories with the same precision as we do here, her general theories of the alleged violation are easily apparent given her repeated reprinting of Section 13(b)(2)(A) of the Securities and Exchange Act in her communications with OSHA and in her pleadings. A high level of legal analysis by the Complainant is not a prerequisite to a finding of protected activity. To be protected, her communication need only have definitively and specifically "implicated" a covered law. *Fraser v. Fiduciary Trust Co. Int'l,* 417 F. Supp.2d 310, 323 (S.D.N.Y. 2006).

of purely internal records can also trigger SOX protection. As another ALJ has previously stated,

> [T]he manipulation a whistleblower identifies as inappropriate [need not] actually appear in an external report or statement before the Act's protections are triggered. The value of the whistleblower resides in his or her insider status. . . . By blowing the whistle, they may anticipate the deception buried in a draft report or internal document, which if not corrected, could eventually taint the public disclosure.

Morefield v. Exelon Servs., Inc., 2004-SOX-2 at 5 (ALJ Jan. 28, 2004).

Second, I am not persuaded by the Respondent's witness testimony suggesting that the internal record in question was, in fact, thoroughly "internal" in nature and purpose. The Complainant argued that this Spreadsheet was used more broadly as a "temporary or interim general ledger," which set "earnings expectations" with Mr. Dick that she would feel pressured to meet in her final calculations. (Complainant's Amended Closing Brief, pp. 2-6.) She also argued that even if the Spreadsheet was used solely on an internal basis, it was still subject to the SEC rules and ICOFR regulations that require internal accounting work papers to provide "reasonable assurance" as to their accuracy, such that Mr. Martin was under an obligation to use reasonably accurate numbers in the Spreadsheet.[22] (RX Z, pp. 12-13).

Mr. Dick's account of the Spreadsheet's use gives some credence to the Complainant's position. He testified that the preliminary numbers in the Spreadsheet are routinely used "to see where we are in relation to what our earnings guidance had been" in order to prepare the executive team for annual and quarterly press releases concerning the Company's progress towards its earnings guidance and conference calls with analysts relative to financial performance.[23] (HT, p. 239.) He also stated that the estimated tax rate "had been reported in our preliminary close process." (HT, p. 238.) Ms. Williams also commented that the purpose of the Spreadsheet was "so that [she] c[ould] keep an accurate assessment of where we [we]re as far as our financial statements are concerned," which raises an additional inference that the Spreadsheet bore some clear relationship to the production of the financial statements. (Complainant's Amended Closing Brief, p. 4.)

Mr. Dick also testified that as of February 18, 2007, executive management was already "getting ready for our earnings release." (HT, p. 237.) As such, I am persuaded that at the time of the Complainant's communications with Mr. Dick and Mr. Martin on February 18, 2007, a Tax Director in the Complainant's position could reasonably have believed that the numbers in the Spreadsheet would bear some influence on the information Mr. Dick would provide publicly in the upcoming earnings release.

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[22] In support, during her communications with OSHA and in her subsequent pleadings, the Complainant has cited to Section 13(b) of the Securities and Exchange Act of 1934, "Form of report; books, records, and internal accounting; directives." Securities and Exchange Act of 1934, 15 U.S.C. § 78m(b) (cited in RX Z-13.) (*See infra*.)

[23] Mr. Dick confirmed, however, that later in the process these preliminary numbers would be "dumped" in exchange for the final numbers calculated by the Complainant. (HT, p. 240.)

That said, I am not necessarily persuaded by the Complainant's position that Mr. Martin's use of the 39 percent rate was, *in fact*, unreasonable to an extent sufficient to violate ICOFR rules concerning accurate internal record-keeping. Testimony from both Ms. Williams and the Complainant establish that this use of a holding place rate was an "appropriate" and "very common practice" for purposes of the preliminary analysis. (HT, p. 485.) As Ms. Williams explained, during the preliminary year-end close work, it is necessary to select a solid rate "so that anybody else who is doing any analysis in the financial statements isn't having numbers changing on them all the time as we're going through the finalization process." (HT, p. 314.) Testimony from Ms. Williams raised an inference that the exact number used for that tax rate is not necessarily of paramount importance; rather, what *is* important is the fact of the number's solidity during the analysis process. The Complainant conceded the basic propriety of Mr. Martin's use of a possibly inaccurate tax rate number as a "holding place rate" in a spreadsheet: "Yes, it is a normal part of the process to record a basic rate as a holding place." (HT, p. 333.) The Complainant contends, however, that the 39% flat rate was too low a number to reasonably use as a holding place rate.

Mr. Martin testified that he decided to use a 39% flat rate on the basis of numbers communicated to him by the Complainant. He reviewed those tax rates provided to him on the Estimated Rate Document, including the 38.94% provided for FY2006 Q4, and "rounded the number to somewhere in the estimate of where [he] thought it might be." (HT, p. 667.) He also testified that his choice of the 39% flat rate took into account prior communications from the Complainant concerning the possible tax rate:

> Th[e] [Estimated Rate Document] wasn't the first set of numbers that she and I had discussed. There was a rate that was actually a little lower than this that was originally discussed. There was a rate that was a little higher than this that was discussed. I basically took an estimated number.

(HT, p. 664.) Mr. Martin testified that he did not necessarily expect this 39% rate to be the final tax rate used in the formal tax provision papers filed with the SEC, but he argued that this expectation of a higher final number did not render his preliminary use of the 39% number unreasonable. He represented that it is "fairly common to get updated tax rates when things are moving forward and earnings change," and that he "fully expected [the tax rate] to change" once the Complainant completed her calculations for the formal tax provision. (HT, p. 662; HT, p. 664.)

Moreover, every witness interviewed on the topic of the Company's tax rates, including the corporate controller who made use of the tax rate in the Spreadsheet, opined that the Company's tax rate tended to be variable between 38% to 40%. (HT, p. 276, 661, 328.) Ms. Williams refused to agree with the Complainant that the Company had a "typical booking rate" around 39.5%, as the rates fluctuated so frequently. (HT, pp. 328, 480.) The Complainant's own evidence demonstrated that the annual tax rates in the three prior fiscal years demonstrated a variance from year to year of between 0.6% to 1.0%. Moreover, the Complainant herself provided Mr. Martin with a possible tax rate of 38.94% for Q4 of FY2006, the most recent fiscal quarter at the time in question, and at the time she considered that rate the "best case scenario" (and therefore not an utterly inconceivable rate) for FY2006. The tax rate worksheet she provided to Mr. Martin also showed a variety of tax rates for FY2006 below 39.5% — not only

in a single quarter, as the Complainant suggested, but in *multiple* quarters in FY2006: 39.29%, 39.42%, and 38.94%. (CX 16, p. 2.) Additionally, four days after she raised concern on February 18 over Mr. Martin's use of a 39% flat rate, the Complainant suggested in an e-mail to Mr. Dick and Mr. Martin that the rate was likely down to 39.2%, and only one week later, the Complainant provided what appears to be a further set of tax rates ranging from as low as 38.884% to 39.995%. (RX Z, p. 5; HT, p. 671; CX 21, p. 50.) Moreover, Mr. Martin's rejection of the Complainant's advice to not use or rely on the estimated 38.94% tax rate she gave him is not an inherent violation of securities law. *See Welch v. Cardinal*, ARB No. 04-064 at 14 (rejecting the argument that a Respondent's rejection of the CFO's advice on an accounting matter signaled an inherent violation of securities law.)

However, this evidence of the variability of the annual rates *above* 39.5% and the occasional occurrence of *quarterly* rates below 39% does not necessarily undermine the Complainant's contention that she reasonably believed that use of a 39% rate in the preliminary ledger *for the fiscal year in question* was grossly inaccurate and thus reasonably construable as a violation of ICOFR's requirement of accurate accounting in internal records. Because as of February 18 the low estimated rate could have been communicated publicly in the earnings release, and the evidence that a less than 1% tax rate difference could carry significant importance to shareholders who learned of the earnings release numbers, I am persuaded that a reasonable Tax Director in the Complainant's position would "more likely than not" have believed that Mr. Martin's use of a low estimated rate in the preliminary ledger constituted a violation of ICOFR. I therefore find that the Complainant has met her preponderance of the evidence burden as to the objective reasonableness of her February 18 complaint.

The Complainant also puts forth additional theories for her reasonable belief of a violation of ICOFR rules.

Her second complaint concerning Mr. Martin's use of the 39% rate involved her belief that Mr. Martin's instruction to Ms. Williams constituted a "management override" of established internal control processes because the 39% tax rate constituted a *change* from the 39.5% rate, which, the Complainant represented, was the number that "normally would have been there." (Complainant's Amended Closing Brief, p. 4; HT, pp. 480-81.) She alleges that she reasonably believed Mr. Martin's instruction to the controller concerning the tax rate constituted a "knowing . . . circumvent[ion]" of an internal accounting control, since it was "typically" the Complainant's role to provide tax rate information to the controller. 15 U.S.C. § 78m(b)(5). The Complainant introduced two theories of process violation: a) she suggested that Mr. Martin's instruction to the controller was an attempt by him to override or replace the Complainant as the source of the *final, recorded* tax rate; and b) she argued that Mr. Martin had no authority to provide *any* information to the corporate controller concerning any tax rate, preliminary or otherwise, and had thus violated a basic internal control process by giving the controller any instructions concerning tax rates for any purpose.

Concerning her first theory of management override, the evidence and testimony at the hearing confirmed the validity of the Complainant's basic contention that it would not have been consistent with the Company's system of internal controls for the CFO to have given the controller any instructions as to the numeric dimensions of a *final* tax rate. However, the record does not support a finding that Mr. Martin instructed the controller to record a *final* tax rate, or

that he attempted to circumvent in any way the Complainant's process of calculating that final tax rate.

The Complainant argued that Mr. Martin did not have "procedural authorization to instruct the corporate controller to *record* any tax expense, at any rate," and that his instruction to the controller evidenced his intention to override the Complainant as the source of the final rate. (Complainant's Amended Closing Brief, p. 2 (emphasis added)). She stated repeatedly her belief that Mr. Martin had attempted to "interrupt . . . a process at its inception" by attempting to "*record* a tax rate" with the Controller before the Complainant had done her tax provision work. (HT, pp. 83, 484 (emphasis added).) She repeatedly referenced the fact that when Mr. Martin gave the instruction to Ms. Williams, the Complainant had not yet received her trial balance which she required in order to begin her final tax rate calculations. (*See supra.*) She deemed this fact suggestive that Mr. Martin had attempted to override or obviate her tax provision process altogether. Meanwhile, she also stated that the Company's system of internal control procedures, under which she herself was always the source of the final tax rate, prevented such an override from happening. (*See, e.g.*, HT, p. 373 (stating that Mr. Martin could not have instructed her to come up with a specific tax rate even if he had wanted to, because "it ends up depending on me and I won't let that happen.").)

Mr. Martin, in turn, represented that he never had any intention of overriding the Complainant's provision of the *final* tax rate to the corporate controller. He considered his spreadsheet was something entirely separate from, and preliminary to, the Complainant's final calculation process. (HT, pp. 475-76, 662.) In support of his denial that he could have had any intent to interfere with the Complainant's *final* calculation process, he pointed out that the instruction to the controller was given very early on, before the Complainant had even received her trial balance. (*See supra*, HT, pp. 662-64).

None of the witnesses interviewed on the matter provided support for the Complainant's interpretation of Mr. Martin's instruction as interfering with the final calculation process. The Complainant has repeatedly referenced the fact that Ms. Williams saw fit to inform her on February 18 of Mr. Martin's instruction. The Complainant construed Ms. Williams' information as an indication that Ms. Williams believed there was something improper in Mr. Martin's instruction. (*See, e.g.*, HT, p. 79). However, Ms. Williams' hearing testimony did not support this interpretation. Ms. Williams testified that she understood and expected that the Complainant's final tax rate would result in changes to the spreadsheet ledger once the holding place rate was replaced by the actual rate produced by the Complainant. Ms. Williams openly corrected the Complainant's erroneous characterization of Mr. Martin's instruction as an instruction to "book" or "record" a tax rate:

> [The Complainant]: Do you recall Sunday, February 18, I came into the office . . . [a]nd you told me that Mr. Martin had told you to book a 39 percent rate. Is that correct?
>
> [Ms. Williams]: The booking of the rate is not an accurate term for what we were doing at that particular point in time. . . . I did not book, which is put into the books and records of . . . Coldwater Creek, a final tax rate until I had that final entry from you.

(HT, pp. 314-15.) Ms. Williams went on to explain that such an instruction to "book" or "record" a 39% rate at that early stage in the close process would have been illogical:

> [Mr. Allen]: Could you even book an entry until you received a final tax rate from Ms. Hillenbrand?
>
> [Ms. Williams]: No. . . . I couldn't because the final tax entry is actually an adjustment of several balance sheet entries as well as the P&L tax expense. And it requires having all of those balances to their accurate amounts before we can actually book that adjustment.

(HT, p. 322.) Mr. Martin also confirmed this correction: "You can't actually book a rate. You book a provision, which consists of balance sheet related items. So there really isn't . . . an entry here that could be made for Ms. Williams." (HT, p. 662.)

Concerning her second theory of management override, the Complainant produced no evidence to prove that Mr. Martin lacked any authorization to communicate with the controller concerning tax rates used for purposes *other than* the recording of the final rate. The Complainant contended that Mr. Martin should not have provided *any* instructions whatsoever to the controller concerning the tax rate. "Mr. Martin does not typically tell . . . Ms. Williams what rate to put in the spreadsheet. That information comes from me, not from Mr. Martin." (HT, p. 482.) Beyond the inevitable observation that the Complainant's use of the word "typically" here suggests that the rule is not a hard-and-fast one, the Complainant produced no witness testimony or other persuasive evidence to support her claim that she was the exclusive source of communication with the Controller concerning tax rates used for purposes *other than* the final tax provision. Moreover, a fact finder could conclude that the 39% tax rate did in fact come from the desk of the Complainant in this case, as well, since the 39% tax rate was drawn from the Estimated Rate Document prepared for Mr. Martin by the Complainant.

I find that there is insufficient evidence to show that Mr. Martin was guilty of any management "override" or process violation in giving an instruction as to the preliminary use of a tax rate provided to him by the Complainant, and the record does support a finding that the Spreadsheet analysis process was distinct and separate from the Complainant's own process of calculating the final tax rate.

I therefore decline to find the Complainant possessed a reasonable belief as to this theory of the alleged misuse of the 39% tax rate.

Finally, the Complainant has also introduced a theory of shareholder fraud pertaining to Mr. Martin's use of the 39% tax rate. She alleges the existence of a plot by Mr. Martin to use the 39% rate to set up inaccurate "earnings expectations" with Mr. Dick (insofar as a lower tax rate would generate higher earnings numbers), to then "seek earnings," and pressure the Complainant manipulate her numbers to meet those expectations, in order to inflate the public earnings release. (Complainant's Amended Closing Brief, p. 3; HT, pp.83, 407, 477, 480-82.) She alleges that this early use of a 39% rate "put [her] in a position of either manipulating the provision work to meet the expectation set, or appear[ing] incompetent." (Complainant's Amended Closing Brief, p. 3.) She argued at the hearing that a lesser person without her strength

of convictions would have bowed to this pressure: "[W]ere I not who I am, if there was someone in this position . . . who was intimidated or pressured . . . You know, I became a control. It was my determination not to let this happen, not to cave to any pressure." (HT, p. 94.)

I am persuaded that she subjectively believed that this pressure existed, as evidenced by her emotionally charged emails to Mr. Martin and Mr. Dick during the relevant time period. (HT, p. 94; *see, e.g.*, RX Z, p. 6.) However, the Complainant has failed to support these allegations of attempted shareholder fraud with any credible evidence showing that she possessed a reasonable belief that such a scheme existed.

Mr. Dick testified that he did not hold any earnings expectations beyond a basic expectation of accuracy: "I think we always had a philosophy at the company that the numbers were what the numbers were." (HT, pp. 274, 287). The only "expectation" Mr. Martin was aware of was the expectation "that we would hit our forecast, and that was calculated based on a rate that was provided by Ms. Hillenbrand weeks before." (HT, p. 668.) While Mr. Dick's testimony that the Spreadsheet was routinely used to prepare management for a public conference call does serve to raise an inference that the Complainant's concerns as to the public impact of inaccuracies in the Spreadsheet had some reasonable basis, this mere inference of reasonableness is not enough to support a finding that Mr. Martin did in fact possess any intent to mislead the analysts during the conference call. The conference call did not take place in this case until March 7, several days after the Complainant completed her final tax calculations. (HT, pp. 323-24.) Ms. Williams specifically testified that the March 7 public earnings statement included the final tax rate arrived at by the Complainant in the preceding days, and the Complainant has presented no evidence to raise any clear inference that Mr. Martin intended to include the low estimated tax rate in this public release. (HT, pp. 323-24.) The 39 percent rate was also not used in any final SEC filings or in the work papers underlying such filings. (*See, e.g.*, HT, pp. 240, 475-76.) The final tax rate recorded was the tax rate supplied by the Complainant. (HT, pp. 474-75; Complainant's Opposition Brief, Ex. 15, p. 4.) The Complainant has presented no evidence that Mr. Martin ever attempted to insinuate a particular tax rate into the formal filings, and she informed Ms. Knepper on March 30, 2007, that she was at no time instructed by Mr. Martin or anyone else to come up with a particular tax rate. (CX 5; HT, pp. 256, 389.)

In summary, the Complainant has failed to show that Mr. Martin's actions involving the 39% tax rate had any fraudulent intent, and I will discuss this theory of attempted shareholder fraud no further. I will proceed with my analysis of the February 18 claim of protected activity on the basis of her ICOFR/inaccuracy-of-internal-records theory only.

Materiality

The Respondent argued in its Pre-Hearing Brief that because the Complainant's concerns as to a violation of ICOFR rules concerning the maintenance of accurate internal records implicate shareholder fraud, the Complainant should be required to prove that her concerns alleged a material fraud against the shareholders and scienter. (Respondent's Pre-Hearing Statement, pp. 33-35.) In its Closing Brief, the Respondent narrowed this argument to the proposition that the Complainant's belief could only have been objectively reasonable if the

conduct she complained of was of material significance to the Company's financial condition. (Respondent's Closing Brief, pp. 14-15.)

If the Complainant's claim of protected activity on February 18 had relied wholly upon allegations of shareholder fraud, the Respondent's positions would have been accurate. SOX cases in which courts have found a materiality requirement have been consistently predicated upon claims of shareholder fraud. *See, e.g., Deremer,* 2006-SOX-2 at 54 ("fraudulent activity is not actionable under SOX, if it is not material or significant enough to constitute *fraud against shareholders*") (emphasis added). The Ninth Circuit recently held that in order for a complainant to possess a reasonable belief as to her allegation of shareholder fraud, her theory of fraud "must at least approximate" the five basic elements of a securities fraud claim. *Van Asdale,* 577 F.3d at 1001. In the Ninth Circuit, these elements include: 1) a *material* misrepresentation or omission of fact, 2) scienter, 3) a connection with the purchase and sale of a security, 4) transaction and loss causation, and 5) economic loss. *Id.* (quoting *In re Daou Sys., Inc.,* 411 F.3d 1006, 1014 (9th Cir. 2005)).

However, as I noted above, SOX does not extend protection only to those employees who allege shareholder fraud. SOX protects employees who report conduct which the employee reasonably believes constitutes a violation of any one of six enumerated laws: section 1341, 1343, 1344, or 1348, any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). The six enumerated sets of laws are each set off by commas, only the last of which makes any mention of fraud against shareholders. In *Van Asdale*, the complainants' general claim of protected communications as to "shareholder fraud" fell within the final category of laws enumerated in SOX. *Van Asdale,* 577 F.3d at 997. I see no reason, therefore, to extend the materiality and scienter requirements put forth in *Van Asdale* to the Complainant's claim which was based on her reasonable belief in the violation of a different category of law — "any rule or regulation of the SEC" — than that at issue in *Van Asdale*. 18 U.S.C. § 1514A(a)(1). The ARB recently clarified in *Lewandowski* that each of the categories of laws enumerated in subsection 1514A(a)(1) is its own separate and distinct ground of protected activity. The ARB's discussion clearly indicated that the category of "shareholder fraud" is unique in requiring a showing of materiality, scienter, and the other elements of a fraud claim. *Lewandowski,* ARB No. 08-026 at 8-9.

Although a materiality showing may be required to establish a violation of some of the "rules or regulations of the SEC," not all contain a materiality prerequisite. *See, e.g.*, 17 C.F.R. § 240.13a-15(a); 17 C.F.R. § 240.13a-15(f)(1)-(2). The SEC regulation upon which I have based a finding that the Complainant possessed an objectively reasonable belief as to an ICOFR violation on February 18 — 17 C.F.R. § 240.13a-15(f)(1)-(2) — does not possess a materiality qualifier.[24]

[24] The Respondent's Pre-Hearing Statement cites to the materiality qualifier in subsection (3) of 17 C.F.R. § 240.13a-15(f) to support Respondent's argument that the Complainant must allege materiality concerning any belief predicated on § 240.13a-15(f). However, subsection (3) relates specifically to "timely detection of unauthorized use or disposition of the issuer's assets," and bears no relation to the Complainant's claim of inaccurate record-keeping which is discussed in subsection (1) and (2). These subsections, in contrast, do not possess a materiality qualifier.

Moreover, SOX itself does not contain any language that explicitly inserts a materiality threshold as a predicate for whistleblower protection. This interpretation is buttressed by case law holding that protected complaints may be based on perceived violations of internal accounting controls. *See, e.g., Morefield,* 2004-SOX-2 at 6 (finding that a complainant may possess a protected reasonable belief as to violation of internal accounting controls even where the amount of money involved was less than 0.0001% of the company's $15 billion in annual revenues: "Sarbanes-Oxley places no minimum dollar value on the protected activity it covers," and "[t]he mere existence of alleged manipulation, if contrary to a regulatory standard, might not be criminal in nature, but it very well might reveal flaws in the internal controls that could implicate whistleblower coverage for seemingly paltry sums.")[25] Since SOX does not contain language imposing a general materiality requirement, and at least one SOX-enumerated law applicable to the Complainant's claim does not require a materiality showing, I decline to insert a materiality threshold into the Complainant's burden of proof. *See generally Morefield*, 2004-SOX-2 at 6; *accord Richards v. Lexmark Int'l, Inc.*, 2004-SOX-49 at 32 n.44 (ALJ June 20, 2006); *Henrich*, 2004-SOX-51 at 8-9.

Thus, I find the Complainant is not required to put forth evidence of materiality to demonstrate a violation of 17 C.F.R. § 240.13a-15(f)(1)-(2).

Subjective Belief

To trigger the protections of the Act, the employee must also have held "a subjective belief that the conduct being reported violated a listed law" at the time of the communication. *Van Asdale*, 577 F.3d at 1000. She need not possess a fully formed conviction as to the illegality of challenged conduct — suspicion as to its illegality can be enough. *Van Asdale*, 577 F.3d at 1002 (finding a subjective belief where the complainant informed her employer that she thought an investigation should be conducted to see if fraud had occurred).

For her February 18 communication to Mr. Dick to be protected, therefore, the Complainant must have subjectively believed at the time of her communication that Mr. Martin's conduct constituted a violation of the ICOFR rules. The Complainant has testified that she held such a subjective belief at the time, and stated in her pleadings that during her discussion with Mr. Dick on February 18 she "specifically and clearly addressed the blatant impropriety of [Mr. Martin's] actions at that time, to include violation[s] of the defined SOX process established for Internal Controls Over Financial Reporting ('ICOFR')." (*See, e.g.*, HT, p. 80; Complainant's Brief in Support of Affirmative Defense, pp. 4-5.) The vehemence of her outburst on February 18 adds support to her claim that she subjectively believed wrongdoing had occurred. Moreover,

[25] The Respondent has repeatedly introduced the legal argument sections of its pleadings with a citation from a 2005 ALJ decision which stated that Congress's intent in passing SOX was "to protect shareholders by requiring accurate reporting of significant information concerning a corporation's financial condition." *Harvey v. Safeway, Inc.*, 2005 WL 4889073, 2004-SOX-21 at 29 (ALJ Feb.11, 2005) (emphasis in original) (finding that errors in calculating the wages of an individual employee did not have the "necessary magnitude to raise a concern about fraud against the shareholders of Safeway" and therefore did not raise concerns related to SOX). I disagree with that conclusion. The goal of the whistleblower provision of SOX can be understood as somewhat distinct from the remainder of SOX. With Section 806 Congress expressed its desire to take advantage of the unique position of employees within an institution who are uniquely able to prevent the magnification of relatively small violations of internal controls into more major problems. *See, e.g. Morefield*, 2004-SOX-2 at 6.

in late February, she visited Mr. Halpin, the DVP of Internal Audit, to speak about her concerns with Mr. Martin. (HT, p. 407.) Mr. Halpin confirmed at the hearing that this visit took place to discuss the Complainant's "general concerns about Mr. Martin" between the dates of February 18 and March 5, 2007. (HT, p. 407.)

I am well aware that anger among colleagues can be engendered by causes other than suspicions of illegal conduct. During the time in question, the Respondent's Finance Department was apparently rife with environmental pressures due to the suspected $4 million earnings miss and the inherent pressures of the annual close process. The record suggests that the Complainant's outburst was motivated by reasons other than her belief in an ICOFR violation. For example, the Complainant's February 19 apology to Mr. Martin and Mr. Dick for her outburst did not suggest that her outburst was motivated by her perception of potentially illegal conduct by Mr. Martin. Instead, she attempted to explain the incident away humorously, attributing it her female menstrual cycle and attendant emotional instability. In addition, her comments at the hearing demonstrated that a significant aspect of her frustration over Mr. Martin's action involved her belief that his use of a lower tax rate number would set up a high earnings expectation with Mr. Dick, who she would later be forced to disappoint, and which she felt would make her "appear incompetent" and potentially impact her professional reputation. (Complainant's Amended Closing Brief, p. 3.) Thirdly, in the course of the OSHA investigation she stated that as of her March 31 evening meeting with Mr. Dick, she did not believe that Mr. Martin had done anything "illegal," and that she felt she could still work with Mr. Martin, but that she had simply been "seeing things that [we]re causing [her] concern." (Complainant's Second Request for Official Notice, Ex. 2, p. 17.) These facts detract from the Complainant's claim that her vehement anger on February 18 was directly caused by her belief that Mr. Martin's actions constituted an internal control violation.

I am nonetheless persuaded that the Complainant's visit to Mr. Halpin, the Company's DVP of Internal Audit, to discuss concerns about Mr. Martin in late February was probative of her subjective belief that Mr. Martin's actions in February involved an internal control problem. This finding is supported by the vehemence of her expressions to Mr. Martin and her testimony under oath concerning the content of her conversations with Mr. Dick and Mr. Halpin. Even though her statements to Mr. Dick on March 31 reveal that she did not, at that time, firmly believe Mr. Martin's actions were "illegal" per se, I nonetheless find that the evidence demonstrates that she held a subjective belief as to the impropriety of his actions as concerns the ICOFR rules on accuracy of internal record-keeping. Certainty about the illegality of challenged conduct is not required in order for complaints to be protected under SOX. *See Van Asdale*, 577 F.3d at 1002.

I therefore find that the Complainant has met her burden of showing that she held a subjective belief during the time in question as to Mr. Martin's alleged violation of the ICOFR rules.

Definitive and Specific Communication of Her Reasonable Belief to Her Supervisor

Sarbanes-Oxley protects employees who provide information to any "person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514A(a)(1)(c).

Mere belief that a violation has occurred, without clear communication of the belief to a person with such authority, is not protected. Protected communications to the employer must be specific as to the facts underlying the complaint. *Lewandowski*, ARB No. 08-026 at 11. While the complainant need not cite a specific code section she believes was violated,[26] the "context" of the disclosure and "the circumstances giving rise to the communication," must "implicate the substantive law protected in Sarbanes-Oxley 'definitively and specifically.'" *Fraser v. Fiduciary Trust Co. Int'l,* 417 F. Supp.2d 310, 323 (S.D.N.Y. 2006). The relevant inquiry is not what the employee alleged in her OSHA complaint, but what she "actually communicated" to her supervisor prior to the alleged adverse action. *Platone*, ARB No. 04-154 at 17; *Lewandowski*, ARB No. 08-026 at 11.

The evidence does not support a finding that the Complainant's outburst on the telephone with Mr. Martin constituted a protected communication. She has not provided evidence that she stated to Mr. Martin during this call her belief that his use of the 39% rate was a violation of internal controls; her comments suggest merely that she "blew a gasket" and expressed her anger at him for using a number that she had earlier instructed him not to use. (HT, p. 79; RX Z, p. 8.) The record contains very little testimony or evidence concerning what was spoken during this exchange, beyond the single initial statement by the Complainant. (HT, p. 79 ("I'm never giving you another single fucking number ever again.").) A complainant's violent expression of emotion, without evidence that the Complainant expressly related that expression of emotion to a perceived violation of law, does not rise to the level of protected activity.

Her subsequent conversation with Mr. Dick on February 18, however, does meet the requirements of a specific communication concerning her allegation of a violation of SEC rules by Mr. Martin. Mr. Dick was not questioned in detail at the hearing concerning the contents of the discussion with the Complainant that followed her outburst, and he did not voluntarily discuss its contents in his pre-hearing Affidavit. I am therefore left with little evidence concerning the contents of this discussion other than what the Complainant herself alleges: that after the outburst, Mr. Dick asked her to explain to him what her perceived problem was, at which time she showed him the Estimated Rate Document, explained to him the reason for her outburst, and specifically addressed to him her belief that Mr. Martin's actions constituted a violation of ICOFR. (Complainant's Brief in Support of Affirmative Defense, pp. 4-5.)

In light of the violence of her expression to Mr. Martin, I am persuaded that Mr. Dick would have expected and/or requested an explanation of the reasons behind her outburst. Moreover, Mr. Dick has not openly opposed the Complainant's account of the meeting that followed. I therefore accept the Complainant's explanation as to the meeting's content, including her claim that during this meeting she alleged specific misconduct involving a violation of ICOFR rules.

[26] *Van Asdale*, 577 F.3d at 997 (quoting *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008)).

I therefore conclude that the Complainant has met her burden of showing that her communications with Mr. Dick on February 18, 2007, involved activities protected under Section 1514A.[27]

The April 3, 2007, SOX Certification

The Complainant alleges that she also engaged in protected activity on or about April 3, 2007, when she "submitted detailed certifications as part of the year-end SOX process," and discussed these concerns with Mr. Dick, Loni Knepper, John Hayes, and Fred Halpin between Friday, March 30th and Monday, April 2nd. (Complainant's Amended Closing Brief, p. 6). The Complainant has alleged that all of the concerns listed on her Certifications — which included complaints about inadequate resources and staffing, Mr. Martin's involvement with the tax rate discussed above, and mention of the workers' compensation error — "pertained to internal controls with the ability to impact reported income." (CX 13, p. 7; ALJX 3, p. 2.) She alleges that the workers' compensation accrual problem pertained to an internal control violation by Mr. Martin, involved an understatement of income for the fourth quarter of FY2006, and implicated his intent to mislead the auditors. (ALJX 3, p. 2.) She contends that all of her Certification disclosures are protected under SOX because they address the Company's "systemic, environmental" failures to provide reasonable assurances of the accuracy of its financial statements (in violation of § 240.13a-15(f)(1)-(2)), and because her mention of the workers' compensation error involves her allegation of an attempt by Mr. Martin to mislead the outside auditors in violation of Section 13b of the Securities and Exchange Act (*codified at* 17 C.F.R. § 240.13b2-2).[28] (CX 13, pp. 1-7; *See* Complainant's Closing Brief, pp. 10-12.)

The Respondent contends that the Complainant has not shown that she engaged in protected activity on or about April 3, 2007, because the concerns she expressed raised no new information which her employers were not already aware of, and she possessed neither a subjective nor objectively reasonable belief that the Respondent was in violation of any law. In defense, the Respondent argues that no fraudulent influence of the auditors occurred concerning the worker's compensation error, the accrual error of $550,000 was immaterial to the Company's financial statement, and the Complainant's vague reference to the accrual error in her

[27] Even though I find the evidence of the Complainant's visit to Mr. Halpin in late February corroborates her claims of a subjective belief in Mr. Martin's wrongdoing, she has not provided evidence sufficient to establish that this discussion with Mr. Halpin also constituted protected activity in its own right. (*See infra*.)

[28] 17 C.F.R. § 240.13b2-2, "Representations and conduct in connection with the preparation of required reports and documents" provides, in pertinent part:

(a) No director or officer of an issuer shall, directly or indirectly;

(1) Make or cause to be made a materially false or misleading statement to an accountant in connection with;

. . .

(i) Any audit, review, or examination of the financial statements of the issuer . . .

(b)(1) No officer or director of an issuer . . . shall directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence any independent public or certified public accountant engaged in the performance of an audit or review of the financial statements . . . if that person knew or should have known that such action, if successful, could result in rendering the issuer's financial statements materially misleading.

Certification did not amount to a "definitive and specific" report of her concerns to her supervisors.

Reasonable Belief

The clear purpose of the Complainant's Certifications was to call management's attention to a series of "Control Environment issues of a recurring nature" that she perceived at the Company. (CX 13, p. 6.) These were the type of concerns that she had raised orally before turning in her SOX certifications in every prior fiscal year. This time she provided them in written format to underscore the depth of her conviction that the problems needed to be addressed. (HT, pp. 174, 256.) The bulk of the concerns expressed in her Certifications were environmental in nature, concerning her perception of a lack of adequate resources and staffing necessary to assure "efficient, effective, and correct processing of data throughout the finance department." (CX 13, p. 1.) She stated clearly at the top of her Certification that she was not alleging knowledge of a material error or misstatement. The only mention in the Certifications of an *actual* error was her mention of the workers' compensation accrual error, which was first detected by the Deloitte & Touche auditors, and was already known to management at the time she submitted her Certification on April 3, 2007. She informed Fred Halpin on April 2 that she considered the over-accrual error to be an example of the type of error she considered was likely, given the systemic control environment problems she complained of.

As discussed above, specific allegations of shareholder fraud are not the sole means through which whistleblowers are able to secure SOX protections. A whistleblower's protected communications under SOX may include complaints as to a variety of the type of internal control concerns alleged by the Complainant in her Certifications:

> [R]easonable concerns may, for example, address the inadequacy of internal controls promulgated in compliance with Sarbanes-Oxley mandates or SEC rules that impact on procedures through out (sic) the organization, or the application of accounting principles, or the exposure of incipient problems which, if left unattended, could mature into violations of rules or regulations of the type an audit committee would hope to forestall.

Morefield, 2004-SOX-2 at 5. Courts have previously held that allegations of deficient internal controls can constitute protected activity. *See, e.g., Smith v. Corning,* 496 F. Supp. 2d at 248-49 (disclosing a violation of generally accepted accounting principles or deficient internal controls can constitute protected activity); *accord Mahoney v. KeySpan Corp.*, No. 04 CV 554, 2007 WL 805813 (E.D.N.Y. Mar. 12, 2007).

However, in cases where courts have accorded SOX protection[29] to complaints of internal control deficiencies, the protected communications have also disclosed *specific* errors that the complainants personally identified in the Company's internal ledgers or external reports, caused

[29] Many of the decisions referred to are orders denying respondents' motions for summary decision. As such, the orders do not go so far as to formally 'accord' protection under SOX, but rather indicate the finding that, given preliminary available evidence, the complaints as to internal control violations showed a strong likelihood of meriting protection under SOX.

by those internal control deficiencies. *See, e.g., Smith v. Corning*, 496 F. Supp. 2d at 245 (noting that the complainant's report to management included his discovery that Respondent's data processing system "was not correctly reporting financial data, [which] affected the reporting of sub-ledgers to the general ledger, making the general ledger incorrect."); *Morefield*, 2004-SOX-2, at 1 (detailing the complainant's report to management that he had detected "improper accounting treatment" of various specific elements in the company's ledgers and budget forecasts); *Mahoney*, 2007 WL 805813 at *1 (explaining the complainant's identification of improper internal and external reporting of post-employment severance benefits).

In contrast, as the Complainant clearly stated at the beginning of her Certifications, the purpose of the Certifications was not to disclose or identify any actual errors occasioned by a deficiency of internal controls. (*See* CX 13, p. 6 ("I am not asserting or claiming knowledge of a material error.").) Rather, her purpose was evidently twofold: 1) to provide a caution to management against the *possibility* of future errors, and 2) to complain of the generally strained working conditions and lack of ideal resources in the Tax area. The only specific, actual error the Complainant identified was the worker's compensation error, which she has called a "human error," was originally detected by the Deloitte & Touche auditors, and was already known to management at the time the Complainant submitted her Certification. (HT, p. 176)

Mere mention of an already identified error in a communication to an employer does not automatically transport that communication within the protection of SOX. To hold otherwise would be to risk opening up the floodgates for meritless whistleblower claims. To be protected as a whistleblower, a complainant must in some sense "blow the whistle," and raise an alarm, calling the employer's attention to conditions, errors, or manipulations that, so far as the employee knew at the time of the report, were as yet unknown by management or by the corporate community at large.[30]

Neither am I persuaded that the Complainant's mention of the over-accrual error could have provided support for a reasonable belief that the Company was in violation of any federal law for the protection of shareholders, or regulation of the SEC. First, the over-accrual was a one-time human error (in contrast to the often more suspect *ongoing* accounting discrepancies). A single human error, which the Respondent showed signs of immediately addressing by meeting with the auditors to discuss the matter, is insufficient to raise reasonable concerns that the Company's ICOFR rules were being violated. Second, the error was never clearly identified as having originated within the Company, such that it could have been reasonably viewed by the Complainant as evidence of the Company's flawed internal controls. Rather, the record suggests that the error originated with the Company's insurance broker, rather than with any area of the Respondent's Finance Department (*see* CX 4, pp. 1-2 ("[W]e obtained the rates from our insurance broker, which were input into our payroll system . . . We believed the rates obtain[ed]

[30] The ARB has noted in dicta, "we do not believe that activity is protected only when the complainant is the first to raise the issue." *Klopfenstein*, ARB No. 04-149 at 17 (rejecting the respondent's argument that the complainant's repeated reports identifying and underscoring an ongoing error could not constitute protected activity because the error had been identified prior to the complainant's employment). However, this dictum from *Klopfenstein* can be distinguished from the present circumstances insofar as in that case, when the complainant in *Klopfenstein* made his initial report and investigation request, he was unaware that the error had been previously identified. *Id.* Here, the Complainant was well aware that management knew of the error by the time that she "reported" it on her April 3 Certification.

through our insurance broker were the appropriate rates to use, but it was subsequently determined . . . that these were the base rates.").)[31]

I also fail to perceive any law that the Complainant reasonably believed the Respondent violated by failing to provide the Finance areas with an *ideal* level of staffing and resources. The Respondent's pace of staffing and resource increases in light of the Company's swift growth does not appear to me to have been unreasonably or egregiously slow so as to violate the SEC's ICOFR rules or provoke reasonable concern as to the accuracy of the Company's financial statements. As previously noted, the Complainant did not identify on her Certification any actual errors that resulted from the Company's alleged understaffing, and she conceded at the hearing that in spite of the environmental and time pressures the finance staff faced, the work nonetheless got done. (*See, e.g.*, HT, p. 476 ("[Mr. Allen]: In other words, you did your work. You did what you needed to do. Right? [The Complainant]: Yes.").)

Between the Complainant's hire in 2004 and her departure in 2007, the Respondent hired no fewer than four tax staff to assist her, retained the outside services of Ernst & Young and a retired KPMG Partner to provide additional assistance, and increased the salaries of the tax staff significantly. The Complainant's salary increased by nearly 50% between 2004 and 2006. Between Mr. Martin's hire in 2006 and the hearing in 2008, the Company added approximately 25 new staff to the Finance areas generally. True, many of these hires took place following the Complainant's departure, and some may even have been inspired by the Complainant's Certification complaints and subsequent resignation. Nonetheless, the record shows that the Company made earnest attempts to increase staffing and resources in the Tax Department during the Complainant's employment. I decline to find that their pace was so egregiously slow as to reasonably suggest an ICOFR violation.

Neither am I persuaded that Mr. Dick's immediate response to her Certification — asking the three individuals speak with her about her concerns; meeting with her on the following Saturday evening to discuss her concerns involving Mr. Martin; and reporting on her concerns and the individuals' findings during the next meeting of the Audit Committee — requires me to find that her concerns involved a reasonable belief that the Respondent had violated a rule or regulation of the SEC. The legislative history of SOX indicates Congress's belief that the employer's decision to investigate the Complainant's concerns can support a finding that the allegations were objectively reasonable. *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) ("Certainly . . . any type of corporate or agency action taken based on the information . . . would be strong indicia that it could support such a reasonable belief.")

However, the type of investigation undertaken by Mr. Dick — asking other employees within the SOX compliance area to interview the Complainant and to document their findings — was effectively *required* of him by the SOX Certification rules established in Section 302-3 of

[31] If the over-accrual error did, in fact, originate within an area of the Company's Finance Department, it appears to me that the Complainant herself was the employee most likely responsible for the error, given her role as the Respondent's insurance liaison responsible for inputting data from the insurance carriers. (HT, pp. 687-88.) If, in fact, the error resulted from her own failures, her later attempt to "report" the error on her Certification, as evidence of the Company's control deficiencies, is unconvincing. Such a circumstance would, in contrast, imply to me that her inclusion of the error on her Certification was an attempt to deflect criticism from herself by locating fault for the error in the Company's control environment at large.

SOX (codified at 17 C.F.R. § 240.13a-15). *See* SEC Release No. 34-55929, *Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934*, at 2 ("Management is responsible for maintaining evidential matter, including documentation, to provide reasonable support for its assessment. This evidence will also allow a third party, such as the company's external auditor, to consider the work performed by management.") Obtaining written confirmations of his belief that the ICOFR rules had not been violated, and later discussing those findings with the Audit Committee, were a necessary conclusion to the investigation of her complaints required under SOX Section 302-3. Moreover, I find that Mr. Dick's Saturday evening invitation to the Complainant was clearly outside the ambit of any SOX investigation. The circumstances of the invitation persuade me that it was motivated by Mr. Dick's wish to lend a friend-and-mentor's listening ear to the Complainant's need to be heard concerning her ongoing relational conflicts with Mr. Martin. For these reasons, I conclude that Mr. Dick's inquiries do not raise the same inference of objective reasonableness that comes about when a corporation or agency engages in a fully discretionary, in-depth investigation of a complainant's reported concerns.

Finally, I also note that the Complainant may not bootstrap her second claim of protected activity onto my finding of protected activity on February 18 by virtue of her mention of the February 18 incident in the March 29 draft of her Certification. On March 7, 2007, the Company used the Complainant's *final* tax rate in its public earnings release for FY2006; given this fact, I find that the Complainant could no longer on March 29 have reasonably believed that Mr. Martin's use of the 39 percent tax rate in the preliminary record bore any likelihood of impacting the Company's financial statements for FY2006. The accuracy of the Company's March 7 external reporting of the tax rate eliminates the Complainant's ability to rely on § 240.13a-15 to support her Certification communication concerning the same instance. As explained above, I am not persuaded by the other fraud-based legal theories the Complainant has put forth in support of her concern over Mr. Martin's actions with regard to the tax rate.

In conclusion, to the extent that the Complainant's Certification was motivated by her good faith wish to assist in the prevention of financial misstatements or errors, I applaud her. However, I do not find that her written caution to management against *potential* problems, generated by inadequacies she perceived in staffing or resourcing, rises to the level of protected activity. I therefore conclude that the Complainant has not met her burden of showing that her Certification communications on or about April 3, 2007, involved activities protected under § 1514A.

Definitive and Specific Communication to her Supervisor Concerning her Allegations of Attempted Fraud by Mr. Martin Occurring on or About April 3, 2007

I have thus far addressed only one aspect of the Complainant's claim of protected activity on or about April 3, 2007. I addressed the perspective that her Certification concerns raised objectively reasonable complaints involving the Company's systemic control environment, given the requirement of § 240.13a-15(f)(1)-(2) that the Respondent provide "reasonable assurances" of the accuracy of its internal record-keeping.

However, the bulk of her attention at the hearing and in her pleadings has focused on a separate legal theory: that her Certifications constituted protected activity because her mention of the workers' compensation error and inclusion of Internet references on internal controls and material misstatements on the April 3 Certification involved her allegation of an attempt by Mr. Martin on April 3 to fraudulently mislead the Deloitte & Touche auditors in violation of Section 13b of the Securities and Exchange Act (*codified at* 17 C.F.R. § 240.13b2-2). The Complainant argues that her April 3 Certification was protected activity under SOX insofar as it referred to a fraud by Mr. Martin occurring when he 1) allegedly instructed the auditor, Ms. Fox, to record the overaccrual problem in her formal audit report as a "change in estimate" rather than as an "error," and 2) refused the Complainant's offers to confirm the final amount of the over-accrual error prior to their submission of the 10-K on April 4.

I accept the Complainant's basic contention that the question of how items in formal filings required by the SEC are characterized or classified is not an insignificant one. Such classification decisions can be relevant to shareholder interests and the purposes of SOX. As the SEC has explained in other venues, "'[t]he individual items, subtotals, or other parts of a financial statement may often be more useful than the aggregate to those who make investment, credit, and similar decisions.'" *Welch v. Chao,* 536 F.3d at 278 (quoting *Statement of the SEC, Amicus Curiae, in Support of Neither Side* at 3 [quoting the Financial Accounting Standards Board, *Statement of Financial Accounting Concepts No. 5, Recognition and Measurement of Financial Statements of Business Enterprises* 15-16, ¶ 22 (Dec.1984)].) The Fourth Circuit has held that even where a misclassification on a financial statement does not adversely affect the company's "bottom line," communications concerning those misclassifications may still trigger the protection of SOX. *Welch v. Chao,* 536 F.3d at 278 (rejecting the ARB's holding that "the misclassification of items in a financial statement can *never* 'present investors with a misleading picture of [a company's] financial condition,' so long as the misclassification does not affect the 'bottom line.'" (emphasis in original)).

On the basis of the record evidence, however, I do not believe that the Complainant ever actually communicated with management concerning this alleged April 3 incident between Mr. Martin and Ms. Fox, or her theory of fraud, prior to receiving the information on April 4, 2007, concerning the change in her duties. I am not persuaded that the Complainant's mere mention of the over-accrual error in her Certification served to communicate anything to management concerning the April 3 incidents or any alleged fraud. Mere mention of a financial error, particularly one of which the Respondent was already aware, does not equate to a definitive and specific allegation of fraud sufficient to meet the requirements established by case law concerning SOX. *See, e.g., Platone v. U.S. Dept. of Labor*, 548 F.3d 322, 326-27 (4th Cir. 2008), *cert. denied,* ___ U.S. ___, 130 S.Ct. 622 (Nov. 16, 2009) ("[T]he ALJ did not find that Platone clearly articulated her belief of mail or wire fraud to [her employer], and the ARB found that she clearly did not. It is true that she alerted [her employer] to a billing discrepancy. Yet, a billing discrepancy, without more, does not equal fraud, and Platone failed to identify to [her employer] why she believed the actions related to the discrepancies would violate securities laws and constitute fraud. . . . Therefore, Platone did not sufficiently articulate her fraud theory to [her employer], and Sarbanes-Oxley does not afford her whistleblower protection."); *see also Lerbs,* 2004-SOX-8 at 14 (finding that Complainant failed to establish that he had engaged in protected activity where he merely made general inquiries about the Respondent's conduct).

The Complainant's deposition testimony clearly established that it was not until weeks later, on April 18 and 19, 2007, when she communicated with Mr. Dick and Mr. Halpin concerning the April 3 incident during which Mr. Martin allegedly attempted to mislead the auditor Ms. Fox and prevent the timely correction of the workers' compensation error on the FY2006 financial statements. (*See, e.g.*, RX AA, p. 102.) Prior to April 4, when the Complainant learned of the Respondent's plans to alter her duties, the Complainant's only contact with her supervisors concerning the over-accrual issue consisted of three communications: 1) her listing at the end of her final SOX Certification the general statement, "Worker's compensation accrual and potential understatement of income;" 2) her addition of two web addresses for resources on internal controls and avoiding material misstatements to the bottom of the Certification; and 3) her discussion with Mr. Halpin on Monday, April 2, 2007, concerning the workers' compensation error, when she referred to the workers' compensation problem as an example of the type of error caused by overburdened staff resources. (RX P, pp. 1-3; HT, p. 414.) None of these communications raised any theories of fraud or misleading of the auditors, or even made any reference to a problematic incident involving Mr. Martin. The Complainant stated that she expected to explain the April 3 incident and her fraud theory in detail when someone followed up with her concerning her April 3 addition of the workers' compensation error to her Certification, but no one approached her. (HT, p. 118.)

To find that vague communications such as these constituted definitive and specific reports to her supervisors of fraudulent misconduct by Mr. Martin would be to require the Respondent to be clairvoyant, and would violate the essential jurisprudential policy that employees must relate their concerns with enough specificity "to permit compliance" by the employer. *Lewandowski*, ARB No. 08-026 at 8. For obvious reasons, I decline to impose such an insurmountable burden on respondents in SOX cases. I therefore find that the Complainant did not communicate her theory of fraud, or the facts underlying that theory, sufficiently to her employer to state a claim of protected activity on April 3.

Additional Protected Activity Claims

The Complainant has offered numerous claims of protected activity at different stages in the course of these proceedings concerning her SOX complaint. Her hearing testimony and statements she gave during the course of the OSHA investigation clearly indicated that her case rested upon the two instances of alleged protected activity occurring on or about February 18 and April 3, 2007, discussed at length above. (*See, e.g.*, HT, p. 111.)

The Complainant's pre- and post-hearing pleadings, however, also include additional theories of protected activity. In her Pre-Hearing Statement, she added three additional protected activities to her case: 1) her October 2006 COSO survey, 2) her discussion with Fred Halpin in late February or early March 2007, and 3) her "[c]ommunication throughout the relevant time period summarized in [her] written certifications," concerning "accounting problems" and internal controls generally.[32] (Complainant's Pre-Hearing Statement, Att. A, pp. 3-4.)

[32] The Complainant's collective Certifications for "the relevant time period" (FY2006) were addressed in detail earlier.

In her post-hearing brief, the Complainant increased her number of protected activities to six distinct instances:

> A. On or about October 26, 2006, I voluntarily discussed my individual COSO evaluation with the Company's Chief Financial Officer Mr. Dick. . . .
>
> B. February 18th, 2007, I vehemently opposed Chief Accounting Officer Martin's intentional and reckless action of instructing the Corporate Controller to record an erroneous tax expense at a rate of 39%. His action was an override of internal controls and a violation of [ICOFR]. Mr. Martin did not have the procedural authorization to instruct the corporate controller to record any tax expense, at any rate. . . . I specifically and clearly addressed the blatant impropriety of his action, to include the violation of the defined SOX process established for ICOFR. . . .
>
> C. I continued to engage in protected activity after February 18, 2007, by objecting to the continuous interference, primarily (to essentially exclusively) by Mr. Martin, throughout the provision process. This interference was arbitrary and capricious – retaliation for my objection to his initial action – adversely affecting the ability to prevent financial misstatement. . . .
>
> D. In late February or early March 2007 I spoke with Mr. Halpin about my concerns regarding Mr. Martin. These concerns included Mr. Martin's actions on February 18th, pushing for 'finding earnings' in general, and other behaviors which concerned me.
>
> E. In late March and early April 2007, I submitted detailed certifications as part of the yearend (sic) SOX process and discussed several concerns with Mr. Dick, Loni Knepper, Fred Halpin, and John Hayes.
>
> F. Included on my certification submitted April 3, 2007 was the workers (sic) compensation accrual issue. Testimony and documentation show that accurate information was not provided to the company's auditors, the audit committee, and possibly Mr. Dick.

(Complainant's Amended Closing Brief, pp. 2-6 (citations omitted).) The third enumerated activity above (C) constituted a new claim of protected activity. Some of these alleged protected activities have already been addressed.

In her Closing Brief, the Complainant added a sixth protected activity: her actions of repeatedly "objecting to the continuous interference" by Mr. Martin during the tax provision process in February to March 2007. Her sixth claim of protected activity will not be addressed. It is well-settled that a party may not raise new claims in a closing brief, because it deprives the

opposing party of an opportunity to present evidence at the hearing to rebut the additional claims.[33] (Complainant's Amended Closing Brief, pp. 5-6.)

The Respondent correctly points out that under the procedural scheme established for SOX complaints, the Administrative Law Judge holds a position somewhat akin to an appellate court, reviewing *de novo* the decisions of OSHA. *See* 29 C.F.R. § 1980.106 (providing for "review" of the Secretary of Labor's findings by the Department of Labor's Office of Administrative Law Judges); *Id.* at § 1980.107 (providing for *de novo* review "on the record.") It is well settled that appellate bodies will generally refuse to consider new claims raised for the first time on appeal. *Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 97-SDW-7 at 9-10 (ARB May 29, 2003) ("Issues raised for the first time on appeal will generally not be addressed by appellate bodies, absent rare and unusual circumstances.") (citing *Singleton v. Wulff*, 428 U.S. 106, 119 (1976)). On this theory, because the Complainant failed to allege her four additional claims of protected activity during the course of the OSHA investigation, I am under no clear procedural mandate to consider these additional claims.

However, the ALJ's function in the SOX context is not exclusively appellate. Because of the abbreviated nature of the investigations conducted by OSHA, the ALJ's *de novo* review of the Complainant's claim is more akin to the initial review of a claim accorded by a trial court. As has been previously recognized by federal courts in the context of deciding *res judicata* and collateral estoppel questions following determinations by OSHA, the ALJ's review of OSHA's determination is the SOX Complainant's first "fair and adequate opportunity to litigate [her] theories of the case" in the context of a "trial-court like hearing." *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1322, 1331 (S.D. Fla. 2004). Moreover, OALJ procedural rules broadly allow for Complainants to amend their original complaints when those amendments are "reasonably within the scope of the original complaint." 29 C.F.R. § 18.5(e). I find there exists a reasonable relationship between the facts alleged in her OSHA Complaint and the three additional protected activities separately alleged in the Complainant's Pre-Hearing Statement. I therefore consider them to be proper amendments to her original Complaint, and subject to my consideration here.

Nonetheless, none of these three additional allegations constitute protected communications under SOX.

[33] Even if I were to formally consider it, however, her claim of protected activity on the basis of her ongoing objections to Mr. Martin's interruptions of her work would still fail. Her objections, such as those evidenced by her commentaries tucked into e-mails to Mr. Dick and Mr. Martin, do not in any sense rise to the level of a specific and definitive report of conduct violating a law established for the protection of shareholders. (*See, e.g.*, RX Z, pp. 5-6.) The Complainant herself described these communications as having only *hinted* at the existence of a problem: "[D]id you see e-mails where I was *waving the flag* saying, 'Stop,' as far as the continuous interruptions, the continuous interference, to let you know that *I'm trying to communicate* that 'There's a problem here'?" (HT, pp. 277-78 (emphasis added).) Mr. Dick's testimony in response to these inquiries confirmed that these communications gave him only a general sense that the Complainant believed "the best thing [he and Mr. Martin] could do would be to not keep asking." (HT, pp. 277-78.) The Complainant's vague expressions of frustration do not merit protection under SOX.

COSO Survey

The October 2006 COSO survey and subsequent discussions with Mr. Dick consisted of only general complaints concerning the Company's control environment and did not rise to the level of definitive and specific complaints based on a reasonable belief that the Company was in violation of any law for the protection of shareholders. The Complainant has presented no evidence to support a finding that her COSO survey and subsequent discussions with Mr. Dick contained anything beyond her general, repeated complaints concerning the Company's lack of resources and understaffing which could potentially lead to errors in the future. The Complainant's COSO survey itself contained only numeric responses (1-weak to 5-strong), even though a separate column existed for the express purpose of providing specific "Comments or Corroborating Evidence" to support the numeric responses. Beyond her comments at the hearing that she "went through the various issues, just kind of briefly" with Mr. Dick, and that "when asked, [she] specifically, directly answered it, even though it was supposed to be anonymous," the Complainant has presented no evidence of what additional information she provided to Mr. Dick during this discussion. (HT, pp. 111, 198.)

As discussed above, for complaints as to internal controls to be protected communications, those complaints must also include some discussion of specific errors or manipulations that the Complainant reasonably believes occurred. *See, e.g., Smith v. Corning,* 496 F. Supp. 2d at 245; *Morefield*, 2004-SOX-2 at 1. The Complainant has presented no evidence that the COSO discussions concerned any specific allegations of errors or misstatements, and certainly no commentaries as to possible fraud.

The Complainant therefore has not met her burden of showing that the COSO survey rises to the level of a communication protected under SOX.

Discussion with Mr. Halpin, DVP of Internal Audit

The Complainant has also not presented sufficient evidence to support a finding that her discussions with Mr. Halpin in late February to early March constituted protected activity. Mr. Halpin's testimony confirmed only that the Complainant reported "general concerns" about Mr. Martin during this meeting. This general reporting does not rise to the level of the "definitive and specific" reporting required for SOX protection. *See generally, Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008).

The Complainant alleges that her request that Mr. Halpin should accompany her to the Audit Committee meeting on April 19 serves as circumstantial proof that she had previously discussed with Mr. Halpin her specific concerns as to Mr. Martin's improper actions. (Complainant's Pre-Hearing Statement, Att. A, p. 3.) I find this evidence of her invitation to Mr. Halpin grossly insufficient to persuade me as to the specific content of the meeting with Mr. Halpin.

Concerns Summarized in her Collective Certifications

As discussed at length above, the concerns expressed in the Complainant's Certifications did not rise to the level of definitive and specific communications pertaining to a reasonable

belief that the Respondent had violated a federal law for the protection of shareholders or a rule or regulation of the SEC.

Because the Complainant's remaining five allegations of protected activity fail for the reasons explained above, my analysis will proceed on the basis of my finding of a single protected activity occurring on February 18, 2007.

Respondent's Knowledge of the Complainant's Protected Activity

The second element of the Complainant's burden requires her to set forth sufficient evidence to demonstrate that Respondent "knew or suspected, actually or constructively," of the protected activity. *Van Asdale*, 577 F.3d at 1002 (quoting 29 C.F.R. § 1980.104(b)(1)(ii)); *Collins*, 334 F. Supp. 2d at 1375. Sarbanes-Oxley protects employees who provide information to any "person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514A(a)(1)(C).

The Complainant made her protected communication on February 18 directly to Mr. Dick, her immediate supervisor and the Company's Vice-President and CFO. Mr. Dick has not denied that this conversation concerning Mr. Martin's actions on February 18 took place. Given Mr. Dick's senior position in the organization, the Respondent clearly had actual knowledge of the Complainant's February 18 communications with the Respondent's VP and agent, Mr. Dick.

Unfavorable Employment Action

The third element of the Complainant's burden requires her to demonstrate by a preponderance of the evidence that she was subjected to some form of adverse employment action following her participation in a protected activity. *Van Asdale*, 577 F.3d at 996 (quoting 29 C.F.R. § 1980.104(b)(1)(iii)). Employers are barred from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee because of the employee's protected activity. 18 U.S.C. § 1514A(a); 29 C.F.R. § 1980.102(a). In AIR 21 cases, the ARB uses the term "unfavorable employment action" and "adverse employment action" interchangeably, and has adopted the definition of "adverse employment action" as set forth by the U.S. Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), as consistent with the AIR 21 regulation. *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 at 10-11 (ARB Jan. 31, 2007) (the adverse employment action "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination"). Given the scarcity of case law on SOX, "courts must look to case law applying other federal whistleblower provisions for guidance." *Collins*, 334 F. Supp. 2d at 1374. Accordingly, the ARB's determination in *Hirst* that the *Burlington* definition of "adverse employment action" is consistent with the AIR 21 regulation is properly considered applicable to SOX as well.

In her Closing Brief, the Complainant stated that the set of unfavorable employment actions included:

> [H]arassment, hostility, continuous interference with my work, negative misrepresentations of my performance; extreme physical and emotional stress to

> myself and my children; and imminent risk of negative public exposure exceedingly harmful to my professional and personal reputation – and ultimately a denial of appropriate compensation and removal of duties, resulting in my constructive termination.

(Complainant's Amended Closing Brief, p. 2.) These additions notwithstanding, later in her Closing Brief she nonetheless reduced her allegations of unfavorable employment actions down to two actions: "hostile work environment and constructive discharge." (Complainant's Amended Closing Brief, p. 6.) She located her removal of duties theory under the umbrella of constructive discharge.

The Complainant alleged that the Respondent subjected her to a hostile work environment in retaliation for her February 18, 2007, protected activity. She also claims that Mr. Dick's communication to her on April 4, 2007, concerning the change in her job duties amounted to a removal of duties and, ultimately, her constructive discharge, in retaliation for her protected activity.

I find that she has met her burden of showing she was subjected to an unfavorable employment action on the basis of the removal of many of her core duties and her supervisory position in the Tax Group. However, I find that she was not subjected to a hostile work environment or constructively discharged.

Removal of Duties

The Complainant has argued that the restructuring action included "a denial of promotion; removal of core responsibilities, particularly those related to the publicly reported financial statements; and loss of both senior and supervisory status." (Complainant's Support of Affirmative Defense, p. 7.)

The following facts are not in dispute: on April 4, 2007, the Complainant met with Mr. Dick; at this meeting, Mr. Dick informed the Complainant that a decision had been made to restructure the Tax Department and to create new position, DVP of Tax; Mr. Dick also informed the Complainant that she would be reporting to the new DVP of Tax and would not be considered for this new position; the Complainant's title and pay would remain the same; Mr. Dick asked the Complainant to remain with the company as Tax Director; the Complainant submitted a resignation letter to Mr. Dick five days later, but offered to work out an arrangement to continue working for the Company on a contract basis for a further six months to a year.

The parties also do not dispute that the Complainant's duties would have changed following the reorganization. (HT, p. 701.) Mr. Martin explained that the Company planned to have the Complainant retain only her existing duties in risk management and insurance, and to expand the bulk of her duties into the new, previously unaddressed area of tax planning initiatives. (HT, pp. 268-69, 701.) This testimony corroborated the Complainant's belief that many of her former responsibilities, including her role as the top executive in the Tax Group, would have been removed from her after the reorganization.

Diminution in authority and responsibility can constitute an adverse action capable of deterring a reasonable employee from engaging in a protected activity. *Reines v. Venture Bank*

and Venture Fin. Group, 2005-SOX-112 at 55 (ALJ Mar. 13, 2007) (citing *Hendrix v. Am. Airlines*, 2004-SOX-23 at 12 (ALJ Dec. 9, 2004); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 55 (2006) (finding that in certain circumstances "a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee"). In *Burlington*, the Supreme Court found that the plaintiff had presented considerable evidence that her reassigned duties were "by all accounts more arduous and dirtier;" that her previously-assigned job duties required more qualifications "which is an indication of prestige;" and that her previously-assigned duties were "objectively considered a better job." *Id.* (internal quotation marks omitted). Based on these circumstances, the Court found that a jury could reasonably conclude that the plaintiff's reassignment of job duties would be materially adverse to a reasonable employee. *Id.*

Here, even though the Complainant would have retained her salary, benefits and title of Tax Director going forward, it cannot be ignored that the reorganization would have taken her from a first-tier role, supervising the entire Tax Group, into a second-tier role, beneath the new DVP of Tax. Even though, in all likelihood, her new responsibilities would have become *less* arduous than previously, and her quality of life would have likely increased — given the removal of her responsibilities for supervising the entire Tax Group and managing the time-pressured tax provision calculation process at year-end — I consider it to be clear that her former role as the top executive for the entire Tax Group can be objectively perceived as "a better job" than her new role in a lower respective rank within the Tax Group.

I therefore find the Complainant was subjected to an adverse employment action when she was informed of the planned changes to her duties on April 4, 2007.

Hostile Work Environment

The Complainant has also alleged that the Respondent subjected her to a hostile work environment following her protected activity on February 18, 2007. Subjecting an employee to a hostile work environment in retaliation for the employee's whistleblowing activity is a form of harassment prohibited under the whistleblower protection provisions of SOX. 18 U.S.C. § 1514A(a); 29 C.F.R. § 1980.102(a).

A hostile work environment claim involves repeated conduct or conditions that occur over a period of time. To recover, the Complainant must establish that the conduct complained of was "sufficiently severe or pervasive to alter the conditions of [her] employment." *Pa. State Police v. Suders*, 542 U.S. 129, 133-34 (2004) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks omitted). Whether an environment is "hostile" or "abusive" can be determined only by looking at all of the circumstances. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Circumstances germane to gauging a hostile work environment include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Allen v. Stewart*, ARB No. 06-081 at 16. "[O]rdinary tribulations of the workplace" such as the "'petty slights, minor annoyances, and simple lack of good manners' that often take place at work and that all employees experience," are not sufficient to constitute a hostile work environment. *Id.* (quoting *Burlington*, 548 U.S. at 68). The hostile or abusive environment determination is not based on the complaining party's

subjective perception of the environment as being hostile and abusive. It must be shown that a reasonable person would perceive the environment to be abusive. *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 583 (11th Cir. 2000).

The Complainant has alleged that the hostile work environment she suffered involved Mr. Martin's and Mr. Dick's repeated interruptions of her work during her completion of the tax provision for FY2006 by means of excessive office visits, phone calls, meetings, and e-mails; causing the Complainant to work longer hours as a result of these excessive interruptions; failing to involve her in the creation or presentation of the Potential Significant Deficiency slide concerning the tax provision process; and Mr. Martin's attitude of "flippancy" toward her (as evidenced by his casual professional behaviors such as football tossing and putting his feet on tables during meetings, and his comment that he arrived at the 39% tax rate by rounding up from "the little number" at the bottom of a document she gave him). (HT, pp. 489-90.)

The Complainant believed that the purpose of these multiple communications was to prevent her from the timely completion of her work. (HT, p. 490.) The Complainant also argued that the long hours she worked during the closing process were additional evidence of the hostility of the work environment, to the extent that her already long hours were rendered even longer by the "continuous interference" in her work by Mr. Dick and Mr. Martin. (HT, p. 482.)

Applying the *Meritor*, *Harris*, and *Burlington* standards to this case, I find the Complainant has made far too poor a showing to convince me that any of the activities she complained of were unreasonable, abusive, threatening, or humiliating — singly, or in the aggregate — or in any way sufficient to support a finding that the Respondent created a hostile work environment in retaliation for the Complainant's protected activity. I will nonetheless briefly address the individual allegations of hostile work environment below.

Excessive Communication and Interference in her Work

The Complainant was vague as to the specific content or subject matter of these e-mails, visits, or phone calls. She was unable at the hearing to recall the content of more than one or two of the communications from Mr. Martin and Mr. Dick during the time in question ("I don't even recall at this point") — she objected primarily to their frequency, which she described as "multiple" e-mails each day and "multiple" visits to her office. (HT, p. 489.) The very few individual e-mails that she introduced as examples of excessive communication or harassment by Mr. Dick and Mr. Martin consisted of routine, commonplace inquiries as to whether, for example, the Complainant would be working from home or in the office on a given day, and responses to her own e-mails concerning her calculations.[34] (*See, e.g.,* CX 21, pp. 37-38; RX Z, pp. 5-6.) The Complainant's replies to these e-mails were frequently marked by tense emotion

[34] The Complainant did present evidence of one instance when Mr. Dick telephoned her at home on a weekend day to inquire whether she would be working at the office on that day. In other contexts, this weekend phone call at home might raise an inference of harassment, but in the context at hand, weekend work was commonplace at the Company prior to the year-end filings. (HT, p. 289; *see, e.g.*, HT, p. 78 (describing the Complainant's interactions on Sunday, February 18, with Ms. Williams and Mr. Dick, both of whom were also in the office working on Sunday).) As such, evidence of a single weekend phone call at home, during a time when it was ordinarily expected that the Complainant would be working during the weekends to complete the tax provision, is not enough to raise an inference of harassment.

as evidenced by her repeated use of all-capital letters, multiple exclamation points and, in one case, the word "NO!" in 72-point font. (*See, e.g.*, CX 21, pp. 37-38, 52; RX Z, p. 6.)

Mr. Martin testified that his management style is "fairly informal, not very rigid or rules oriented," but that he often engages in deep questioning concerning employee work product. (HT, p. 643.) He testified that his questioning begins at a general level, but if he is not satisfied with the responses, or if "the numbers don't make sense with what [he's] hearing," then he will continue to question, and will "dig all the way down to dirt if [he] ha[s] to. But generally speaking, most of the staff are fairly professional and (sic) very rarely had to get to that level." (HT, p. 643.) Every witness who was questioned concerning Mr. Martin's management style corroborated this testimony, stating that Mr. Martin's style was to ask numerous questions until he felt comfortable that he understood the employee's work product, findings, and conclusions. (HT, pp. 392, 563, 605.)

Although the Complainant would like to characterize the communications she received as both "frequent" and "severe," I am not remotely persuaded that the interruptions she complained of meet the test referred to in *Allen*. *Allen v. Stewart*, ARB No. 06-081 at 16. The Complainant has produced no evidence of comments made to her that could be reasonably construed as humiliating or abusive on their face, or that the "multiple" interruptions were *so frequent* as to prevent a reasonable person from the completion of her work. If the interruptions were as severe and frequent as she claims, I would have expected, at a minimum, for her to have presented a far more significant number of e-mails initiated by Mr. Dick or Mr. Martin than the two such e-mails she did introduce into evidence.[35]

Rather, the bulk of the hostility in the record appears to have been directed *from* the Complainant *towards* Mr. Martin, as evidenced by, for example, her February 18 outburst toward him, her angry e-mailed responses to apparently ordinary questions (see, for example, her single-word statement "NO!" in 72-point font in response to Mr. Martin's question concerning her tax rate calculation on February 26, 2007), and the testimony from Ms. Knepper and Mr. Martin that the Complainant's behavior toward him became tense and hostile following the February 18 outburst.[36] (RX Z, p. 6; HT, pp. 399, 669-70 ("she basically stopped talking to me for about a week subsequent to that evening.").) The only possible suggestion of hostility directed toward the Complainant that I can perceive from the record was a single statement the Complainant alleges was stated "under the breath" by Mr. Martin following a discussion with the Complainant concerning her work on the tax provision: "[o]ne of these days, you're going to have to listen to me." (HT, p. 489.) After the Complainant yelled profanities at Mr. Martin, I decline to criticize

[35] The Complainant's Trial Exhibits contained, by my count, only two e-mail threads initiated by Mr. Martin or Mr. Dick, neither of which suggested any element of hostility or abuse: 1) On February 25, 2007, Mr. Dick e-mailed the Complainant, Ms. Williams, and Mr. Martin and stated, "I will be leaving shortly, can you provide me with an update on taxes and the inventory reconciliation?" (CX 21, p. 51); 2) On March 16, 2007, Mr. Martin forwarded an email to the Complainant and Rob Larson, stating "Laurie, Can you give me you (sic) take on the below?" (CX 21, p. 48.) The very few other e-mails in the record from Mr. Martin and Mr. Dick were responses to e-mail threads initiated by the Complainant herself.

[36] Moreover, the Complainant's melodramatic responses to professional communications (such as her statement to Mr. Dick that phone calls from him would "suck every bit of life out of [her]" and leave her unable to complete her work) serve in my estimation to undermine her credibility on the topic of what constitutes a reasonable professional interaction. (HT, p. 289.)

Mr. Martin for making a single, quietly spoken statement in return. Moreover, evidence of a single, questionably threatening statement is not enough to demonstrate a *pervasive* environment of hostility or threatening behavior sufficient to meet the *Meritor* or *Harris* standards.

Furthermore, the Complainant received no support at the hearing from other witnesses concerning her perceptions of hostility or abuse. Even Carol Williams, whom the Complainant has argued was also being "railroaded" by Mr. Martin during the time in question, testified as to her belief that the level of involvement from Mr. Martin was exactly what she would have expected given the inherent year-end time pressures and the potential $4 Million earnings miss.[37] (HT, p. 313.) Robert Larson, a frequent participant in meetings between Mr. Martin and the Complainant, denied having witnessed any "bogus" meetings instigated by Mr. Martin, or any show of disrespect or mistreatment of the Complainant by Mr. Martin. (HT, pp. 606-07.) Mr. Dick, who, despite her allegations of harassment and retaliation the Complainant claims she trusted and with whom she claims she maintained a positive relationship until the end, denied witnessing or causing anything like a hostile work environment. (HT, pp. 241, 278.) Rather, he testified that it was a normal, reasonable exercise of his and Mr. Martin's responsibility for the financial statements to ask questions to ensure that they understood the Complainant's progress on the tax provision:

> [The Complainant]: Are you aware of how frequently Mr. Martin was interrupting my work and calling me into things and e-mailing me, and calling me throughout that following . . . three-week time period?
>
> [Mr. Dick]: You know, I wouldn't know specifically how many times that might have happened. I would have expected that he would be discussing on a frequent basis with you where we were in terms of finalizing the tax provision, just given the timing and the nature of trying to get the audit completed and the financial statements finalized. . . . [I]n his role as the Chief Accounting Officer, I would anticipate he would have had some frequent conversations with you. How many he would have had, I would not know.
>
> [The Complainant]: And did I – did I share with you, or talk with you, or did you see e-mails where I was waving the flag saying, "Stop," as far as the continuous interruptions, the continuous interference, to let you know that I'm trying to communicate that "There's a problem here"?
>
> [Mr. Dick]: Well, you had expressed concern to me that the best thing we could do would be to not keep asking. And I think we discussed the fact that we were asking, because we wanted to know if we could help, and if you needed additional help, what needed to happen so that we could complete it on a timely basis. . . . I

[37] The only piece of the Complainant's evidence which clearly suggests that at least one other employee of the Company shared her perceptions of retaliation by the Company was an April 20, 2007, e-mail from Todd Coumbe, Director of Accounting, in which he asked "Has whistleblower crossed your mind?" (CX 21, pp. 21-22.) In the same e-mail thread, however, he attested to his own personal frustrations with Mr. Dick: "I'm really tired of the crap and can't figure out what Mel has against me." *Id.* Given these heated expressions of personal frustration with Mr. Dick, I accord little weight to Mr. Coumbe's suggestion of possible retaliation by Mr. Dick.

> think our job was to understand the provision, and understand that it was accurate, or as accurate as it could possibly be at the time.

(HT, pp. 277-78.) In her cross-examination of Mr. Dick, the Complainant also referred to one phone conversation which she presented as evidence of harassment by Mr. Dick:

> You called me at home, I was working, and it was late morning maybe. And you called to check on how things were going, and I said "Every time you call me, every time you ask me, you suck every bit of life out of me that I have, and I have nothing left to do the work, and there is no one else to do the work."

(HT, p. 289.) The Complainant referred to such communications from Mr. Dick and Mr. Martin as "imposition" and "distraction from task," and testified that she interpreted these communications as harassment. (RX Z, p. 5; HT, p. 169.)

Mr. Martin stated that the form and content of his questions were always driven by his desire to bring her the resources and answers she would need to complete her tax provision work. He testified:

> [The questions] were around whether or not she needed help from [Ms. Williams], whether or not we could get [Earnst & Young] in there earlier to help her, whether or not she wanted to spend some time with Mr. Larson and I to discuss any of the issues related to the stock options . . . I was trying to make her life more simple and provide her with resources . . . I was actually trying to help. And also to make sure that I was doing my job which is to understand why the numbers were moving.

(HT, pp. 673-74.)

Loni Knepper, John Hayes, and Robert Larson all testified that Mr. Martin tended to ask a great deal of questions generally of all employees. As Mr. Larson commented, "If [Mr. Martin] wasn't getting a comfort feeling, if he wasn't understanding it, he would continue to ask more questions until he got comfortable." (HT, pp. 392, 563, 605.) Moreover, the FY2006 year-end close out was Mr. Martin's first fiscal year-end with the Company, so no referential framework existed by which to judge Mr. Martin's conduct. (HT, p. 392.) Mr. Martin conceded that he did ask more questions than usual of the Complainant following the February 18 incident, but explained that the increase was due to his belief that she had stopped speaking openly to him following the incident: "I felt that I was unable to get any explanations from her that were meaningful or clear or concise in any way, shape or form, which is why I asked probably more questions to try to clarify concerns." (HT, p. 674.)

I am persuaded that the number of interactions between the Complainant and Mr. Martin did increase during the time in question. I find Mr. Martin's explanations for this increase to be highly credible. Mr. Martin explained that the communication increase was occasioned by two key factors: 1) Mr. Dick's instructions to him "to understand what was in the tax rate, and why it was moving" during the period of assessing the potential earnings miss; and 2) the

Complainant's own behavioral changes toward Mr. Martin following the February 18 incident (namely, her own hostility and refusal to openly speak to him).[38] (HT, pp. 669-70, 672-73.)

The Complainant conceded that it was properly part of Mr. Martin's and Mr. Dick's jobs to understand her work on the tax provision and to be aware of her timeframes for its completion, insofar as they were "on the hook" concerning the public and legal implications of the Company's financial statements. (HT, pp. 169-70.) She said that after March 5, 2007, Mr. Martin's interference "seemed to back off a little." (HT, p. 113.) This timing coincides with the Complainant's completion of her tax provision work on approximately March 3, 4, or 5. (HT, p. 475.) This is consistent with the testimony from various witnesses that the multiple contacts were the result of the overall pressures surrounding the preparation of the reports.

I am persuaded that uncommunicativeness from the Complainant during a key period in the Company's calculations and filing process would *reasonably* engender increased questioning and concern from Mr. Martin and Mr. Dick, the members of the Company's executive management who would be held legally liable in the event the Complainant failed to timely and accurately complete her work.

The Complainant has also not persuaded me that this increase in communication from Mr. Martin and Mr. Dick in any way interfered with her work performance, let alone that it "unreasonably" so interfered. *Allen v. Stewart,* ARB No. 06-081 at 16. Although she stated such a belief to Ms. Knepper, Mr. Martin, and Mr. Dick, she has not presented evidence sufficient to persuade me that the delays she experienced were in fact occasioned by these interruptions, rather than by other relevant factors, such as the unique environmental time pressures affecting the entire Finance Department during the period in question (see below), her own ongoing problems with focus (the cause of her frequent work from home),[39] and her difficulties with delegating work to her employees. (*See, e.g.,* HT, p. 400.)

Even if these interruptions from her supervisors did cause delays in her completion of her work, however, she must demonstrate that the interruptions to her work were unreasonable. *Allen v. Stewart,* ARB No. 06-081 at 16. She has not done so. The uncontroverted testimony of Mr. Martin and Mr. Dick is that the sole purpose of their interactions with the Complainant was to assist her in the timely completion of her work on the tax provision. The Complainant has presented no credible evidence to undermine these statements. When the Complainant insinuated to Mr. Martin and Mr. Dick her belief that their communications to her were an "imposition" that prevented her from completing her work, Mr. Martin's single-word response ("Imposition?") denoted his confusion, and strikes me as credible corroboration of his claim at the hearing that he did not understand at the time what aspect of his and Mr. Dick's

[38] Given repetitive testimony at trial concerning the Complainant's somewhat dramatic, outspoken, and abrasive personality — as well as Ms. Knepper's comment that the Complainant believed Mr. Martin owed *her* an apology following her February 18 outburst — I find it highly credible that the Complainant accorded Mr. Martin something akin to a "silent treatment" in the days and possibly weeks following February 18. (HT, p. 399.)

[39] The "vent memo" written privately by T.J. Eigler also suggested Ms. Eigler's belief that the Complainant had a significant problem with procrastination, and the Complainant's own statements as to her difficulties with focus ("You know I closet myself at home so I can FOCUS!!!") both corroborate Mr. Dick's trial testimony concerning the Complainant's problems with focus and the timely completion of work. (*See* Complainant's Opposition Brief, Ex. 9, p.2; CX 21, p. 38; HT, p. 230.)

communications with the Complainant she could have felt was an "imposition." (CX 21, p. 37; HT, p. 672.) Moreover, the Complainant's own testimony that Mr. Martin began to "back off" on approximately March 5 (around the time when she completed her tax provision calculations) is consistent with his claim that his communications with her were driven by the reasonable desire to help facilitate her completion of her work. (HT, pp. 113, 673-74.)

Increased Work Hours

The Complainant has suggested that Mr. Martin's interruptions of her work involved his intent to unnecessarily increase her working hours, so as to heighten the hostility of her working environment and prevent her from completing her work. (HT, p. 490.) She alleges that following February 18, she was "working virtually around the clock." (Complainant's Pre-Hearing Statement, Att. A, p. 4.)

While I am persuaded that the time pressures upon the Complainant were more intense during the year-end for FY2006 as compared to prior fiscal years, I see no basis in the record for accepting the Complainant's theory of retaliation as a way of accounting for this increase in work intensity. Rather, the record evidences a variety of new factors that were in play in the FY2006 year-end process, in contrast to prior fiscal years, which would have naturally increased pressures on the Complainant and other Finance staff. These include: 1) the potential $4 million earnings miss identified in February 2007, 2) the Company's recent switch to new outside auditors, 3) the Complainant's dismissal of T.J. Eigler and introduction of Sam Roberts in January 2007, and her ensuing obligation to spend time training Mr. Roberts; and 4) the fact that FY2006 was Mr. Martin's very first year-end close with the Company, and his work patterns and management styles at year-end were as yet unknown.

Moreover, the Complainant alleges that even *prior* to her protected activity on February 18, she was also working excessive hours. (Complainant's Pre-Hearing Statement, Att. A, p. 4 ("Prior to February 18, 2007, I had been working at least 80 hours a week since the beginning of the school year.").) Moreover, beyond the time-stamps of two or three e-mails sent in the later evenings and early mornings, the Complainant has presented no solid evidence of the actual number of hours she worked (because she worked frequently from home, witnesses were unable to testify as to her exact work patterns).

The Complainant has also presented no evidence that she was in any way singled out. All witnesses questioned concerning the time pressures and hourly work expectations during the period of time in question confirmed that conditions were uniformly intense across the Finance staff. Carol Williams testified that she, too, worked twelve hour days and brought work home in the evenings during the closing process from February through the beginning of April 2007.[40] (HT, p. 331.) Ms. Williams testified that conditions were precisely what she would expect given

[40] The Complainant sought to establish that Mr. Martin was guilty of "railroading" his employees generally. She introduced a March 30, 2007, e-mail thread in which the Complainant remarked on Ms. Williams' "spiral of despair" and warned her not to "give [her] power and energy to the bully," referring to Mr. Martin. (CX 21, p. 22.) If, in fact, Mr. Martin was guilty of engaging in aggressive activities towards Ms. Williams, this would undermine the Complainant's claim of retaliation. If other employees who did not engage in protected activity were being subjected to the same allegedly hostile treatment, then the Complainant's claim of disparate treatment fails.

the time of year and the existence of a significant discrepancy between the forecast earnings versus actual earnings, stating:

> I would say that the Executives had a great deal of concern about the earnings at that point, as would any company when your expectation was not met at that point . . . The expectation of Executive Management was the same as it is on every month and quarter and year-end close . . . that that process be done as quickly and accurately as possible.

(HT, p. 313.) The Company's shift in outside auditors from KPMG to Deloitte & Touche in 2006 also increased pressure in the Finance areas. As Ms. Williams explained, "When new auditors come in the house, they are unfamiliar with how the accounting is done, the subtleties of the business, and so that increases the work load on the accounting staff." (HT, pp. 326-27.)

Moreover, as a general matter, and in this case, I find that an increase in working hours in the Finance Department of a publicly traded company during the fiscal year-end is an "ordinary tribulation . . . of the workplace," and insufficient to constitute severe or pervasive conditions of hostility. *Allen v. Stewart,* ARB No. 06-081 at 16.

The Potential Significant Deficiency Slide

The Complainant has suggested that the tax slide presented to the Audit Committee on March 5, 2007, was a form of "concealment" and an additional example of the pervasive hostility directed at her following her February 18 protected activity. (Complainant's Pre-Hearing Statement, Att. A, p. 8.)

The Complainant did not dispute Mr. Dick's and Mr. Martin's belief that there was a potential significant deficiency in tax. She disagreed with the basis for their belief. (*See, e.g.,* Complainant's Pre-Hearing Statement, Att. A, p. 8 (stating that the slide "did not represent *the real issues*" in the tax provision process) (emphasis added).) Because she disagreed with the slide's content, and because she inferred in the surrounding circumstances a retaliatory purpose in Mr. Martin's creation of the slide, she considered the slide was "bogus" in both purpose and content. *Id.* I decline to accept the Complainant's conclusion that the slide was "bogus" because it did not contain the elements she perceived to merit greatest discussion. It is not disputed that it was a reasonable decision for Mr. Martin and Mr. Dick to create and present a slide such as this to the Audit Committee, given their legal obligation under SOX to inform the Audit Committee of potential significant deficiencies and the documented, ongoing problems in the tax provision process. (HT, p. 683.) The reasonableness of the slide was further confirmed by the outside auditors' subsequent confirmation of a significant deficiency in the Company's tax provision process. (CX 19, p. 2.) The fact that the presentation involved factual elements that the Complainant considered insignificant does not, without more, render the slide "bogus," or evidence of retaliation against her.

The Complainant also argues that, as Tax Director, common courtesy should have required that she be included in the process of creating and presenting the slide, and management's failure to include her provides further evidence of retaliation. In support of this claim, she pointed to an e-mail from Mike Stone in which he commented sardonically that it

would have been "nice" for her to have been included in this discussion of her area of responsibility. (CX 21, p. 35.) I am not persuaded by the Claimant's argument. I find credible Mr. Martin's explanation that Mr. Dick decided against discussing the slide with the Complainant because he believed she would take it as a "personal slight" against her, and that it would disrupt her work on the tax provision.[41] (HT, p. 684.)

A reasoned decision by management to exclude the Complainant from a necessary discussion by the Audit Committee of her area of responsibility does not rise to the level of abuse or pervasive hostility, even if that failure to include her could be construed as a violation of professional manners. "Petty slights" and "lack of good manners" may disappoint an employee, but they do not, without a great deal more, demonstrate the existence of a hostile work environment. *Burlington,* 548 U.S. at 68. I decline to pass judgment on Mr. Dick's reasonable desire to avoid causing more strife between himself, Mr. Martin and the Complainant during an already tense period in her calculation process, and I do not find that SOX requires me to do so.

Attitude of Flippancy

The Complainant represented that Mr. Martin's attitude of "flippancy" in her interactions with him also contributed to her sense of being harassed or degraded. (HT, pp. 489-90.) Examples she cited of such flippancy included a variety of actions including: 1) tossing around a football in his office during meetings; 2) rolling his eyes; 3) working on the computer while others were talking; and 4) sitting with his feet on the desk or conference table. (HT, p. 616.) The attitude of "flippancy" the Complainant complained of was by all accounts a personal style of Mr. Martin's. The Complainant presented no evidence that these examples of Mr. Martin's casual behavior were directed solely at her. The entire department poked fun at his style when they photographed themselves with their feet up on the conference table. (HT, pp. 616-17.)

Mr. Martin testified that his management style tends to be an "informal" one. (HT, p. 643.) The Complainant also introduced a statement by Mr. Martin as evidence of his derision or flippancy towards her. The only specific, "flippant" comment which the Complainant recalled at the hearing was his comment when she asked him why he used a 39% rate in the Spreadsheet, rather than the 39.5% rate she expected him to use. She said he replied, "Well, I rounded up from the little number at the bottom of the page."[42] (HT, p. 490.) This comment could not conceivably have harassed or humiliated any reasonable person.[43] (HT, p. 490.) Again, the

[41] This was a reasonable decision on Mr. Dick's part in light of the fact that by this point in time the Complainant had repeatedly requested that Mr. Dick and Mr. Martin leave her in peace to complete her tax provision work. The reasonableness of his judgment finds support in the fact that the Complainant *did* consider the slide to be a personal slight targeted against her once she learned of it. Given her tightly-wound, emotional responses to Mr. Dick's and Mr. Martin's inquiries as to mundane aspects of her tax provision calculations (see, for example, her single-word statement "NO!" in 72-point font in response to Mr. Martin's question concerning her tax rate calculation on February 26, 2007), it was reasonable for them to believe that she might have gotten upset, causing greater delays in her progress on the calculations. (RX Z, p. 6.)

[42] The "little number" to which he referred was the 38.94% tax rate for Q4 FY2006 discussed above, a number provided to him by the Complainant in the Estimated Rate Document. (CX 16, p. 2.)

[43] If anything, with this statement Mr. Martin engaged in humor at *his own* expense, portraying himself as taking a carefree approach to calculations. The humor of such a comment, made by a publicly traded company's CAO, is evident, even to me.

Complainant's perception of Mr. Martin's poor manners is insufficient to demonstrate evidence of severe humiliation, abuse or hostility. *Burlington*, 548 U.S. at 68.

When given opportunities to do so internally during her employment, such as through one-on-one meetings with Mr. Halpin and Ms. Knepper or when addressing the Audit Committee, the Complainant did not allege the existence of a hostile work environment following the February 18, 2007, incident. (*See, e.g.*, HT, p. 417.)

For these reasons, I find the record evidence cannot possibly support a finding that the Complainant was subjected to a hostile work environment.

Constructive Discharge

The Complainant's final theory of unfavorable employment action — constructive discharge — involves her perception that the reorganization decision affecting her was "a career ending action" (insofar as she would be denied further promotions within the Company's tax area), and that her new planning role was so "small" and distinct from her former duties that the intent of management was to force her to resign. (Complainant's Support of Affirmative Defense, p. 7.) The Complainant contended that the decision not to promote her to DVP of Tax and to alter her duties was made in retaliation for her protected activities on February 18 and April 3, 2007.

The Respondent argued in rebuttal that the decisions were made for a variety of non-retaliatory reasons related to the Complainant's professional performance (discussed above), including her poor management skills, history of interpersonal conflicts with colleagues, lack of long-term commitment to the Company, and lack of experience working with high level companies. (*See supra.*) Moreover, the Respondent contended that the decision was made prior to both of her exercises of protected activity.

Mr. Dick testified that at the time of the Complainant's final promotion to Director of Tax in December 2006, he had already decided that she would not be in the running for a Divisional Vice President of Tax position:

> [Mr. Dick]: . . . [W]e went through a five-year annual planning process, and updated that five-year plan on an annual basis . . . at that point in time, I felt Laurie was ready to be a director . . .
>
> [Mr. Allen]: Did you see her at that point in time becoming a DVP of tax?
>
> [Mr. Dick]: Not at that point in time, no. . . . I did not think she would be ready at that point time (sic) to assume those responsibilities.

(HT, p. 229.) The Company's plans involved increasing the size of its tax department and bringing in someone with a strong management background and experience working with multi-billion dollar companies to lead that larger department. (HT, pp. 245-46.) While Mr. Dick and Mr. Martin both believed that the Complainant "would be a very good asset to the company as the Tax Director," they shared the opinion that she "was not at that point in time ready to be the Divisional Vice President of Taxes." (HT, pp. 245-46, 652.)

Mr. Dick testified that the thought process and decision concerning the Complainant and the DVP of Tax position were made "in the '06 time frame. I don't know if there was a specific date . . . where I made a final decision. But it would have been thereabouts." (HT, p. 251.) Mr. Martin corroborated this timeframe, stating that the discussions with Mr. Dick concerning the Complainant's future with the Company took place "around Christmas" 2006, at which time they also discussed Ms. Williams' future as corporate controller and promotion possibilities for Mr. Larson and Mr. Locascio. (HT, p. 652.) He further testified that the decision that the Complainant was not the best choice to lead the tax department "in the long-term" was "then finalized, and sort of bedded" in late January to early February 2007 as they prepared for the presentation to the March 5, 2007, Audit Committee meeting concerning their reorganization ideas. (HT, pp. 652-53.) As noted above, the set of slides detailing the reorganization and revealing the plan to keep the Complainant in a position subordinate the new DVP was distributed to and discussed by the Audit Committee on March 5, 2007. (*See supra*; RX F, p. 10.) Mr. Martin explained that he felt "comfortable" that the decision concerning the Complainant was made prior to February 18, 2007. (HT, pp. 653-54.) Robert McCall of the Audit Committee also testified that he had a "vague recollection" of discussing with Mr. Dick in "the early part of 2007" the possibility of creating a DVP position for the Tax Department. (HT, p. 518.)

Additional, reliable record evidence exists which persuasively corroborates Mr. Dick's testimony that his serious doubts about the Complainant's future with the Company began as early as 2006. During the summer of 2006, the Complainant expressly asked Mr. Dick what it would take for her to be promoted to DVP by 2008. (RX AA, p. 109.) The Complainant asked Mr. Dick to reflect upon the question and to speak to her about it when she returned from her vacation, but Mr. Dick never reinitiated the conversation. Importantly, the Complainant interpreted his silence as indicating that he did not plan to promote her to DVP: "We never had that conversation. He on at least one occasion said, I know I owe you a response. So I put all that together in a pot saying, you know, where is my career path here?" (RX AA, p. 110.) Second, the "vent memo" written by Ms. Eigler in October 2006 noted that Mr. Dick had by then already intimated to her his doubts about the Complainant's long-term future with the Company: "Is Mel Dick really thinking of replacing her or did he ask me that question to get my hopes up . . . ?" (Complainant's Opposition Brief, Ex. 9, p. 2.)

Given the concerns that arose for Mr. Dick in the 2006 to early 2007 timeframe as to the Complainant's 1) various difficulties working effectively with colleagues, 2) difficulties in managing employees and effectively delegating work, 3) lack of commitment to remaining with the company for more than 2.5 years, and 4) problems with focus requiring her frequent work from home, I find Mr. Dick's and Mr. Martin's claims credible that the Complainant was not at the top of their list to become the leader who would take the Company's Tax division "to the next level." The record does not contain any evidence to indicate that the Complainant demonstrated improvements in her areas of weakness before the March 5, 2007, meeting where the DVP of Tax decision was announced. In my estimation, therefore, the above evidence supports a finding that the decision that the Complainant would not be considered for DVP was made in the December 2006 to January 2007 timeframe.

The Ninth Circuit has explained that constructive discharge occurs "when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently

extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (quoting *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000)). In other words, an employee is constructively discharged when her working conditions are rendered "so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary." *Reines*, 2005-SOX-112 at 55 (citing *Hughart v. Raymond James & Assoc., Inc.*, 2004-SOX-9 at 51 (ALJ Dec. 17, 2004)). The inquiry is objective: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Pa. State Police v. Suders*, 542 U.S. at 141 (citation omitted). The employee's resignation must be reasonably foreseeable to the employer on the basis of the egregious deterioration in conditions. *Brooks*, 229 F.3d at 930 (quoting EEOC, Policy Guidance on Sexual Harassment, 8 BNA FEP MANUAL 405:6681, 405:6693 (Mar. 19, 1990) ("[A]n employer is liable for constructive discharge when it imposes intolerable working conditions [which] foreseeably would compel a reasonable employee to quit.")).

The Complainant's failure to establish the existence of a hostile work environment eviscerates any theory of constructive discharge predicated on a claim of harassment or deteriorating working conditions. The Ninth Circuit has explained the essential relationship between the claims of hostile work environment and constructive discharge: "Where a plaintiff fails to demonstrate the severe or pervasive harassment necessary to support a hostile work environment claim, it will be impossible for her to meet the higher standard of constructive discharge: conditions so intolerable that a reasonable person would leave the job." *Brooks*, 229 F.3d at 930; *Hughart*, 2004-SOX-9 at 51 ("Establishing a constructive discharge claim requires the showing of an even more offensive and severe work environment than is needed to prove a hostile work environment.")

The Complainant urges an additional theory of constructive discharge which she describes as "corporate politics." She argues that the changes to her position carried a gravitas that may not appear evident to the ordinary person considering her case, but which would have compelled a reasonable corporate tax director in her position to resign. (*See, e.g.*, Complainant's Opposition Brief, Ex. 15, p. 5.)

In *Poland v. Chertoff*, *supra*, the Ninth Circuit recently rejected a claim of constructive discharge predicated on facts and theories very similar to the Complainant's. *Poland*, 494 F.3d 1174. In *Poland*, the plaintiff, the former director of the Portland office of the Customs Service, argued that he felt compelled to retire because his cross-country reassignment and demotion to a non-supervisory position with no possibility of further promotion was a "career ender." *Id.* at 1184-86. The Ninth Circuit rejected the plaintiff's arguments, stating that "constructive discharge cannot be based upon the employee's subjective preference for one position over another,"[44] and "[b]ecause we require job conditions to be worse than those which a reasonable person could tolerate, '[a]n employee may not . . . be unreasonably sensitive to a change in job responsibilities.'" *Id.* at 1185 (quoting *Serrano-Cruz v. DFI P.R., Inc.*, 109 F.3d 23, 26 (1st Cir. 1997)). In rejecting the plaintiff's "career ender" theory of constructive discharge, the Ninth

[44] *Poland*, 494 F.3d at 1185 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 755 (5th Cir. 1986), *aff'd in part and remanded in part*, 491 U.S. 701 (1989)).

Circuit reiterated the requirement that for a constructive discharge claim to lie, the conditions must be so "intolerable," "extraordinary and egregious," that a reasonable worker would feel no choice but to resign.[45] *Poland,* 494 F.3d at 1184-85. The fact that the plaintiff, Mr. Poland, decided to continue working in his demoted position for an additional five months was also persuasive to the Court, which held that "[a]s a matter of law, these are not the actions of someone who finds his working conditions so intolerable that he felt compelled to resign." *Id.* at 1185. Given Mr. Poland's decision to continue working for a short term, as well as his preservation of his former salary and benefits, the Ninth Circuit concluded that "his work conditions, although a disappointment to him, were not intolerable." *Id.* at 1186.

Following the standards set forth in *Poland*, the Complainant's offer to continue working for an additional six months to a year — an arrangement that she was so keen to establish that she actually took the initiative of drafting the contract — undermines her claim that she perceived her working conditions at the Company to be intolerable. (*See* RX Z, p. 10; ALJ 3, p. 3.) Moreover, in her resignation letter the Complainant made no reference whatsoever to difficult working conditions; rather, she thanked Mr. Dick for a positive experience working with him ("I have sincerely enjoyed working with you . . . "), and she explained that her resignation decision was based on her need to turn her attentions to the well-being of her family.[46] (RX A).

Clearly the Complainant was disappointed by the Company's failure to grant her the promotion she had been hoping for, and by its decision to remove her from her primarily supervisory position. Under the *Poland* standards, however, where an employee has not proven an environment of severely and pervasively hostile or abusive working conditions, that employee's mere disappointment as to her shift in duties and removal from a supervisory role cannot suffice to establish constructive discharge. *Poland,* 494 F.3d at 1185.

Therefore, viewing the alleged retaliatory conduct as a whole, I find that the Complainant has not established that the Respondent's agents (Mr. Martin and Mr. Dick) engaged in a pattern of abuse or that, by reason of their alleged conduct, her "working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary." *Hughart,* 2004-SOX-9 at 51.

[45] The Ninth Circuit in *Poland* explained the policy basis for maintaining strict requirements for claims of constructive discharge: "We set the bar high for a claim of constructive discharge because federal antidiscrimination policies are better served when the employee and employer attack discrimination within their existing employment relationship, rather than when the employee walks away and later litigates whether his employment situation was intolerable." *Poland*, 494 F.3d at 1185.

[46] The Complainant insists that, hidden between the lines, this April 8 letter contained commentaries concerning the severe difficulties of her working conditions at the Company; the lack of ethics and integrity she encountered there; and the virtual heroism of the work she performed. (*See* Complainant's Opposition Brief, Ex. 15, p. 5). She has presented no evidence, however, that she ever made a report of any lack of ethics or integrity prior to submitting her resignation. At the conclusion of her March 30 evening meeting with Mr. Dick, for example, after she explained her concerns involving Mr. Martin, when Mr. Dick concluded that her concerns sourced from nothing more than a "communication problem," she agreed with his assessment at the time. (RX AA, p. 146.)

Causation

The fourth and final element of the Complainant's burden requires her to prove by a preponderance of the evidence that her protected activity on February 18 was a contributing factor in the unfavorable action taken against her (the removal of some of her former duties). 49 U.S.C. § 42121(b)(2)(B)(iii); *Van Asdale*, 577 F.3d at 996; *Stojicevic v. Arizona-American Water*, ARB Case No. 05-081, ALJ No. 2004-SOX-073 at 12-13 (ARB Oct. 30, 2007).

The ARB has explained expansively that a contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Klopfenstein,* ARB Case No. 04-149 at 18 (ARB May 31, 2006) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed.Cir. 1993)); *see also Collins*, 334 F. Supp. 2d at 1379 (quoting *Marano*, 2 F.3d at 1140 (noting that the contributing factor test "is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action.").

Direct Evidence of Causation

Direct evidence of causation is "smoking gun" evidence that the respondent acted with retaliatory motivation. *Reines,* 2005-SOX-112 at 57 (citing *Kalkunte v. DVI Financial Serv., Inc*., 2004-SOX-56 at 38 (ALJ July 18, 2005)). For example, comments made by a manager or those closely involved in employment decisions may constitute direct evidence of discriminatory intent. *Reines,* 2005-SOX-112 at 57.

The Complainant has testified concerning three comments that she argues should be construed as direct evidence of the Respondent's intent to retaliate against her. First, she alleges that Mr. Martin's comment to her under his breath that "[o]ne of these days, you're going to have to listen to me," suggested the Respondent's plans or intent to retaliate against her. (HT, p. 489.) She recounted that Mr. Martin made this statement during a discussion of the tax rate, after he had attempted to interject and she had cut across him, saying "Wait, let me finish." (Complainant's Pre-Hearing Statement, Att. A, p. 4.) At the hearing, Mr. Martin neither affirmed nor denied making this statement, and the Complainant has presented no evidence to corroborate her interpretation of the statement as being motivated by a retaliatory animus. Moreover, the context of the comment detracts from her theory. As the Complainant recounts, Mr. Martin made the comment immediately following her refusal to let him interject his thoughts — or, in other words, following her refusal to "listen" to him. The more plausible interpretation of the statement in my view is the literal one: that the comment was quite simply his response to her demand to have her own thoughts heard while refusing to let him speak. I am therefore not persuaded that this comment provides direct evidence of retaliatory animus.

Second, the Complainant also refers to a comment allegedly made by Mr. Dick following her resignation, during their discussions of her possible continued employment on the basis of an independent consulting agreement: "[T]hat's not how we do *these things*." (Complainant's Opposition Brief, Ex. 21, p. 10 (emphasis in original).) The Complainant interpreted this comment as implicitly referring to "termination agreements," and as an admission by Mr. Dick that he believed the Company had, in fact, terminated her — just not in the ordinary way. The

Complainant did not question Mr. Dick at the hearing concerning this alleged comment, and there is nothing in the record to confirm her suspicions as to the hidden meaning behind the statement. Again, I find that the more plausible interpretation takes into consideration the facts immediately surrounding the statement. Here, by the Complainant's own account, Mr. Dick made the statement during their discussions of an independent consulting agreement for the Complainant's continued employment. As such, the statement far more plausibly referred to the type of contract they were discussing at the time — independent consulting agreements — rather than a type of contract they did not discuss at any time — termination agreements.[47] I am therefore not persuaded that this comment provides any direct evidence of retaliation.

The third comment which the Complainant lists as direct evidence of the Company's retaliatory intent against her involved an alleged exchange between the Complainant and Mr. McCall on April 19 when the Complainant addressed the Audit Committee to discuss her SOX Certification and her decision to leave the Company. (*See* RX T, p. 5.) She alleges that when she said, "I'm probably going to cry [and] I've been effectively terminated," Mr. McCall responded by saying, "I know." (HT, p. 407.) She recounted this same interpretation of Mr. McCall's statement in an e-mail to a colleague the following day, April 20, and Mr. Halpin's testimony confirmed that he recalled that she had made statements "along those lines" during the meeting. (CX 21, p. 20; HT, p. 407.) Mr. Halpin did not recall Mr. McCall responding along the lines the Complainant alleged, however, and Mr. McCall adamantly denied making such a statement, or having even heard the Complainant state her belief that she had been constructively terminated. Mr. McCall expressed, instead, that the Complainant had misunderstood his kindly words of comfort — "That's okay" — spoken to help assuage her emotional state. (HT, pp. 524-25.) Mr. McCall testified that he and the rest of the Audit Committee had prepared for the meeting with the Complainant with an understanding of the delicacy that would be required, and had agreed in advance to be accepting and tolerant of her testimony, and to discuss their conclusions at a later time. (HT, p. 524.) Mr. Halpin's account that everyone in the room was "politely nodding" supports Mr. McCall's account of the general approach of acceptance that the Audit Committee decided to take in the delicate situation. (HT, p. 407.)

Mr. McCall also testified that he was generally "mystified" by the Complainant's account of the exchange, since the statement she alleged would have been inconsistent with his personal, professional approach to such situations. He testified,

> I think just for me, as a person, I couldn't have made that snap judgment or off-the-cuff judgment even if I had heard it because it's something, I think, requires . . . gathering of information and thought and judgment about what appears to have transpired. And that's the way I would have approached it had I heard it in the first place.

[47] The record shows that the Complainant herself drafted up an independent consulting agreement for her continued work with the company, and asked Mr. Dick to sign it prior to his departure on vacation. (RX Z, p. 10.) Mr. Dick responded that he wished to have the Company's labor attorney review the agreement. (RX Z, p. 10.) I find it highly plausible that the comment, "that's not how we do these things," could have been made in reference to the fact that the employee herself had drafted her own employment contract. Mr. Dick's discomfort with this situation was evidenced by his refusal to sign it until a lawyer had reviewed it.

(HT, p. 525.) Mr. McCall's long professional history — including 25 years of owning and running a CPA firm, membership on the Company's Board of Directors since the Company went public in 1995, and Chairmanship of the Audit Committee since its inception — as well as his calm, professional demeanor at the hearing is consistent with his testimony of the cautionary approach he would have taken in this case concerning judgments as to the Company's illegal retaliation against an employee. (HT, pp. 511-13.) Had this alleged exchange with Mr. McCall taken place in a private meeting between him and the Complainant in a situation where a person in his position might conceivably have felt more freedom to make unguarded, controversial statements, I would be inclined to give less weight to his adamant denials at trial. However, I simply do not find it plausible that a person in Mr. McCall's position, with his significant years of professional experience, would have openly made a statement before the rest of the Audit Committee and the Company's executive team, confirming that he believed the Complainant had been illegally retaliated against, unless he truly believed that to be the case. Nothing whatsoever in the record provides credible support to the Complainant's assertions that Mr. McCall did believe that to be the case. I, therefore, find that the Complainant misconstrued Mr. McCall's show of personal support and reject her argument that his comment provided direct evidence of the Company's retaliatory motives against her.

The Complainant has therefore not offered any credible *direct* evidence showing that her protected activity was a contributing factor in the decision to alter her responsibilities and not consider her for the DVP position.

Circumstantial Evidence of Causation

The remainder of the Complainant's case involves circumstantial evidence that the decision to reduce her duties and remove her from a supervisory position was motivated by retaliatory intent; she urges that Mr. Dick's and Mr. Martin's retaliatory motives can be inferred circumstantially from a) the evidence of her positive work history at the Company, and b) the close timing between her participation in protected activity on February 18, 2007, and the decision alter her duties which was communicated to her less than two months later.

The Complainant's Performance

The Complainant asserts that she had a positive work history and that her employees in the Tax Group were the happiest employees in all of the finance staff; that none of the dissatisfaction that Mr. Dick and Mr. Martin allege they felt concerning her poor performance was ever documented by negative performance reports; and that she received promotions and pay raises as late as December 2006. (Complainant's Pre-Hearing Statement, Att. A, p. 8.) She also argues that the Company's decision to maintain her, post-reorganization, in a position of liaising with attorneys and insurance brokers on behalf of the Company is a testament to their belief in her strong professionalism. (Complainant's Final Reply Brief, p. 7.)

The Complainant maintained some positive working relationships at the Company, and she was well liked by several of her coworkers. Mike Locascio, DVP of Corporate Financial Planning & Analysis, testified that he "kind of hated to see [her] go." (HT, p. 494.) Heather Trana, Director of Controllership, also testified she had "a good working relationship" with the Complainant. (HT, p. 366.) The Complainant received a November 29, 2006, e-mail from

Mona Lang-Gillming, one of her employees in the Tax Department, in which she wrote, "You always make me feel better after talking with you. I feel appreciated and valued so thanks…" (CX 21, p. 7.) The Complainant represented that "it was a well known fact that I had the two happiest employees in the entire Finance Department." (Complainant's Opposition Brief, Ex. 15, p. 8). The Complainant also maintained a solid working relationship with her supervisor, Mr. Dick, throughout her employment (although, ironically, the Complainant has included Mr. Dick in her claim of retaliation). (HT, p. 224.) The Complainant also received a series of congratulatory e-mails from various colleagues in diverse departments[48] following the announcement of her promotion to Tax Director in January 2007. For example, Ronn Hall from the Sourcing Department wrote, "Well deserved for a brilliant person. Thanks for all you have done for Sourcing." (CX 21, pp. 3-6.)

The Complainant also made notable improvements to the Company's Tax Department during her tenure. She brought the tax function in-house and helped to uncover a multi-million dollar error in the fixed asset component of prior tax provision calculations. (HT, pp. 90-91.) The Complainant took the matter of accuracy in her work seriously; she considered herself to be publicly "on the hook" for inaccuracies in the tax provision to an equal extent as the three legally responsible officers (the CFO, CAO and CEO). (HT, pp. 84, 169-70.)

Several of the Complainant's colleagues indicated that they believed her promotions were well deserved. (CX 21, pp. 3-6.) Mr. Dick also testified that he believed she had earned her final title of Tax Director, and that he saw her as "fitting into the company's future." (HT, pp. 228-29.) While the adjectives Mr. Dick used to describe the quality of Complainant's work varied unimpressively among "good," "adequate," and "decent," he also described the Complainant's specific strengths:

> I believe she did a good job on the technical side of taxes, understanding the tax code and regulations. She worked very hard. . . . And I think Laurie did a good job of managing the workload with the resources that she had. So I would say those were here (sic) strengths . . . particularly on the technical side.

(HT, pp. 224, 230.) Mr. Dick also stated she showed additional strengths in the creative area of tax planning strategy. (HT, p. 246.) Mr. Martin testified that the Complainant "absolutely was very valued, brought a lot to the table," and again noted her particular skills in the area of tax planning which he had been "very much interested in exploring" with the Complainant until her resignation. (HT, pp. 652, 700-01.) He opined that "Ms. Hillenbrand had some experience in that, and a very strong interest in it. And I was very excited about working with her on that. . . . It would have given the organization more bench strength and a larger band[]wi[d]th . . . to accomplish some things that we were looking to do." (HT, p. 701.)

Though the Complainant had good technical skills, the record supports a finding that she also possessed a few, heavily remarked upon, professional weaknesses; primarily, her difficulties with focus, poor "people skills" and professionalism, and poor management skills generally. Mr.

[48] Introduced as exhibits by the Complainant were four congratulatory e-mails from Kelly Leary, DVP of Sourcing Operations; Mickey Quinn, DVP of Retail & Spa Operations; Ronn Hall from Sourcing; and Carl Brenner, whose role in the Company is not established in the record. (CX 21, pp. 3-6.)

Dick stated that the Complainant "was not a strong manager of employees," and that "there were things Laurie needed to work on and needed to improve at in order to perhaps advance to the next level." (CX 18, p.1; HT, p. 230.) When asked to identify which weaknesses he saw in the Complainant that could justify his belief that she would not be ready to assume the responsibilities of a Divisional Vice President of Tax, Mr. Dick was forthcoming with an array of specific concerns, including the Complainant's lack of experience working for larger companies with high sales volume; lack of experience managing personnel; problems with focus on the task at hand; problems with "professionalism and in dealing with other people within the company;" lack of commitment to remaining with the company "on a long-term basis . . . over a five-year time horizon;" and a poor background in process and procedures. (HT, pp. 246-47.)

Though the Complainant did receive congratulatory e-mails from other employees when she was promoted, it is noteworthy that none of them were sent by individuals in the Finance areas. (CX 21, pp. 2-6.) It can be easy to maintain positive working relationships with individuals who work beyond arm's length; the more difficult task is to maintain strong relationships with those with whom one interacts on a daily basis and in a subordinate capacity.

A significant amount of evidence suggests that the Complainant was also prone to developing significant conflicts with supervisors and close working colleagues. In the Complainant's two prior salaried positions before joining the Company, she voluntarily resigned within one and three years, respectively, after developing personal conflicts with her supervisors and mistrust of their competency. (RX AA, pp. 16-17.)

In the months and years leading up to her alleged instances of protected activity at the Respondent Company in February and April 2007, the Complainant developed significant conflicts with at least three of her close colleagues and supervisors in the Tax and Finance Groups at the Company: the former DVP of Finance, the corporate controller Carol Williams, and the Complainant's former employee in the Tax Group, T.J. Eigler.

The first conflict involved the former DVP of Finance, to whom the Complainant reported directly. Although the Complainant referred to this conflict only in passing during her testimony, the conflict was severe enough to inspire her to actively seek alternative employment in 2005, within a year of joining the Company. (HT, p. 491.) At that time she interviewed with the independent recruiter who later helped her obtain the Merix position. (HT, p. 491.) The former DVP of Finance left the company in early 2006, at which time the Complainant began reporting directly to Melvin Dick. (HT, p. 224.)

The second conflict involved the corporate controller, Carol Williams. In 2006, the Company brought in an outside professional facilitator to work with the Complainant and Ms. Williams to improve their "strained working relationship . . . [and] their ability to communicate with each other." (HT, pp. 232, 650.) Around this time the company also retained Mr. Stone to mentor the Complainant and assist in her "leadership development." (HT, p. 650.) Mr. Martin was also charged with the task of smoothing out the conflict between the two women after his hire. (HT, p. 640.)

The Complainant contested the notion that the source of her problems with Ms. Williams was interpersonal; rather, she argued that the problems were a product of their departments' lack

of adequate resources, and therefore not in any way the Complainant's fault. (HT, p. 284.) Mr. Dick testified, in contrast, that it was only *after* the outside facilitation that the Complainant and Ms. Williams decided that their problems were based on a lack of resources. (HT, p. 284.) Mr. Martin testified that when he began working for the Company in March 2006 the Complainant and Ms. Williams "actually, wouldn't talk to each other." This evidence of emotional strife between the two corroborates Mr. Dick's representation that the problem was largely an interpersonal one. (HT, p. 640.)

The third conflict involved T.J. Eigler, who was hired in May 2006 to work under the Complainant in the Tax Department. (RX AA, p. 81.) By October 2006, the Complainant had developed complaints concerning Ms. Eigler's job performance when she failed to timely complete her work and the Complainant had to assist her in order to meet a filing deadline. Ms. Eigler, in turn, expressed concerns as to the Complainant's experience, qualifications, professionalism, and management abilities. (HT, pp. 589-90, 600, 647.) Ms. Eigler shared in the fault for the persistence of this conflict; Anne Bruce at one point called her "self-righteous," and Mr. Martin confirmed that there had been performance concerns involving Ms. Eigler's timely completion of her tax return work. (HT, pp. 590, 647.)

The Complainant did not follow Company procedures to resolve the conflict with Ms. Eigler. Standard procedures used in cases of poor employee performance involved alerting Anne Bruce, then Director of Employee Relations, at an early stage in the conflict, and engaging in at least two attempts at internal mediation between the employee and manager. (HT, p. 592.) The Complainant represented that she attempted to reconcile the problems with Ms. Eigler using the procedures available through the Human Resources Department during the months of November 2006 through January 2007. (HT, p. 589; Complainant's Opposition Brief, Ex. 15, p. 9.) Ms. Bruce testified, in contrast, that the Complainant never engaged in a facilitated mediation with Ms. Eigler and that Ms. Bruce only met with Ms. Eigler on one occasion, at which time Ms. Bruce understood that the Complainant's decision to fire Ms. Eigler had already been made. (HT, pp. 590-92.) Mr. Dick allowed the Complainant to make the decision concerning the termination of Ms. Eigler. (HT, pp. 593, 600.) Mr. Martin represented that he and Mr. Dick both felt the decision to fire Ms. Eigler was "appropriate," because "Laurie was the head of tax . . . She was unable to work with T.J. and that was the decision that Laurie and Mel supported." (HT, p. 649.) Ms. Eigler was, in fact, fired on January 17, 2007. (HT, p. 171.)

During the conflict with Ms. Eigler, the Company hired the Complainant's top recruit choice and her former colleague, Sam Roberts, for a Senior Tax Manager position in November 2006. Mr. Roberts began work in January 2007, near the time that Ms. Eigler was fired. (HT, pp. 172, 425.) Mr. Martin testified that he was only "marginal" on the decision to hire Mr. Roberts but left the decision up to the Complainant and Mr. Dick. (HT, p. 655.)

A fourth severe conflict developed with Mr. Martin primarily as a result of the events described herein. The Complainant represents that she began to develop a personal mistrust of him prior to the outburst on February 18, 2007 (*see infra*), but that they maintained an effective relationship: "Up to the event, the phone call event, I was starting to have some concerns about behaviors of his that I was seeing, but you know, he came over to my house to bring his kids for trick and treat [in October 2006]." (RX AA, p. 131.) Loni Knepper placed the visible strain between them as occurring at some point following the most recent fiscal year-end, which took

place on February 3, 2007. (HT, p. 397.) Ms. Knepper was unable to identify a particular date on which she first perceived the conflict. Mr. Martin testified that he initially enjoyed a "very collegial" relationship with the Complainant, and took on "sort of a mentoring type of role and supporting role." (HT, p. 641.) His testimony suggested that he did not perceive hostility from the Complainant until after the February 18 incident.

Multiple witnesses testified concerning the Complainant's sarcastic and dramatic behavioral and management styles, qualities which likely intensified these conflicts. The Complainant was described as known for being "funny and sarcastic," "passionate," "quite dramatic," and "abrasive." (HT, pp. 395, 399, 603.) One colleague, Robert Larson, testified that he sensed in the Complainant "a low emotional maturity . . . it just seemed that the emotions didn't get separated from the issue and distracted from the task." (HT, p. 603.) Mr. Larson's impression was that "at times, it seemed like she had an ax (sic) to grind and wanted to pick fights. You know, it just seemed that she was out there to pick a fight."[49] (HT, p. 603.) A private "vent memo" written by T.J. Eigler following a meeting with the Complainant on October 17, 2006, described the Complainant in similarly unfavorable terms: "Seriously, Laurie is rude, self-absorbed, and engages in unprofessional behavior on a regular basis. She tells people to shut up so she can talk, she uses inappropriate language when speaking to people she hardly knows, and she's paranoid . . . "[50] (Complainant's Opposition Brief, Ex. 9, p. 2.)

In summary, the few items of solid evidence that the Complainant presented of her positive relationship with her close colleagues is in my estimation overshadowed somewhat by the bulk of diverse evidence in the record of the Complainant's poor track record on maintaining strong working relationships in the Finance area. The Complainant required outside facilitation to help resolve her ongoing conflicts with the corporate controller, Ms. Williams; she developed major working conflicts with her tax colleague, Ms. Eigler, failed to use the prescribed Company resources for attempting to resolve the conflict, and fired Ms. Eigler within nine months of her hire; she developed a conflict with her first direct supervisor, the former DVP of Finance, which was severe enough to inspire her to seek alternative work within a year of her joining the Company; she developed a serious conflict with Mr. Martin, her future direct supervisor, and yelled profanities at him on one occasion; and she had also quit her two most recent former jobs after developing conflicts with her supervisors.

The record is also replete with evidence corroborating Mr. Dick's claim that the Complainant possessed weak management skills. Prior to her work for the Company, she had never before managed staff, having always been "an individual contributor." (HT, p. 651.) The

[49] Following the Complainant's departure and the arrival of Michelle Carlone, the new DVP of Tax, Mr. Larson testified that "a lot of the drama has gone." (HT, p. 612.) Mr. Martin also corroborated this testimony with his comment that Ms. Carlone has brought an aura of "calm" to the Department and forged new, "tight knit" bonds with the management of the other Finance areas. (HT, p. 697.)

[50] I am well aware that Ms. Eigler's comments concerning the Complainant likely carried some quality of taint or rancor, given the ongoing conflicts between the women. I will therefore be guarded concerning the weight I accord to Ms. Eigler's subjective judgments concerning the Complainant's personal qualities. However, I do consider that the circumstances of this document's production raise a strong inference of reliability or trustworthiness — it was written by Ms. Eigler three months preceding her termination following a meeting with the Complainant and was apparently intended to serve no other purpose than Ms. Eigler's private catharsis, having been discovered in a file on her desktop computer following her departure.

Complainant was considered by several colleagues to be a poor delegator. Mr. Martin described the Complainant as a "lone wolf" who regularly took entire boxes of files away from the office to work from home, and did a poor job of delegating work to her colleagues or interweaving their work with her own. (HT, p. 697.) Her style of management was, according to Mr. Martin, "to be very much managing and doing things on her own. She feels that she's the only person who can prepare the tax provision [and] the only one that could do the returns." (HT, p. 648.) Mr. Martin believed that this management style was the basic source of the conflicts between the Complainant and Ms. Eigler, as Ms. Eigler had in her former employment been "used to a lot of hands-on supervision and direct interface with a boss who actually gave her specific tasks to do." (HT, p. 649.) Anne Bruce corroborated this view of the conflict with Ms. Eigler, testifying that Ms. Eigler reported having requested the chance to take on more work at a higher level, but the Complainant refused to delegate the work. (HT, p. 393.) Ms. Eigler's "vent memo" also states, "I . . . need to document every instance where unclear direction caused wasted work," and queried, "Can [Mr. Dick] really be happy with [the Complainant] in this position?" (Complainant's Opposition Brief, Ex. 9, p. 2.)

The Complainant, in turn, repeatedly asserted that she had no choice but to operate solo. Notwithstanding the hire of Sam Roberts, her top choice recruit for a Senior Tax Manager position in November 2006, the Complainant maintained the view that she had no choice but to complete the tax provision work on her own. (HT, p. 234.) For example, after Mr. Dick telephoned the Complainant while she worked at home on the tax provision, she told him, "Every time you call me, every time you ask me, you suck every bit of life out of me that I have, and I have nothing left to do the work, and *there is no one else to do the work*." (HT, p. 289 (emphasis added).) Mr. Martin also testified that when he attempted to ask her questions during her tax provision work, she told him "that the spreadsheet was exceptionally complex and that she was the only one that could do any of this work." (HT, p. 674.)

The Company accommodated the Complainant's frequent work from home. (HT, p. 386.) However, Mr. Martin represented that her need to work from home made her less effective as a manager of employees, as she was "not really . . . accessible for questions . . . [a]lthough she was fairly . . . responsive via e-mail," and the tax group lacked a "supervisory executive presence in the office," which Mr. Martin said caused him "concern . . . from a leadership perspective." (HT, p. 650.) Ms. Eigler's "vent memo" corroborates Mr. Martin's concerns about the Complainant's lack of presence in the office: "[She]'s never here often enough to know if I'm chatting, working, etc. . . . I also have no intention of tracking her down on her cell phone all the time." (Complainant's Opposition Brief, Ex. 9, p. 1.)

E-mail threads from the Complainant also corroborate Mr. Dick's claim that she had problems maintaining focus at work. In one thread between the Complainant and Mr. Dick on February 21, 2007, after Mr. Dick inquired if she would be in the office that day, the Complainant replied, "Yes. You know I closet myself at home so I can FOCUS!!!" and later in the thread stated, "the best way for you to help me is to leave me alone and let me do my work." (CX 21, p. 38.) A different e-mail to Mr. Martin on February 20, 2007, stated, "THIS IS WHERE I NEED TO FOCUS – no more on the payable or any other random piece right now. I'm going dark." (CX 21, p. 52.) This genre of statement by the Complainant, indicating her need to work in the privacy of her home in order to successfully complete her work, provides

support for Mr. Dick's and Mr. Martin's concerns as to her difficulties with focus within the Company's working environment.

Mr. Martin and Mr. Dick also shared performance concerns as to the accuracy and timely completion of the Complainant's work, the difficulty of reviewing her complex spreadsheets, and the swift fluctuations among tax rates that she supplied. (HT, p. 671; CX 19, p.1; CX 21, p. 50.) On March 4, 2007, Mr. Dick e-mailed Mr. Martin and Mr. Larson to state his belief that they needed to have an outside expert carry out a "deep dive" review of the Complainant's work on the tax provision. (Complainant's Opposition Brief, Ex. 2, p. 8.) E-mails from the Complainant containing differing tax rates in short succession also corroborate Mr. Dick's and Mr. Martin's statements at the hearing that they were concerned and confused by the number of shifts in the Complainant's tax rate calculations. (*Compare* CX 16, p. 2 (containing the Complainant's February 15, 2007 calculation of a 39.68% tax rate) *with* RX Z, p. 5 (containing the Complainant's conclusion on February 22, 2007, that "[t]he rate is in the 39.2 zone") *and with* RX Z, p. 6 (providing Mr. Martin with additional numbers on February 26, 2007 which led him to believe the tax rate was 38.8%.).) Her supervisors' increased level of involvement in the Complainant's tax provision calculation process, which she deemed evidence of hostility and harassment, in my estimation adds some additional support to their claims that they were concerned about the accurate and timely completion of her work. Ms. Eigler's "vent memo" also expressed her concrete concerns as to the Complainant's competence:

> It's apparent from prior year's (sic) workpapers that she doesn't know the difference between the 2 ½ month "rule" from Sec. 404 and the 8 ½ month "rule" from Sec. 461(h) . . . And she isn't even current on her CPA certificate, and I think she's totally naïve about the materiality of FIN 48 . . . I sure hope, for the company's sake, that someone with some technical knowledge and audit/controversy experience is going to review our computations.

(Complainant's Opposition Brief, Ex. 9, pp. 2-3.) These concerns are corroborated by Fred Halpin's testimony that following the Complainant's departure the new DVP of Tax restructured the tax provision process, saying: "I'd . . . say in general that it's been completely redone." (HT, p. 428.)

Moreover, I also accord little weight to the Company's failure to write these problems up in the Complainant's performance reviews, in light of the Complainant's own statement that the Company "d[id] not have an objective or effective performance management program." (Complainant's Pre-Hearing Statement, Att. A, p. 8.) Absent evidence of similar situations where the Company did include specific commentaries of this genre on employees' formal performance reviews, I am not persuaded that the Company's failure to do so in this case was significant.

Additionally, the evidence of the "salary compression" issues that led to the Complainant's pay raises undermines her reliance on her pay raises as evidence that her performance met and exceeded the Respondent's expectations. At her deposition, the Complainant explained her awareness of the explicit causal connection between her pay raises and the hires of T.J. Eigler and Sam Roberts at higher salaries than her salaries to date. (RX AA, pp. 42-43; CX 22, p. 63.) After Ms. Eigler was hired as a "Tax Manager" at a higher salary than

the Complainant's, the Complainant's salary was increased and her title was changed to "Senior Tax Manager." After Mr. Roberts was hired as a "Senior Tax Manager," again, at a salary higher than the Complainant's, her salary was again increased and her title was changed to "Tax Director." (CX 22; HT, p. 654.) Mr. Dick commented only that he felt the Complainant's pay raises were "appropriate" given the circumstances. (HT, p. 234.) Faced with these circumstances, I do not consider that the Complainant's promotions and salary increases provide compelling evidence of outstanding professional performance. The promotions speak more to the Company's sense of fairness than they speak to the Complainant's professional qualities.

Chronology

The Complainant also argues that the close time frame of events raises an inference that the protected activity contributed in some way to the adverse employment action taken against her. I previously found that the timing of events in this case was sufficient to satisfy the Complainant's causation burden at the summary decision phase. (Order Denying Motion for Summary Decision and Motion to Strike, p. 16.) Her protected activity occurred on February 18, 2007, and she was informed of the adverse employment action on April 4, 2007.

Where an adverse employment action "follows on the heels of protected activity," this close timing and chronology can suffice to establish the causation element of the complainant's *prima facie* case at the summary decision phase of a proceeding. *Van Asdale*, 577 F.3d at 1003 (quoting *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1065 (9th Cir. 2002)). However, at the post-trial phase, when the judge ultimately weighs all of the evidence to decide whether the protected activity contributed to the adverse action, close timing alone is not enough to satisfy this element. In fact, one ALJ has commented that at the post-hearing phase, "Close timing alone is rather weak evidence. . . . Strong countervailing evidence may lead the judge to conclude that retaliation had nothing to do with the adverse action." William Dorsey, *An Overview of Whistleblower Protection Claims at the U.S. Dep't of Labor*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 43, 87 (Spring 2006).

In this case I find that there is an exceptionally large body of countervailing evidence to support the Respondent's position that the personnel decisions involving the Complainant were taken irrespective of her participation in protected activity.

As a primary matter, I feel compelled to note that I am not persuaded that the Complainant's protected activity — complaining to Mr. Dick concerning Mr. Martin's inaccurate internal accounting in potential violation of ICOFR rules — was of sufficient significance to the Respondent that it would have "merited" the Respondent's retaliation, so to speak. As discussed at length above, the use of an estimated "holding place rate" in the preliminary ledger was a common practice at the Company, and information available to Mr. Martin as of February 18 provided him with a factual basis for using a 39% flat rate as the placeholder. (*See supra*.) As such, the Complainant's complaints as to the potential inaccuracy of this rate were not likely to generate a great deal of concern from her supervisors, and I do not find evidence in the record to suggest that her February 18 complaint to Mr. Dick did, in fact, inspire significant concern for management. According to the Complainant's own account of her protected discussion with Mr. Dick on February 18, 2007, he may not have even clearly understood the reasons for her complaint. (*See* HT p. 80 ("I showed Mr. Dick the e-mail on my

screen, and I said . . . 'This is where it came from.' . . . [A]nd he sat down across the desk from me and said, 'Well, what are the problems? What's the issue?'").)

Rather, the concern generated for the Respondent's management on February 18 arose from the violence and hostility of the Complainant's outburst toward Mr. Martin. As I have explained, this outburst was a communication both separate and distinct from her protected activity on that date. Given this distinction, Mr. Dick's reasonable concerns pursuant to the violent outburst — concerns about the Complainant's professionalism and the future working relationship of the Complainant and Mr. Martin — and the possibility that the outburst did contribute in some way to the adverse personnel decision affecting the Complainant, do nothing to raise an inference that *her protected activity* on February 18 — her subsequent conversation with Mr. Dick during which she specifically explained her belief in Mr. Martin's violation of ICOFR rules concerning accuracy of internal accounting — contributed in any way to the adverse personnel decision taken.[51]

Moreover, I see nothing in the record to persuade me that the Respondent or Mr. Dick had ever demonstrated any hostility against the Complainant following the other ICOFR-related complaints that they had received from her over the years. Through the entire duration of her employment at the Company, the Complainant was outspoken concerning potential ICOFR problems at the Company, and her reputation at the Company reflected this quality. (*See, e.g.,* HT, p. 110 ("[K]nowing that I'm not shy about sharing my thoughts on when I see things wrong, [Ms. Knepper] suggested that [Mr. Dick] come talk to me" concerning the 2006 COSO surveys).) The Complainant has not presented evidence to show that the Company ever discouraged her complaints. On the contrary, the Company continued to support her by promoting her within her area, giving her substantial salary raises, providing her with additional staff, hiring outside tax consultants for her use and benefit, raising salaries in the tax area, hiring outside facilitators to resolve interdepartmental problems the Complainant faced, and directing Mr. Martin upon his hire to devote attention to helping resolve the Complainant's concerns. (*See supra*.) After this long record of granting support to the Complainant following her lodging of serious complaints as to the Company's possible violation of ICOFR rules, I see no basis in the record for believing that the Company suddenly took a retaliatory turn in response to an individual complaint of a similar kind.

Additionally, I find that the temporal connection of events is not as close as it appears on first blush. As I discussed at length above, after my consideration of all relevant evidence, I find the weight of evidence supports Mr. Dick's and Mr. Martin's testimony that the decision not to consider the Complainant for the DVP position was made *prior* to her protected activity on February 18, in the December 2006-January 2007 timeframe. (HT, pp. 251, 652.) Two credible pieces of direct evidence and a great deal of circumstantial evidence supports this finding of an earlier timeframe for the decision, including: 1) The Complainant's testimony concerning Mr. Dick's failure in 2006 to respond to her inquiries concerning her desired promotion to DVP of

[51] The Complainant argued in her Final Reply Brief that when Mr. Dick commented that the Complainant's February 18 outburst was not a "significant factor" in the decision to change her duties, in so stating he admitted that her February 18 protected activity "had some effect" on the decision, however small. Given the clear distinction I perceive between the outburst and her protected activity, I consider this comment by Mr. Dick to be irrelevant to the Complainant's claim.

Tax by 2008, and her own belief that his silence indicated that at that time he believed her "career path" did not include promotion to DVP (RX AA, p. 110); 2) Ms. Eigler's private report of comments made to her by Mr. Dick in October 2006 indicating his intent to replace the Complainant as the head of Tax (Complainant's Opposition Brief, Ex. 9, p. 2); 3) the Complainant's difficulties working effectively with the controller Ms. Williams in 2006; 4) the Complainant's management deficiencies that arose in 2006, as evidenced through her conflict with Ms. Eigler; 5) Management's discovery during the conflict with Ms. Eigler in 2006-January 2007 that the Complainant lacked any prior experience in employee supervision (HT, p. 651); 6) the Complainant's discussions with Mr. Dick in January 2007 indicating her lack of commitment to remaining with the company for a duration beyond 2.5 years (HT, p. 120); and 7) the Complainant's ongoing need to work from home, which detracted from her "executive presence" in the office, and which she conceded was due to her problems with focus while in the office (CX 21, p. 38 ("You know I closet myself at home so I can FOCUS!!!").)

Given my finding that the decision not to promote the Complainant to DVP was made prior to February 18, the only remaining question, therefore, is whether her protected activity contributed in any way to the exact dimensions of the planned job changes communicated to her on April 4.

The Respondent has provided a significant body of evidence to explain its rationales for the changes to her position at the time in question. The Company was growing swiftly, and it planned to expand its number of strong directors in tax beneath the new DVP position. As a practical matter, at some point in time, as more staff and the DVP were added to the tax workforce, the Complainant's duties would have *had* to be reduced and specialized, to make way for the creation of new tax roles with distinct areas of responsibility. The decision was made to gradually reorient the Complainant's responsibilities in the direction of what the Respondent reasonably perceived to be her clearest strengths, and away from her clearest weaknesses. The Complainant's weaknesses as a manager of staff and as the liaison with the Accounting Department had already become clear in the preceding year. (*See supra*). The deficiencies in her work on the financial reporting process had also become evident, as demonstrated by the ongoing problems in her area of responsibility (which triggered creation of the potential significant deficiency slide). (*See supra*).

The Respondent considered the Complainant to be a valuable and knowledgeable team-member, however, and I am persuaded that Mr. Martin's and Mr. Dick's decision to alter her duties was based in substantial part on their wish to encourage the Complainant in the direction of the areas they perceived to be her clearest strengths: the creative side of tax: innovative tax planning, tax initiatives, and "connecting the dots." (HT, pp. 121, 700-01.) According to the Complainant, Mr. Dick began his April 4 discussion of the changes in her duties by informing her that he perceived her greatest strengths to be in these areas. (HT, p. 121 ("And [Mr. Dick] said, '[L]et's see, what are your strengths? You're really good at connecting the dots,' and he wrote 'Connect the Dots' on the board. And then he circled the 'P' for Planning, and he said, 'This is where I think you belong.'").) Mr. Martin's testimony concerning this thought process was also highly credible. He explained that as the Company grew, they looked to expand into areas they had not formerly had the "bench strength" or "bandwidth" to take on, such as planning initiatives to lower the Company's tax rate over time. The Complainant had discussed with Mr. Martin some of her ideas on tax planning initiatives, and communicated to Mr. Martin that she

"had some experience in that, and a very strong interest in it." (HT, pp. 652, 700.) Pursuant to these discussions, Mr. Martin became "very excited about working with her about (sic) that. . . . It would have given the organization more bench strength and a larger band wi[d]th . . . to accomplish some things that we were looking to do." (HT, pp. 700-01.) This testimony by Mr. Martin is corroborated by the Complainant's own comment in a public interview that her favorite aspect of tax work was "operations tax," which involves "helping analyze initiatives." (Complainant's Opposition Brief, Ex. 5, p. 1.)

As companies grow, the roles and responsibilities of employees will naturally be seen to shift over time. I decline to penalize a company for its reasoned decision to maximize staffing resources by redirecting a valued employee's role toward a new area of tax work — particularly an area which she had, on more than one occasion, expressed an interest in taking on.

On the whole, therefore, the Complainant has not provided sufficient evidence to persuade me that the protected activity she engaged in on February 18, 2007 — complaining to Mr. Dick about inaccurate internal accounting by Mr. Martin and possible violation of the SEC's ICOFR rules — inspired Mr. Dick or the Respondent to retaliate against her, or that it contributed in any way to the adverse action taken against her. I am persuaded that the Company would have made the decision to remove the Complainant from a primarily supervisory position, and to reorient her duties towards the new area of work for which she had expressed experience and interest, regardless of any protected activities carried out by the Complainant. The Complainant has therefore not satisfied the fourth element of her burden under SOX.

Moreover, even if the Complainant had been able to prove every element of her case by a preponderance of the evidence, I find that the Respondent would still have avoided liability, because it demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Van Asdale*, 577 F.3d at 996. Clear and convincing evidence is evidence which indicates that "the thing to be proved is highly probable or reasonably certain." *Peck v. Safe Air. Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 at 6 (ARB Jan. 30, 2004). The evidentiary burden is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt. *Grant v. Dominion East Gas*, 2004-SOX-63 at 36 (ALJ March 10, 2005). In light of my findings as to a lack of causation addressed at length above, I find that the Respondent has met this burden of showing that the unfavorable employment action would have been taken even in the absence of the Complainant's discussion with Mr. Dick on February 18, 2007.

CONCLUSION

In conclusion, the Complainant has failed to prove by a preponderance of the evidence that the Respondent Coldwater Creek violated the whistleblower protection provision of Sarbanes-Oxley by retaliating against her for her protected activity. The Complainant established that she engaged in protected activity, and that the Respondent acted adversely toward her by removing her from a top-tier supervisory position and altering certain of her duties. However, the Complainant failed to establish by a preponderance of the evidence that there was any connection between her protected activity and the Respondent's decision concerning her future role in the Company. Moreover, the Respondent has shown by clear and

convincing evidence that it would have taken the same adverse action in the absence of the Complainant's protected activity.

ORDER

In light of the foregoing, it is ORDERED that the relief sought by the Complainant Laurie Hillenbrand be **DENIED** and that her complaint be **DISMISSED WITH PREJUDICE**.

A

JENNIFER GEE
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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