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Issue Date: 28 May 2010

CASE NO.: 2009-SOX-00027

In the Matter of

JAMES KARL REID, II,
Complainant,

v.

THE BOEING COMPANY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This action involves a complaint under the employee protection provisions of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("the Act" or "SOX") and its implementing regulations found at 29 C.F.R. § 1980.

On September 29, 2008, James Karl Reid, II ("Complainant"), filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging his employer, the Boeing Company ("Respondent"), violated the Act. Complainant alleged Respondent's discriminatory conduct toward him under the Act included the following: (1) constructive discharge, (2) blacklisting, (3) demotion, (4) denial of benefits, (5) harassment, (6) the creation of a hostile work environment, (7) "compromising my integrity," (8) increasing his workload by compressing the audit cycle, (9) intimidation, (10) various health and safety violations, (11) "[r]eassignment from SO[X] Specialist[] to General Audit Staff affecting prospects for promotion," (12) negative performance reviews, and (13) causing Complainant to file for personal bankruptcy. In addition to naming Respondent and a number of its current and former employees in his complaint, Complainant additionally alleged that PricewaterhouseCoopers, LLP, and Aetna Insurance Company engaged in some of the discriminatory acts listed above.

I conducted a hearing into this matter in two separate phases. The first phase occurred on June 10, 2009 in Bellingham, Washington. The second phase occurred from August 18, 2009 through August 27, 2009 in Seattle, Washington. During the hearing, I admitted Complainant's Exhibits ("CX") 1-21, 23-77, 79, and 81-105,[1] Hearing Transcript ("TR") at 2204-05, as well as Respondent's Exhibits ("RX") 3-4, 6, 9-10, 12, 14-23, 26-31, 33-34, 36-40, 44-50, 52, 54-55, 57-62, 65-74, 76-78, 80-83, 85-91, 93-98, 100-02, 105, 107, 110-11, 113, 115, 118-21, and 126-38 into evidence. TR at 2205-07. I also admitted into evidence Administrative Law Judge's Exhibits ("ALJX") 1-10. TR at 96-100. Finally, I admitted into evidence on December 17, 2009, Complainant's and Respondent's posttrial briefs – respectively marked as ALJX 11 and ALJX 12 – thereby closing the record.

[1] I admitted CX 105 into evidence by a separate order issued on December 14, 2009.

I. **Stipulations**

The parties included no stipulations in their pretrial materials. However, Respondent admits in its prehearing statement that it is a covered employer and Complainant is a covered employee within the meaning of 18 U.S.C. § 1514A. ALJX 7 at 2.

II. **Procedural History**

As noted, Complainant filed his OSHA complaint on September 29, 2008 alleging thirteen types of discriminatory conduct directed toward him by Respondent and other named entities. RX 3 at 1-3. On January 2, 2009, OSHA issued a three-page decision ("OSHA Decision") dismissing the complaint. On February 4, 2009, Complainant filed an objection to OSHA's dismissal of his complaint. On February 6, 2009, the case was referred to me.

On February 18, 2009, I issued an Order to Show Cause ("February 18 Order") in which I requested Complainant come forth with reasons why I should not dismiss PricewaterhouseCoopers, LLP, and Aetna Insurance Company – who were named parties in Complainant's OSHA complaint – from these proceedings. *Id*. at 1. On February 23, 2009, Complainant's attorney sent a letter to this Court stating, inter alia, Complainant and Respondent agreed "[a]ll Respondents except The Boeing Company are dismissed from this action." Consequently, I issued an order on February 27, 2009 ("February 27 Order") dismissing PricewaterhouseCoopers, LLP, and Aetna Insurance Company from this action. ALJX 8 at 2. The February 27 Order further bifurcated the proceedings into two separate phases, the first of which was then set to begin on May 4, 2009, and was to address the issue of whether or not Complainant had timely filed his complaint under the Act. *Id.* On April 3, 2009, I issued an additional order resetting the beginning of the proceedings from May 4, 2009 to June 8, 2009.

On April 14, 2009, Respondent filed a motion for summary decision with respect to Complainant's SOX complaint. In its motion, Respondent argued the complaint was untimely with respect to any retaliatory acts occurring more than ninety days from the filing of the complaint before July 1, 2008. ALJX 9 at 2. Responded further argued that any acts alleged to have occurred on or after July 1, 2008 were not actionable because they did not appear in Complainant's OSHA complaint, were not retaliatory, or were not acts attributable to Respondent. *Id.* On May 12, 2009, Complainant filed his opposition to Respondent's motion, arguing that three of the alleged acts of retaliation – the termination of his short-term disability benefits by Aetna, Respondent's refusal to provide workers' compensation information to Complainant, and his alleged "termination" by Respondent – occurred within the statutory filing period, and that the remaining acts were timely due to proper application of the doctrine of equitable tolling. *Id*. On May 18, 2009, Respondent filed a reply to Complainant's opposition.

On May 27, 2009, I issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision and Denying Complainant's Cross Motion for Summary Decision ("May 27 Order"). ALJX 9. In the May 27 Order, I first addressed Complainant's argument for tolling 18 U.S.C. § 1514A(b)(2)(D)'s ninety-day limitations period on the grounds that he was mentally unable to file a complaint within this time period. *Id*. at 8. With respect to this argument, I found a genuine issue of material fact then existed regarding Complainant's capacity to file a SOX complaint prior to July 1, 2008. *Id*. at 9. In doing so, I noted Complainant suffered from conversion, panic, generalized anxiety, and post-traumatic stress disorders as well as major depression. *Id.* I further noted a genuine issue of material fact existed as to whether Respondent's alleged conduct directed at Complainant caused these psychiatric disorders. *Id.* at 10-11.

I next addressed the three alleged retaliatory acts Complainant argued occurred within 18 U.S.C. § 1514A(b)(2)(D)'s ninety-day limitations period. ALJX 9 at 11-14. With respect to Aetna's termination of Complainant's short-term disability benefits, I noted only "the weakest inference of third-party influence" by Respondent. *Id.* at 12. I found any such influence arose only from Complainant's unsupported allegations of improper influence by Respondent and that such allegations did not create a genuine issue of material fact. *Id.* I therefore granted Respondent's motion for summary judgment with respect to this issue. *Id.* at 13. With respect to Respondent's refusal to provide Complainant with workers' compensation information, I refused to grant summary decision to either party, noting that a genuine issue of material fact existed regarding the motive of Ms. Dianne Kallunki, Respondent's Director of Human Resources, in her alleged failure to provide such information. *Id.* at 13-14. Finally, I addressed Complainant's allegation of "termination" by Respondent. *Id.* at 14. Complainant grounded this allegation in the "ZZing" of his email account with Respondent on July 31, 2008, which refers to the deactivation of email accounts. *Id.* Here, I found Complainant himself did not believe such an action equated to termination. *Id.* Complainant continued to refer to himself as taking a "leave of absence" in an email and his formal OSHA complaint, both of which he composed after July 1, 2008. *Id.* I therefore granted Respondent's motion for summary decision with respect to this issue, finding the ZZing of Complainant's email account did not constitute a retaliatory act by Respondent. *Id.*

On August 13, 2009, Complainant – as part of his prehearing brief – filed a motion requesting spoliation sanctions against Respondent for alleged destruction of evidence as well as a motion to compel the production of billing invoices from PricewaterhouseCoopers, LLP. On August 14, 2009, I issued an Order Taking Complainant's Motion for Spoliation Sanctions Under Submission Pending Testimony at Trial and Denying Motion to Compel Production of Detailed Auditor Billing Invoices ("August 14 Order"). In the August 14 Order, I noted Complainant failed to adhere to the requirement that the parties meet and confer to settle any disputed issues before filing a motion with this Court. *Id.* at 2. I noted Respondent properly responded to Complainant's document requests regarding the billing invoices. *Id.* Alternatively, I noted Complainant failed to utilize additional discovery tools to address allegedly insufficient discovery responses from Respondent. *Id.* I took under submission the issue of spoliation related to documents allegedly possessed by Ms. Nancy Ross-Dronzek for further development at trial. *Id.* At the conclusion of trial, however, I informed the parties that Complainant had failed to show Respondent's disposal of Ms. Ross-Dronzek's work files and emails was intended to destroy evidence in this case as I found Ms. Ross-Dronzek's testimony credible. TR at 2209. Moreover, I found Respondent did not have an obligation to preserve Ms. Ross-Dronzek's files after she left the company in July 2007. *Id.* Respondent was unaware litigation had commenced or was likely to commence in this matter prior to Ms. Ross-Dronzek departure, and the subsequent disposal of her work files and emails shortly thereafter occurred pursuant to Respondent's business policy. *Id.* Absent such awareness, there is no spoliation if records are destroyed for storage accommodation purposes. *See, e.g., U.S. ex. rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002).

Finally, I note Complainant reduced the number of both protected activities and events constituting the alleged hostile work environment from his prehearing statement to his posttrial brief. In his prehearing statement, Complainant alleges the occurrence of seventeen separate protected activities and twenty-nine separate events comprising the hostile work environment. ALJX 3 at 4-9. In his posttrial brief, however, Complainant reduces to sixteen the number of protected activities and to twenty-seven the number of hostile work environment events. ALJX 11 at 16-30. I therefore structure my analysis below in accordance with the reduced number of events alleged in Complainant's posttrial brief.

III. **Issues Presented for Adjudication**

Complainant presents the following issues for adjudication:

1. Did Complainant engage in protected activity?
2. Did Respondent know of the protected activity?
3. Did Complainant suffer an unfavorable personnel action?
4. Do the circumstances suggest that the protected activity was a contributing factor to the unfavorable action?
5. Was the work environment hostile?
    a. Was the harassing conduct sufficiently severe or pervasive to alter the conditions of employment?
    b. Would the harassment have detrimentally affected a reasonable person?
    c. Did the harassment detrimentally affect Complainant?

ALJX 3 at 9-10. In addition to the issues raised by Complainant, my May 27 Order also left open the issue of equitable tolling and Complainant's ability to file his OSHA complaint between September 20, 2007 and July 1, 2008. ALJX 9 at 11.

IV. **Summary of Decision**

I ultimately conclude Complainant has not proven by a preponderance of the evidence that any protected activity was a contributing factor that motivated Respondent to take any adverse action against him. In reaching this conclusion, I find the full record developed in this case fails to demonstrate Complainant's entitlement to the protections of equitable tolling. I also find Respondent did not take any adverse action toward Complainant within 18 U.S.C. § 1514A(b)(2)(D)'s ninety-day limitations period, nor did Respondent engage in the creation of a hostile work environment or direct individual adverse acts toward Complainant within the limitations period. Furthermore, I find Complainant is unable to prove he engaged in any sort of communications that could be characterized as objectively reasonable protected activity within the activities specified in 18 U.S.C. § 1514A(a)(1). As a result of these findings, I dismiss Complainant's SOX complaint.

V. **Background**

Below is a background of the circumstances giving rise to Complainant's SOX complaint. I begin by discussing Complainant's general background and expertise in audit work, as well as specific auditing experience he gained prior to his employment with Respondent. Next, I discuss the management structure of Respondent as it related to Complainant's work. Finally, I conclude with a description and exploration of the twenty-seven events alleged by Complainant to constitute a hostile work environment. I choose to discuss these events chronologically as they encompass the entire period of conduct relevant to Complainant's SOX complaint.

A. Complainant's Background and Work Experience Prior to Employment with Respondent

Complainant has a varied educational background. He possesses a bachelor's of science degree in studio art from Lamar University as well as a diploma in networking technologies from Southern Methodist University. TR at 1033-34; CX 82. Complainant is also a Microsoft Certified Systems Engineer ("MCSE") and a Certified Novell Administrator ("CNA") and has certifications in A+ and *Brain Bench*'s Information Technology Security Fundamentals. CX 82.

Prior to his employment with Respondent, Complainant spent a significant amount of time in the military and with other private companies where he performed auditing work as well as work with risk management and information technology ("IT") systems. Complainant served in the U.S. Army for seventeen years, at the end of which tenure he had achieved the rank of Captain. TR at 1034-35. During his Army tenure, Complainant created mobilization plans and engaged in risk management, which included assessment of both physical and IT security risks. *Id.* at 1035-36. Examples of Complainant's work with IT systems prior to his employment with Respondent include work with a mainframe system at a hospital and various financial systems. *Id.*

Complainant became involved with audit work in 1989 while still a member of the U.S. Army. *Id.* at 1037. Since becoming involved with such work, Complainant stated that the "majority" of his professional work has been performing auditing tasks. *Id.* at 1037-38. Complainant first began performing SOX IT work in 2002, *id.* at 1036, and has exclusively performed such work since 2004. *Id.* at 1038. Complainant estimates he audited approximately seventeen public companies for SOX IT compliance from 2004 through the beginning of his employment with Respondent. *Id.*

Complainant began doing work for – but not with – Respondent in late May or early June of 2006. *Id.* During this period through February 8, 2007, Jefferson Wells employed Complainant to perform SOX IT audit work for Respondent as one of two outside contractors – the other being PricewaterhouseCoopers. *Id.* Complainant stated PricewaterhouseCoopers employees regularly "peer reviewed" his work during this period, and he characterized himself as a "top performer" and one of the three best auditors used by Respondent at the end of 2006. *Id.* at 1040-41. During his tenure with Jefferson Wells, Complainant served as the lead auditor on Respondent's finance tower A. *Id.* at 1038-39. According to James Corio, also a former Jefferson Wells employee who was in charge of scheduling all IT audits at Respondent during the first three fiscal quarters of 2007, *id.* at 769, a "tower" was one of the delineations of applications within Respondent's organizational structure, which also included things like its supply chain and its database. *Id.* at 786. According to Mr. Corio, the tower lead "would assign auditors out and audits out to their auditors." *Id.* However, Mr. Corio noted this structure changed in 2007. *Id.*

Many of Complainant's peers and supervisors paint him as a capable SOX IT auditor. Ken Stavinoha, who worked with Complainant in 2003 and 2004, characterized Complainant as "a very diligent auditor" and noted that he "went to [Complainant] for a lot of information" when performing his own audits. *Id.* at 340-41, 347. Steve Yunker, who worked with Complainant as an Audit Lead in the employ of Respondent in 2007, noted Complainant "was always nose down" when it came to his work and was "pretty strong" in terms of his capabilities as a SOX IT auditor. *Id.* at 403-05. Jim Estep, Complainant's supervisor while employed by Respondent, noted Complainant had "an excellent working spirit[] that is highly valued" and described Complainant as someone who was "excellent with the clients." *Id.* at 2155. Lourdes ("Lou") Domingo, a Senior Manager in Respondent's SOX IT unit, RX 6 at 1, characterized Complainant as "[v]ery good with people and his interactions with auditees" but noted Complainant was "not as agile or . . . a little slow" in a few aspects of his auditing work. *Id.* at 1947, 1956.

B. History and Background of Respondent's SOX IT Unit and Management Personnel

In the years preceding Complainant's hiring, Respondent encountered problems with its IT controls, which it sought to address from 2004 through 2006. TR at 1683-86. Matthew Scott Bailey, who was Deputy to the Director of Financial Compliance for Respondent in 2007, *id.* at 1657-68, noted Respondent had discovered significant deficiencies in its computing controls in 2004 that it later disclosed in 2006. *Id.* at 1683-84. Mr. Bailey further noted Respondent cured these deficiencies, in part, by moving previously outside contract SOX IT auditors in-house to its corporate audit department, thus

creating the position in which Complainant worked while employed with Respondent. *Id.* at 1688-89. According to Mr. Bailey, however, there was no significant deficiency found in 2007. *Id.* at 1693.

Mr. Bailey further testified that members of the Respondent's SOX Process Action Team established the procedures for corporate audit in 2007. *Id.* at 1696-99. According to Mr. Bailey, this consisted of eight members in 2007, including the then-Director of Financial Compliance,[2] a member from IT, a member from audit, and a member from each of Respondent's business units. *Id.* at 1697. The SOX Process Action Team made a number of decisions, including choosing corporate audit as the department that would be the designated testers of controls, determining where testing would be required, and – as noted – the establishing of audit procedures. *Id.* at 1695-99. Each member of the SOX Process Action Team received one vote in making decisions. *Id.* at 1698.

Respondent hired Complainant as a full-time employee on February 9, 2007. *Id.* at 1038. Joel Fulton, who was then a manager for Respondent, hired Complainant and other Jefferson Wells auditors to work for Respondent on the condition that they would be allowed to telecommute or telework remotely. *Id.* at 149, 403. However, Respondent later revoked the telework aspect of these offers and required Complainant and other auditors hired by Mr. Fulton to work on site. *Id.* at 403. Mr. Fulton left Respondent to work for Starbucks in late 2006 or early 2007. *Id.* at 148, 150. As a result, Steve Wescott, Respondent's Director of Corporate Audit, replaced Mr. Fulton with Macy Moring.[3] *Id.* at 138, 150. Mr. Wescott testified Ms. Moring's hire was then to be for "an interim six month position." *Id.* at 152.

While employed with Respondent, Jim Estep served as Complainant's direct supervisor. RX 6 at 1. Prior to his employment with Respondent, Mr. Estep had served as a consultant for Respondent through two different companies. TR at 2146. Mr. Estep began working directly for Respondent in November 2006. *Id.* at 2168. Mr. Estep's experience in both the areas of SOX IT and auditing generally began at the time he started doing consulting work for Respondent. *Id.* at 2168-69. According to Mr. Estep, much of the knowledge he gained related to both SOX IT work and auditing generally came "on the job" while consulting for or as employed by Respondent. *Id.* at 2169. Mr. Estep admitted, however, to being unaware of or unfamiliar with many of the standards and written guidance governing the work done by auditors employed by Respondent, including Respondent's professional practices framework, the Institute of Internal Auditors ("IIA") Standards, and the Committee of Sponsoring Organizations ("COSO") requirements. *Id.* at 2173-74; *see* ALJX 12 at 10 (noting Respondent had, "for some purposes, adopted IIA Standards").

Ms. Morning served above Mr. Estep in Respondent's management structure, a position from which Ms. Moring oversaw all of the Audit Leads, Process Leads, and auditors employed by Respondent within its corporate audit SOX IT unit. RX 6 at 1. Ms. Moring began employment with Respondent in 1989 and has worked in a variety of positions since this date, most of which involved some level of IT-related skills. TR at 2029-30. As noted, Ms. Moring replaced Mr. Fulton as manager in Respondent's corporate audit SOX IT unit. Ms. Moring testified she had very limited SOX IT experience upon assuming her interim management position and had never conducted a SOX IT audit. *Id.* at 2070-71. However, she did have some expertise in both COSO and SOX generally. *Id.* at 2073-74. Ms. Moring admitted that she did not consult the IIA Standards during her tenure of interim manager of Respondent's SOX IT unit. *Id.* at 2077-78.

Mr. Wescott credibly characterized Mr. Fulton and Ms. Moring as having quite different management styles. According to Mr. Wescott, Mr. Fulton "empowered his team to do what they felt they needed to do with not a tremendous amount of direct involvement or oversight." *Id.* at 152.

[2] Mr. Bailey is the current director or financial compliance. TR at 1656-57.
[3] Ms. Moring has since changed her last name to Crane. TR at 2029.

Conversely, Mr. Wescott described Ms. Moring as someone who was very "hands on" as a manger. *Id.* Mr. Wescott attributed this approach to Ms. Moring's prior employment for a number of years with Respondent as an auditor. *Id.* He noted further that one of Ms. Moring's weaknesses was she could be "a bit abrupt" or "direct" and identified "interpersonal skills" as an area in which Ms. Moring could have used improvement at the time she served as interim manager of the SOX IT unit. *Id.* at 152, 1955. In line with Mr. Wescott's comments, some of Ms. Moring's subordinates – not including Mr. Reid – described her interactions with others as "hostile," "aggressive," and creating "an uncomfortable working environment." *Id*. at 364-65, 748-49.

Ms. Moring reported to Lou Domingo. RX 6 at 1; TR at 1945. Ms. Domingo began working for Respondent in 1985. TR at 1946. She spent her first twenty-two years with Respondent working in IT and has been in a management position since 1995. *Id.* at 1946-47. In April 2007, Ms. Domingo became the senior manager of Respondent's SOX IT unit.[4] RX 6 at 1; TR at 1947. Prior to April 2007, however, Ms. Domingo admitted to having no knowledge of SOX or internal auditing. TR at 1974-75. Ms. Domingo also admitted to being unfamiliar with the IIA Standards prior to becoming the senior manager of Respondent's SOX IT unit, but noted she familiarized herself with the Standards in the weeks following her appointment to the position. *Id.* at 1975.

C. Hostile Work Environment Background

Complainant sets forth twenty-seven events in his posttrial brief he alleges collectively constitute a hostile work environment. *See* ALJX 11 at 21-30. I discuss all of these events chronologically below.

1. February 21, 2007 Meeting

On February 21, 2007 Respondent conducted an "enterprise-wide" meeting with all SOX IT auditors. TR at 562. Bob Jouret, Respondent's then-Vice President of Corporate Audit, led this meeting that Complainant and the other auditors attended. *Id.* at 1054-55. According to Complainant, Mr. Jouret stated on this date that "SOX would be going away." *Id.* Complainant interpreted this to mean that the "tone at the top" of Respondent's organizational structure was one that harbored a hostile attitude toward SOX or that Congress would repeal SOX itself in the coming years. *Id.*

Other attendees at this meeting interpreted Mr. Jouret's remarks differently, however. Steve Yunker testified he understood Mr. Jouret's remarks to reflect how Respondent would institutionalize the requirements of SOX, perhaps through reorganization of the audit structure. *Id.* at 477. Eric Levitt, an audit lead who attended the meeting, understood the same comment to mean Respondent's "SOX audit program . . . would basically become part of the overall corporate audit program," and the SOX IT unit would therefore "just sort of meld into the rest of the corporate audit group." RX 6 at 1; TR at 1855.

2. Reduction of the audit cycle from ten to seven days in March 2007

Sometime in March 2007 Respondent reduced its audit cycle from ten to seven days. CX 47 at 2; TR at 1063. This cycle also included two management meetings. TR at 1064. Complainant alleges that the seven-day schedule left "no gaps between cycles." ALJX 11 at 21. However, Mr. Corio, who scheduled audits for the SOX IT unit in 2007, testified the seven-day cycle included one day in between each audit cycle. TR at 769, 789. Complainant testified the seven-day cycle required his working up to twelve hours on some days to keep up with his work. *Id.* at 1066. However, testimony of other Respondent SOX IT employees indicated all auditors worked longer hours under this cycle. *See id.* at

[4] Overseeing the SOX IT unit constituted approximately one-third of Ms. Domingo's duties in her management position. TR at 1948.

790 (Mr. Corio states, "[In] 2007 the auditors were quite often there past 5:00 [PM].") Complainant testified he accepted the seven-day cycle because he "had no choice," but he stated to his direct supervisor, Mr. Estep, that Respondent should not reduce the cycle below seven days. *Id.* at 1066. The seven-day cycle applied to both auditors employed by Respondent as well as those working on a contract basis through PricewaterhouseCoopers. *Id.* at 184.

3. March 12, 2007 Email from Ms. Moring Informing Auditors of Title Change

On March 12, 2007, Ms. Moring sent out an email to seven auditors. CX 45 at 1. Within the email, Ms. Moring directed three auditors – Complainant, Matt Neumann, and Steve Yunker – to "[c]hange auditor type from SOX to Prof. Auditor." *Id.* Complainant interpreted this directive to be hostile and a form of harassment because Respondent had hired him under the title of SOX IT auditor. ALJX 11 at 22; TR at 1515. However, Nancy Ross-Dronzek, Respondent's former director of audit, testified certain auditors considered the changed title with the inclusion of the word "professional" an upgrade over being referred to a simply SOX IT auditors. TR at 1222, 1326-27. Mr. Wescott testified that the title change was, in part, to ensure that all auditors working for Respondent received the same type of professional development training. *Id.* at 184-86. Mr. Yunker testified that Ms. Moring's request disturbed him somewhat, but he also attributed this partially to his being unable to work remotely for Respondent. *Id.* at 492-93; *see id.* at 403. Mr. Yunker further testified that the title did carry some positive connotations, such as that its holder "has worked in audit, has studied audit, [and has] performed [audit]." *Id.* at 492. Ms. Moring credibly testified the title change was "to make sure that everybody had the appropriate label on their – on their name and professional auditing – was what the permanent staff was referred to." *Id.* at 2046.

4. Request from Ms. Moring on March 14, 2007 that Complainant Change an Audit

Complainant alleges Ms. Moring made a request on March 14, 2007 that he change certain results in one of his audits. Complainant, however, cites no portion of the record other than his own testimony to support this allegation. *See* ALJX 11 at 22. Furthermore, the page within the transcript cited by Complainant to support his own allegation of Ms. Moring's March 14, 2007 directive contains no discussion of any action taken on this specific date.[5] On the page of the transcript cited to in this instance by Complainant, he alleges he "ran into problems . . . by having three risk areas combined into one." TR at 1066. Ms. Moring credibly testified such meetings occurred with all auditors, and any requested changes constituted a "quality control mechanism" and not a retaliatory act toward Complainant. *Id.* at 2047-48.

5. Ms. Moring's Reprimanding of Complainant on March 15, 2007

Complainant attended a closure meeting on approximately March 15, 2007. TR at 1077. According to Complainant, such meetings consisted of an auditor submitting results to an executive signer and the auditees associated with a particular audit. *Id.* at 1077-78. At this particular meeting, Ed Gallagher served as the executive signer and David Yaeger, one of Mr. Gallagher's subordinates, was the auditee control performer. *Id.* at 1078. Ms. Moring also attended this meeting via speakerphone. *Id.* According to Complainant, Mr. Yeager understood this particular audit to require Complainant's presence for an entire week, and he noted in the presence of Mr. Gallagher and Ms. Moring that Complainant "had not been there all week." *Id.* Complainant testified Ms. Moring's response to this comment was to state, "'Well, that won't happen again, will it, Karl[?],' in a very sarcastic and demeaning tone." *Id.* Complainant stated he had never experienced such criticism in his professional capacity nor had he ever

[5] Erroneous citation to the record is commonplace in Complainant's brief – at least half of citations to the Hearing Transcript given by Complainant allegedly supporting his view of events in this case are incorrect.

received criticism from "my manager . . . without first gathering facts." *Id.* at 1079. Complainant further testified that the comment made him "feel . . . like a child" and that he reported Ms. Moring's comment to his immediate supervisor, Mr. Estep. *Id.*

Ms. Moring testified that she has no recollection of this event. *Id.* at 2091. Ms. Moring agreed, however, it would be improper to reprimand an auditor in front of an auditee. *Id.* at 2092. When asked if phrases such as "You won't do that again, Karl?" and "Is that so?" would be reprimands, Ms. Moring responded in the negative. *Id.* at 2091-92.

6. March 22, 2007 Threat to Change Audit Results

On March 22, 2007, Ms. Moring sent an email to all SOX IT auditors – including Complainant – outlining a review process applicable to all audits from that point forward. CX 76 at 1. Ms. Moring informed the auditors she and Naman Parekh – her technical counterpart at PricewaterhouseCoopers, RX 6 at 1 – would "need[] to *see and approve* [all] Day 7 Closure Pitch[es]." CX 76 at 1 (emphasis in original). Ms. Moring's email stressed that the auditors should review their presentations for "content," "formatting," "ratings," and "spelling" as well as how auditors' results constituted "a reflection of the work [the SOX IT unit is] doing." *Id.* The email required auditors to schedule thirty minutes for this process per audit and cautioned "there may be changes to your results or presentation as a result of the review." *Id.* Ms. Moring testified as to the origin of this email. In her testimony, she stated the preclosure management review was her idea, which she had implemented based on her experience with such a process in conducting quarterly audits. TR at 2128. Ms. Moring further testified she did not view such changes as interfering with auditor independence; in her opinion, the "organizational alignment" of Respondent ensured such independence. *Id.* at 2087-88.

Complainant found the procedure outlined in Ms. Moring's March 22, 2007 email to be very disturbing. According to Complainant, management in none of the sixteen or seventeen companies he had done audit work for prior to his employment with Respondent had implemented a procedure potentially resulting in changes to audit results. *Id.* at 1091-92.

7. Complainant Forced to Change Audit Results by Ms. Moring on April 11, 2007

Complainant met with Ms. Moring on April 11, 2007 for over an hour. TR at 1120. Only Complainant and Ms. Moring attended this meeting. *Id.* Complainant described the meeting as very "heated" and lasting for over an hour. *Id.* at 1120-21. Complainant stated the substance of the meeting consisted of his refusal to combine three risks within his audit into one risk per Ms. Moring's instruction. *Id.* at 1120. The meeting ended when, according to Complainant, he left the room after telling Ms. Morning to "put your name on it and say you did the audit." *Id.*

8. Complainant Accused of a Risk Navigator Error on April 12, 2007

Complainant testified his name showed up on an audit report reflecting a date when he was at a training offered by Respondent in Chicago. TR at 1122. According to Complainant, his attendance at the training precluded his serving in the position – audit lead – reflected in the report. *Id.* Consequently, Complainant sent an email to Mr. Estep and Celia Worrell, a PricewaterhouseCoopers employee, inquiring as to why this had occurred. *Id.*; CX 74 at 1. Eight minutes later, Ms. Worrell replied to Complainant apologizing and noting she had erroneously assigned the process at issue to Complainant. RX 136 at 1. In the same email, Ms. Worrell reassigned the process to the correct audit lead. *Id.*

9. Complainant's First Quarterly Performance Review ("QPE") on April 12, 2007

On April 12, 2007, Complainant received his first QPE as an employee for Respondent. TR at 1123; CX 49 at 1-3. Ms. Moring completed the evaluation, which also contains comments from Complainant in response to Ms. Moring's rating of his performance. Ms. Moring testified she met with the entire group of SOX IT auditors to go over the criteria for performance evaluations prior to completing Complainant's first QPE. TR at 2040-41. According to Ms. Moring, she presented the evaluation criteria according to a preexisting "matrix" applicable to Respondent's corporate audit and in a format developed by another of Respondent's employees, emphasizing "the requirements [we]re stringent" with respect to such evaluations. *Id.* at 2041-42.

The first page of Complainant's first QPE lists "Business Goals and Objectives" of which there are eight: planning and research, fieldwork, reporting, follow-up, lead project, internal process improvement, additional duties, and support organizational objectives. CX 49 at 1. The QPE provided for one of five ratings within each category: did not meet expectations, met some expectations, met expectations, exceeded expectations, and far exceeded expectations. *Id.* Within these eight categories, Ms. Moring gave Complainant a rating of met expectations in four categories (planning and research, internal process improvement, additional duties, and support organizational objectives) and met some expectations in the remaining four categories (fieldwork, reporting, follow-up, and lead project). *Id.* Despite this even split within the eight categories, Ms. Moring rated Complainant as having met expectations overall on business goals and objectives. *Id.*

The second page of the QPE lists "Performance Values," of which there are ten: problem solving, communication, technical skills and knowledge, integrity, quality and productivity, customer satisfaction, people working together, corporate citizenship, enhanced shareholder value, and leadership. *Id.* at 2. Ms. Moring gave Complainant the rating of met some expectations in the categories of problem solving, communication, quality and productivity, and leadership; the rating of met expectations in the categories of technical skills and knowledge, integrity, corporate citizenship, and enhanced shareholder value; and exceeded expectations in the categories of customer satisfaction and people working together. *Id.* Ms. Moring gave Complainant an overall rating of met expectations in the Performance Values section. *Id.*

The QPE next contained an "Employee Comments" section consisting of comments and responses between Ms. Moring and Complainant. *Id.* at 2. It is this section of the review that most highlights the differing views taken by Complainant and Ms. Moring toward Complainant's first quarter work with Respondent. Ms. Moring begins her comments by noting Complainant was "struggling to consistently complete [the] audit process" in the first quarter of 2007. *Id.* Complainant responded he had missed only one deadline on seven audits and therefore did not view the completion on time of six of seven audits as "struggling." *Id.* Ms. Moring next commented Complainant needed "to work [to] improve the quality of audit input into Risk Navigator and his attention to detail of the audit results and reports for teams he leads." *Id.* Complainant responded he only erred in inputting data from his first audit into Risk Navigator and attributed further mistakes to erroneous instructions and guidance on inputting such data, which Complainant stated he brought to the attention of his superiors. *Id.* Ms. Moring next commented on Complainant's need to be more inquisitive to "strengthen his understanding of audit guidance," to which Complainant responded was a quality he already possessed. *Id.* Ms. Moring next noted Complainant's failure to "actively engage with his audit teams." *Id.* Complainant responded this criticism was unfounded, and any perception of inadequacy in his leadership resulted from the gross inexperience and "immaturity" of the other auditors on his team. *Id.*

The QPE concluded with sections in which Ms. Moring commented upon Complainant's "Strengths" and "Development Opportunities." *Id.* at 3. With regard to Complainant's strengths, Ms. Moring noted Complainant's ability to work with "challenging clients," his "positive attitude," his "industry experience," and his desire to seek professional development opportunities. *Id.* With regard to

development opportunities for Complainant, Ms. Moring summarized earlier comments from the employee comments section, noting Complainant's need to meet deadlines, input data correctly into Risk Navigator, ask more questions, and "actively engage with his audit teams." *Id.*

At trial, both Complainant and Ms. Moring testified as to the circumstances surrounding Complainant's first QPE. Complainant testified the first quarter QPE "was the worst one I ever had." TR at 1124. He noted his understanding that a majority of the ratings given in separate categories in such a review would need to be "in the exceeded expectations column" for a promotion, something that Complainant's first quarter QPE did not achieve. *Id.* at 1125. Complainant gave specifics on the one audit deadline he missed, noting the auditee in that case was extremely difficult to work with as well as describing how he alerted his superiors to this problem at the proper time. *Id.* at 1129-30. He also discussed attempting to address errors in Risk Navigator in the presence of his direct supervisor, Mr. Estep. *Id.* at 1137-38. According to Complainant, Mr. Estep was present as Complainant inputted data into Risk Navigator per the official guidance, yet this process still resulted in errors. *Id.* Ms. Moring testified to holding a meeting with all of Respondent's auditors upon assuming her management role within the SOX IT unit. *Id.* at 2040-42. According to Ms. Moring, the format used in corporate audit was unique to that department. *Id.* at 2041. Ms. Moring also informed the auditors that "the requirements [were] stringent" within the QPE evaluation process. *Id.* at 2041-42.

10. Mr. Wescott and Ms. Moring Meet with the Auditors on April 13, 2007

On April 13, 2007, Complainant and the other auditors in the SOX IT unit met with Mr. Wescott and Ms. Moring. TR at 1534. Complainant testified he approached Mr. Wescott at this meeting to address the perceived negative performance review he received from Ms. Moring the previous day. *Id.* at 1535. However, according to Complainant Ms. Moring interrupted this conversation and would not allow Complainant to convey his impression of how the process occurred to Mr. Wescott. *Id.* Mr. Wescott testified that the purpose of this meeting was "designed to get . . . information from the team [of auditors]." *Id.* at 169. The meeting focused on a list of eight concerns identified in a meeting with Nancy Ross-Dronzek given to Mr. Wescott by Matt Neumann. *Id.* at 167-68; CX 75 at 3-4. The concerns included logistical details related to Ms. Moring's management style, the SOX IT auditors' relationship and interaction with PricewaterhouseCoopers' contract auditors, and the addition of transparency to the QPE process. CX 75 at 3-4. Mr. Wescott addressed all eight concerns with the auditors on this date. TR at 168-77.

11. April 27, 2007 Email from Mr. Wescott to Auditors Placing Them on the Professional Auditor Development Track

On April 26 and 27, 2007, an email chain developed between Mr. Wescott, Ms. Moring, and a group of Respondent's SOX IT auditors. CX 52 at 1-2. The email chain began with a message from Ms. Moring stating SOX IT auditors would "follow the same employee development processes as the rest of corporate audit" and containing a link to Respondent's Employee Development Website for Corporate Audit. *Id.* at 1. Nick Tides, a SOX IT auditor employed by Respondent in St. Louis, RX 6 at 1, responded to the email and inquired as to what portions of the materials mentioned by Ms. Morning specifically applied to SOX IT auditors. CX 52 at 1. Mr. Wescott replied to Mr. Tides's inquiry, writing, "[B]asically you are all on a professional auditor development track which is the same for all Corporate Auditors – we will discuss at the meeting." *Id.* Complainant alleged that "[t]his statement made SOX auditors begin to look for other positions," and auditors "felt the change in title from SOX IT auditor to corporate auditor might increase the risk of being put into a quarterly rotation." ALJX 11 at 25.

12. Respondent Reduces SOX IT Audit Cycle to Six Days on May 8, 2007

On May 8, 2007, Naman Parekh forwarded an email from Amy Hollis to all corporate auditors (including SOX IT auditors) informing them Respondent would reduce the audit cycle from seven to six days. CX 67 at 1-2. Although the email stated "the actual impact to IT will be minimal," *id.* at 1, Complainant stated the result was to "put more pressure and stress on auditors by giving them less time to complete the audit and review meetings." ALJX 11 at 25.

13. May 10, 2007 Meeting of Auditors with Bob Jouret in New Orleans

On May 10, 2007, the SOX IT auditors again met with Bob Jouret, this time in New Orleans. ALJX 11 at 25-26; TR at 594-96. According to Nick Tides, the New Orleans meeting was an "audit symposium" consisting of many auditors, including those from outside of the SOX IT unit. TR at 594. Mr. Tides stated Mr. Jouret requested at some point all SOX IT auditors follow him to a separate location from the rest of the auditors within the location of the symposium. *Id.* Mr. Tides described Mr. Jouret's tone and mood as very somber, and paraphrased Mr. Jouret's comments to the group as being "that [PricewaterhouseCoopers is] in charge, get used to it, this is the way it is, you guys are lucky to have jobs, Sarbanes-Oxley's going away." *Id.* Mr. Tides further attempted to present to Mr. Jouret his perspective that the relationship between PricewaterhouseCoopers auditors and those auditors employed directly by Respondent had deteriorated to the point of being "a risk to independence and . . . integrity to what was being put out there for anyone to look at." *Id.* at 595. Mr. Jouret's response, according to Mr. Tides, was to "basically [tell him] to shut it." *Id.*

Steve Yunker also attended the meeting in New Orleans. Mr. Yunker testified the auditors attempted to discuss with Mr. Jouret at the meeting the eight concerns they had also attempted to discuss with Mr. Wescott on April 13, 2007. *Id.* at 457; *see* CX 75 at 3-4. Mr. Yunker recalls that he, Complainant, and Mr. Tides spoke to Mr. Jouret at the meeting in front of the other auditors and that the meeting became very "pretty heated." TR at 457. Mr. Yunker recalled Mr. Jouret telling Mr. Tides to stop talking. Mr. Yunker claims to have "wrapped up" the meeting by asking Mr. Jouret, "Bob, can you tell us where this is headed so we can decide where we want to work[?]" *Id.* at 457-58.

Complainant also testified that Mr. Jouret pulled the SOX IT auditors aside in New Orleans to address the issues addressed by Mr. Wescott on April 13, 2007. *Id.* at 1177-78; *see* CX 75 at 3-4. Similar to Mr. Tides and Mr. Yunker, Complainant described the meeting as "very hostile." TR at 1178. Complainant testified as to his challenging Mr. Jouret's comment that "SOX was going away" by noting he had heard similar comments many times before with different clients. *Id.* Complainant also voiced concerns to Mr. Jouret about his perception that the training proposed for SOX IT auditors was inadequate. *Id.* at 1178-79. According to Complainant, auditors employed by Respondent also discussed with Mr. Jouret their being supervised by PricewaterhouseCoopers employees who they had trained and who possessed much less experience than them. *Id.* at 1181-82. Complainant stated the meeting concluded "with everybody in a quiet [sic] and afraid to ask questions." *Id.* at 1182.

14. PricewaterhouseCoopers Employees Distract Complainant from His Work on May 30, 2007

The record contains evidence Respondent opened an investigation on May 30, 2007 regarding a complaint by Complainant that several PricewaterhouseCoopers employees were "alleged to be engaging in playing fantasy football, working expense reports and going to dating web sites [sic] during normal working hours while on [Respondent's] premises." RX 9 at 1. Complainant claimed PricewaterhouseCoopers employees engaged in playing fantasy baseball, and at least one

PricewaterhouseCoopers employee left work early on May 31, 2007 to play golf. *Id.* at 14. Complainant found it hard to concentrate on his work with such activities going on. TR at 1183.

Jeff Culp, and ethics advisor for Respondent, *Id.* at 1875, and Mark Klinke, a corporate investigator for Respondent, *id.* at 1910, investigated Complainant's allegations. Mr. Culp concluded Complainant's allegations in this instance were unsubstantiated and communicated this conclusion to Complainant. *Id.* at 1882. Mr. Klinke prepared a report regarding Complainant's allegations. RX 9 at 20-23. In the report, Mr. Klinke discusses various investigative steps taken, including interviews with and email received from Ms. Moring, looking into the internet activity of the PricewaterhouseCoopers employees allegedly misusing the Internet, summaries of telephone interviews of PricewaterhouseCoopers employees identified by Complainant in his allegations, and a review of Respondent's rules governing the use of its property and computers. *Id.* Mr. Klinke also concluded Complainant's allegations were unsubstantiated. *Id.* at 23.

15. Respondent's Running of "Spector" on June 6, 2007

In his posttrial brief, Complainant alleges as an adverse act that Respondent "runs Spector to monitor auditors" on June 6, 2007. ALJX 11 at 26. Nowhere does Complainant explain what Spector is, what it does, or how its being "run" constitutes an adverse act. As evidence of this act, Complainant submits an email from Del Valerio to Tony Anthony – the latter of whom Complainant does not identify within Respondent's organizational structure. *See* CX 79 at 1. The body of the message consists entirely of three sentences stating as follows: "Any idea how long we are going to keep running spector [sic] on all the auditors? We will run into storage space and performance issues before too long. Let me know is [sic] I can shut any of them down." *Id.* Mr. Valerio testified at trial; however, his testimony contains no mention of Spector.

16. Complainant's Second QPE on July 12, 2007

Complainant received his second QPE from Ms. Moring on July 12, 2007. *See* CX 58 at 1-2. According to the QPE, Complainant's performance within individual subcategories improved while his overall performance remained the same. *Compare* CX 49, *with* CX 58. For example, within the eight categories under Business Goals and Objectives, Ms. Moring deemed Complainant to have met expectations in seven of the eight categories – as compared to only four of eight categories in the first QPE – while continuing to give Complainant an overall rating of met expectations in this section. CX 58 at 1. Under Performance Values, Ms. Moring found Complainant met expectations in seven categories (as compared to four categories in the first QPE), met some expectations in one category (as compared to four categories in the first QPE), and exceeded expectations in two categories (as compared to two categories in the first QPE). *Id.* at 2. Ms. Moring again gave Complainant a rating of met expectations overall in performance values. *Id.* In commenting on Complainant's strengths, Ms. Moring noted Complainant "has done an excellent job of working with some of our more challenging clients and continues to show strong Customer Satisfaction skills. He has worked very hard to improve data quality within our audit tools. His daily audit work has improved from [the first QPE]." *Id.* In commenting on development opportunities available to Complainant, Ms. Moring noted some continued problems with respect to the impact of Complainant's documentations on reperformance standards, but noted that this was something Complainant addressed during the quarter and was appreciated. *Id.*

During trial, Complainant characterized his second QPE as "poor," but admitted that it was "better" than the first QPE. TR at 1191. Complainant testified of never being given examples of unsatisfactory work associated with categories where he received met some expectations (instead of met expectations) ratings. *Id.* at 1192-94. Complainant further testified both Ms. Domingo and Ms. Moring went over the results of this QPE with him. *Id.* at 1192.

17. Respondent's Security Receives Report on July 27, 2007 that Complainant Has a Gun in His Car

On July 27, 2007, security personnel for Respondent escorted Complainant to his car to search for a gun after receiving an anonymous complaint. *See* CX 59. Several people knew Complainant owned a gun. TR at 1547. According to Complainant, he was escorted to a meeting with two security personnel who asked if he had a gun in his car. CX 59 at 2. Complainant responded that, although he possessed a valid concealed weapons permit, he did not have a gun in his car. *Id.* Complainant signed a consent form allowing Respondent's security officers to search his car. *Id.* The search turned up no weapons in Complainant's vehicle. *Id.*

Later that day, Complainant emailed Steve Wescott, informing him of the circumstances surrounding the search of his car. *Id.* at 2-3. In his email to Mr. Wescott, Complainant noted his view of the ordeal as "quite malicious or retaliatory." *Id.* at 2. Mr. Wescott responded to Complainant, stating in his reply that he had "no idea who would make such a call or why," noting that Respondent was required to "take these allegations seriously," and apologizing for any inconvenience to Complainant. *Id.*

Respondent conducted an investigation of the incident, which it closed on July 31, 2007. *See* RX 10 at 1. The file contains a narrative summary compiled by Mark Klinke, in which he describes the receipt of an anonymous letter accusing Complainant of being someone who "uses and sells drugs at the Renton facility" and carries a weapon in his vehicle. *Id.* at 3. The narrative concludes with Mr. Klinke's noting his participation in the search of Complainant's vehicle which turned up no drugs or guns. *Id.* The file also contains a copy of the anonymous letter accusing Complainant of the above misdeeds, stating its author is "a long time [Respondent] employee." *Id.* at 4.

18. Reduction of the Audit Cycle to Five Days on July 30, 2007

On July 30, 2007, Respondent informed the SOX IT unit that it was reducing the audit cycle to five days. CX 81 at 1-2. An exhibit submitted by Complainant entitled "Corporate Audit Interim Review" notes Respondent sent this announcement to Ms. Domingo, Ms. Moring, and ten SOX IT auditors, including Complainant. *Id.* at 1. Complainant testified he found the new schedule "very hectic," especially when an audit involved travel. TR at 1377. Complainant stated he and the other auditors voiced their concern over such a compressed schedule to management, but they received a response that Respondent would nevertheless go to a five-day audit cycle. *Id.* Mr. Corio, who scheduled the SOX IT audits, also testified as to his belief that the five-day schedule did not provide enough time to properly conduct audits. *Id.* at 880-83.

19. Someone Places a Starbucks Career Pamphlet on Complainant's Desk on August 8, 2007

On August 8, 2007, Complainant returned to his desk after an audit to find a Starbucks career pamphlet sitting on his desk. TR at 1380. According to Complainant, the area of the building in which he worked was nearly unoccupied that day, with the exception of Mr. Estep and Mr. Corio. *Id.* at 1379. Complainant described the process of arriving at his desk location involving passing through a door with a badge-swiping station as well as a security camera. *Id.* at 1380.

Complainant described being very frightened by this particular incident. According to his testimony, he was "scared to death" as a result of the career pamphlet being placed on his desk. *Id.* at 1381. Complainant stated he reported the incident to Ms. Domingo while also showing her his badly bitten fingernails as evidence of the cumulative stress he was experiencing. *Id.*

Ms. Domingo testified about this incident at trial. According to her, she did not view this as "a very serious matter." *Id.* at 1987. Ms. Domingo credibly testified that she had applications for various positions of employment outside of Respondent's organization left on her desk as well during her career. *Id.* Ms. Domingo did not characterize leaving such applications on employees' desks as a "general practice" within Respondent's organization, but noted also Respondent had no official policy prohibiting one employee from notifying another employee of a job opening by leaving an application on his or her desk. *Id.*

Complainant testified he believed Ms. Moring was responsible for placing the Starbucks career pamphlet on his desk as a form of retaliation. *Id.* at 1549. Complainant admitted, however, that hundreds of people potentially had access to his workspace and, consequently, he had no proof beyond speculation to support his theory that Ms. Moring was the culprit. *Id.*

20. Complainant Overhears PricewaterhouseCoopers Employees on August 20, 2007 Allegedly Targeting Mr. Tides for Retaliation

On August 20, 2007, Complainant overheard Mr. Estep and the PricewaterhouseCoopers process lead, Shauib Shakoor, RX 6 at 1, having a phone conversation allegedly targeting Mr. Tides for retaliation. TR at 1406-07; CX 63 at 1-2. In an email to Mark Klinke, Complainant stated he heard Mr. Shakoor on the phone with someone saying he "found another workbook to use against Nick Tides." CX 62 at 1. Complainant further told Mr. Klinke that Mr. Shakoor "wanted to wait for Jim Estep to finish his review of Nicks [sic] work before he 'hits him with this one.'" *Id.* Mr. Shakoor, according to Complainant, stated while on the phone that he had already given this information to Ms. Moring, a circumstance Complainant stated further solidified his belief Ms. Moring was "heavily involved" in taking retaliatory actions against certain SOX IT auditors. *Id.*

21. Ms. Moring Introduces Additional Quality Review on August 21, 2007

Complainant alleges Ms. Moring introduced an additional level of quality review on August 21, 2007, and this additional process contributed to Respondent's creation of a hostile work environment. ALJX 11 at 28. Mr. Corio, who scheduled the SOX IT audits, testified as to the effect of this additional review. According to Mr. Corio, the additional quality review "seemed to introduce more challenges than [he thought] it solved." TR at 881. Mr. Corio attributed this to the fact that the quality review added yet another step to an already stressful and multi-phased process. *Id.* at 882. The overall impact, according to Mr. Corio, was that the SOX IT auditors made more – instead of fewer – mistakes in their audit work. *Id.* Mr. Corio also noted this process seemed to have a greater negative effect on auditors employed by Respondent – as opposed to those employed by PricewaterhouseCoopers – mostly due to Respondent's auditors having more involved "family lives" than those of auditors employed by PricewaterhouseCoopers. *Id.* at 883.

22. Jeff Culp Issues Results of Ethics Investigation to Complainant on September 4, 2007

Complainant lists as an act contributing to the hostile work environment the issuance by Mr. Culp of his investigative report on September 4, 2007 finding Complainant's allegations of hostile acts unsubstantiated. ALJX 11 at 28; *see* RX 9 at 1-25. This report discusses Complainant's complaints of being disrupted by alleged non-work-related activities of PricewaterhouseCoopers employees. *See supra* Part V.C.14; RX 9 at 1-25. As noted, this report demonstrates that Mr. Culp conducted interviews with numerous PricewaterhouseCoopers and Respondent employees and managers, ultimately finding no basis for Complainant's allegations. *Id.*

23. Complainant Scheduled on September 11, 2007 for Additional Audit Despite Availability of Other Auditors and His Having Previously Unclosed Audits

On September 11, 2007, Mr. Corio scheduled Complainant for an audit within the five-day cycle despite Complainant having incomplete audits and the availability of other auditors. ALJX 11 at 29; TR at 797. According to Mr. Corio, he spoke with both Ms. Moring and Mr. Parekh in an attempt to pull Complainant from this audit due to Complainant's need to complete work on other earlier audits. TR at 797. Ms. Moring and Mr. Parekh, however, both told Mr. Corio he could not remove Complainant from the then-upcoming audit. *Id.* Mr. Corio testified to telling Ms. Moring that he "had available auditors" and "would like to free up some time for [Complainant] so he could close out the audit findings on his two previous audits." *Id.* According to Mr. Corio, Ms. Moring responded to this information by telling him she had already identified other projects for those apparently "available" auditors. *Id.* at 798.

A day before Mr. Corio's scheduling of Complainant for the audit discussed above, Complainant sent an email to Ms. Domingo. *See* CX 84. In the email, Complainant voiced his concerns that Ms. Moring and Mr. Parekh were attempting "to apply additional pressure" on him. *Id.* at 1. Complainant's email was in response to an earlier email from Ms. Domingo inquiring into the status of three open audits. *Id.* at 2-3. Ms. Domingo responded to Complainant's email response, telling him to "please work with Jim Estep to get these audits closed asap." *Id.* at 1.

Ms. Domingo testified to intervening on Complainant's behalf and consequently overriding Ms. Moring's and Mr. Parekh's decision to not allow Complainant relief from the scheduled audit. TR at 1971-72. According to Ms. Domingo, she told Ms. Moring and Mr. Parekh that "we have to make a decision" and that "somebody cannot do everything all at the same time." *Id.* at 1971. Ms. Domingo testified she, Ms. Moring, and Mr. Parekh ultimately decided Complainant should finish the two open audits, and Mr. Corio should assign another auditor to Complainant's then-upcoming audit. *Id.* at 1971-72.

24. Complainant's Email on September 19, 2007 to Nick Tides Bounces, Leading Complainant to Believe Respondent Had Fired Mr. Tides

Complainant testified at trial to learning Mr. Tides's email was "ZZed" on September 19, 2007. TR at 1459-61. According to Complainant, an email being ZZed indicates that particular email account was "put to sleep." *Id.* at 1457. Complainant further testified that his "experience with ZZ has always been these are fired employees." *Id.* at 1459. Therefore, Complainant concluded Respondent had fired Mr. Tides.

Mr. Tides testified at trial that Respondent in fact terminated him on September 28, 2007. *Id.* at 638. This termination was in response to Mr. Tides's decision to release certain information to the press in violation of Respondent's personnel policies. *Id.* Respondent submitted as an exhibit the report of its investigation into Mr. Tides's contact with the press. *See* RX 47. In the report, Mr. Tides gave a statement admitting to being interviewed by and passing along information to a local reporter regarding what he viewed as his working conditions. *Id.* at 20-21. Respondent consequently placed Mr. Tides on suspension September 19, 2007, *id.* at 21, the same day Complainant learned Mr. Tides's email account had become ZZed.

25. Complainant Suffers a Breakdown on September 20, 2007

During the summer of 2007, Complainant began experiencing physical manifestations of stress. For example, Complainant testified to showing his badly bitten fingernails to Ms. Domingo on August 8, 2007. TR at 1381. Mr. Estep testified that "a month or so" after April 2007, "stress levels started to go

up" for Complainant, and he noticed Complainant began to stutter. *Id.* at 2170-71. Mr. Estep further noted Complainant was "breaking down" during the summer of 2007, including beginning to stutter and struggle more with his work. *Id.* at 2167. According to Complainant, he was doing his best "just to survive" during the final months leading up to his leave of absence in September 2007. *Id.* at 1429.

On the day of his breakdown,[6] Complainant remembers having to deal with completing an audit with a very difficult client while at the same time having a training scheduled for the following Monday. *Id.* at 1429-30. According to Complainant, despite these circumstances he received a message from Mr. Corio informing him of an audit to begin the following day. *Id.* Complainant declined the invite sent to him by Mr. Corio to participate in the audit and then went to speak with Mr. Estep. *Id.* at 1430. According to Complainant, he informed Mr. Estep he could not complete the upcoming audit because his training fell in the middle of the five-day cycle. *Id.* at 1430-31.

According to Complainant, it was during this conversation with Mr. Estep that he began to break down. *Id.* at 1434. Complainant stated he felt "signs of weakness" on his left side, could not hold anything in his left hand, and "could barely swallow." *Id.* Complainant remembered Steve Yunker being present in addition to Mr. Estep and described his emotions as feeling "one hundred miles away from home." *Id.* Complainant next called Leslie Robinson, and ethics advisor for Respondent. *Id.* Ms. Robinson called Respondent's Employee Assistance Program ("EAP") and placed all of them on a three-way phone call. *Id.* at 1435. At this point, Complainant recalls simply repeating that he wanted to go home. *Id.*

After having the conversation with Ms. Robinson and EAP, Complainant recalls Mr. Estep gathering up Complainant's computer bag and computer. *Id.* Complainant has some recollection of Mr. Estep walking him to his car, at which point Mr. Estep – according to Complainant – simply told Complainant to "[h]ave a safe trip." *Id.* Complainant next testified to driving to his RV that day and then driving to his home in Bellingham, Washington, the following day. *Id.*

Complainant's wife, Belinda Born-Reid, testified as to Complainant's condition upon arriving home in Bellingham the following day. According to Mrs. Born-Reid, Complainant was "just the worst [she'd] ever seen him" upon returning to Bellingham. *Id.* at 990. Mrs. Born-Reid described her husband as "totally incoherent," and she noticed he "had been stuttering and bitten off his nails and had been very nervous." *Id.* Ms. Reid drove Complainant to the hospital, during which trip Complainant was "crying and . . . babbling and stuttering." *Id.* Ms. Born-Reid did testify, however, that she spoke to Complainant on the morning of September 21, 2007, and that she could not discern in her very brief exchange with him over the phone that Complainant was suffering from any sort of physical symptoms. *Id.* at 1009-10.

Mr. Yunker testified to being with Complainant on the day of his breakdown. According to Mr. Yunker, he had accompanied Complainant into the parking lot a few hours before Complainant suffered his breakdown. *Id.* at 469. Mr. Yunker described Complainant as having a "difficult time talking" during their conversation in the parking lot. *Id.* Mr. Yunker next saw Complainant a few hours later, at which point Complainant's condition had worsened to the point where "[i]t would literally take him three to five minutes to get two to three words out." *Id.*

Mr. Yunker testified Mr. Estep arrived sometime after Complainant's symptoms worsened, at which point Mr. Yunker told Mr. Estep he believed Complainant needed to be taken to a hospital. *Id.* at 469-70. According to Mr. Yunker, Mr. Estep accompanied Complainant out of Respondent's building

[6] To clarify the following portion of background discussion, I take administrative notice of the fact that September 20, 2007 was a Thursday. *See* 29 C.F.R. § 18.201(b)(2) and (c).

after agreeing with Mr. Yunker that he would take Complainant to a nearby hospital for medical care. *Id.* at 470. According to Mr. Yunker, however, Mr. Estep returned approximately fifteen or twenty minutes later and told Mr. Yunker Complainant had insisted he wanted to simply go home and had refused to go to the hospital. *Id.*

According to Mr. Estep's version of the events, Complainant came to him to discuss his being placed on the upcoming audit. *Id.* at 2161. Mr. Estep testified he could tell Complainant was "really upset" and that "[h]is face was red" and "[h]is voice fluctuated" when he spoke. *Id.* Complainant told Mr. Estep he understood he was to have an "off-cycle" during the upcoming audit cycle, and therefore Mr. Corio's scheduling him for an audit the following day conflicted with this understanding. *Id.* at 2161-62. Mr. Estep responded by telling Complainant that this understanding was incorrect and that Complainant – along with everyone else – was scheduled to perform audits during the next cycle. *Id.* at 2162.

Mr. Estep testified to convincing Complainant to take a walk with him "later that afternoon," a practice he stated he engaged Complainant in on a somewhat regular basis when Complainant needed to relax due to work-related stress. *Id.* According to Mr. Estep, he noticed during this walk that Complainant was "still very upset" and "his stuttering was even more pronounced." *Id.* After the walk, Complainant told Mr. Estep he couldn't "even go back in the building." *Id.* Complainant therefore requested Mr. Estep go back into the building to gather up his "stuff," including "his laptop . . . and a couple of other personal effects." *Id.* Mr. Estep claims he was concerned about Complainant's condition and asked him if he was okay to drive. *Id.* Complainant said he was okay and "just want[ed] to go home." *Id.* at 2162-63. Mr. Estep consequently escorted Complainant to his car and watched him drive away. *Id.* at 2163. Mr. Estep then returned inside Respondent's building and called Ms. Domingo to tell her about the events that had just transpired. *Id.*

Complainant returned to his home to Bellingham, Washington, on September 21, 2007, the day following his breakdown. *Id.* at 1435. However, on the evening of September 20, 2007, Complainant stayed in an RV in which he lived during the week while working at Respondent's facility in Renton, Washington. *See id.* The following morning Complainant called his wife either while or before driving home to Bellingham, *id.* at 1009-10, and returned to Bellingham later that day. *Id.* at 1435.

26. DameWare Attack on March 28, 2008

Complainant testified to his belief Respondent used a program called DameWare to interfere with and remove files from his computer on March 28, 2008. TR at 1447-53. According to Complainant, he opened his computer on March 28, 2008 to access some information needed for insurance purposes. *Id.* at 1446. Complainant received an email from Ms. Domingo at 9:49 AM on this date, and subsequently took a screen shot of his work computer approximately an hour later in which the icon for DameWare appeared. *Id.* at 1448; CX 68 at 1. According to Complainant, the screen shot showed the DameWare icon with two miniature screen icons that flashed red and green. *Id.* at 1449. Complainant testified he "knew something was going on" at this point because of familiarity gained from working with DameWare on past audits. *Id.*

According to Complainant, his email began to disappear upon his logging onto Respondent's network. *Id.* at 1451-52. Complainant testified as to having knowledge of the operation of DameWare due to past incidents in which IT personnel working for Respondent would use the program to "correct a problem" with his computer or to "add a piece of software or trouble-shoot something." *Id.* at 1454. In the past, Complainant noted, IT personnel would contact him to seek his permission before accessing his computer – something Complainant testified did not happen in this case. *Id.* at 1454. Complainant further testified that, in this instance, whoever accessed his computer used DameWare's "server" versus

its "client" application, the former Complainant testified had "more power" than the latter. *Id.* Complainant testified that after the DameWare attack, he discovered seven months' worth of email missing from his inbox. *Id.* at 1455-56.

Del Valerio credibly testified with respect to the alleged DameWare attack on behalf of Respondent. Mr. Valerio is a computing forensic examiner employed by Respondent. TR at 1616. Mr. Valerio testified he had never known of anyone employed by Respondent to have used "Dameware [sic] to infiltrate and erase data from a computer without the computer user's knowledge." *Id.* at 1618. Based on his position within Respondent's organizational structure, Mr. Valerio believed he would have heard of such a use of DameWare had it occurred. *Id.* at 1619. Furthermore, Mr. Valerio stated DameWare would not be the best tool to use should someone want to covertly erase data from a user's computer given how the program notifies anyone whose computer it is being used to access. *Id.* Mr. Valerio instead characterized DameWare as a program used "typically to help the end user with problems." *Id.* at 1647.

Mr. Valerio further addressed the screenshot that Complainant testified was proof of DameWare accessing his computer. According to Mr. Valerio, the screenshot taken by Complainant does not demonstrate DameWare was then in use on Complainant's computer. *Id.* at 1620-21; CX 68 at 1. Mr. Valerio noted the two icons in the screen shot were red and green, which indicates DameWare is not in use. TR at 1621. According to Mr. Valerio, both icons turn red when DameWare is in use. *Id.*[7] Mr. Valerio noted the image captured by Complainant in the screen shot demonstrated only "that the DameWare client is present on [Complainant's] computer . . . as it would be on all of the other [Respondent] computers." *Id.* at 1621-22. Contrary to Complainant's testimony, Mr. Valerio testified the image presented by Complainant demonstrated definitively that DameWare was not in use when Complainant took the screen shot because of the red and green colors of the two icons. *Id.* at 1622.

Mr. Valerio also conducted a forensic examination of the hard drive on Complainant's Respondent-issued computer. *Id.* at 1622-23. An ethics advisor employed by Respondent witnessed Mr. Valerio undertake this examination. *Id.* at 1623. Mr. Valerio determined through his examination that no files were deleted from Complainant's computer on March 28, 2008 – the date Complainant believes the DameWare attack occurred. *Id.* Mr. Valerio further found no tampering with the security log on Complainant's computer and that, specifically, no emails were erased from Complainant's computer on March 28, 2008. *Id.* at 1623-24. Mr. Valerio did note, however, that March 28, 2008 was the approximate date on which Respondent decided to "push out" DameWare to all computers on its network. *Id.* at 1625. This, according to Mr. Valerio, was similar to the installation of a security patch and did not constitute and actual connection to Complainant's computer. *Id.* Additionally, Mr. Valerio determined through his examination that no individual – aside from Complainant – accessed Complainant's computer between November 12, 2007 and May 1, 2009. *Id.* at 1624. On cross examination, however, Mr. Valerio testified it would be "technically possible" for someone within Respondent's organizational structure to send a script to Complainant's computer if that person had knowledge Complainant had logged on to Respondent's network. *Id.* at 1640.

[7] I note the exhibit submitted by Complainant containing the screen shot is a grayscale copy; therefore, the icons appear as dark grey and light grey. *See* CX 68 at 1. However, neither party at trial disputed that the icons appeared red and green when Complainant's screen shot was presented in color.

27. August 27, 2008 Email to Dianne Kallunki

On August 27, 2008, Complainant sent an email to Dianne Kallunki, Respondent's Human Resources Director for Corporate and OIG and Business Development and Strategy. RX 21; TR at 1604.[8] Prior to this email, however, Complainant exchanged a number of emails with Ms. Kallunki and Tracy Beckwith, a Human Resources Generalist for Respondent. TR at 1591; *see* RX 21.

On July 31, 2008, Complainant sent an email to Ms. Beckwith requesting information on "how to file an L&I[9] claim." RX 21 at 1. In the email, Complainant noted he had already attempted to reach Ms. Kallunki, but had been unsuccessful as she was on vacation. *Id.* Ms. Beckwith responded to Complainant's email three minutes later, stating she was not familiar with the term "L&I." *Id.* at 2. Complainant's wife, Mrs. Born-Reid, who was copied on the email chain, responded to Ms. Beckwith twelve minutes later. *Id.* at 2-3. In her email, Mrs. Born-Reid explained Complainant's short-term leave policy was inadequate, that Complainant was "unable to work due to illness," and that she and Complainant understood an L&I claim to be a means of gaining "assistance through the state or through [Respondent] for employees that do not have income while on sick leave." *Id.* at 2. Ten minutes later, Ms. Beckwith replied to Mrs. Born-Reid's email, recommending they contact "Total Access, . . . the focal point of all employee concerns." *Id.* Total Access is a service provided by Respondent dealing with services "such as benefits, leave of absence, health and wellness, pension, or savings." TR at 1594.

On August 21, 2008, Complainant sent Ms. Kallunki and Ms. Beckwith an email requesting a "Report of Incident." RX 21 at 5. On August 27, 2008, Complainant sent another email to Ms. Kallunki. *Id.* at 6. In this email, Complainant struck a more irritated tone, noting he had not gotten a direct response to his July 31, 2008 email from Ms. Kallunki and expressed his feeling that she had "shoved [him] off to Tracy Beckwith" who "promptly went on unexplained [leave of absence] from" work. *Id.* Complainant stated he had spoken with Denise Ayres, a subordinate of Ms. Kallunki, *see* TR at 1609, who had not gotten back to Complainant despite a promise to do so. RX 21 at 6. Complainant at this point requested the contact information for Respondent's "Self-Insured Employer's Representative." *Id.* Ms. Kallunki sent a response email to Complainant that same day.[10] *Id.* In her response, Ms. Kallunki noted she attempted to call Complainant the prior Friday regarding the August 21, 2008 email, but Complainant's son informed her Complainant was then asleep. *Id.* Ms. Kallunki also stated she did not know who the self-insured employer's representative was, that she had contacted Total Access herself to see if she could obtain any information, and that she would still like to speak with Complainant in an attempt to gain further clarity on the information he needed. *Id.* That same day, Complainant replied to Ms. Kallunki's response. *Id.* In his response, Complainant noted he was able to discover information about L&I claims via a Google search and, further, that Respondent was self-insured for such claims. *Id.* Complainant repeated his demand that Ms. Kallunki provide him with the contact information for such a representative.

On September 2, 2008, Ms. Kallunki sent a response to the last email in her chain of correspondence with Complainant on August 27, 2008. *Id.* at 8. In this email, Ms. Kallunki directed

[8] Complainant, in his posttrial brief, does not explain how his sending of an email constitutes and adverse act. In describing this alleged adverse act, Complainant only states, "Reid sends email to Dianne Kallunki re: assistance with L&I." ALJX 11 at 30. Given Complainant's failure to provide greater detail regarding this incident, the Court presumes Complainant views Ms. Kallunki's response – or lack thereof – as the adverse act.

[9] L&I is an abbreviation for Washington State Department of Labor and Industry. TR at 1610.

[10] Ms. Kallunki's response is time-stamped 4:52 PM on August 27, 2008. RX 21 at 6. Mr. Reid's response to this email is time-stamped 4:26 PM. *Id.* However, Ms. Kallunki testified to working from Chicago during the time of this email exchange, which would explain why the time-stamp of Mr. Reid's response appears earlier than Ms. Kallunki's email to him. *See* TR at 1478-79.

Complainant to contact the Leave Management help line through Total Access as well as his Leave Coordinator with any future questions related to his disability. *Id.* Ms. Kallunki provided the phone number for the help line and noted the contact information for Complainant's Leave Coordinator existed in materials Complainant had already received from her. *Id.*

At trial, Complainant testified he found it "highly unusual" Ms. Kallunki did not know who Respondent's self-insured employer's representative was. TR at 1476. Complainant also testified that no one responded to the last email he sent to Ms. Kallunki on August 27, 2008, *id.* at 1480 – despite her response on September 2, 2008. *See* RX 21 at 8. On cross-examination, however, Complainant admitted after viewing Ms. Kallunki's email that she had responded to the final email he sent on August 27, 2008. TR at 1489.

At trial, Ms. Kallunki credibly testified she typically leaves the generation of responses to employee questions to Ms. Beckwith, Ms. Ayres, or other members of her team. *Id.* at 1609. Ms. Kallunki further testified that she had not heard the term "labor and industry" before despite spending the first forty-seven years of her life living in the state of Washington. *Id.* at 1610. Ms. Kallunki also stated incident reports were not something generated by the human resources department, but instead came from Total Access. *Id.* at 1612.

Ms. Beckwith also testified at trial. In describing her job duties, she noted her responsibilities included providing support for working employees, but not those "who are on leave or who have been terminated." *Id.* at 1591-92. Ms. Beckwith further stated she did not understand what Complainant was requesting when he submitted his request for information to help with his L&I claim on July 31, 2008. *Id.* at 1593. Ms. Beckwith also called Mrs. Born-Reid after receiving her email on July 31, 2008. *Id.* at 1595-96. During their conversation, Ms. Beckwith told Mrs. Born-Reid to contact "Total Access and/or Aetna" because she did not have the information they needed. *Id.* at 1596. Ms. Beckwith testified she "felt the issue was resolved" following her email correspondence with Complainant and Mrs. Born-Reid and her conversation with Mrs. Born-Reid. *Id.* at 1598. Ms. Beckwith also stated had Complainant's inquiry been regarding "workers' compensation" as opposed to an "L&I claim," she would have nevertheless directed Complainant to contact Total Access. *Id.* at 1599. Finally, Ms. Beckwith noted she may have performed intake on a complaint filed against Ms. Moring sometime in 2007 that also involved Complainant, but stated she did not participate in the investigation associated with this complaint. *Id.* at 1602.

VI. **Analysis**

To succeed on a whistleblower complaint under SOX, Complainant bears the burden of demonstrating the existence of four elements: (1) his engagement in protected activity; (2) knowledge on the part of Respondent that he engaged in such activity; (3) his suffering of some "unfavorable personnel action"; and (4) that his engagement in the protected activity was "a contributing factor" to the unfavorable personnel action taken by Respondent. 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b); 29 C.F.R. § 1980.109(a); *see Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351-52 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008). Complainant sets forth each of these elements in his pretrial brief as issues for my determination. ALJX 3 at 9-10. However, I also include in my analysis below the issue of equitable tolling, which I preserved in the summary decision phase of these proceedings. ALJX 9 at 9-11. Consequently, I turn first to this issue, followed by analyses of the issues of adverse activity (in the form of both a hostile work environment and as single discrete acts within the limitations period), protected activity, causation, and knowledge of Complainant's engaging in protected activity on the part of Respondent.

A. Equitable Tolling

SOX's statutory filing period is not a jurisdictional requirement, and therefore may be equitably modified. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, slip op. at 4 (ARB Dec. 30, 2005). The doctrine of equitable tolling allows a plaintiff to file a claim outside of a statutory period because there exists some sort of "excusable delay." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). However, equitable tolling is not available to a plaintiff or complainant who simply chooses not to pursue diligently his or her own claim. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). This is keeping with the notions that "restrictions on equitable tolling . . . must be scrupulously observed," *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 19 (3d. Cir. 1981), and that courts should apply the doctrine only "sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

A party seeking the equitable tolling of a limitations period generally bears the burden of justifying the doctrine's application, *see Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995); *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993), and must prove two elements to invoke its protections: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (citing *Irwin*, 498 U.S. at 96). Although the Supreme Court has held a plaintiff's awaiting the appointment of counsel may be sufficient to invoke the doctrine of equitable tolling, *see Baldwin*, 466 U.S. at 151 (citing *Harris v. Walgreen's Distrib. Ctr.*, 456 F.2d 588, 592 (6th Cir. 1982)), it has also held representation by counsel does not necessarily preclude the doctrine's application. *See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 383-87 (1993).

I discussed the applicability of equitable tolling in my May 27, 2009 Order addressing Respondent's and Complainant's separate motions for summary decision. *See* ALJX 9 at 9-11. There, I found a genuine issue of material fact existed "as to Complainant's ability to file his SOX claim between September 20, 2007 and July 1, 2008, and as to whether Complainant's limitations were the result of Respondent's wrongful conduct." *Id.* at 11. In reaching such a finding, I framed the parties' arguments within the context of *Stoll v. Runyon*, 165 F.3d 1238 (9th Cir. 1999). In *Stoll*, the Ninth Circuit allowed the equitable tolling of a limitations period by a represented and noninstitutionalized plaintiff. *Id.* at 1242. The plaintiff in *Stoll* suffered nearly unspeakable physical abuse – including "repeated sexual abuse, rape, and assault" – at the hands of her superiors over a six-year period with the U.S. Post Office which "left her severely impaired and unable to function in many respects." *Id.* After detailing the abuse, the Ninth Circuit went on to describe the plaintiff's psychiatric repercussions:

> [She] suffers from severe major depression and severe generalized anxiety disorder, as well as somatic form pain disorder. She is unable to attend to paperwork concerning the case due to her anxiety disorder, and cannot open her mail without experiencing a panic attack. She cannot concentrate well enough to read. She is currently considered totally psychiatrically disabled and receives federal occupational benefits. . . . [Her] anxiety . . . is particularly acute when an issue arises involving her experience at the Post Office and the subsequent proceedings, and when she is required to have any form of contact, even non-physical, with males, including, tragically, her own sons.

Id. at 1240. The court noted these circumstances prevented plaintiff's direct communication with her male attorney during her EEOC proceedings or the opening of the mail involving her lawsuit, which led to an arrangement where her psychiatrist's female receptionist became a conduit for communication to or from either of these sources. *Id.* The court concluded the plaintiff was unable to file her Title VII claim because "she was too psychiatrically disabled to comply with relevant time periods and deadlines." *Id.* at 1241-42.

In this case, Respondent again argues the circumstances surrounding Complainant's psychiatric disorders do not rise to a level – as in *Stoll* – that is sufficient to equitably toll SOX's ninety-day statute of limitations. In doing so, Respondent points to a neuropsychological evaluation done by Complainant's treating physician, Dr. Tedd Judd, and the notes of his treating nurse practitioner, Gail C. Baker, as well as the testimony of Dr. Jeffrey Steger, a number of Complainant's coworkers, his wife (Mrs. Born-Reid), and that of Complainant himself. I therefore turn to this evidence in determining if Complainant may invoke the doctrine of equitable tolling on the grounds that his mental health prohibited him from filing his OSHA complaint before September 29, 2008. I ultimately conclude Complainant has not brought forth sufficient evidence to invoke the protections of equitable tolling.

1. Report of Dr. Tedd Judd

On April 3, 2008, Complainant's treating physician, Dr. Tedd Judd, issued a neuropsychological report addressing Complainant's conditions. *See generally* CX 2. The records review portion of Dr. Judd's report indicates another neurologist, Dr. Chobanov, saw Complainant on September 21, 2007 for "slurred speech and an episode of difficulty swallowing." *Id.* at 1. During the September 21, 2007 visit, Complainant underwent a brain MRI scan, which revealed "a 6 mm non-specific focal area of increased T2 signal in the midbrain." *Id.* at 1-2. Complainant returned to see Dr. Chobanov on October 8, 2007, at which point Complainant's symptoms had improved. *Id.* After this visit, Complainant underwent a series of CT and MRI scans, all of which revealed a lesion of various sizes, and saw another neurologist. *Id.* Both of these neurologists concluded Complainant's symptoms were "functional," however, and therefore likely not the result of the lesion that appeared on the CT and MRI scan images. *Id.* Dr. Judd also interviewed Complainant and Mrs. Born-Reid together and separately during the April 3, 2008 visit and conducted a series of tests on Complainant. *Id.* at 8-15.

Dr. Judd concluded Complainant "had response patterns [on the tests] suggestive of the distraction of anxiety but not of brain impairment" and described Complainant as having "a personality style of a high need to be liked and a high need to be in control." *Id.* at 15. Dr. Judd further noted Complainant's "position as an employee [with Respondent] was, in important ways, unprecedented for him in that he was under the control of others, unappreciated, and, to his perception, under attack." *Id.* He characterized Complainant as "eager to tell his story" and "eager to complain about his symptoms, what he regarded as his poor medical treatment, and his hostile work environment." *Id.* at 8. Based on his review of Complainant's record, the interviews, and the various tests, Dr. Judd diagnosed Complainant with "conversion disorder, panic disorder without agoraphobia, Generalized Anxiety Disorder, and major depression." *Id.* at 15. Dr. Judd noted in his April 3, 2008 report, however, that Complainant's "prognosis for a full recovery is excellent with complete treatment," which would include "[a] *brief* course of rehabilitation therapies" for Complainant's conversion disorder "once a vigorous course of psychotherapy has been established." CX 2 at 18-19 (emphasis in original). Dr. Judd concluded that "with proper treatment and favorable circumstances," Complainant's "condition is likely to resolve fully with an ability to return to work within a few months." *Id.* at 19.

2. Notes of Nurse Gail C. Baker

Ms. Gail Baker, an advanced registered nurse practitioner, appears to have begun seeing Complainant in November 2007.[11] Ms. Baker's reports issued at this time indicate she based her

[11] Complainant submits ninety-two pages of Ms. Baker's largely handwritten notes and evaluations summarizing his course of treatment with her. *See generally* CX 5. The pages of this exhibit contain many duplicates, *see, e.g., id.* at 80-91, and are not organized chronologically. Complainant gives no indication in his posttrial brief as to when he began seeing Ms. Baker. Furthermore, a review of this entire exhibit reveals no record dated November 11, 2007, the day on which Complainant claims Ms. Baker completed an assessment of him. *See* ALJX 11 at 34.

conclusions on interviews with Complainant and Mrs. Born-Reid as well as a number of tests she administered to Complainant. CX 5 at 36-62. On November 30, 2007, she gave Complainant a score of twenty-eight on the Beck Depression Inventory, indicating moderate, high-end clinical depression. She characterized Complainant's affect as "tearful"; his mood as "depressed," "angry," "anxious," "panicked," and "frightened"; his speech as "rapid," "pressured," "rambling," "expansive," and "circumstantial" with "stuttering at times"; and his thought process as "disorganized." *Id.* at 36. Ms. Baker diagnosed Complainant with conversion disorder, general anxiety disorder, major depression, and breathing sleep disorder. *Id.* She recommended Complainant avoid email and phone calls to keep his stress level low and increased Complainant's dosage of Effexor from 112.5 milligrams to 187.5 milligrams on November 9, 2007. *Id.* at 36, 40.

In later reports, Ms. Baker noted increased depression in Complainant and prescribed different medications for Complainant. On June 13, 2008, Ms. Baker noted Complainant scored fifty-one on the Beck Depression inventory, indicating extreme depression; seventy-four on the Zung Anxiety Index, indicating extreme anxiety; and forty on the Global Assessment of Functioning ("GAF") index. *Id.* at 9. On this date, Ms. Baker also noted Complainant was taking Clonazepam and increased his dosage of this medication. *Id.* On June 27, 2008, Ms. Baker noted Complainant suffered from posttraumatic stress disorder ("PTSD") as well and recommended Complainant switch from Effexor to Pristiq. *Id.* at 5. On July 6, 2008, Ms. Baker received a call from Mrs. Born-Reid stating Pristiq caused a marked increase in Complainant's anxiety. *Id.* Ms. Baker consequently recommended Complainant switch back to Effexor. *Id.*

3. Testimony of Dr. Steger

Dr. Steger is a clinical psychologist with a specialty in medical psychology. TR at 9. He earned a bachelor's degree from Michigan State University in 1969 and a master's degree in 1972 and a Ph.D. in 1974 in clinical psychology from the University of Oregon. *Id.*; CX 1 at 1. His career accomplishments include serving as an instructor at the University of Oregon and as a faculty member at the University of Washington Medical School. TR at 10. Dr. Steger has served as Complainant's treating psychologist since April 2008. *Id.* at 11.

In his testimony, Dr. Steger gave some background on conversion disorder, describing it as "when a variety of emotional and/or environmental stresses come to bear on a person and they convert that stress . . . into physical symptoms that are noticeable or measurable." *Id.* at 12. Dr Steger stated he treated approximately five or six patients each year with the disorder. *Id.* at 69. Dr. Steger described his treatment course with Complainant, noting he saw him two to three times per month since April 23, 2008 and continuing through at least June 2009, *id.* at 13-14, and described Complainant as experiencing "non-traumatic stress." *Id.* at 14. Dr. Steger testified this stress, which he attributed to Complainant's work with Respondent and "his interactions with his supervisor," had led to Complainant's conversion disorder. *Id.* at 14-16. Dr. Steger also concluded Complainant was not malingering, *id.* at 21-24, and testified that, upon beginning to treat Complainant, he gave him a GAF competency score of forty-seven, demonstrating "significant impairment." *Id.* at 76. This level of impairment, according to Dr. Steger, affected most of Complainant's "areas of life functioning" and did not change significantly through July 1, 2008. *Id.*

Dr. Steger also opined as to how Complainant's conversion disorder would have affected attempts to file an OSHA complaint at different points along a timeline. Dr. Steger noted that, prior to July 1, 2008, Complainant was "still very confused, and he would not [have been] consistently able to put together a good chronology or a good history." *Id.* at 25. Dr. Steger also noted "[s]tress comes and goes" and Complainant may have had days where addressing the facts giving rise to such a complaint would have been manageable. *Id.* at 25-26. However, Dr. Steger testified an attempt by Complainant to address

the "whole chronology" of events giving rise to his OSHA claim would "re-trigger the stress and start[] to make the brain less efficient." *Id.* at 26.

On an August 6, 2008 visit, Dr. Steger set a number of treatment goals with Complainant. *Id.* at 27-28. One of these goals was "to file an OSHA or SEC claim with[in] a six-month time frame." *Id.* at 28. When asked why he chose this date for establishing such a goal, Dr. Steger testified setting such a goal any earlier would have been problematic due to Complainant's inability to "deal with any of the specifics" of such a claim. *Id.*

Dr. Steger admitted that Dr. Judd's report indicated a somewhat high level of functionality for Complainant. Dr. Steger noted Complainant could read and write and kept both a written and video journal regarding his condition while seeing Dr. Judd. *Id.* at 32-34. Dr. Steger stated he never instructed Complainant to keep a video journal of his condition, however. *Id.* at 33. Dr. Steger also testified he never reviewed any emails written by Complainant prior to his evaluation of his condition and that his understanding of the events underlying Complainant's condition came from Complainant's "face value" retelling of such events. *Id.* at 33-34. Regarding the testing performed by Dr. Judd, Dr. Steger noted it took several hours and – although it made Complainant "highly stressed" – it was something Complainant was able to complete. *Id.* at 38. Dr. Steger also admitted based on these observations from Dr. Judd that an attempt by Complainant to file an OSHA complaint prior to July 2008 would have been "[n]ot impossible, but difficult." *Id.* at 38-39. Dr. Steger also testified Complainant's conversion disorder could have caused him to perceive certain events incorrectly, including a possible exaggeration of his work conditions. *Id.* at 39-40.

Dr. Steger also testified about the circumstances surrounding and the impact of Complainant's symptoms on his ability to file an OSHA complaint. Dr. Steger admitted he understood Complainant to have used his computer "infrequently" before July 1, 2008 and that he himself had never filed an OSHA complaint and did not look into the specifics involved in such a process prior to testifying. *Id.* at 43-44. Dr. Steger based his conclusion regarding Complainant's ability to file such a complaint on the premise that Complainant would not need to confront any of Respondent's employees to do so. *Id.* at 45. He also agreed Complainant had been able to relay the events giving rise to his conversion disorder to a number of medical professionals, and that Complainant likely viewed these persons as "someone who's likely to help" him. *Id.* at 47-49. Dr. Steger agreed an OSHA investigator would have been someone Complainant would have viewed as nonadverse under such circumstances. *Id.* at 51. He drew a distinction, however, between the levels of impairment associated with talking about filing an OSHA complaint versus the act of filing, noting a much more significant level of impairment may associate itself with an actual attempt to file such a complaint. *Id.* at 78-79. Dr. Steger was not aware Complainant referred to himself as a "protected whistleblower under Sarbanes-Oxley" while talking to Aetna representatives two to three months before he met with Complainant. *Id.* at 50. Dr. Steger admitted representatives from Aetna would not have been of the category of people Complainant would have viewed as on his side. *Id.* at 50. Dr. Steger further noted that a conversation by Claimant with a nurse in which he stated "he fe[lt] good about being able to have his say in the upcoming OSHA case" would have been further evidence of Complainant addressing the circumstances giving rise to his conversion disorder with people he viewed as not adverse to him. *Id.* at 66.

Dr. Steger had no recollection of approving Complainant's communicating with an OSHA investigator in May or June of 2008. *Id.* at 53-54. He also was not aware of Complainant then receiving treatment from any other psychologist at that point in time. *Id.* at 56. According to Dr. Steger, however, such communication could then have possibly been therapeutic for Complainant. *Id.* Dr. Steger was also questioned about the timeline Complainant kept regarding Respondent's alleged retaliatory conduct toward him. *Id.* at 59-61. *See also* CX 40 at 1. Dr. Steger was not certain whether Complainant could have emailed or faxed such a timeline to an OSHA investigator in May or June of 2008. *Id.* at 60-61.

4. Testimony of Complainant's Coworkers

Complainant's coworkers also testified as to his functionality and ability to discuss the events giving rise to the alleged hostile work environment following his September 20, 2007 breakdown. Mr. Tides and Mr. Neumann testified about Complainant's ability to communicate with them regarding Respondent's alleged retaliation against him and its creation of a hostile work environment. Mr. Tides forwarded Complainant the name of his attorney in April 2008. TR at 614. Mr. Tides testified his reason for doing this was because Complainant then "was looking towards what legal availabilities he had for any action he may be able to protect himself with." *Id.* at 617. Mr. Neumann testified to having conversations with Complainant from October 1, 2007 through the end of that year that involved Respondent's creation of a hostile work environment. *Id.* at 670. Mr. Neumann stated it was during this time Complainant informed him he had compiled a "matrix of retaliation" detailing the events constituting Respondent's hostile work environment. *Id.* at 671; *see also* CX 40 at 1. Mr. Neumann specifically recalled conversations during this time in which Complainant spoke of Ms. Moring, Mr. Wescott, and PricewaterhouseCoopers' lack of independence. *Id.* at 671-72. Mr. Corio also testified to Complainant's ability to use a computer after his breakdown in that he engaged in an online role-playing game. *Id.* at 861. Mr. Corio noted, however, that "if [Complainant] was online, it was not in a focused sense." *Id.* Mr. Corio did not testify as to whether Complainant used his work or personal computer for such an activity.

5. Testimony of Mrs. Born-Reid

Complainant's wife, Mrs. Born-Reid, testified as to Complainant's condition immediately after his breakdown and in the following months. According to Mrs. Born-Reid, she did not realize anything was wrong with Complainant when she first spoke with him on the morning of September 21, 2007. TR at 1010. She testified, however, that upon Complainant's return to Bellingham, Washington, on September 21, 2007 he was "stuttering" and "very nervous." *Id.* at 990. Mrs. Born-Reid noticed Complainant had bitten off all of his fingernails as a result of work stress. *Id.* She further described Complainant as "totally incoherent" upon his return and stated he "was just crying and just babbling and stuttering" as she drove him to a local doctor's office. *Id.* Mrs. Born-Reid testified Complainant was told by the doctor he visited to instead go to an emergency room, and that she consequently took him to a local hospital. *Id.* Complainant received inpatient treatment from Friday, September 21, 2007 through Sunday, September 23, 2007. *Id.* at 991.

Upon Complainant's return from the hospital, Mrs. Born-Reid cared for Complainant under the assumption he had suffered a stroke. *Id.* at 992. According to Mrs. Born-Reid, Complainant received medication that left him heavily sedated, causing him to sleep much more than usual. *Id.* at 993. Mrs. Born-Reid further noted Complainant cried often when awake and could "hardly communicate." *Id.* Complainant also attended physical therapy sessions. *Id.* Mrs. Born-Reid noted Complainant was unable to drive a car and "could barely walk" through the end of 2007. *Id.* at 993-94.

Mrs. Born-Reid also discussed the circumstances under which she and Complainant first sought the assistance of an attorney. According to Mrs. Born-Reid, this occurred after Aetna denied Complainant's claim for continued disability benefits sometime in January 2008. *Id.* at 994-95. Mrs. Born-Reid described this process as her making several visits to the office of an attorney, Steve Chance, "to pick up paperwork and take paperwork." *Id.* at 995. Complainant accompanied Mrs. Born-Reid to Mr. Chance's office only to sign the fee agreement. *Id.* at 996. Mr. Chance was ultimately unsuccessful in Complainant's claim against Aetna, and Mrs. Born-Reid consequently sought the assistance of another attorney who she later discovered was not licensed to practice in the state of Washington. *Id.* Mrs. Born-Reid further testified she did not discuss any potential SOX claims with Mr. Chance during their meetings

in early 2008 because she understood such a claim to be premature unless Respondent fired Complainant. *Id.* at 1020-22. Mrs. Born-Reid stated, however, that despite this understanding Complainant's condition also prohibited him from filing a SOX complaint. *Id.* at 1024.

Mrs. Born-Reid testified she became aware of Complainant's potential SOX claim when Complainant told her he wanted to visit an OSHA office in Seattle in August 2008. *Id.* at 997. Mrs. Born-Reid learned sometime in approximately July of 2008 that Mr. Tides and Mr. Neumann had filed SOX claims against Respondent. *Id.* According to Mrs. Born-Reid, OSHA investigators contacted Complainant prior to the filing of his own claim and inquired as to Complainant's interest in serving as a witness with respect to the claims of Mr. Tides and Mr. Neumann. *Id.* at 997-98. Mrs. Born-Reid was concerned about Complainant's serving as a witness, however, because of his recent troubles with stress and anxiety. *Id.* at 998.

According to Mrs. Born-Reid, the process of filing an OSHA complaint was difficult for Complainant to accomplish. Mrs. Born-Reid testified that she and Complainant visited the Seattle OSHA office in the first or second week of August 2008, at which time they received the necessary paperwork for filing a complaint. *Id.* at 1000. Mrs. Born-Reid testified Complainant returned to Bellingham to complete the complaint, ultimately filing it on September 30, 2008.[12] *Id.* at 1002. Mrs. Born-Reid stated it took Complainant six weeks to complete the complaint, but she could not recollect if Complainant worked on the complaint on a daily basis. *Id.* at 1003. Mrs. Born-Reid described Complainant's condition at the time of filing his complaint, noting Complainant still then walked with a cane, had panic attacks, and was "very challenged" when attempting to speak. *Id.* at 1004.

6. Testimony of Complainant

Complainant also testified to the circumstances leading up to the filing of his OSHA complaint. According to Complainant, his first contact with OSHA investigators came in serving as a witness with respect to the complaints filed by Mr. Tides and Mr. Neumann in late May 2008. TR at 1461-64. Complainant received questions via email from an OSHA investigator to respond to regarding these claims. *Id.* at 1464. He discussed his potential involvement in this capacity with Dr. Steger, who recommended Complainant not serve as a witness at that time. *Id.* at 1461. Nevertheless, Complainant testified he responded to these questions sometime in July 2008, although he needed approximately one month to fulfill this request. *Id.* at 1464. Complainant next spoke with Dr. Steger about filing his own OSHA complaint. *Id.* at 1464. According to Complainant, he and Dr. Steger added this as a goal of Complainant's treatment. *Id.* at 1464-65. Complainant took this step in part because of an email he received from Ms. Victoria Coleman, an OSHA investigator, inquiring, according to Complainant, as to why he had not yet filed his own OSHA complaint. *Id.* at 1469. According to Complainant, one of the steps taken by him and Dr. Steger was Complainant's compiling a blog in order to refamiliarize himself with the use of a computer. *Id.* at 1484.

Complainant testified as to the significance of receiving the email ZZing his email account at Respondent with respect to the filing of his OSHA complaint. According to Complainant, he received the email notifying him that Respondent was ZZing his work email account on July 31, 2008. *Id.* at 1468. Complainant interpreted this information as "basically mean[ing] I'm gone" or terminated from employment at Respondent and asked one of the OSHA investigators if this email – along with other information he had gathered and the testimony of Mr. Tides and Mr. Neumann – could be used in his own complaint. *Id.* at 1466-68.

[12] The complaint itself is stamped "received" on September 29, 2008. RX 3 at 1.

Complainant also described the emotions associated with reviewing his work emails in the process of participating as a witness for Mr. Tides and Mr. Neumann and in filing his own OSHA complaint. *Id.* at 1470. Complainant described this process as causing him to cry and associated it with feelings of anger and anxiety. *Id.* In drafting his responses to the questions associated with Mr. Tides's and Mr. Neumann's complaints, Complainant noted he only went through "pertinent" emails, and that the process of confronting the events giving rise to their claims made him feel "horrible." *Id.* at 1470-71.

Drafting the OSHA complaint, according to Complainant, took him from sometime in early August until late September. *Id.* at 1471. Complainant visited the OSHA office in Seattle one time before filing his complaint. *Id.* According to Complainant, he spoke with Ms. Coleman during this visit, who grew "very upset" with Complainant because he "couldn't express [him]self." *Id.* Ms. Coleman consequently took it upon herself to assist Complainant, giving him a document containing a short statement and listing additional information Complainant would need to include in order to complete his complaint. *Id.*; *see* CX 102 at 1. This document contained a short paragraph in first-person narrative stating Complainant was unable to file his complaint earlier because he was "incapacitated and debilitated" due to "work-related stress." CX 102 at 1. The document noted, however, an additional alleged discriminatory act occurring within the then-ninety-day limitations period – Respondent's alleged denial of employment benefits to Complainant on August 11, 2008. *Id.* Ms. Coleman also reminded Complainant in the document to include his complete name and phone number and the names and addresses of all potential respondents and to file the complaint by mail fax or email "*before* November 9, 2008" as to the August 11, 2008 incident. *Id.* (emphasis in original).

7. Conclusion Regarding Equitable Tolling

I find – after reviewing the evidence, viewing the witnesses, and hearing testimony presented at trial – Complainant has failed to demonstrate circumstances existed sufficient to toll SOX's ninety-day limitations period on equitable grounds with respect to any alleged adverse acts occurring before July 1, 2008. Three bases support this finding. First, the circumstances surrounding and conditions associated with Complainant's alleged mental incapacity differ greatly from those found by the Ninth Circuit in *Stoll* to merit the invocation of equitable tolling. Second, the testimony of Complainant's medical providers and coworkers demonstrates Complainant was capable of taking the steps necessary to file an OSHA claim despite his alleged mental incapacity. Third, the testimony of both Complainant and his wife demonstrates their mistaken belief that Respondent had to terminate the employment of Complainant for his claim to become actionable.

I addressed in my May 27 Order the issue of equitable tolling, then finding any determination involved genuine issues of material fact requiring the introduction of further evidence. ALJX 9 at 8-11. In so finding, I focused primarily on the Ninth Circuit's *Stoll* opinion, noting "just as in *Stoll*, Complainant's psychiatric difficulties were allegedly the result of the [Respondent]'s wrongful conduct," and the facts then available left doubts as to Complainant "ability to timely file his SOX claim" and his ability to communicate with OSHA investigators. *Id.* at 9-10. Turning now to a complete factual record, I find *Stoll* no longer supports Complainant's entitlement to the doctrine of equitable tolling as applied to SOX's ninety-day limitations period.

Stoll involved, as discussed, *see supra* VI.A, an environment that subjected the plaintiff to horrendous sexual abuse and harassment over the course of six years. *Stoll*, 165 F.3d at 1239. After detailing the effects of the plaintiff's psychiatric condition, the Ninth Circuit cited three reasons justifying the applicability of equitable tolling in *Stoll*. First, the record clearly indicated the defendant's conduct left the plaintiff "so broken and damaged that she [could]not protect her own rights." *Id.* Second, the plaintiff's mental incapacity – and its effect of prohibiting contact with her male lawyer – was an "extraordinary circumstance" justifying the invocation of equitable tolling. *Id.* (citing *Brockcamp v.*

United States, 67 F.3d 260 (9th Cir. 1995)). Finally, the plaintiff presented sufficient evidence to demonstrate her "mental illness . . . precluded her from exercising an agency relationship with the attorney who handled her EEOC case," leading the Ninth Circuit to disagree with the district court's finding that her attorney's knowledge of the statutory filing period could be automatically imputed onto the plaintiff. *Id.* The Ninth Circuit described extensively the effects of the defendant's conduct upon the plaintiff, which included her "inability to concentrate well enough to read," her medical providers' opinions that she "might never work again," and her inability "to have any form of contact, even non-physical, with males, including, tragically, her own sons." *Id.* at 1240. The Ninth Circuit also noted the plaintiff's inability "to understand her legal rights and act on them" was due to a large amount of sedatives prescribed, in part, to abate possible suicide attempts. *Id.*

I find the complete record in Complainant's case is distinguishable from that relied on by the Ninth Circuit in *Stoll* and does not justify the application of equitable tolling in this case. As an initial matter, the conduct giving rise to the invocation of the doctrine of equitable tolling varies greatly between *Stoll* and Complainant's case. In *Stoll*, the plaintiff endured six torturous years of intolerable working conditions, including uninvited groping and fondling; rape and degradation (including two episodes of not being allowed "to go to the ladies' room because she was menstruating heavily"); and "sadistic . . . screaming." *Id.* at 1239-40. While the Ninth Circuit noted "all women" employed by the defendant experienced sexual harassment, it also relied on a judge's finding that male employees superior to the plaintiff targeted her for the most egregious misconduct "because she was quiet and pretty." *Id.* at 1239.

Complainant's evidence portrays exposure to a work environment for just under eight months that was not at all on the level present in *Stoll*. Much of the alleged misconduct on the part of Respondent varies greatly both in severity and the specific targeting of Complainant. For example, Respondent directed many of its allegedly hostile acts – such as the reduction of the audit cycle, the changing of auditor titles, and perceived threatening emails from superiors – to all auditors, not just Complainant. This varies from the egregious and physically abusive conduct specifically targeting the plaintiff over six years in *Stoll*. Complainant fails to tie other acts – such as the placing of the Starbucks application on his desk and the weapons possession complaint – to Respondent with anything other than his own allegations. Furthermore, I find those acts directed specifically at Complainant by identified individuals – such as Ms. Moring's negative reviews and reprimanding of Complainant, Mr. Culp's finding Complainant's allegations of retaliation were unsubstantiated, the bouncing of an email to a coworker leading to Complaint's subjective belief that the coworker had been fired, and Complainant's receiving unsatisfactory assistance with his L&I claim – do not rise at all to the level of the "repeated sexual abuse, rape, and assault" endured by the plaintiff in *Stoll*. *See Stoll*, 165 F.3d at 1242. While the level of a defendant's (or in this case Respondent's) alleged misconduct does not necessarily preclude a finding that equitable tolling applies based solely on "extraordinary circumstances beyond [a plaintiff's] control," it is one of the two bases on which a party may attempt to invoke equitable tolling. *See, e.g., Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (citing *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991)). In this case, I find Respondent's conduct does not rise to a level sufficient to allow the equitable tolling of a limitations period. While the work conditions encountered by Complainant in 2007 were difficult at times - especially after the audit work cycle was temporarily reduced to five days - I find that Respondent did not engage in wrongful conduct and Complainant was never singled out.

I also find Complainant's level of mental incapacity following his September 20, 2007 breakdown differs from that present in *Stoll* and does not constitute the type of "extraordinary circumstance" needed to equitably toll SOX's ninety-day limitations period. I note initially Complainant does share several diagnoses and symptoms – including depression, generalized anxiety disorder, and panic attacks – with the plaintiff in *Stoll*. *Compare Stoll*, 165 F.3d at 1240, *with* CX 5 at 36 (diagnoses of depression and anxiety disorder), *and* TR at 1004 (Mrs. Born-Reid's observation of Complainant's panic

attacks). However, the plaintiff in *Stoll* exhibited several additional symptoms of greater severity than those experienced by Complainant. For example, medical experts uniformly found – and the defendant accepted – that the plaintiff in *Stoll* would likely "never work again" as a result of the defendant's abuse. *Stoll*, 165 F.3d at 1240. Although Dr. Judd on April 3, 2008 noted Complainant suffered from multiple physical symptoms and diagnosed Complainant with "conversion disorder, panic disorder without agoraphobia, Generalized Anxiety Disorder, and major depression," he found "[t]hese conditions [to be] highly treatable." CX 2 at 15-16. Dr. Steger agreed with Dr. Judd's diagnoses, although he expressed the opinion that any treatment would be "more prolonged and extensive" than that envisioned by Dr. Judd. TR at 12. The plaintiff in *Stoll* also lost the ability to read due to her psychiatric conditions. *Stoll*, 165 F.3d at 1240. Complainant, however, reported being able to read to Dr. Judd as well as being able to resume using his computer two months after his breakdown. CX 2 at 6. Dr. Steger also testified Complainant could both read and write during his observations and treatment of Complainant. TR at 32. Most notably, the plaintiff in *Stoll* became so affected by her psychiatric condition that it completely prevented her contact with her male attorneys and sons. *Stoll*, 165 F.3d at 1240. Complainant, while demonstrating to varying degrees that his psychiatric condition affected his ability to address Respondent's conduct toward him, sets forth no evidence of being so extremely incapacitated that he suffered a lasting consequence such as being unable to interact or communicate with all attorneys of one sex or the other. In fact, Complainant met with his lawyer in the Aetna dispute at least once to sign a fee agreement and took a brief weekend vacation in Whistler, British Columbia, to celebrate his wedding anniversary with his wife in early June 2008. TR at 995-96, 1485-86.

The testimony of Complainant's medical providers and coworkers as well as his own communications also demonstrate a continued ability to address and discuss the allegedly hostile conduct toward him by and while employed with Respondent. Communications by Complainant in which he alleges "retaliatory" or "hostile" acts by Respondent permeate the record. For example, Complainant kept a "matrix of retaliation" detailing specific acts taken by Respondent against himself and his coworkers during his employment with Respondent. CX 40 at 1. It was updated sometime after Mr. Tides and Mr. Neumann were terminated in September 2007. *Id.* Mr. Neumann testified to Complainant's discussing this matrix with him sometime between October 1, 2007 and the end of that year. TR at 670. Complainant asked Mr. Tides about potential names of attorneys for representation in April 2008. *Id.* at 614-17. Complainant also participated in a chat session with Mr. Yunker on August 20, 2007 in which they discussed retaliation against Mr. Tides. CX 63. Complainant sent a number of emails to superiors alleging retaliatory conduct against him while employed with Respondent. *See* CX 48 at 3; CX 51 at 1-2; CX 86 at 1; CX 94 at 1-2. Such behavior demonstrates Complainant had the ability to address and discuss Respondent's allegedly hostile conduct toward him both before and throughout his leave of absence.

Complainant's medical providers described his psychiatric condition as the cause of varying degrees of mental incapacity, although none testified to a level of impairment in Complainant similar to that present in the plaintiff in *Stoll*. Ms. Baker diagnosed Complainant in the end of 2007 with conversion disorder, general anxiety disorder, major depression, and breathing sleep disorder, CX 5 at 36, and found Complainant's "mood [was] better when not focused on . . . work-related issues." *Id.* at 73. Dr. Judd agreed with Ms. Baker's diagnoses of conversion disorder, general anxiety disorder, and depression, but characterized Complainant as someone who actually desired to tell his story of how Respondent had retaliated against him during his tenure as an auditor. CX 2 at 8. Neither of these diagnoses or characterizations demonstrate Complainant was unable – due to mental incapacity – to file an OSHA complaint prior to the date on which he actually did so.

Dr. Steger's diagnosis and conclusions regarding Complainant's mental condition are perhaps most favorable to a finding of mental incapacity sufficient to allow equitable tolling, but I find even his testimony indicates Complainant possessed the ability and means to file an OSHA complaint throughout

his period of alleged mental incapacity. Dr. Steger agreed with Dr. Judd's diagnoses of conversion disorder, general anxiety disorder, and depression, but noted further that Complainant also experienced "chronic stress and anxiety related to some work situations." TR at 11-12. With respect to Complainant's filing of an OSHA complaint, Dr. Steger testified Complainant would have had difficulty completing whatever it was he viewed as "the final thing" – such as sending an email – in the process of filing such a complaint. *Id.* at 61. I find that, despite this evidence, Dr. Steger's testimony does not demonstrate Complainant suffered from a level of incapacity preventing the filing of such a complaint. Complainant possessed his "matrix of retaliation" prior to his September 20, 2007 breakdown, the events within which would have sufficed as the substance of an OSHA complaint. *See* 29 C.F.R. § 1980.103(b) ("No particular form of complaint is required, except that a complainant must be in writing and *should* include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.") (emphasis added); *see also Ruud v. Westinghouse Harford Co.*, No. 90-087, slip op. at 20 n.27 (ARB Nov. 10, 1997) (noting "Department of Labor precedent that complaints are informal filings which need not set forth all legal causes of action or allege all elements of a discrimination case" and citing ARB cases observing such practice). Dr. Steger also testified Complainant did not encounter such problems in communicating about Respondent's allegedly hostile acts toward him with parties he viewed as nonadverse – which, according to Dr. Steger, included OSHA investigators. TR at 47-51. As noted, numerous witnesses nonadverse to Complainant testified as to his ability and desire to discuss and write about Respondent's alleged retaliatory conduct toward him. While Complainant's hiring of an attorney to represent him or providing testimony for another employee in a case against Respondent may arguably be the equivalent of the type of "final thing" that would be "difficult" for Complainant to undertake, *see* TR at 38-39, 61, the record indicates Complainant engaged in such activity during the period of alleged mental incapacity. *See, e.g.*, *id.* at 996 (discussing Complainant's signing of fee agreement with attorney to represent him against Aetna); ALJX 9 at 11 (noting Complainant's belief Respondent controlled Aetna's decision); RX 29. Ultimately, I find Dr. Steger's diagnoses and testimony regarding Complainant's psychological condition do not demonstrate any such condition constituted an "exceptional circumstance" preventing Complainant from filing his OSHA complaint between September 20, 2007 and July 1, 2008.

Finally, I find the testimony of Complainant and his wife, Mrs. Born-Reid, demonstrates the filing of his OSHA complaint on September 29, 2008 was due, at least in part (if not entirely), to their mistaken belief that Complainant's claim became actionable only upon his termination. Complainant testified his learning of the ZZing of his email account by Respondent on July 31, 2008 led to a belief he had been fired. TR at 1588-89. *See also* ALJX 9 at 6. Complainant agreed it was from this point he understood SOX's ninety-day limitations period to have begun to run. *Id.*; *see also* RX 21 at 11 ("I [Complainant] wrote an email to Ms. Coleman of OSHA on August 1, 2008 expressing my view that I had just been terminated and would be filing an OSHA complaint.") Mrs. Born-Reid also testified as to a belief that Complainant could not file a SOX complaint unless Respondent fired him first. *Id.* at 1020-22. Such evidence further supports a finding that Complainant's filing of his OSHA complaint on September 29, 2008 was due not to recovery from his alleged mental incapacity, but instead a misunderstanding about the law. Such justification is insufficient to equitably toll SOX's limitations period. *See Moldauer*, No. 04-022, slip op. at 6-7.

In sum, I find Complainant's alleged mental incapacity resulting from work-related stress incurred while in Respondent's employ does not support the equitable tolling of SOX's ninety-day limitations period. Consequently, I find the complaint in this case was untimely filed as to all alleged adverse acts occurring prior to July 1, 2008. Complainant's case is distinguishable from the facts supporting the Ninth Circuit's *Stoll* decision, including those underlying its conclusions regarding the pervasiveness and extent of the defendant's wrongful conduct and the circumstances surrounding the plaintiff's mental incapacity. The record demonstrates Complainant – despite consistent diagnoses of depression, anxiety disorder, and conversion disorder – possessed the ability to communicate about

Respondent's perceived retaliation toward him with coworkers and other persons he viewed as nonadverse, including OSHA investigators. Finally, evidence exists of Complainant's own belief his claim was not actionable until after termination, which in turn undermines the applicability of equitable tolling.

B. Hostile Work Environment

Adverse action in the form of a hostile work environment arises from a view developed by courts that certain repeated conduct – when "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" yet not actionable when broken down into individual events – may create an intolerable and abusive work environment for which there exists legal redress. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Such conduct must create an environment that is abusive at an objective level – to a reasonable person – and subjectively to the party alleging its existence. *Harris*, 510 U.S. at 21-22. Courts may consider a number of factors in determining the existence of a hostile work environment, including "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." *Id.* at 23. However, allegations of a hostile work environment consisting of "'petty slights, minor annoyances, and simple lack of good manners' that often take place at work and that all employees experience" will not suffice as adverse action in the context of SOX. *Allen v. Stewart Enters., Inc.*, No. 06-081, slip op. at 16-17 (ARB July 27, 2006) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

If a party successfully proves a series of acts constituted a hostile work environment, then a court may consider acts comprising that environment but falling outside of a specified limitations period in analyzing such a party's claim. *See Morgan*, 536 U.S. at 117. However, acts outside of the statutory period must have some "relation" to those within it. *See id.* at 118; *Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th Cir. 2003). Courts use the "continuing violation theory" to analyze harassment under a hostile work environment theory allegedly extending beyond the limitations period. *See Morgan*, 536 U.S. at 115-16; *Cherosky*, 330 F.3d at 1246. This theory focuses on whether the alleged hostile work environment consists of "a series of related acts against a single individual" or acts falling into groupings that "'represent a separate form of alleged employment discrimination.'" *Green v. L.A. County Superintendent of Schs.*, 883 F.2d 1472, 1480-81 (9th Cir. 1989) (quoting *London v. Coopers & Lybrand*, 644 F.2d 811, 816 (9th Cir.1981)). If the acts falling outside of the limitations period do not demonstrate sufficient relation to some "anchoring event" within it, then an employee's claim, if based solely on allegations of a hostile work environment, must be dismissed. *See Foster v. Nevada*, 23 Fed. App'x 731, 733 (9th Cir. 2001); *Green*, 883 F.2d at 1480-81.

Complainant argues Respondent directed twenty-seven acts toward him between February 21, 2007 and August 27, 2008 which collectively constitute a hostile work environment. ALJX 11 at 21-30. However, only one of these acts – the August 27, 2008 email exchange between Complainant and Dianne Kallunki – falls within SOX's ninety-day limitations period given the September 29, 2008 filing of Complainant's OSHA complaint. *See* 18 U.S.C. § 1514A(b)(2)(D). Therefore, I address Complainant's hostile work environment allegations in two separate inquiries. First, I examine whether Complainant has brought forth sufficient evidence to demonstrate the August 27, 2008 email exchange is related to the acts outside of the limitations period and therefore constitutes a continued violation. Second – should Complainant demonstrate the aforementioned relationship – I next examine whether Complainant has produced sufficient evidence to prove the twenty-seven alleged acts collectively constituted a hostile work environment. As discussed below, I find Complainant's evidence falls short with respect to both of these inquiries.

1. August 27, 2008 Email Exchange

I noted, *see supra* Part V.C.27, that the allegedly hostile act labeled by Complainant as "email to Dianne Kallunki re: assistance with L&I," ALJX 11 at 30, actually began with an earlier email sent by Complainant to Ms. Kallunki on July 31, 2008. Ms. Kallunki did not respond to this email as she was on vacation, and Complainant sent an email to Tracy Beckwith stating as much and seeking assistance with his L&I claim. RX 21 at 1. Ms. Beckwith responded twice to Complainant's email that day – once to gain clarification and once directing Complainant to contact Total Access. *Id.* at 2-3. In both instances, Ms. Beckwith replied within minutes to emails from Complainant or Mrs. Born-Reid. *Id.*

Ms. Kallunki also followed up quickly to Complainant's August 21, 2008 email sent to her and Ms. Beckwith. In her August 27, 2008 email to Complainant, Ms. Kallunki wrote of attempting to contact Complainant on August 22, 2008 regarding his request for a "Report of Incident." *Id.* at 6. In this email, Ms. Kallunki stated she had spoken with Complainant's son in an attempt to gain further information to address Complainant's requests. *Id.* Complainant offers no evidence to rebut Ms. Kallunki's claim that she made such a call. Ms. Kallunki further stated clearly in her August 27, 2008 email that she did not understand Complainant's request, and that she herself had contacted Total Access to inquire into the name of Respondent's "self-insured employers [sic] representative." *Id.* Ms. Kallunki concluded this email by requesting Complainant "[p]lease advise of your availability and preferred contact number and I will contact you back." *Id.* Complainant presents no evidence he ever provided Ms. Kallunki with such information. Ms. Kallunki subsequently sent a final email to Complainant on September 2, 2008 recommending he contact Total Access and his Leave Coordinator. *Id.* at 8. Ms. Kallunki provided the phone number for Total Access and informed Complainant he already possessed materials with the contact information for his Leave Coordinator. *Id.*

Assuming first that the email exchange between Complainant and Ms. Kallunki beginning on July 31, 2008 and ending on September 2, 2008 was adverse to Complainant, I find it was not related to the alleged hostile work environment. Twenty-five of Respondent's twenty-seven listed adverse acts constituting what Complainant argues was a hostile work environment are alleged by Complainant to have directly affected him or other SOX IT auditors in their professional capacity. *See* ALJX 11 at 21-29. Complainant offers no argument or evidence as to how his email exchange with Ms. Kallunki and Ms. Beckwith was "related to" acts comprising such an environment. Complainant correctly observes in his posttrial brief that a hostile work environment consists of individual acts which themselves "are part of the same pattern or practice," ALJX 11 at 56 (quoting *Hendrix v. Am. Airlines, Inc.*, 2004 WL 3093326, at *195-96 (U.S. Dep't of Labor Dec. 9, 2004) (citing *Morgan*, 536 U.S. at 116)), yet he offers no evidence as to how the perceived inadequacy of the information provided by Ms. Kallunki and Ms. Beckwith fits within a pattern of adverse actions directed at him due to his SOX IT work or auditor status. No evidence exists Ms. Kallunki or Ms. Beckwith had any knowledge of Complainant's position as a SOX IT auditor or his interactions with his supervisors between February 9, 2007 and September 20, 2007. Furthermore, Complainant offers no theory as to how Ms. Kallunki's and Ms. Beckwith's responses relate to the other acts comprising a hostile work environment – such as Complainant's receipt of alleged negative reviews from Ms. Moring for his SOX IT work, the shortening of the audit cycle, or the changing of auditor titles – which ceased ten months prior to the beginning of this email exchange. Such divergence fails to demonstrate this email exchange related to other acts outside of the limitations period based on Complainant's duties as a SOX IT auditor and promulgated by supervisors in a wholly different area of Respondent's corporate structure. *See Nichols v. Mineta*, 26 Fed. App'x 729, 733 (9th Cir. 2002); *Green*, 883 F.2d at 1481.

Furthermore, an examination of the record related to the email exchange demonstrates it was in no way adverse to Complainant. As noted, a hostile work environment – to be actionable – must be objectively abusive or hostile. *See Harris*, 510 U.S. at 21-22. In this case, the text of the email exchange

and the testimony of Ms. Kallunki, Ms. Beckwith, and Complainant demonstrate any hostility associated with the email exchange existed entirely in Complainant's subjective perception of it.

The email exchange itself demonstrates Complainant sought information from Ms. Kallunki and Ms. Beckwith on three occasions – July 31, August 21, and August 27, 2008. RX 21 at 1, 5, 6. In the first instance, Ms. Beckwith responded to Complainant's request within minutes, first asking for additional information and shortly thereafter referring him to Total Access. *Id.* at 2, 3. In the second instance, Ms. Kallunki called Complainant the day after receiving his email in an attempt to gather more information to assist Complainant, but was told by Complainant's son he was taking a nap. *Id.* at 6; TR at 1608. Complainant presents no evidence that he ever returned Ms. Kallunki's call. Nevertheless, Ms. Kallunki responded to Complainant's email six days later. RX 21 at 8. I find this gap in time reasonable. Ms. Kallunki requested in her August 27, 2008 email that Complainant inform her of a convenient time to be contacted for additional information to clarify his request. Complainant presents no evidence of ever providing such information, and Ms. Kallunki testified she never "heard back" from Complainant regarding this request. TR at 1608. As had Ms. Beckwith, Ms. Kallunki at this point recommended Complainant contact Total Access. RX 21 at 8. Ms. Kallunki additionally recommended Complainant contact his Leave Coordinator and directed Complainant to where he could find the information necessary to do so. *Id.*

The testimony at trial further demonstrates any alleged hostility harbored toward Complainant by Ms. Kallunki and Ms. Beckwith was not objectively reasonable and that their behavior toward Complainant was in no way hostile or abusive. At trial, Complainant characterized Ms. Kallunki's inability to provide the information requested as "highly unusual" and claimed Ms. Kallunki never responded to his final email on August 27, 2008. TR at 1476-80. Complainant provided no evidence – aside from conjecture and his own accusations – as to how these two alleged acts adversely affected him. Complainant argues Ms. Kallunki's inability to provide contact information for Respondent's self-insured employer's representative was suspect because a Google search he conducted revealed Respondent "is Self-Insured [sic] for L&I." RX 21 at 8; TR at 1477. Complainant offered no evidence, however, as to how the existence of such representatives within Respondent's corporate structure imputed knowledge of their names onto Ms. Kallunki. Complainant also admitted on cross-examination that he did in fact receive a response from Ms. Kallunki to his August 27, 2008 email. TR at 1489; *see* RX 21 at 8. Ms. Beckwith testified to having no knowledge of any complaints filed or made by Complainant at the time of the email exchange,[13] TR at 1601-02, and Complainant presents no evidence demonstrating Ms. Kallunki had any knowledge of his involvement in earlier complaints filed against his superiors within the SOX IT unit.[14] Regarding Complainant's "Report of Incident" request, Ms. Kallunki testified fulfilling such requests was not something her department handled. *Id.* at 1612. Ms. Kallunki also stated, regarding the first email exchange between only Complainant and Ms. Beckwith, that her not responding was typical of the way her department handled such requests. *Id.* at 1609. Ms. Kallunki also offered credible testimony regarding her ignorance of the term "L&I" in 2008, stating Total Access usually handled such claims. *Id.* at 1610. Ms. Beckwith and Ms. Kallunki both offered consistent and credible testimony that they routinely referred the above types of requests to Total Access, *id.* at 1593-94, 1607-09, and their email exchange with Complainant demonstrates they adhered to this practice in dealing with Complainant's requests to them. RX 21 at 1-8. I consequently find the email exchange and conversations between Complainant, Ms. Kallunki, and Ms. Beckwith were in no way hostile or adverse to Complainant.

[13] Ms. Beckwith did recall doing intake on a complaint against Ms. Moring, but she testified as to having no knowledge of Complainant's involvement because she was not part of the subsequent investigation. TR at 1602.

[14] Complainant emailed Ms. Kallunki on August 23, 2007 to inquire if Lou Domingo had informed her of the weapons complainant against him and the fact that a Starbucks application was placed on his desk. CX 60 at 1. While Complainant states in this email that he "was being retaliated against," he does not accuse any of his superiors within the SOX IT unit of such retaliation.

In sum, I find the email exchange and conversations between Complainant, Ms. Kallunki, and Ms. Beckwith are insufficient to serve as the sort of "anchoring event" necessary for consideration of other events comprising the alleged hostile work environment falling outside of SOX's ninety-day limitations period. *See Foster*, 23 Fed. App'x at 733. The evidence regarding this event demonstrates Ms. Kallunki and Ms. Beckwith adhered to their standard practice in handling such complainants and acted in no way toward Complainant that could be objectively perceived as hostile or abusive. Furthermore, even were such actions objectively hostile, Complainant has failed to demonstrate how this event is related to the other events outside of the statutory period that constitute the alleged hostile work environment.

2. Examination of Hostile Work Environment

As discussed, I find Complainant's complaint must fail on the basis that the one event within SOX's statutory filing period is neither adverse to Complainant nor sufficiently related to the other events outside of the limitations period to save Complainant's complainant. Nevertheless, I below provide an examination of the first twenty-six events constituting the alleged hostile work environment.[15] As with prior theories, I again find Complainant has not set forth sufficient evidence to demonstrate Respondent created a hostile work environment.

I find a large portion of the events alleged by Complainant to have contributed to an adverse or hostile work environment are not objectively adverse. Examples of such events include Ms. Moring's request Complainant modify his audit at a March 14, 2007 preclosure meeting (Complainant's fourth alleged adverse event, ALJX 11 at 22), Ms. Moring's "reprimand" of Complainant at a March 15, 2007 closure meeting (Complainant's fifth alleged adverse event, ALJX 11 at 22), both of Complainant's QPEs (Complainant's ninth and sixteenth alleged adverse events, ALJX 11 at 24, 26-27), the conclusion by Mr. Culp that Complainant's ethics complaint regarding the behavior of PricewaterhouseCoopers employees was unsubstantiated (Complainant's twenty-second alleged adverse event, ALJX 11 at 28), Complainant's being scheduled for a future audit despite having outstanding unresolved issues related to a past audit (Complainant's twenty-third alleged adverse event, ALJX 11 at 29), and the alleged DameWare "attack" (Complainant's twenty-sixth alleged adverse event, ALJX 11 at 29-30). Regarding Ms. Moring's request Complainant change audit results, I find the evidence demonstrates Complainant had made a similar request of a PricewaterhouseCoopers auditor, which he viewed as completely reasonable. TR at 1559-61. Complainant fails to explain such a paradox in his own reasoning. Regarding Ms. Moring's alleged reprimand of Complainant in front of two other persons, I find Ms. Moring's comment constituted a request for an assurance from Complainant that was not hostile or adverse. The evidence presented in this instance demonstrated Ms. Moring sought this assurance due to a control performer's concern about auditors not being physically present at the location of the audit. TR at 1077-78. I find this inquiry reasonable under these circumstances. Regarding Complainant's QPEs, I find these reviews were in no way objectively adverse to Complainant. Ms. Moring's uncontradicted testimony demonstrates she clearly explained her expectations to the SOX IT auditors as they related to performance reviews, noting that the "requirements [were] stringent." TR at 2041-42. Complainant disagreed with some of Ms. Moring's comments, but he received a rating of met expectations on both reviews. CX 49 at 1-3; CX 58 at 1-2. Although complainant testified these reviews were the worst of his career, TR at 1124, these were the only performance reviews he received specifically from Respondent. Complainant makes no allegation that some uniform performance rating system applied to auditors within all corporations and

[15] I do not again consider Complainant's twenty-seventh alleged adverse event – the email exchange with Ms. Kallunki and Ms. Beckwith. As discussed, *supra* Part VI.B.1, I find this event is unrelated to the other twenty-six events constituting the alleged hostile work environment as well as nonhostile and nonadverse to Complainant in and of itself.

presented no evidence of how these reviews impeded his advancement within Respondent's corporate structure. Regarding Mr. Culp's investigation, the evidence demonstrates Mr. Culp conducted several interviews and produced a twenty-five page report, *see* RX 9 at 1-25, before ultimately concluding Complainant's complaints were unsubstantiated. Furthermore, Complainant fails to demonstrate how this finding adversely affected him in any way aside from discontent associated with the investigation's conclusion. Regarding the scheduling of Complainant for an audit despite outstanding issues from a prior audit, the record demonstrates Ms. Domingo intervened on Complainant's behalf and had him removed from this assignment so that he would not have to perform the later audit. CX 84 at 1. Regarding the alleged DameWare attack, I find Mr. Valerio provided credible testimony the icon image submitted into evidence by Complainant did not demonstrate DameWare was in any way infiltrating Complainant's computer. TR at 1620-21. Furthermore, Mr. Valerio stated he was unaware of DameWare ever being used to erase data remotely from a computer, *id.* at 1618, and that his forensic investigation of Complainant's computer revealed no one but Complainant accessed the computer between November 2007 and May 2009, *id.* at 1624, a range encompassing the date of the alleged attack. Although Mr. Valerio does work for Respondent, I find his explanations and conclusions credible regarding the functionality and appearance of DameWare on Complainant's computer on March 28, 2008. I therefore find that any alleged attack rests only on Complainant's subjective belief and testimony that it occurred. Given Mr. Valerio's expertise and credibility, I find this also does not constitute an objectively adverse act. Furthermore, given all of the above acts lack any objectively adverse quality, I find they did not contribute to a hostile work environment. *See Harris*, 510 U.S. at 21-22.

Other events alleged to be hostile or adverse to Complainant are not attributable to Respondent or were not directed at Complainant based on the evidence presented. Examples of these events include the anonymous weapons violation report (Complainant's seventeenth alleged adverse event, ALJX 11 at 27), Complainant's overhearing PricewaterhouseCoopers employees "targeting" Mr. Tides (Complainant's twentieth alleged adverse event, ALJX 11 at 28), and Complainant's receipt of an email informing him of the ZZing of Mr. Tides's email account (Complainant's twenty-fourth alleged adverse event). In the case of the weapons violation report, Complainant presents no evidence the anonymous complaint originated with a supervisor or employee of Respondent. *See* TR at 1547. Complainant's own description of the investigation itself demonstrates Respondent's security personnel in no way acted unprofessionally in conducting the search. CX 59 at 2. Mr. Wescott informed Complainant that Respondent's company policy required the investigation of such complaints and apologized for the inconvenience it had caused Complainant. *Id.* Regarding the targeting of Mr. Tides and Complainant's learning of the ZZing of Mr. Tides's email, Complainant offers no explanation as to how these events subjected him or contributed to an adverse or hostile environment. Complainant bases the targeting of Mr. Tides on a conversation he overheard in which Mr. Shakoor stated he wanted to "hit" Mr. Tides with "another workbook." TR 1408-10. Complainant interpreted this conversation as a plot to target Mr. Tides selectively, *id.* at 1407, yet he offers no evidence beyond speculation as to the adequacy or inadequacy of the workbook mentioned by Mr. Shakoor. Regarding the ZZing of Mr. Tides's email, Complainant alleges this act contributed to his own fear of being fired based on the "matrix of retaliation" he kept. TR at 1460. Complainant, however, does not address within his matrix Mr. Tides's testimony that his firing resulted from a clear violation of Respondent's company policy of not talking to outside media. *Compare id.* at 638, *with* CX 41 at 1. Given Respondent therefore did not direct this action at Complainant and provided a legitimate basis for firing Mr. Tides, I find this event also did not contribute to the creation of a hostile work environment.

I find several other acts listed by Complainant as allegedly contributing to the hostile work environment constitute planned measures by Respondent to improve the efficiency of its audit process that also did not create a hostile work environment. Examples of such alleged hostile acts include the reduction of the audit cycle (listed as hostile acts numbered two, twelve, and eighteen in Complainant's posttrial brief, *see* ALJX 11 at 21-22, 25, 27) and various quality control measures implemented by Respondent (listed as hostile acts three, six, eleven, and twenty-one, *see* ALJX 11 at 22-23, 25, 28).

Regarding the reduction of the audit cycle, Respondent presented ample evidence that this process was planned far ahead of Complainant's tenure with Respondent and implemented in an organized way. Mr. Wescott testified the implementation of the reduced audit cycle came about because Respondent wanted "to standardize on one audit approach, one plan, and then over time improve that one, standard process." TR at 153. Mr. Corio's and Mr. Tides's testimony that the reduced audit cycle came about through Respondent's new CEO's approach to eliminating certain inefficient processes supports this view. *See id.* at 563-64, 834-35. The reduction of the audit cycle also occurred at approximately two-month intervals, lending further support to a finding that these acts did not contribute to a hostile work environment. While the reduction in the audit cycle did lead to SOX IT auditors, including Complainant, working longer hours, *id.* at 1066, I do not find such an expectation or circumstance hostile or adverse given Complainant's status as a white-collar employee at a large, multinational corporation such as Respondent. Respondent also ultimately returned the audit cycle to six days. *Id.* at 2052. This evidence demonstrates Respondent's intent to make the audit cycle more efficient, and I do not find any of Respondent's planned changes to the audit cycle therefore to be objectively adverse or hostile.

I also find the various quality control measures did not contribute to a hostile work environment. For example, regarding the title change of SOX IT auditors (Complainant's third alleged adverse event) and the moving of SOX IT auditors into the professional development track applicable to all auditors (Complainant's eleventh alleged adverse event), Complainant presents only equivocal evidence and his own subjective view that such events were at all hostile. With respect to the title change, Respondent presented evidence that at least some auditors viewed this as a positive development. *See id.* at 492, 1222, 1326-27. With respect to the single-track professional development approach for all auditors, Complainant offers only his own opinion that such a change may have "increase[d] the risk of [SOX IT auditors] being put into a quarterly rotation," ALJX 11 at 25, yet he offers no evidence as to how such a change would occur or whether such a rotation would help or hurt an auditor's career with Respondent.

I find the additional quality control reviews implemented by Ms. Moring were also in no way adverse to Complainant. Ms. Moring sent her March 22, 2007 email introducing the first preclosure management to all SOX IT auditors. CX 76. The email explaining the review focuses largely on formatting, spelling, and ensuring auditors' results are presented in a concise and understandable way, requests which I find reasonable and in no way adverse or hostile. *See id.* Ms. Moring, as a middle manager, was responsible for generating reports and presentations for her own superiors. In such a position, it is perfectly reasonable that she requested her subordinates proofread and edit their own work before turning it over to her for such a purpose. Evidence also exists the additional level of review added on August 21, 2007 was a similar quality-control measure. While Complainant alleges this measure constituted nothing but an opportunity for Ms. Moring to "manufacture 'quality issues,'" ALJX 11 at 28, he presents no evidence to support such an assertion. Mr. Corio testified this process "introduced more challenges than . . . it solved," but agreed the second measure of review was "just another layer of review" that applied to "the entire audit staff." TR at 838, 881-82. I find Respondent implemented both of these processes to improve the quality of data entered into and reports generated from Risk Manager, *see* TR at 890, a problem Complainant himself notes Respondent needed to address. *See* ALJX 11 at 24. Such measures, although resulting in some stress due to the shortened audit cycle, do not rise to the level of action constituting or contributing to a hostile work environment.

Other acts alleged as adverse by Complainant constitute nothing more than the type of "petty slights" or "minor annoyances" that do not suffice to create a hostile work environment. *See Allen*, No. 06-081, slip op. at 16-17. Such events include Complainant's being "accused" of a Risk Navigator error (Complainant's eighth alleged adverse event, ALJX 11 at 24), his complaints about PricewaterhouseCoopers employees playing fantasy football and doing personal work (Complainant's fourteenth alleged adverse event, ALJX 11 at 26), the running of Spector by Respondent (Complainant's fifteenth alleged adverse event, ALJX 11 at 26), and the anonymous placing of a Starbucks career

pamphlet on his desk (Complainant's nineteenth alleged adverse event, ALJX 11 at 27-28). Regarding the Risk Navigator incident, Respondent presented uncontradicted evidence that the PricewaterhouseCoopers employee who erroneously attributed work to Complainant in Risk Navigator corrected the mistake eight minutes after being informed of her error by Complainant. RX 136 at 1. Regarding the personal use of computers by PricewaterhouseCoopers employees, I find this constitutes nothing more than the type of minor annoyance present in almost every workplace. Regarding the running of Spector, Complainant, as noted *supra* Part V.C.15, presents no evidence as to what this program is or does beyond a three-sentence email from Mr. Valerio. Furthermore, Complainant's counsel failed to ask Mr. Valerio any questions about this program during trial. Finally, I find the Starbucks pamphlet placed on Complainant's desk was also not adverse. Despite testifying this incident caused him to become "scared to death," TR at 1381, Complainant presents no evidence beyond his own speculation attributing this action to any of his superiors or employees of Respondent. Ms. Domingo testified such applications were often left on her own desk and that she did not view this particular incident as "a very serious matter." *Id.* at 1987. Furthermore, testimony at trial revealed Complainant's prior manager, Mr. Fulton, as well as a PricewaterhouseCoopers employee had actually left Respondent's employ for positions with Starbucks. *Id.* at 148, 497. Such circumstances demonstrate this action could have been a friendly attempt to suggest alternative employment to Complainant – given his expressed discontent with Respondent's organization structure and environment – just as easily as it could have been a negative action intended to harass Complainant. However, given Ms. Domingo's testimony and the nature of the event, I find, even in the latter case, it constitutes only at most a petty slight.

In light of the preceding discussion, I find only five of Complainant's alleged adverse events could be perceived as objectively adverse so as to contribute potentially to a hostile work environment: the February 21, 2007 meeting in which Mr. Jouret stated "SOX would be going away" (Complainant's first alleged adverse event, ALJX 11 at 21), Ms. Moring's April 11, 2007 meeting with Complainant in which she requested he change audit results (Complainant's seventh alleged adverse event, ALJX 11 at 23), the April 13, 2007 meeting of SOX IT auditors with Ms. Moring and Mr. Wescott (Complainant's tenth alleged adverse event, ALJX 11 at 24-25), the May 10, 2007 meeting of SOX IT auditors with Mr. Jouret in New Orleans (Complainant's thirteenth alleged adverse event, ALJX 11 at 25-26), and the circumstances surrounding Complainant's breakdown on September 20, 2007 (Complainant's twenty-fifth alleged adverse event, ALJX 11 at 29). I conclude these events do not demonstrate Complainant suffered from adverse action in the form of a hostile work environment while in Respondent's employ.

With respect to the February 21, 2007 meeting, Ms. Moring's April 11, 2007 request that Complainant change audit results, and the circumstances surrounding Complainant's breakdown, I find evidence of hostility is equivocal at best and in no way collectively severe or pervasive. *See Morgan*, 536 U.S. at 116. In each of these instances, Complainant portrays supervisors within Respondent's organizational structure as acting in a vindictive or retaliatory manner toward either him or SOX IT auditors as a whole. However, the record undermines such a definitive portrayal of these events. For example, while Complainant interpreted Mr. Jouret's comments during the February 21, 2007 meeting as meaning the "tone at the top" of Respondent's management viewed SOX as a barrier or hindrance, TR at 1054-55, Mr. Yunker and Mr. Levitt credibly understood these comments to refer to a potential reorganization in which SOX IT auditors would become part of Respondent's larger corporate audit department. *Id.* at 477, 1855. Such conflicting testimony makes me doubt the Complainant's characterization of Mr. Jouret's comments as hostile.

Likewise, I find the April 11, 2007 meeting did not occur exactly according to Complainant's recollection, in which he states Ms. Moring pressured him to disguise or diminish two issues from an audit by combining three separate issues into one. *Id.* at 1120-21. Complainant's testimony demonstrates Ms. Moring requested this change because the information was to be condensed for a PowerPoint presentation to the auditees of this particular audit. TR at 1512-13. Ms. Moring testified to this point as

well, noting the information in the PowerPoint presentation was a "deliverable for the client," and therefore had to be easily understood. *Id.* at 2048. According to Complainant, he insisted on verbatim inclusion of the following language in the PowerPoint presentation:

> The direct database access issues, the control activity is not designed effectively if you've got direct database access issues and no monitoring of who is doing that changes and you're running generic groups that allow multiple people to anonymously make changes. And you might be able to figure out who made the changes based on log-in times, but it would take lots of man-hours to do that. By that time, you don't know how much damage they've done to the system.

Id. at 1509-10; RX 137 at 1. Complainant stated Ms. Moring characterized this explanation as "long-winded," TR at 1512, and ultimately condensed this passage to the following: "Control 04.01 & 04.02 – Schema reconciliation does not capture changes to Application/Database outside change control window." RX 137 at 1. While Ms. Moring's version is significantly shorter than Complainant's, I find her changes do not demonstrate an act contributing to a hostile work environment. The entirety of this PowerPoint presentation comprises several pages of similar concisely worded bullet points. *See generally id.* at 5-10. Nowhere within these pages exists an explanation that is of the length suggested by or that strikes a similarly informal tone as that of Complainant's statement.

I also find Complainant does not demonstrate Respondent acted in a hostile or adverse manner with respect to his breakdown on September 20, 2007.[16] In this instance, Complainant fails to prove his stroke-like symptoms were apparent to Mr. Estep or that he ever requested to be taken to a hospital. According to Mr. Estep, Complainant became very upset and began to stutter profusely on this date in reaction to being placed on an upcoming audit. TR at 2162. Mr. Estep responded by walking with Complainant outside of their building in an attempt to calm Complainant down. *Id.* Complainant then refused to reenter the building, stated he wanted to go home, and asked Mr. Estep to go into the building to retrieve his computer and a few other things so he could leave. *Id.* at 2162-63. Mr. Estep claims he asked Complainant if he were okay to drive before doing so, and Complainant responded he was okay and "just want[ed] to go home." *Id.* Mr. Estep did not notice any signs of stroke or paralysis in Complainant's left side or see Complainant "slobber himself" on this date or at any time preceding this date during the summer of 2007. *Id.* at 2163, 2167-68. Mr. Yunker testified to observing "stroke symptoms coming on" in his observations of Complainant before he left work on September 20, 2007, but Mr. Yunker did not elaborate on what these symptoms were aside from Complainant's extreme stuttering, *id.* at 469-70, or provide any basis or expertise for his determination of such a diagnosis. Mr. Yunker stated he told Mr. Estep someone should take Complainant to a hospital, and that Mr. Estep agreed with him. *Id.* Mr. Estep, however, had no recollection of agreeing with Mr. Yunker that he would drive Complainant to the hospital. *Id.* at 2202. Complainant also testified to conversations with various employees of Respondent, including Mr. Yunker and Mr. Estep. *Id.* at 1434-35. Complainant confirmed Mr. Estep gathered his belongings for him, but his version of events concludes with Mr. Estep curtly telling him to "[h]ave a safe trip" while loading Complainant into his car to be on his way. *Id.* at 1435. Complainant also testified to repeatedly telling his coworkers that he wanted simply to go home. *Id.*

While Mr. Yunker's testimony conflicts with that of Mr. Estep regarding any conversation about taking Complainant to a hospital, Mr. Yunker was not present when Mr. Estep escorted Complainant to his car. Complainant himself offered no testimony that he requested to be taken to a hospital, although he did testify to being able to articulate repeatedly the words, "I want to go home." *Id.* Mr. Estep also

[16] As with Complainant's allegation in his posttrial brief that his own sending of an email to Ms. Kallunki somehow constituted an adverse act, I again presume it is not the breakdown itself Complainant views as an adverse act, but Respondent's handling of this event.

observed no physical signs of a stroke in Complainant on the day of his breakdown. *Id.* at 2167-68. While Mr. Yunker testified to observing "stroke symptoms," *id.* at 469-60, he did not elaborate on what these symptoms were. Given this version of events, I find Mr. Estep acted reasonably and in a nonhostile way in response to Complainant's breakdown. Complainant repeatedly stated he wanted to go home and at no time asked to be taken to a hospital. Complainant offers no explanation as to why or how Mr. Estep could have taken him to the hospital against his explicit desire to "go home." *Id.* at 1435.

This of course leaves two events to support Complainant's hostile work environment claim: the April 13, 2007 meeting of SOX IT auditors with Ms. Moring and Mr. Wescott and the May 10, 2007 meeting of SOX IT auditors with Mr. Jouret in New Orleans. While evidence exists with regard to both of these events that Respondent's managers took a hostile tone or approach toward Complainant individually or a group of SOX IT auditors, Complainant presents no case law to support an argument that two such events constitute a hostile work environment. Although Ms. Moring interrupted Complainant and would not allow him to go uninterrupted in his explanation of his performance review to Mr. Wescott at the April 13, 2007 meeting, *id.* at 1536, the record demonstrates the purpose of this meeting was Mr. Wescott's addressing of eight concerns raised by the SOX IT auditors (including their relationship and interactions with PricewaterhouseCoopers employees). *Id.* at 168-77; CX 75 at 3-4. Complainant, Mr. Yunker, and Mr. Tides characterized the May 10, 2007 meeting as one at which Mr. Jouret chastised them, cut them off while speaking, and again reiterated his view that SOX was "going away." TR at 457-58, 594-95, 1177-82. Complainant offers no explanation as to how such events constitute anything beyond two isolated instances of confrontation between SOX IT auditors and managers, are the type of behavior that is "sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment," *Harris*, 510 U.S. at 21, or how these meetings constituted an unreasonable interference with either his or the other SOX IT auditors' performance of their jobs. *Allen*, No. 06-081, slip op. at 16. Consequently, I find such acts fail to demonstrate adverse activity under a hostile work environment theory.

3. Conclusion Regarding Respondent's Creation of Hostile Work Environment

In sum, I find Complainant does not demonstrate the creation by Respondent of a hostile work environment. Complainant has failed to demonstrate his email exchange with Ms. Kallunki and Ms. Beckwith – the only alleged event falling within 18 U.S.C. § 1514A(b)(2)(D)'s limitations requirement – was in any way objectively hostile toward him or sufficiently related to other events outside of the limitations period. I also find nearly all of the events alleged by Complainant to have created such an environment were either not objectively hostile, not directed at Complainant, or not attributable to Respondent. Regarding those for which some evidence exists of objective hostility on the part of Respondent toward Complainant, I find they do not collectively create the sort of "severe or pervasive" abusive environment required to sustain a claim on such a theory. *See Morgan*, 536 U.S. at 116; *Harris*, 510 U.S. at 21; *Vinson*, 477 U.S. at 67. Such circumstances therefore constitute grounds on which to dismiss Complainant's SOX complaint.

C. Protected Activity

Under SOX, a complainant bears the burden of demonstrating that "protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." 29 C.F.R. § 1980.109(a). What constitutes such activity is set forth explicitly under 18 U.S.C. § 1514A(a)(1) as follows:

> any lawful act done by the employee . . . 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 [18 U.S.C. §§] 1341 [mail fraud],

> 1343 [wire 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 if provided to . . . a person with supervisory authority over the employee. . . .

Id.; *see also Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009); *Day*, 555 F.3d at 53. A complainant's actions must "'definitively and specifically' relate to [one] of the listed categories" within § 1514A(a)(1). *Van Asdale*, 577 F.3d at 996 (internal citation omitted). Furthermore, a complainant must demonstrate he or she subjectively believed the reported conduct violated one of the provisions of § 1514A(a)(1) as well as that such a belief was also objectively reasonable. *Id.* at 1000-01.

Complainant in this case sets forth sixteen separate acts of alleged protected activity occurring from March 14, 2007 through August 27, 2008. ALJX 11 at 16 – 21. As an initial matter, I noted several of these alleged "protected activities" suffer from the same fatal flaw as many of the alleged "hostile actions" discussed in the preceding section – they do not, even in the broadest sense, approximate any form of action fitting within such a category. At least six of Complainant's "protected activities" in no sense involve the reporting of information or practices related to any of the provisions of § 1514A(a)(1).[17] Such actions can in no sense be considered "protected activities" within the parameters of § 1514A(a)(1) and 29 C.F.R. § 1980.109(a).

Complainant's remaining ten alleged protected activities arise, if at all, within the final two provisions of protected activity within § 1514A(a)(1): a violation of SEC rules or fraud against shareholders.[18] I address each of these theories in turn, focusing first on shareholder fraud. Ultimately, I conclude Complainant is unable to demonstrate he engaged in any form of protected activity.

1. Protected Activity – Shareholder Fraud

Shareholder fraud "is not, in the context of SOX, a colloquial term." *Day*, 555 F.3d at 55. To the contrary, a complainant basing his or her complaint on this form of protected activity bears the burden of demonstrating fraud itself, which, at a minimum, includes proof that the employer "intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss." *Id.* at 55-56; *see* 29. C.F.R. § 1980.109(a). Under such a framework, however, "[a] disagreement with management about internal tracking systems which are not reported to shareholders is not actionable." *Day*, 555 F.3d at 56.

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[17] Specifically, these are Complainant's reporting on April 17, 2007 to HR Investigators of being admonished by Ms. Moring in front of a client (Complainant's sixth listed protected activity, ALJX 11 at 18); Complainant's reporting to Mr. Westcott, Ms. Moring, and Ms. Domingo on July 27, 2007 "that the workplace is hostile" (Complainant's ninth listed protected activity, ALJX 11 at 19); Complainant's delivery of his "matrix of retaliation" to Ms. Domingo (Complainant's tenth listed protected activity, ALJX 11 at 19); Complainant's informing Mr. Culp "that the workplace is becoming hostile and harassing towards him" (Complainant's eleventh listed protected activity, ALJX 11 at 19-20); Complainant's reporting the Starbucks application incident to Ms. Domingo and Ms. Kallunki (Complainant's fourteenth listed protected activity, ALJX 11 at 20); and Complainant's "email to Wanda Denson-Low regarding harassment and intimidation" (Complainant's sixteenth listed protected activity, ALJX 11 at 21).

[18] Complainant states he "grounds his claims primarily" on protected activity stemming from SEC rules and regulations violations and shareholder fraud. ALJX 11 at 40. However, despite such open-ended language, nowhere does Complainant allege communications that "definitively and specifically" relate to one of the other four types of protected activities articulated under SOX. *See Van Asdale*, 577 F.3d at 996. I therefore determine only whether Complainant's alleged protected activities fall under the auspices of an SEC rule violation or shareholder fraud.

I find none of Complainant's protected activities rise to the level of fraud necessary to constitute protected activity under § 1514A(a)(1). Five of the activities address record-keeping within Risk Navigator, which constitutes just the sort of "internal tracking system" for which complaints about perceived inadequacies do not equate to protected activity. *See Day*, 555 F.3d at 57; ALJX 11 at 17, 19-20 (Complainant's fourth, eighth, twelfth, thirteenth, and fifteenth listed protected activities). Another listed protected activity is Complainant's refusal to combine three deficiencies into one at Ms. Moring's request; however, as discussed, *see supra* Part VI.B.2, I found this to be a reasonable request by Ms. Moring done for the sake of efficiency and clarity in creating a PowerPoint presentation, not to misrepresent or omit material facts. The remaining protected activities alleged by Complainant address concerns raised by auditors and memorialized by Ms. Ross-Dronzek, CX 32; *see also* ALJX 11 at 16-19 (Complainant's second, fifth, and seventh listed protected activities), as well as Complainant's concerns regarding an incident influencing auditor independence. CX 50; *see also* ALJX 11 at 17 (Complainant's third listed protected activity). The document produced by Ms. Ross-Dronzek and submitted into evidence by Complainant, however, contains no evidence of fraud or deceit. The first page of the document focuses largely on the relationship between Respondent's auditors and those employed by PricewaterhouseCoopers, noting areas of concerns as PricewaterhouseCoopers' auditors' "role," "expertise," and "relationship" as well as how Respondent would ultimately transition away from the use of outside contract auditors. CX 32 at 1. Other concerns raised included staff development opportunities, Ms. Moring's lack of "people skills," other management-related concerns, "IT Controls," "Ethics," and "general" concerns, including the auditors' overall dislike of Respondent's working environment and their feelings of being "intimidated, demoralized, [and] demeaned" while at work. While these concerns portray a less-than-desirable working environment for Complainant and the other auditors employed by Respondent, they nowhere contain evidence of an intentional misrepresentation or omission of material facts of the type necessary for a claim of fraud. Regarding the issue of auditor independence, Complainant submits an email sent to Mr. Estep. CX 50. In the email, Complainant forwarded to Mr. Estep a message from another auditor, Patrick Kolieboi Jr. Mr. Kolieboi in his email reported incidents in which PricewaterhouseCoopers' auditors – who wrote controls – interacted with SOX IT auditors responsible for testing the same controls. *Id.* at 2. Mr. Kolieboi noted such behavior created the problem of "blurring the independence between these two very important functions." *Id.* Although Mr. Kolieboi did not testify at trial, even were I to take such a complaint at face value, it does not demonstrate intentional misrepresentation on the part of Respondent. Complainant offers no proof such an incident resulted from any sort of directive from Respondent. Consequently, I find none of Complainant's allegations of protected activity constitute the type of fraud needed under § 1514A(a)(1) or that Complainant could have harbored an objectively reasonable belief such fraud was afoot.

2. Protected Activity – SEC Rule or Regulation Violation

Complainant sets forth four theories as to how his alleged engagement in protected activities related to Respondent's violation of an SEC rule or regulation. Complainant first argues Respondent – as a member of the New York Stock Exchange ("NYSE") – failed to adhere to that body's Corporate Governance Rules requiring an audit committee,[19] a "corporate internal audit function," and verification of compliance with the Rules by a listed company's CEO. *NYSE, Final NYSE Corporate Governance Rules* 7(c)(i)(A), 7(d), 12(a) (2003), *available at* http://www.nyse.com/pdfs/finalcorpgovrules.pdf. Complainant's attempt to make out protected activity under such a theory fails, however, for two reasons. First, the Rules themselves state they were "approved by the SEC," not that they *are* SEC rules themselves as would be required to alleged protected activity under § 1514A(a)(1). Second, even assuming Complainant could bring such provisions within the explicit requirements of § 1514A(a)(1), his

[19] Complainant alleges Rule 7(b) requires the audit committee to "assist[] board oversight of the performance of the company's internal audit function." ALJX 11 at 41 n.8. This requirement, however, is contained in Rule 7(c)(i)(A). *See NYSE, Final NYSE Corporate Governance Rules* 7(c)(i)(A) (2003).

evidence fails to establish Respondent violated any of these requirements. As discussed in the preceding paragraph, Complainant's alleged protected activity demonstrates only that he complained about Risk Navigator, joined others in complaining about the unpleasant work environment and the rocky relationship with PricewaterhouseCoopers, and forwarded to his immediate supervisor information about an incident of auditors interacting with control designers. I am unable to discern how such complaints demonstrate Respondent's failure to comply with the Rules cited by Complainant and consequently find such a theory does not demonstrate Complainant's engaging in protected activity.

Complainant next argues he engaged in protected activity due to the requirements of SOX itself. Specifically, Complainant alleges a violation of SOX section 404(a) which requires

> an internal control report, which shall . . . state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and . . . contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

15 U.S.C. § 7262(a). Taking into consideration such a requirement, Complainant again fails to demonstrate how his alleged communications addressed activities that one could objectively perceive constitute its violation. As discussed, Complainant's alleged protected activities discuss an instance where his name accidentally appeared as an audit lead in Risk Navigator, ALJX 11 at 17, 24, but was corrected minutes after he informed the PricewaterhouseCoopers' employee of the error, CX 74 at 1; a communication regarding a perceived lack of independence, ALJX 11 at 17; concerns over the process of issuing passwords for Risk Navigator, ALJX 11 at 20; and his own suspicions about the adequacy of Risk Navigator as Respondent's system of record.[20] ALJX 11 at 19, 20. Such complaints go only to the sorts of "purely internal practices" (if anything) which do not constitute protected activity under § 1514A(a)(1). *Day*, 555 F.3d at 58.

Complainant next argues his communications constituted protected activity in light of requirements set forth in the Securities and Exchange Act of 1934. Complainant directs the Court's attention specifically to its requirement that Respondent

> 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. . . .

15 U.S.C. § 78m(b)(2)(B). Complainant here again fails to demonstrate how his communications regarding problems with Risk Navigator and a single instance involving perceived lack of auditor independence demonstrate Respondent's failure to put in place a system of internal accounting controls as detailed above. Again, I find such communications not objectively reasonable in the context of a perceived violation of a SEC rule or regulation under § 1514A(a)(1).

[20] Despite unfounded allegations that changes to Risk Navigator originated from outside of Respondent's corporate audit department, TR at 1398, Complainant also admitted errors within Risk Navigator could have arisen from faulty guidance resulting in his own entering of errors into the system. *Id.* at 1132-33.

Complainant's final theory addressing protected activity under the guise of an SEC rule or regulation violation involves the alleged adoption by Respondent of the Institute of Internal Auditors ("IIA") control framework. ALJX 11 at 42. Under this theory – the most tortured of the four presented by Complainant fitting his alleged protected activities under an SEC rule or regulation violation – Respondent's adoption and subsequent violation of the IIA standards in response to an SEC regulation transforms Complainant's communications into protected activity. *Id.* at 43. Such an argument fails for many reasons. First, as noted by Respondent, Complainant offers no proof – beyond bare conjecture – that Respondent's adoption of such standards, if having occurred, resulted from an SEC rule or regulation. Indeed, the regulation cited by Complainant allegedly mandating the adoption of such a framework requires only that Respondent adopt "*a* suitable, recognized control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment," further noting "there are *many different ways* to conduct an evaluation of the effectiveness of internal control over financial reporting." 17 C.F.R. 240.15d-15(c) (emphasis added). Second, there is no evidence Respondent "adopted" such standards in the wholesale manner argued by Complainant. *See* ALJX 11 at 43. As proof of Respondent's adoption of such a framework, Complainant submits Procedure PRO-1873, which Respondent issued on March 16, 2007. CX 15. Complainant argues this document demonstrates an adoption by Respondent of the IIA standards in their entirety. However, PRO-1873 contains only a single, ambiguous reference to the IIA Standards applicable only to Respondent's Vice President of Corporate Audit, noting he or she will "[e]nsure Corporate Audit performs its work independently and objectively, and consistent with the Standards for the Professional Practice of Internal Auditing as set forth by the Institute of Internal Auditors, *as well as other appropriate standards*." CX 15 at 4 (emphasis added). Third, even were Respondent to have adopted such a framework per the above regulation, Complainant fails to demonstrate how such adoption would transform the IIA framework itself into a "rule or regulation of the Securities and Exchange Commission" as required by § 1514A(a)(1). Fourth, Complainant fails to cite any case law supporting the view that a violation of accounting standards that are not SEC rules or regulations themselves constitutes behavior for which communications about are viewed by courts as objectively reasonable protected activity. To the contrary, courts that have addressed this issue take the opposite view. *See Day v. Staples*, 555 F.3d 42, 57 (1st Cir. 2009); *Welch v. Cardinal Bankshares Corp.*, ARB No. 05-064, slip op. at 12 (ARB May 31, 2007), *aff'd sub nom. Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008) (holding communications about alleged violations of Generally Accepted Accounting Practices ("GAAP"), Generally Accepted Accounting Standards ("GAAS"), and Federal Financial Institutions Examination Council ("FFIEC") standards – even if adopted under a SOX mandate – do not constitute protected activity as such a view would constitute "a wholesale rewriting of SOX's section 1514A"). Consequently, I find this theory also does not transform Complainant's communications into a type demonstrating an objectively reasonable belief in a violation of one of § 1514A(a)(1)'s provisions.

3. Conclusion Regarding Protected Activity

In sum, I find Complainant fails to demonstrate he engaged in protected activity sufficient to sustain his SOX whistleblower complaint. None of the activities alleged or theories propounded prove Complainant had an objectively reasonable belief that Respondent engaged in behavior in violation of a provision of § 1514A(a)(1). As such, I find this constitutes an additional basis for the dismissal of Complainant's SOX whistleblower complaint.

D. Respondent's Knowledge of Complainant's Engagement in Protected Activity and Causation

Complainant also lists in his pretrial brief as issues to be determined whether Respondent knew he engaged in protected activity and whether Respondent took unfavorable personnel action toward him as the result of engaging in such activity. ALJX 3 at 9. Although such requirements are necessary for a

finding in Complainant's favor, *see Livingston*, 520 F.3d at 351-52; *Allen*, 514 F.3d at 475-76, their existence necessarily depends first on a finding of adverse action and protected activity. As discussed above, *see supra* Parts VI.B, VI.C, I find Complainant is unable to demonstrate he suffered adverse action or engaged in protected activity. Consequently, I do not reach a conclusion regarding the issues of causation or Respondent's knowledge of Complainant's engaging in protected activity.

VII. **Conclusion**

The record in this case demonstrates Complainant is afflicted with recognizable psychological problems that began almost simultaneously with his leave of absence of from Respondent. Complainant's medical providers all agree he, at some point, suffered from panic attacks, conversion disorder, and general depression and anxiety disorders. The record also demonstrates the work environment of Complainant and the other SOX IT auditors, while not actionable under SOX whistleblower law, consisted of less-than-ideal conditions as evidenced by the prickly interactions between auditors employed by Respondent and PricewaterhouseCoopers, the near-unanimous opinion of Ms. Moring's supervisory shortcomings shared by her then-subordinates in the SOX IT unit, and the whistleblower complaints filed by other SOX IT auditors stemming from the same circumstances on which Complainant bases his own complaint. While I may personally find the work environment created by Respondent distasteful and bad for the long-term morale of its employees, it is my function to evaluate the record in this case in light of the regulations and precedent applicable to Complainant's whistleblower complaint. Within this framework, I find Complainant is unable to demonstrate the applicability of the doctrine of equitable tolling, the existence of adverse action in the form of a hostile work environment or individual acts within the limitations period, and an objectively reasonable belief he engaged in protected activity.

Consequently, **IT IS ORDERED** that Complainant's whistleblower complaint is **DISMISSED**.

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GERALD M. ETCHINGHAM
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, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or email communication; however, if you submit it in person, by hand delivery, or by other means, it is filed when the Board receives it. *See id.* § 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 id.* § 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. § 1980.110(a). 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 id.* §§ 1980.109(c), .110(a), (b).