U.S. Department of Labor Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 24 July 2013

ALJ CASE NO. 2008-S0X-00064

ARB CASE NO. 09-118

In the Matter of

MATTHEW VANNOY
COMPLAINANT,

v.

CELANESE CORORATION,
RESPONDENT

BEFORE: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

Appearances:
Thad Guyer,Esq.,
Stephanie Ayers, Esq., Medford, Oregon
For Complainant

Charles M.Poplstein.Esq.,
Brian Lampling, Esq.,
Thompson, Coburn LLP, St. Louis, Missouri
For Respondent

DECISION AND ORDER ON REMAND

On September 28, 2011, the Administrative Review Board issued a Final Decision and Order of Remand reversing the undersigned's decision to grant Respondent's motion for summary decision and ordering an evidentiary hearing in this matter. In remanding this case the Board stated that there were genuine issues of material fact requiring an evidentiary hearing to determine (1) whether Vannoy

suffered an adverse action due to protected activity and (2) whether the circumstances surrounding Vannoy's procurement of sensitive company and employee data for the purpose of distributing the data to the IRS constituted protected activity. A hearing was held in Dallas, Texas to address those issues on August 21, 22, and 23, 2012 and January 22, 23, and 24, 2013 and by telephone on February 5, 2013.

Before resuming the hearing two significant events occurred. First, the undersigned disqualified Vannoy's initial counsel, F. Benjamin Riek, based upon his disbarment by the Ohio and Texas Supreme Courts for professional misconduct in using a client's trust fund as a personal account (comingling) and his action in this case in misrepresenting to this court his understanding of the deadlines of this case and thereafter placing his personal preferences and priorities over the responsibility to the client and the court. Because of Reik's poor representation, I misunderstood that Vannoy had sent RX-1 by e-mail or compact disk in 2005 employee PII to the joint e-mail account of his domestic partner and non-employee Joseph Silva and himself over the public internet when in fact he had not done so but rather had attempted to send on February 15, 2007 PII to Silva and Vannoy's joint account. Such information was kicked back because it was too large to be sent by email and thus a copy of such was burned to a disk, the one and only disk he made in this case. I gave Vannoy 90 days to get substitute counsel and conduct additional discovery. Vannoy chose his present council who did a good job representing Vannoy in these proceedings.

Second Respondent filed a motion in limine to prevent Vannoy from calling three witnesses (Joseph Silvia, Michael Sullivan, and Marjorie Nichols) because of Vannoy's current counsel's failure to designate them as witnesses. The undersigned allowed Vannoy the opportunity to call Silvia and Sullivan because of the nature of the proceeding as determined by the Board and the fact that Respondent was already fully aware of their involvement in this proceeding and could have easily deposed and called them. Vannoy was not allowed to call Ms. Nichols, a social worker and therapist who provided minimal treatment to Vannoy prior to and following his discharge because of Vannoy's refusal to obtain a release of his treatment records from Nichols prior to her testimony as requested by Respondent's counsel.

I. BACKGROUND

Celanese is an international, publically traded company engaged in the manufacture and distribution of valued-added industrial chemicals with its corporate headquarters located in Dallas, Texas. As of December31, 2007 Celanese employed about 8,400 employees. Pursuant to Celanese's Business Conduct Policy (BCP) employees are allowed to report and investigate in good faith, anonymously and without fear of retaliation, suspected legal or ethical concerns.

Since July 1991, Vannoy has resided with his domestic partner, Joseph Silvia. (Tr.226) In September 2004, Celanese hired Vannoy as a contract employee through Venturi Staffing Resources to assist in the cataloging, auditing, and reconciling of employee expense reimbursement submissions. (Tr.

231). Vannoy's daily activities included the review and reconciling of about 10,000 expense reports dating back to October 2003 to verify if these reports which had been paid by Celanese on its U.S. Bank program were properly documented as legitimate business expenses in accord with IRS regulations.

As a contract employee Vannoy produced two reports in April 2005 entitled "Executive Summary Compliance Update 2004/2005 T&E Expense Reports "detailing instances (52% or 832) where employees failed to comply with IRS regulations by not supplying receipts and information concerning business purpose and authorizations exposing Celanese to an estimate $7 million liability (CX-1, 2; Tr. 243-257). Vannoy identified in these reports a systemic or recurrent problem never fully addressed by Celanese of a lack of personal responsibility by employees in providing requested information.

Vannoy performed these contract services until the end of May 2005 when Celanese hired him[1] directly as Administrator of its U.S. Bank Visa Card Program. (Tr. 231-234; CX-3). In this job Vannoy served as the liaison or primary contact between Celanese and U.S. Bank and was authorized to open up credit card accounts when employees were approved to receive a credit card for travel and entertainment for Celanese, terminate cards when employees left Celanese and continue his auditing function. In both jobs he compiled reports for management showing deficiencies in receipts and compliance with IRS criteria. (Tr. 235-236).

Vannoy worked under the immediate supervision of Donna Tillapaugh, supervisor accounts payable, until his dismissal in January 2008. Tillapaugh reported to Debra Keehn, global accounts manager, who in turn reported to Corey Fox, global transaction services director. As management began to realize the size of the problem it contracted with Protiviti, an outside consulting firm, in June of 2005 to assist in cataloging and reconciling employee expense reimbursement. In doing such work Protiviti provide expertise and training to Vannoy on what IRS and SOX required for compliance. (Tr. 237-239).[2] Prior to his employment with Celanese had Vannoy had no formal education in accounting or tax although he had worked as a manager of a chain of frozen yogurt stores, a restaurant and coffee house and had accounting experience as an accounts payable representative for GTE, and executive administrative assistant for Allied Riser Communication reconciling expense reports, making travel arrangements and developing customer accounts. (Tr. 227-230).

In September 2005, Protiviti submitted an "Expense Audit and a Project Wrap Up" Report to Celanese management recommending that Celanese identify and implement a new electronic system for submitting and reimbursing employee business expenses to address deficiencies in Celanese existent manual system. (CX-7). This report confirmed many of Vannoy's prior findings and was used to get an electronic system called GELCO to replace its manual system U. S. Bank Card Program However by

[1] Vannoy gave CX-1, 2, 10 to his attorney, Michael Sullivan who in turn provided them to the IRS. (Tr. 264, 269-271).
[2] IRS requires receipts to substantiate deductible travel and entertainment expenses. (CX-5).

June 2006 Vannoy had identified over $10 million in unsubstantiated business expenses encompassed not only the T and E card but the purchasing card for 2004 and 2005. (CX-10; TR. 268-274, 283-288). In the summer of 2006 Celanese approved the use of GELCO and in December and January 2007implemented this system. (Tr. 268).[3]

In July 2005 Celanese provided Vannoy and others in his department with laptops. Vannoy did not generally take and use this computer for company business at home but rather used a standup computer which he shared with his domestic partner, Joseph Silvan. On this computer there were 3 accounts one of which was a joint account. (mjsilvan@comcast.net) which Vannoy used because he had remote access capabilities and a secure log in to employee account information directly from U.S. Bank without using the company laptop. (Tr. 348-49, 352). From December 2006 to his departure on medical leave in 2007, Vannoy used his personal e mail account (Mvannoy2001@yahooo.com) to communicate with 1600 cardholders. (Tr. 347-48). Celanese had no restrictions on remote accessing of company or U.S. Bank servers from his home computers. Silvan testified he did not access any information intended for Vannoy. (Tr. 116).

Throughout his tenure at Celanese Vannoy assisted in a company "Gap Closure" project which identified and collected missing expense reports to support employee expenses charged to U.S. Bank credit cards and procurement cards which Celanese paid on each employee's behalf to U.S, Bank. Vannoy was diligent about and understood the importance of securing necessary information to substantiate expense requests that Celanese employees submitted. Some managers questioned and resisted or "pushed back" Vannoy's efforts at securing necessary documentation.[4]

In those instances Tillapaugh instructed Vannoy not to confront these card holders but rather to refer them to her. (Tr. 339-40). Before his suspension and discharge Vannoy always received positive evaluations, with bonuses, and merit increases in 2005 and 2006. (CX-13, 21, 38; RX-7; Tr. 338-345). Vannoy received his 2006 evaluation on March 6, 2007. (CX-38, RX-55).

II. VANNOY'S INITIAL BUSINESS CONDUCT COMPLAINT

In early February, 2007, Vannoy started to receive audit findings from Gelco that managers were authorizing payments as they had done under the prior manual system without proper substantiation and timely documentation.(Tr. 353; CX-29,36). In addition employees and supervisors were continuing to send e-mails harassing Vannoy with impunity. (Tr. 354-55; CX-31, 34). On February 15, 2007, Vannoy filed an internal BCP complaint stating that there existed within Celanese real and potential misuse of

[3] The benefits of the GELC0 program were set forth in CX-14, 15.

[4] Some of the individuals who resisted compliance included William Seeliger who repeatedly questioned Vannoy's instructions as did, Jim Alder and Jim Conner. (Tr. 339-340; CX-39).

corporate and procurement cards in violation of SOX and IRS compliance requirements. (CX-32).[5] Vannoy set forth systemic problems including a lack of accountability, continued compliance failures without consequences, white washing and lack of urgency at the highest levels. Vannoy provided copies of the BCP complaint to his immediate supervisors Tillapaugh, Keehn, Corey Fox so they would not be "blindsided" by the report. Tillapaugh reviewed the complaint and responded that she disagreed with it and pointed out alleged errors. Vannoy refused to change it. (Tr.367).

Celanese assigned Gary Rowan, regional coordinator and Donna Wegner, vice president of Celanese global unit, to investigate and interviewed Vannoy concerning his BCP complaint. (Tr. 366). Rowan quizzed Vannoy for an hour followed by brief interview by Wegner. During the meeting with Rowan Vannoy told him that he had documents and other information to support his claim. Rowan never asked Vannoy for such information. (Tr. 370-372). Wegner in like manner did not ask for supporting documents but asked Vannoy to send examples of bullying. In reply he sent 24 emails from Seeliger wherein Seeliger continued to harass Vannoy. (RX-110-115, Tr. 712-728).

Vannoy informed Rowan that another gap closure project was in the planning stages in an attempt to cover up for systematic failures and provide additional coverage for those employees who did not live up to their fiduciary responsibility and that in good conscience he could not participate in any such undertaking whereupon Rowan responded that Vannoy's refusal could be deemed insubordination. (Tr. 363-370). At that point Vannoy decided to seek outside legal advice and ultimately retained Michael Sullivan to advise him on what to do to be compliant with SOX and IRS regulations .(Tr. 370, 371). However before meeting with Sullivan Vannoy in order to preserve and protect his position, attempted to e-mail the documents supporting his BCP complaint to his joint home e-mail address which he shared with roommate Joseph Silvia at mjsilvan@comcast.net and mjsilvan@tx.rr.com. When those documents proved too large to be e-mailed Vannoy burned or copied those documents to a disk. Among those files later successfully e-mailed was a file entitled Sternin.xls containing PII information such as employee names and social security numbers and cardholder numbers. (Tr. 393-95; RX-2-4).

Vannoy admitted having only a rudimentary knowledge of SOX but was aware that Sox required accurate keeping and internal controls to insure that company expenditures were legitimate company expenses and that controls were in compliance with such. (Tr. 371-374, 661-620). When Rowan issued his final report in February 2008 Vanoy heard Celanese had set up a $ 2 million tax reserve (FIN 48) to take care of any tax liability which Vannoy thought was low considering the fact Celanese had $7 million lost by former employees who had walked out the door or quit without providing necessary documentation. (Tr. 375, 376).

[5] The complaint set forth various violations with managers approving credit card payments without proper verification. (Tr. 357-365). Compliance was apparently a major problem as late as March 2007 as confirmed in company emails of Wegner. (CX-39, 40, 41, 42, 44).

At the end of February, 2007, Vannoy contacted attorney Michael Sullivan seeking Sullivan's advice. On March 1, 2007, Sullivan called the IRS on Vannoy's behalf. (CX-37). In July, 2007, Vannoy and Sullivan met with the IRS and supplied them with the reports Vannoy had generated and participated in showing non-compliance with IRS regulations. These documents included CX-1, 2, 7, 8, 9, 10, 12, 14; RX-2 to 4. (Tr. 377-383). Vannoy discussed with the IRS various topics including cash withdrawals and personal expenditures by Celanese executives without appropriate substantiation or identification of legitimate company expense. (Tr. 503-505). On October 8, 2007 Vannoy sent RX-5 (the Sternin file) to his personal account in support of his BCP complaint. (Tr. 384-86)

On April 2, 2007, Vannoy had a meeting Tillapaugh and Keehn regarding noncompliance issues such as lack of proper documentation that the Gelco system continue to show Vannoy asked to be assigned alternate tasks because he was continuing to see the very persons he had reported in his complaint as being non-compliant and this caused him considerable distress and despondency. Keehn responded that Celanese had done nothing illegal or unethical and that if Vannoy refused to do his job he would need to speak to Human Resources. Vannoy responded that he had reported human resource representative, Venita Jackson, and her supervisor, Perry Christianson in his complaint as non-compliant. (Tr. 401-02). They refused Vannoy's request. Later that evening, Vannoy sent them as e-mail stating he would continue do his job reporting but would not do anything unethical. (CX-47) On that same day Tillapaugh sent Vannoy an e-mail telling him that when he received an unprofessional response from a non-compliant employee he should not respond but rather send the e-mail directly to her for processing. (Tr. 408-09; RX-30).

On April 3, 2007, Vannoy went on short term disability leave because of stress and anxiety he experienced in connection with his BCP complaint. (Tr. 402-04). While on medical leave he saw his physician and a mental health counselor (Nichols) and was denied access to Celanese websites or servers. (Tr. 405; CX-47). In contrast, Donna Wegner while on a disability leave later in the fall of 2007 maintained her normal access to Celanese websites and servers.

On October 2, 2007, Vannoy returned from medical leave. (Tr. 406). Before returning, Vannoy learned that Celanese had decided to phase out and transfer certain finance positions including his job to Budapest, Hungary. On May 9, 2007, he signed a retention agreement entitling him to $7,500.00 if he remained until the transition with Celanese giving him 60 days advance notice prior to layoff. Vannoy understood that his position would expire within six to months and he would receive the retention bonus only if he was employed through the transition period.

Upon his return, Vannoy rarely saw Tillapaugh. This was directly contrary to his prior experience wherein he worked with Tillapaugh on a close, daily basis, having developed a personal relationship with her outside the office. (Tr. 407). In this period prior to his suspension and discharge Vannoy never received any criticism about his dealing with cardholders but learned in a Celanese response to his OSHA complaint that an employee in his department, Casey Tarkenton had complained

about Vannoy's treatment of her mother, Patricia Tarkenton, a vice president of human resources. Vannoy had identified her as a non-compliant card holder in an October 24, 2007 report as one who should not be reimbursed for her claimed business expenses. (Tr. 412-15).

On October 29, 2007, Tillapaugh approached Vannoy while he was sitting at his desk and asked him to accompany her to Zarinah Curry's office. Curry was Celanese manager of Human Relations. (CX-57). In the office Tillapaugh began the meeting by telling Vannoy they had discovered while reviewing Vannoy's e-mail that he had sent a document to his personal e-mail address and wanted to know why he had that document in his possession. Vannoy asked what document they were referring to. They gave a brief description and Vannoy replied he could not respond without referring to the document which they did not produce.[6] The document in question was RX-5, a 32 page document entitled sternin.xls showing non-compliant cardholder employee with travel and entertainment and purchase cards that had been reimbursed by Celanese from 2004-2006. (Tr. 385-386; RX-5). Vannoy then stated the document was in support of his BCP complaint and he want to insure no reprisal. They replied that he needed to delete or destroy any such documents in his possession and that he was suspended with pay. As he was being escorted out of the office Vannoy said he was being represented by attorney Michael Sullivan.[7]

During the meeting Tillapaugh did not question him about his treatment of any card holders which alleged prompted her to investigate Vannoy's e mail and discover the Sterin file because of Casey Tarkenton allegedly remarks that Vannoy had been loud, continuous and abusive for several weeks and prevented her from working and led to her request for a transfer. In fact the reason for the e-mail search was merely a pretext for there was nothing in Vannoy's conduct that was loud continuous or disruptive as confirmed by the credible testimony of Vannoy and Elek. In fact, when questioned further neither Tillapaugh nor Tarkenson demonstrated any loud, continuous or abusive language by Vannoy. (Tr. 302-305, 308-310).

Rather Vannoy and Elek testified only that since his return Vannoy had continued to express his concern about two officials, Pat Tarkenton, mother of Casey Tarkenton who continued to appear on the delinquent list for timely submission of business expenses and David Weidman, (CEO of Celanese, who had approved payment of $10,858 to Josh Cheng president of Celanese China operations for a meeting in China with 17 CBC members. Vannoy in October 2007 had twice rejected this payment and on October 17, 2007 asked Tillapaugh how to handle this transaction. (RX-40; Tr. 422-424, 535-537) In questioning Patricia Tarkenton and David Weidman action Vannoy was in effecting going against

[6] Vannoy was concerned about Tillapaugh's review of his e-mails because she had not done so in the past and although Celanese had the right to review his e-mails a supervisor such as Tillapaugh needed a reason under Celanese guidelines to review another employee's e-mail. Casey Tarkenton testimony about her complaint to Tillapaugh allegedly provided the "reason" for the search of Vannoy's e-mails to see if he had mistreated any cardholders. Moreover on his return Vannoy saw Tarkenton on a few brief occasions.

[7] Vannoy contacted Sullivan in the Vannoy's behalf. (CX-37). Vannoy had no knowledge of the IRS Whistleblower Program when he initially contacted Sullivan. Several days later Sullivan informed him of the program. (Tr. 392-94).

Tillapaugh's instructions to Elek not to question their actions. (Tr. 329-334). On October 29, 2007, Wegner's assistant, Robin Stephenson, approved the payment to Weidman. (RX-36). Although the payment to Weidman appears to be justified in the final analysis, Weidman initial request for cash advance of $3,000 was withdrawn after being rejected by Vannoy for a lack of substantiation. (CX-53, 66; Tr. 535-537, 806-809).

On November 5, 2007, Curry sent a letter to Vannoy telling him that although their investigation was not complete it showed evidence that he may have violated company policy by transferring or attempting to transfer confidential documents to his personal e-mail account or to e-mail account of non-employees. Accordingly he was suspended without pay pending completion of the investigation. Further in order to give Vannoy the opportunity explain his actions they were giving Vannoy until November 7, 2007 to arrange a meeting at which his attorney, Michael Sullivan, who had not call them could be present. (Tr.417, 418; RX-8; CX-32).

On November 8, 2007, Vannoy mailed to Gary Rowen 35 pages of company documents in support of his BCP complaint. (RX-40; Tr. 421). Page 3 of this document shows Vannoy twice rejecting CEO Dave Weidman's request for cash reimbursement for lack of explanation on October 11, 2007. (Tr. 422-24). RX-40 contained a $7 million lack of documentation for employee expenses. (Tr. 428-31).

On November 9, 2007, a police officer from the Farmers Police Department in Dallas was dispatched to Celanese corporate offices and advised by vice president of human relations, Joseph Fox that on October 29. 2007 he discovered that Vannoy had on October 8, 2007 had downloaded 1600 employee names, social security numbers, company credit card numbers to a spread sheet that was e-mailed to Vannoy personnel e-mail address a home. Further on February 15, 2007 at 3:05pm Vannoy had copied U.S. bank financial data (578 files) from a Celanese network to his PC over a VPN without authorization.

Joseph Fox told the officer that Vannoy had recently been on sick leave and upon his return Fox had received reports from employees in his department that Vannoy was acting out of character which led Fox to investigate Vannoy's conduct. During this investigation Fox discover Vannoy that been downloading employee personal information to his personal e-mail address at home and that he was pulling all of his transactions over a two year period. Fox filed a charge of fraud or possession of personal identifying information. Admittedly Fox had no evidence of any fraud or possession of PII by any individual outside of Celanese at the time of filing his charge or thereafter.

On November 26, 2007, the police obtained a search warrant and searched Vannoy's apartment on November 27, 2007. During the search they learned of Vannoy's cooperation with Sullivan and the IRS as a whistleblower. A copy the police report with their finding is dated December 18, 2007. (CX-54, p.2; Tr. 482, 483).

On November 18, 2007, Celanese by letter notified current and former card holders of an employee (Vannoy) who had made unauthorized disclosures on July 15, 2005 to a person (Joseph Silvia) with whom he resided of personal information which may pertain to them and that in order to protect them from identify theft Celanese was providing at no cost to them identify theft protection.(RX-11; Tr.432). On November 20, 2007, Joseph Fox, notified by mail various state attorney generals of a loss of personnel information of 6,000 current and former employees involving the name addressers, social security numbers possible corporate card numbers of the employee (Vannoy) when an employee made such unauthorized disclosures on July 15, 2005, to an individual (Joseph Silvia) with whom he was living and additional disclosures or attempted disclosures on February 15, 2007. (RX-12, 94).

On January 2, 2008, Zarinah Curry, HR Manager, by letter notified Vannoy that he was being terminated that date by violating Celanese Business Policy in electronically transferring or attempting to transfer Celanese confidential and proprietary information to non-Celanese accounts. (RX-17; Tr. 707-08). Curry's letter of January 2, 2008 stated that as early as November 4, 2007 Celanese had uncovered evidence of this misconduct. However, Celanese gave him additional time to explain his actions which he decline. On January 22, 2008, Protiviti reported an analysis of Vannoy's laptop to determine whether Social Security numbers had been removed Celanese premises by burning the data to a CD, sent via e-mail or copied to an external drive of some derivation. Protiviti identified several circumstances where Vannoy e-mail such numbers to his and M.J. Silvan personal e-mail address and propriety information to an outside whistleblower lawyer, Michael Sullivan. Vannoy had 217 e-mails between himself and Silvia four of which had SSN in the text (RX-19). This report indicates an earlier e-mail analysis which was delivered to Celanese on November 29, 2007. (RX-19, page 3).

The earlier e-mail analysis showed a "Cardholder List-Account Errors.xls" that was sent to MJSilvan@comcast.net on July 17, 2007. This document contained 1657 line items with social security numbers and had been previously identified as RX-1 which was allegedly sent by Vannoy on July 15, 2005. (RX-19, p. 9) On the same page of the report is a remnant of a zip drive showing on February15, 2007 Vannoy sending from his Celanese account to his private account mvannoy2005@yahoo.com, 7 documents with "Cardholder Delinquency Summary Final Review.

Following his termination, Vannoy although quite depressed sought work by posing his resume on a Career Builder and Monster Website, submitting 300 inquiries and applications but receiving only one interview and not being hired for any full time job.(Tr. 508-509). His total income since his termination was in 2010 for $6,706.00. (Tr.505-509). In 2009 he sought work on a regular basis. In 2010 he looked for work on an occasional basis up to May 1, 2012 when he ceased looking for work. (Tr. 598-600).

In support of his case Vannoy called Joseph Silvia, Pam Elek and Mike Sullivan. Silvia is currently a project manager for McAfee, a security software company and the domestic partner for Vannoy for past 21 years. Silvia worked for Celanese prior to his present position from 2001 to-to

September 3, 2004. (Tr. 108-09). Like Vannoy he signed a confidentiality agreement with Celanese while working with them. Celanese allowed the manager to determine whether co-employees could work from their home. In 2007 Silvia had a stand up computer with joint accounts he shared with Vannoy and over which he received e-mail but did not access e-mails intended for Vannoy. (Tr.115-16). Silvia knew if he or other employees violated the confidential agreement they could be fired. (Tr. 119). Vannoy worked mainly on the stand up computer although he had a Celanese laptop. In December 2007 Celanese sent him a letter asking for his cooperation in a criminal investigation which he declined following a police search of his and Vannoy's apartment. (RX-15; Tr. 153).

Silvia confirmed Vannoy's search for work following his dismissal and the fact he suffered from depression following the filing of his BCP complaint and his discharge. (Tr.135,150,153). In like manner Pamela Elek confirmed Vannoy's problems because of Celanese lack of SOX and IRS compliance but Vannoy's appropriate response nonetheless. (Tr. 297-305). Further she was told by Tillapaugh that upper management including Dave Wiedman was not to appear on their lack of compliance list because of their positions. (Tr. 328-29). Further, Tillapaugh told Elek not to talk to Vannoy while he was on suspension or she would be terminated.

Sullivan on the other hand testified about his experience in IRS whistleblowing procedures and his representation of Vannoy telling him of the necessity of providing supporting and original documentation showing how it was obtained and the basis of his knowledge. (Tr. 156- 162; 164-167. Vannoy provided the necessary information to Sullivan who in turn provided it to the IRS (RX-43; CX-51; Tr. 168-178). Sullivan advised Vannoy not to use Company e-mail when transmitting information or to tell the Employer of the investigation so not to risk losing his attorney/client privilege or compromise the investigation. (Tr. 202-211). Vannoy kept his involvement with Sullivan to himself until Tillapaugh confronted on October 29, 2007 and his involvement with IRS until the police search of his apartment. (Tr. 221).

III. CELANESE TREATMENT OF VANNOY'S BCP COMPLAINT

As mentioned previously Celanese appointed two people to investigate Vannoy's BCP complaint, Gary M. Rowen, chief compliance officer and associate general counsel and Donna Wegner, vice president of global audit services. On April 25, 2007, Rowan issued a preliminary report. basically exonerating Celanese saying although that the company still has items to correct it had acted in good faith to address compliance failures by taking the following steps: personnel changes to program in the first quarter of 2005; clean up efforts to collect missing documentation and regular reporting to the Office of Chairman (OTC) in 2005 and 2006; retraining and certification on company policy in mid-2005; escalated potential fraudulent activities for investigation; formal remediation plan developed at end of 2006 to address past compliance issues; and implementation of Gelco reporting system and new controls and reporting capabilities in December, 2006. He noted that the person filing the complaint (Vannoy) had received significant push back (resistance) from the organization but the employee was

partially to blame by not referring the matter to supervision to handle. Where he referred the matter to supervision they in turn addressed and corrected the issue. Concerning the financial statements there was no misstatement. However, a tax reserve of $1.8 million for 2004, 2005 and 2006 was set aside to offset any "technical tax violations" and included in FIN 48 enclosures. (EX-35).

Vannoy filed a supplemental BCP complaint on November 8, 2007 by including 34 pages in which Rowen indicated a commitment to high standards of integrity and responsibility with the termination of 3 employees and he resignation of a 4th employee for the submission of fraudulent claims, the denial of Weidman's claim for Josh Cheng by himself, an e-mail to Tillapaugh wherein Vannoy asks if Celanese should pay claims that lack substantiation for more than 60 days, and a list of card holders more than 30 days late in submission of required documentation. (RX-40).

On November 15, 2007 Wegner prepared a report concerning Vannoy's initial BCP complaint. In her report she confirmed Vannoy's effort over the past two years to expose potential and real fraud, lack of fulfillment of SOX and IRS regulations. She noted that management has been aware of compliance issues and has taken efforts to correct the process. However, she notes that many examples of non-compliance on documentation and expense reporting still exist but that the company is addressing these issues. (EX-34).

On February 5, 2008, Rowan responded to the initial and supplemental BCP complaints saying in regard to the initial report that Celanese was aware of compliance issues pertaining to the corporate and procurement card system and was taking steps to improve and correct he process which included automatic discontinued authorizations if an employee did not file an expense report to reconcile credit card expenses within 60 days of incurring those expenses and where appropriate terminating and seeking reimbursement where fraud was involved or when appropriate issuing warnings that in turn would affect bonuses. Concerning bullying Vannoy's supervisors told him to report instances of such conduct to them. In turn when he reported such the supervisors took appropriate action. On the issue of Celanese reimbursing expense reports without proper documentation and taking these reimbursements as business expenses the company was aware of this problem and had posted a reserve for such. Regarding the payment of Josh Cheng by David Weidman for hotel expenses of 20-25 members of the Corporate Executive Counsel (CEC), the CEC had attended an event in Nanjing, China where Celanese had opened a new plant. Cheng had booked and paid for the room charges with his credit card. In turn, Weidman reimbursed Cheng for the payment. Weidman had initially requested an additional $4,000 in cash which he never substantiated and was withdrawn after it was initially challenged by Vannoy for lack of substantiation. (Tr. 787-88). Finally, whether 60 days was an IRS requirement for the submission of expense reports as Vannoy had asked, such a period was merely a "safe harbor' in which an expense can be submitted. (RX-34).

Rowen never addressed the fact that 40% of the card holders who were audited failed to pass and Miniki Peacock and Alan Maxwell were on the OTC committee that investigated Vannoy and were

more than 60 days delinquent in their submissions (RX-40, p.7; Tr. 786) Indeed it appears that as late as November 8, 2007 more than 170 employees had their cards suspended for non-compliance thus substantiating Vannoy's concern about a corporate culture allowing non-compliance.

IV. SUSPENSION AND TERMINATION

Joseph Fox, vice president of human resources and employment law with an extensive background representing corporations in employment testified that he learned of Vannoy's erratic behavior when his supervisor Tillapaugh and Serena Curry reported Casey Tarkenton reported to them being unable to work for several weeks allegedly because of Vannoy's loud complaints about employees continuing failure to properly record expenses. As an alleged result, Tillapaugh started to check Vannoy's e-mail after telling him not to confront card holders and learned that Vannoy had transferred a file, Sternin.xls, on October 8, 2007, from his Celanese e-mail account to his personal-email account at mvannoy2001 containing PII. Only after Vannoy was suspended did he learn of his BCP complaint which Fox denied had anything to do with his suspension. Rather the decision to suspend and terminate Vannoy was a collective decision of himself, Tillapaugh, Curry, and Corey Fox was because they discovered that Vannoy had sent across the public internet privately identifiable information to another person e-mail putting at risk thousands of employees for personal identity theft. (Tr. 828, 835).

Fox testified that Celanese had no procedures to guide them in complaining to the government about company actions or the turning over of confidential or proprietary information of Celanese to the government. (Tr. 830). Fox claimed that in the first meeting that Vannoy had with Tillapaugh that he learned that Michael Sullivan was representing Vannoy but did not take the time to find out of Sullivan's whistleblowing involvement with the IRS. (Tr. 833-34). Fox admitted he had no knowledge of any breach or compromise of this information but that once this information goes from the server to Silvia's Comcast account then "[i]t's out there digitally somewhere. It's out there. It never leaves." (Tr.835). This information could then be hacked, as it could be from any server. (Tr. 836).

Tillapaugh confirmed the collective decision to terminate but admitted Celanese never issued 1099 forms for employees to report as income those expenses which they could not verify as legitimate. (Tr.846). The first document that Tillapaugh claims that Vannoy sent to his roommate Silvia was dated July 15, 2005 and contained PII for cardholders including names, addresses and social security numbers of about 1600 employees on 45 pages entitled Cardholder List-Account Errors.xls. (Tr.966). Vannoy denied sending this list. (Tr. 395).[8]

[8] This list was provided to OSHA by Joe Fox on March 31, 2008 as an example of Vannoy's misappropriating confidential employee information on July 17, 2007. On this date Vannoy was on short term disability leave and had no access to such data while on such leave. (RX-54,p. 10; Tr. 757) . Later when a report was made to the OTC on November 15, 2007, this list was reportedly send by Vannoy on November 7, 2007 when Vannoy was suspended and again had no access to Celanese computers. (RX-10, p.2.). On November 29, 2007, an e-mail analysis of Vannoy's laptop by Protiviti showed someone had sent RX-1 to Vannoy's and Silvan's joint account on July 17, 2007.

On January 2, 2008, Curry, H.R. manager, notified Vannoy he was terminated because by his actions in electronically transferring and attempting to transfer Company confidential and proprietary information to non-Celanese e-mail accounts requiring the company to expend considerable time and resources current and former employees of this breach. (RX-17).

VI. PARTIES' POSITION

In support of its position Vannoy claims that (1) his job placed him in a position well suited to forming reasonable belief that Celanese was violating IRS Regulations and hence Sox; (2) he engaged in protected activities by his disclosure of IRS and SOX issues to his supervisors and with the assistance of Attorney Michael Sullivan to the IRS by providing to the IRS original information critical to the investigation; (3) Celanese took adverse action taken against him consisting of his suspension and discharge were not based on his alleged inappropriate communication with card holders but upon animus directed towards him as manifest by Tillapaugh and Tarkenton laughing at him while packing his office during his suspension and instructing Elek, a co-worker, not to speak to him during his suspension under threat of termination and Joe Fox filing a false charge and one sided presentation to police of evidence of against him; (4) Celanese suspended and discharged him based upon his activity in filing charges and in copying and in sending supporting documents in support of his complaints to IRS about violations of IRS and SOX regulations (5) his economic remedy is not limited to the outsourcing of work to Hungary because all his supervisors and co-workers except Elek who Celanese knew supported Vannoy maintained employment after the layoff but should include damages for emotional distress.

On the other hand Celanese contends that Vannoy did not reasonably believe the conduct he reported in his BCP complaint violated any enumerated category of 1514 (a)|(1) but rather an alleged tax liability of Celanese which is not mentioned in Section 1514 A and is not one of the enumerated categories of that section and thus not protected because his conduct did not definitely and specifically to any of the six enumerated statutes and regulations under 1514 (a) (1) citing *Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009) *See also Harp v. Charter Commc'ns, Inc,* 558 F 3d 722, 723 (7th Cir, 2009). Michael Sullivan, Vannoy's attorney, attempt to confirm the tax liability of Celanese is not protected activity and is not mentioned in 1514 (a)(1) at the time he made his report citing *McClendon v Hewlett Packard ,Inc.* 2006-SOX-00029 at 73, 2006 WL 6577175 (ALJ October 5, 2006).

Notwithstanding any lawful conduct by Vannoy he acted recklessly and unreasonably and should have used less careless ways to gather documents for his BCP complaint and IRS Bounty claim citing *Cafasso, U.S. ex rel. v Gen Dynamics C4 Sys.,* 637 F.3d 1047, 1062 (9th Cir 2011, *Shukh v. Segate Tech, LLC.* 2011 WL 1258510; *Niswander v. Cincinnati Ins. Co.*, 529 F.3d, 714, 726 (6th Cir. 2008). Vannoy simply identified a huge directory that may contain relevant documents and drug all of these into a file. Thereafter, he sent thousands of files outside the Celanese network to a foreign server across

the internet to his personal email address and that of a non-Celanese employee without bothering to encrypt them, accessed the documents remotely through a Celanese servers, printed the documents and sent them to the government via courier or sent them through a secure fax or simply hand delivered the documents to the IRS rather than sending them out over the internet with no protection. Thus, Vannoy took exponentially more documents he needed to and provided only a fraction of the documents to the government. In so doing he did not carefully examine the documents he took before taking them to see whether the documents contained confidential information and sent the documents in the most reckless and dangerous way possible. Vannoy's data breach is not protected activity because the documents he provided the IRS constituted only a fraction of the documents he removed from Celanese citing *Galinsky v. Bank of America Corp.* 2012 WL 5391424 (ARB Oct. 31, 2012).

Celanese contends it policies encourage compliance with the law. Tillapaugh, Tarkenton and Joe Fox deny the conduct attributed to them by Elek or a biased presentation to the police. Tillapaugh, Curry, Joe Fox and Corey Fox all testified that the decision to terminate Vannoy was based not on his BCP complaint nor his participation in the IRS Whistleblower program but rather Vannoy's action in sending private identifiable information across the public internet to another person's email and putting at risk thousands of employees for personal theft on three occasions (July 15, 2005; February 15, 2007 [an unsuccessful attempt that resulted in copying of material to disk(s) and refusing to later turn them over to Celanese] and in sending the Sterin file on October 8, 2007. Celanese says that its BCP policy encourages whistleblowers and make no attempts to prevent to prevent employees from discouraging employees in disclosing information to the government but expects employees who disclose information to act legally, reasonably and disclose information in the least public manner possible while disclosing the minimum information necessary to make their report. Therefore it does not and would not retaliate against any employee who unlike Vannoy, properly and reasonable disclosed information nor would it deem that employee in violation of the BCP. Moreover, Celanese contends that his back pay must be limited because his position was transitioned overseas soon after his dismissal and because it is based upon flawed assumptions.

In response, Vannoy denies any transmission of information on July 15, 2005. Vannoy admits that on February 15, 2007 he attempted to send to himself at the above address a number of e-mails which were too large to be e-mailed requiring him to burn one CD which was done in support of his BCP complaint and later provided to Attorney Sullivan in support of his IRS whistleblower complaint and then given to his criminal defense attorney to defend him against criminal allegations by Joe Fox. Vannoy also admits sending the Sterin file in further support of his BCP complaint.

Vannoy disputes Celanese assertion of its BCP policy of encouraging whistleblowers in cooperating with the government and asserts he was never informed the above policy but rather his complaints about culture of corporate non-compliance of IRS regulations and Sox where were largely ignored by Gary. Rowen and Donna Wegner who were assigned to "investigate" Vannoy's BCP complaint who did not inform him of the "results" of the 'investigation and who (Rowan)did not accept

the documentation Vannoy offered in support of his BCP and later copied to a CD which was used to terminate him. Vannoy further replies that he provided all files he was responsible for working on in accordance with IRS directives as directed by Attorney Sullivan. The kinds of information he procured and the manner of transfer were necessary to prove a violation of law and were protected even if the information he took and the manner of taking did not in fact advance proving a violation of law.

Finally, Celanese argues further the information provided to the IRS was not "original information because Celanese had already disclosed its potential tax liability related to the T and E program to the IRS by establishing a $1.8 million FIN 48 tax reserve" The Fin 48 relates to the same tax deficiencies Vannoy complained of and is a public disclosure available to any IRS agent. It is disclosed on the Celanese 10K with Celanese making available the background and supporting financial data. Further, SOX does not protect complaints to the IRS which is not an law enforcement or independent regulatory agency and does not protect Vannoy's conduct which Celanese maintains was violations of the Consumer Fraud and Abuse Act, 18 U.S.C. § 1030 (a)(2)(a); Tex. Pen Code §32.17 and Tex Bus. & Com. Code Ann. 521.051 as allegedly told by local police and by an unnamed representative of the U.S. Attorney's Office in Dallas. Rather he acted recklessly and unreasonably in gathering documents in support of his claim. *See Cafasso* and *Shukh.*

In response Vannoy contends that all that is necessary for SOX's protection is that the whistleblower reasonably believe at the time he took the information that the kind of information taken and the manner of transferring the data would advance proving a violation of law regardless of whether all the information taken would be useful or he actually provided all to regulators. Vannoy claims he reasonably believed such conduct reported in his BCP complaint and to the IRS violated SOX and trumped any application of the aforementioned statutes and constituted "original information he worked on in furtherance of SOX and IRS rules regardless of any attempt by the company of filing a FIN 48 of which he was never advised and which did not cover all liability especially that of corporate officers who should have reported "reimbursements" as income where proper documentation of business expenses was not provided. More significantly, Vannoy points to timing, knowledge of IRS involvement, motive or pretext, and disparity in treatment as evidence of unlawful suspension and discharge.

VII. CREDIBILITY

In this case, many of the crucial facts rest up the credibility of the parties. This is the case wherein both sides have excellent representation. In making credibility determinations I have considered the witness demeanor while testifying together with inherent logic of their testimony. In this case I was more impressed by the testimony of Pam Elek versus Donna Tillapaugh and Casey Tarkenton Gross wherein Elek testified that she was told by Tillapaugh not to have any contact with Vannoy 'inside or outside of work while he was on suspension upon threat of termination. Further, I was more impressed with Elek who testified she saw Casey Tarkenton and Tillapaugh go into Vannoy's cubicle after he had been terminated and while cleaning it out and throwing his things in a box heard them snickering and laughing saying" he'll never need this anymore". (Tr. 308, 309, 311, 312). Her

testimony was consistent with a very negative attitude that Tillapaugh displayed toward Vannoy after he returned from leave and told her when she questioned him about RX-5 that he had sent RX-5 to his personal e-mail address to support his BCP complaint and insure no reprisal and was represented by attorney Michael Sullivan which admittedly shocked Tillapaugh. In crediting Elek, I have taken into consideration what Celanese has said about Elek's failure to include this statement in her statement to former counsel and disbarred attorney Reik as well as her statement about receiving a bonus when in fact she did not receive one because of her leaving early to take a job with a contractor which job she took only when advised she did not qualify for any other Celanese job. However, I find her to have little to gain in testifying against Tillapaugh.

In like manner, I find Vannoy's testimony to be generally credible and consistent and credit his testimony over Tillapaugh concerning the October 29, 2007 meeting with her and Curry which was called supposedly because Casey Tarkenton had requested a transfer due to Vannoy's loud and abusive treatment of card holders when in fact he had not done so. It was at this meeting that Tillapaugh questioned Vannoy about sending RX-5 to Vannoy's personal e-mail address and was informed that it was sent to Rowen to supplement his BCP complaint and that if they wished to question him further they should talk to his Attorney Michael Sullivan.

Regarding Vannoy's kinds and manner of transfer of Celanese PII documents I find and credit Vannoy's testimony as set forth in the last or third brief supplemental brief filed by Complainant's counsel wherein Vannoy denied sending any PII on July 15, 2005 (RX-1) followed by an unsuccessful attempt to send other documents on February 15, 2007 (RX-2,3,4) resulting in one CD burn which was done to support his BCP complaint and then given to Sullivan who took them most pertinent documents and presented them in July 2007 to the IRS in support of his IRS whistleblower charge and then to his criminal defense attorney to defend against criminal charges followed by email of RX-5 (the Sterin file) to further supplement his BCP complaint that was sent to Rowen.

Regarding the theft allegations which Joe Fox filed with the Dallas police I find that he had no evidence and even today has no evidence that Vannoy did anything improper with the information he supplied to himself, or his legal counsel to support his BCP complaint or his IRS/SOX whistleblower claim. Vannoy did not send RX-1 despite Tillapaugh's assertions to the contrary. Fox knew or should have known this fact as contained in the Protiviti report delivered to Celanese on November 29, 2007 which showed RX-1 alleged e-mailed to the joint e mail address of Silvia and Vannoy on July 17, 2007 on which date Vannoy was on sick leave and again had no access to RX-1. Indeed a report to Celanese OTC on November 7, 2007 showed Vannoy sending RX-1 on November 7, 2007 when Vannoy had no access to Celanese computer due to his suspension.

Even later after his discharge when it was admittedly known that Vannoy was cooperating with the IRS he was never reinstated but Celanese remained firm in its decision in terminating Vannoy. How then could it say that all Vannoy had to say was that he was cooperating with the IRS and that the

information he had taken was safely in Agency's and his attorney's hands so as to avoid termination. In fact, Tillapaugh considered it to be company policy that Vannoy should not be able to take company data and transmit it then to a government agency without prior knowledge and approval of Celanese's attorneys. (Tr. 1007).

Indeed, I find that Tillapaugh did not find any file containing PII from July 15, 2005 as she claimed. (Tr. 966). Rather I find that she when examining his lap top had sent a file on July 17, 2007 containing PII and made it appear to the discharge committee that Vannoy had sent this file (RX-1) on July 15, 2005. In addition I do not credit her denials of telling Elek to stop putting top executives on the non-compliance list, laughing while packing up Vannoy's belongings or telling Elek not to talk to Vannoy while he was on suspension or face termination herself. Also I do not credit her denials or the denials of any members of his discharge committee of making any connection between his attempt to send document on February15, 2007 and his BCP complaint filed at the same time. Further I do not credit Fox when he denied knowing about Vannoy's involvement with the IRS until after Vannoy's discharge inasmuch the police department report, which Fox filed on November 9, 2007, showed its dismissal on December 18, 2007 because of Vannoy's involvement with the IRS. I find it incredible that Fox who took it upon himself to file the charge to protect company interest would not keep abreast of police developments and would take no more than a cursory investigation into the identity of Michael Sullivan until after Vannoy's termination when allegedly involved the potential theft of data was the largest in company history and warranted spending ½ million dollars in notifying and protecting employees. Also, there is no evidence to suggest that in taking and transmitting Vannoy violated any law as asserted by Fox. Rather Vannoy was true to his claim before he left Celanese for a leave of absence that he would do nothing unethical to assist Celanese officials in their refusal to comply with IRS and SOX regulations.

Finally, I credit Sullivan's testimony about his presentation of "original" information which Vannoy had created or worked on directly and which he had presented to the IRS in July 2007. It was precisely that kind of information that Congress intended to be protected under the IRS and SEC whistleblower programs. The fact that Celanese filed a Fin 48 does not change the nature of this information. In like manner, I find nothing in the transfer of this information to be reckless or unnecessary so as to remove its protection under the IRS program. The fact that not all such data was turned over to the IRS but retained by Vannoy's counsel does not show either a reckless or unnecessary transmission by Vannoy for he did not know ahead of time of the information how much or what information was necessary. Rather he was told to submit all information he had.

VIII. DISCUSSION

Section 806 of the Sarbanes-Oxley Act, protects from retaliation employees of covered companies who engage in SOX-protected activity. The provision, as amended, reads, in relevant part:

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. No 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)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, . . . or any officer, employee, contractor, subcontractor, or agent of such company, . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee --

(1) to provide information, cause information to be provided, or otherwise assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

(A) a Federal regulatory or law enforcement agency; . . . or

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

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

In *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -42 (ARB May 25, 2011), the Board addressed factors related to the complainant's burden to establish protected activity under SOX Section 806. The legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) govern SOX Section 806 actions. 49 U.S.C.A. § 42121 (Thomson/West 2007); see 18 U.S.C.A. § 1514A(b)(2)(C). To prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct that § 1514A protects; (2) the respondent took an unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action. *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-047, slip op. at 5 (ARB June 28, 2011); *Sylvester*, ARB No. 07-123, slip op. at 9. If the complainant satisfies his burden, the respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action against him absent the protected activity. *Menendez v. Halliburton*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011).

The Board observed in *Sylvester* that of the "six categories" set out in SOX Section 806, "only the last one refers to fraud against shareholders." *Sylvester*, ARB No. 07-123, slip op. at 19. "In examining the SOX's language, it is clear that a complainant may be afforded protection for complaining about infractions that do not relate to shareholder fraud." *Id.* at 20 ("When an entity engages in mail fraud, wire fraud, or any of the six enumerated categories of violations set forth in Section 806, it does not necessarily engage in immediate shareholder fraud."). The Board explained that the "purposes of the whistleblower protection provision will be thwarted if a complainant must, to engage in protected activity, allege, prove, or approximate that the reported irregularity or misstatement satisfies securities law 'materiality' standards, was done intentionally, was relied upon by shareholders, and that shareholders suffered a loss because of the irregularity." *Id.* at 22. "Section 806's plain language contains no requirement that a complainant quantify the effect of the wrongdoing the respondent committed." *Id.*

In *Sylvester*, the Board made clear that the "definitive and specific" standard previously employed by the ARB was inconsistent with the statutory language of Section 806. *Sylvester*, ARB No. 07-123, slip op. at 17. The Board stated that "[n]ot only is it inappropriate, but it also presents a potential conflict with the express statutory authority of § 1514A, which prohibits a publicly traded company from discharging or in any other manner discriminating against an employee for providing information regarding conduct that the employee 'reasonably believes' constitutes a SOX violation." *Id.*

Additionally, the Board has clarified that disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen. *Funke v. Federal Express*, ARB No. 09-004, ALJ No. 2007-SOX-043, slip op. 11 (ARB July 8, 2011), citing *Sylvester*, *supra* at 16. Complainant's "[b]elief must be grounded in facts known to [the] employee, but [the] employee need not wait until a law has actually been broken to register a concern." *Funke*, ARB No. 09-004, slip op. at 11, citing *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992).

Here, the record shows that Vannoy alleged accounting discrepancies that he reasonably believed related to noncompliance with federal securities laws and fraud generally. In his BCP complaint, Vannoy complained to Celanese about failures in the company's employee credit card program. Specifically Vannoy expressed concerns about:

> [c]ash withdrawals taken on the corp. card without proper substantiating documentation[;] failure to submit required documentation per Celanese and IRS regulations in a timely manner or at all[;] failure to properly document transactions and identify and legitimize the required business purpose for the expense[; and] failure to provide required receipts for corporate and procurement card transactions per IRS regulations.

(CEX-32, p. 4-5). Based on these detailed allegations, Vannoy complained to Celanese officials that the company "has misstated their financial records and underestimated their required tax burden potentially in millions of dollars." *Id.*

In his Amended Complaint, Vannoy alleged that these practices caused Celanese to "misstate[] its financial records and underestimate[] its tax burden, both violations of company policies and of federal law." Amended Compl. at 15, ¶ 54. Vannoy also stated in his Amended Complaint that his

concerns over the company's practices centered on its failure to "comply with its obligations under IRS and U.S. securities laws to maintain adequate internal controls and about management circumventing or knowingly failing to implement an effective system of internal accounting controls." *Id.* at 25, ¶100. In his deposition, Vannoy stated that his belief that the company's inadequate accounting practices were "based upon the result of the no-submission documentation [and] was potentially a SOX violation . . . ." Vannoy Dep. at 125.

While Vannoy may not have asserted a claim of shareholder fraud specifically, under SOX he need not do so to sustain his claim of a SOX violation. Vannoy's complaints concerning Celanese's business practices, assertions as to misstated financial records, and shortcomings in the company's "accounting controls" support the reasonableness of his belief that the company was engaging in accounting misconduct in violation of SOX.

A. Vannoy's disclosures to the IRS are covered under SOX

SOX states that a complainant engages in protected activity when he or she complains about a violation of any "rule or regulation of the Securities and Exchange Commission" when the "information or assistance is provided to . . . a Federal regulatory . . . agency." 18 U.S.C.A § 1514A. The statutory language does not in any way narrow the definition of "federal regulatory . . . agency" to include exclusively the SEC or the Department of Labor. There is nothing in the statutory language that limits the agencies to which a complainant may report information in furtherance of enforcement of laws that fall within the SOX's coverage. It would be incompatible with the congressional intent to promote disclosures of corporate misconduct to narrowly construe the statute in such a way that only reports to the SEC warrant its protection.

Vannoy reported his concerns not only to his employer (explicitly protected under SOX), but also to the IRS. The record reflects that the content of his complaint to the IRS included complaints about accounting irregularities that affected the company's reporting requirements under SEC rules. See CEX-70 (Vannoy alleged "improper deductions" stemming from "personal, non-business cash advances and purchases," including expenditures "relating to 'bail and bond,' fines, motorcycle shops, pet shops, cosmetics, dance halls, childcare services, schools/education, casinos, record stores, and clothing."); see also Amended Compl. at 25 (Vannoy "raised concerns to his own management chain" about the company's "failure to comply with obligations under IRS and U.S. securities laws."). Because there is no limiting language in Section 1514A that precludes complaints to agencies other than the SEC and Department of Labor, the Board has determined that under these unique circumstances, Vannoy's complaint to the IRS would fall within SOX's coverage.

Celanese argues that Vannoy's actions in appropriating the documents from Celanese are not protected activity because he allegedly acted unlawfully. Celanese contends that Vannoy's activity violated both federal and Texas state statutes relating to the protection, disclosure, and transfer of PII by citing to the various statutes. Additionally, Celanese asserts that Joe Fox was told by two "law enforcement" officials that Vannoy had acted illegally by transferring documents containing PII outside of the company. Mr. Fox's bare assertions of these statements coupled with the fact Complainant has yet to be charged or convicted of any crimes related to his activities challenges Celanese's contention.

The Board recognized the conflict that exists between a company's legitimate business interest in protecting confidential information and the potential need for such information that has arisen as a result of the whistleblower bounty programs created by Congress and that incentivizes the disclosure of confidential company information in furtherance of enforcement of tax and securities laws. These programs require that the whistleblower provide "original information to the SEC relating to a violation of the securities law," 15 U.S.C. 78*u*-6(b)(1), where such original information is: (i) "derived from the independent knowledge or analysis of the whistleblower;" (ii) "is not known to the SEC from any other source, unless the whistleblower is the original source of the information;" and (iii) the information "is not derived exclusively from another allegation contained in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media, unless the whistleblower is a source of the information." *Vannoy v. Celanese Corp.*, ARB No. 09-118, slip op. 16 (Sept. 28, 2011) citing 15 U.S.C. 78*u*-6(a)(3).

Vannoy's testimony, accompanied with the undersigned's credibility determinations, shows that Complainant's sole purpose in transferring the Celanese documents was to support his BCP complaint to Celanese and/or his disclosure to the IRS. Celanese argues that Vannoy improperly removed Celanese documents containing PII in July 2005 which were not used in relation to his BCP or IRS complaints. As previously stated, I discredited Donna Tillapaugh's testimony concerning her discovery of a July 15, 2005 file containing PII that Vannoy allegedly sent to an outside email account. Additionally, Complainant's testimony revealed that he would have no need to transfer such documents outside of Celanese, even when working from home, because he had remote access to U.S. Bank servers.

It is not necessary to determine whether Vannoy engaged in protected activity when he allegedly transmitted documents in July 2005 because the record supports a finding that no such transfer ever occurred. Concerning Vannoy's duplication, transfer, and removal of documents in February and October 2007, Complainant's testimony supports a finding that all such actions were taken in full support of his BCP and/or IRS complaints. Celanese representative Joe Fox testified that the actions taken by Complainant, if done in cooperation with a government agency investigation, would not be considered a violation of Celanese's BCP. Further, Celanese's policies do not specifically address the manner in or circumstances under which files or documents containing PII are to be transferred, duplicated, or stored. There is not policy requiring encryption of such information or specifically prohibiting the copying of such to a disc or other similar storage device. Accordingly, Vannoy's actions in February and October 2007 constitute protected activity under SOX.

B. Vannoy suffered an adverse employment action

Section 806 states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee." This language explicitly proscribes even non-tangible activity, evincing a congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. Accordingly, the Board recently ruled that an "adverse action" under SOX refers to any unfavorable employment action that is more than trivial, either as a single event or in combination with other deliberate employer actions. An adverse action is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of analysis.

Following his complaints about the company's employee credit card accounting practices, Celanese suspended Vannoy with pay for a short period, suspended him without pay, and then terminated his employment. See *supra* at 4-5. There is little question that Vannoy suffered a number of adverse actions which ultimately led to his dismissal. The Board notes that even *paid* administrative leave may be considered an adverse action under certain circumstances. In *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-038, slip op. at 4-5 (ARB Apr. 20, 1998), the Board held that, although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus.

C. Vannoy demonstrated that his protected activity was a contributing factor in the adverse personnel action taken by Celanese

Upon Vannoy's return to work following his short-term disability leave, Celanese returned Complainant to the same position and job duties which constituted the basis for his initial BCP complaint. Vannoy was clear in his objection to allow what he believed to be unethical and illegal activity to continue. Vannoy continued to voice his disagreement with the way reimbursements and corporate card charges were handled at Celanese. It was precisely these actions by the complainant as well as his opinion that and repeated reporting of HR vice president Patricia Tarkenton as a non-compliant card holder that ultimately led to Casey Tarkenton complaining to Donna Tillapaugh on October 24, 2007 about Vannoy's supposed mistreatment of Patricia Tarkenton. This served as Tillapaugh's pretext for searching Vannoy's email and computer and ultimately moving for his dismissal. Additionally, the timing of Terkenton's allegations and Tillapaugh's meeting with Vannoy and Curry on October 29, 2007 comes less-than 2 weeks after Vannoy's latest rejections of David Weidman's submissions. These pretextual and temporal facts cannot be ignored and such correlation between Vannoy's protected activity and the adverse actions taken against him, establishes that activity was a contributing factor in Celanese's actions. *Vannoy* at 15, citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity of 30 days established nexus); *Nichols v. Bechtel Constr., Inc.*, No 1987-ERA-044, slip op. 12 (Sec'y Oct. 26, 1992) (1992 WL 752733 *6) (temporal proximity of less than two months established nexus); *Goldstein v. EBASCO Contractors, Inc.*, No 1986-ERA0036, slip op. at 11-12 (Sec'y Apr. 7, 1992) (1992 WL 752670 *5) (temporal proximity of seven to eight months established nexus).

D. Celanese has not shown by clear and convincing evidence that it would have terminated Vannoy even absent the protected activity

As previously stated, I have found Celanese's assertion that Complainant was terminated due to an alleged breach of company policy related to the July 15, 2005 disclosure of documents containing PII unsubstantiated and resulted from the misinformation of Celanese employee, Donna Tillapaugh. Further, Respondent's contention that Complainant's position within the company was being transferred oversees and thus was due to disappear despite Complainant's alleged violations is unfounded. Although Celanese claims that all operations associated with Vannoy's group were being transferred to Budapest, Hungary, all of the affected employees were reassigned within Celanese with the exception of Pam Elek and Complainant.

IX. REMEDIES

Pursuant to 18 U.S.C. § 1514A(c)(1) (2002), a prevailing employee is, "entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(2) requires that relief for any action shall include:

> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
> (B) the amount of back pay, with interest; and
> (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees and reasonable attorney fees.

Complainant seeks general damages, back pay, and front pay. Complainant seeks lost wages and benefits in the form of back pay in the amount of $550,800.00 and front pay for five years totaling $500,000.00. Complainant also seeks compensation for litigation costs, expert witness fees, and reasonable attorney fees. Finally, Complainant claims entitlement to $100,000.00 to $250,000.00 in general damages for emotional distress.

A complainant has the burden of establishing the amount of back pay that a respondent owes. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993). The purpose of reinstatement and a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not for the discrimination against him. Back pay awards should, therefore, be based on all the earnings the employee would have received but for the discrimination. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). Reasonable salary increases should be included in the award of back pay. *Mosbaugh v. Georgia Power Co.*, 91-ERA-1 and 11 (Sec'y Nov. 20, 1995). Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997); *Johnson v. Bechtel Construction Co.*, 95-ERA-11 (Sec' Sept. 11, 1995).

Respondent bears the burden of proving that the complainant did not properly mitigate damages. To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of the doubt ordinarily goes to the complainant. *Hobby v. Georgia Power Co.*, 2001 WL 168898, ARB Nos. 98-166 and 98-169, ALJ No. 90-ERA-30 (ARB Feb 9, 2001).

Complainant's 2007 tax return shows that he had wages of $54,366.00 or $1,045.50 a week. However, Complainant argues that based on employment claim data filed with the Texas Workforce Commission, he earned $72,000.00 from June 2006 to June 2007, including bonuses and overtime. Complainant also includes an annual pay raise of 4.3% in his calculation of back pay. Aside from Complainant's testimony and self-computed figures, he offers no evidence in support of the inflated earnings of $72,000.00 or annual salary increases of 4.3%. While reasonable salary increases are allowed and uncertainties as to amount of back pay may be settled in favor of a complainant, Vannoy has failed to show how an increase of 4.3% is reasonable and not arbitrary or why overtime earned

during a specific period[9] should be factored in to the undersigned's determination of back pay. It is however appropriate and reasonable to increase Vannoy's annual earnings at the rate of inflation which, from 2008 through 2012, averaged 1.8%.[10] Accordingly, the substantial evidence demonstrates that Vannoy would have received an annual salary in the amount of $54,366.00 with 1.8% increases each year from November 5, 2007 through August 8, 2012.[11] Celanese argues that pursuant to the Board's decision in *Kalkunte v. DVI Fin. Serv., Inc.*, ARB Nos. 05-139 and 05-140, 2009 WL 564738 (ARB Feb. 27, 2009), any award of back pay should be limited to the time prior to Celanese's transfer of Complainant's position. This case is distinguishable from *Kalkunte* in that the DVI Financial Services, Inc. (DVI), respondent in *Kalkunte*, entered bankruptcy after complainant's termination and was no longer a going concern at the time the ALJ rendered a decision. The Board specifically disagreed with DVI that complainant's back pay, front pay, and bonus should end when her department within the company was dismissed and instead ruled that such an award should be inclusive of the time until the last DVI employee was terminated. *Kalkunte*, *supra* at *13.

Additionally, I find that Celanese has failed to show that equivalent positions existed and that Vannoy failed to use reasonable diligence in seeking those positions. Celanese argues that complainant could have obtained a position commensurate with his work experience as a manager of a service establishment prior to his employment with Celanese. Respondent's representative, Joe Fox, testified that the job market Dallas, TX at this time was sufficiently robust and respondent argues that Vannoy should not have limited his job search to the Dallas area due to the specialized nature of his job. These positions are contradictory and do not support a finding that Celanese has shown that substantially equivalent positions were available. Additionally, Vannoy testified that he had applied to approximately 300 positions during his job search. This constitutes reasonable diligence.

Reinstatement is the preferred remedy for unlawful employment discrimination, and front pay is the disfavored alternative, available only when reinstatement is impracticable or impossible. *Ford Motor Co. v. EEOC*, 458 U.S. 219, (1982); *Hobby v. Georgia Power Co*., ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); *Martin v. The Department of the Army*, 93-SDW-1 (Sec'y July 13, 1995); *Kucia v. Southeast Ark. Cmty. Action Corp.*, 284 F.3d 944, 948-49 (8th Cir. 2002) (Title VII case). However, in this case there is no job to reinstate because Celanese has transferred such operations overseas.

Although front pay is an equitable remedy, *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999), I may not bypass the procedural protections of our adversarial system in resolving disputed adjudicative facts, *Lussier v. Runyon*, 50 F.3d 1103, 1113 & n. 13 (1st Cir. 1995), and a front pay award must be based on evidence. *See Davoll v. Webb*, 194 F.3d 1116, 1143-45 (10th Cir. 1999). Front pay, like reinstatement, is a form of equitable relief. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-48, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001). Front pay is intended to compensate the complainant for wages and benefits he would have received from the respondent employer in the future if not for the retaliation. *Pollard*, *supra*; *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 402 (5th Cir.

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[9] Respondent contends that Complainant's overtime earned during this period was due to specific needs associated with setting up the GELCO system and would not be regularly required or authorized for Complainant.

[10] See http://www.bls.gov/bls/newsrels.htm#OPLC (last visited on July 24, 2013).

[11] Complainant's dates for back pay are based on the documentation submitted and accepted into evidence at hearing. Remainder of 2007 - $8,364; 2008 - $55,344.59; 2009 - $56,340.79; 2010 - $57,354.92; 2011- $58,387.31; 2012 (to Aug. 8) - $35,434.36; (Total - $271,225.96).

2002); *Raefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1213 (7th Cir. 1989). *Tyler* affirms a denial of front pay where an award would be purely speculative. But "[c]alculations of front pay cannot be totally accurate because they are prospective and necessarily speculative in nature." *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869 (5th Cir. 1991). The front pay award should address the equitable needs of the employee, such as the ability to obtain employment with comparable compensation. *E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 555 (8th Cir. 1998). Loss of future earnings is proved with reasonable certainty by evidence of (1) the amount of wages lost for some determinable period and (2) the future period over which wages will be lost.

The evidence reasonably demonstrates that Vannoy would earn $24,003.92 from Aug. 8 through the end of 2012; $60,508.17 in 2013; and $61,597.32 in 2014. Complainant testified that he would have been retained to implement the GELCO program even with Celanese's transfer of accounting operations to Hungary. It is therefore reasonable to conclude that Vannoy would have remained employed with Respondent at least through 2013, making a front pay award of $84,512.09 reasonable and supported by the evidence in the record.

Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified by the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced).

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

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

Complainant supports an award of $100,000.00 to $250,000.00 with his own testimony. He did not present any medical or psychiatric evidence or testimony to further substantiate his claim.[12] Accordingly, while Complainant's testimony is sufficient to support an award of general damages based upon the distress, anxiety, humiliation, and damage to reputation resulting from Respondent's retaliation, the amount sought is more than is reasonable to compensate. Based upon the testimony presented by Complainant, I find that an award of general damages in the amount of $25,000.00 is appropriate.

X. ORDER

IT IS HEREBY ORDERED that the Respondent, Celanese Corporation:

1. Pay to Complainant back pay in the amount of $271,225.96, with interest at a rate specified by the Internal Revenue Code, 26 U.S.C. § 6621.

2. Pay to Complainant compensatory damages in the amount of $25,000 in compensation for distress suffered as a result of the anxiety, humiliation and retaliation endured.

3. Pay to Complainant front pay in the amount of $84,512.09.

4. Pay to Claimant, all costs and expenses, including reasonable attorney fees incurred by him in connection with this proceeding. Counsel for the Complainant will have thirty (30) days from the date of this Order in which to submit an application for attorney fees and expenses reasonably incurred in connection with this proceeding. A service sheet showing that proper service has been made upon the Respondents and the Complainant must accompany the application. Respondent will have twenty (20) days following receipt of the application to file and objections thereto.

SO ORDERED this 24th day of July, 2013 at Covington, Louisiana.

CLEM[illegible]ENNINGTON
ADMI[illegible]TIVE LAW JUDGE

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, C=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, [illegible], C=US
Location: Covington LA

[12] As noted *supra*, Complainant was not allowed to call his therapist, Marjorie Nichols, to testify due to his refusal to execute releases prior to her testifying at deposition.