U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 November 2009

CASE NO. 2009-SOX-25

IN THE MATTER OF:

ANGELINA ZINN,

Complainant

v.

AMERICAN COMMERCIAL LINES,

Respondent

APPEARANCES:

STUART M. NELKIN, ESQ.
CAROL NELKIN, ESQ.
For Complainant

STANLEY J. BROWN, ESQ.
WILLIAM P. FLANAGAN, ESQ.
ELIZABETH M. BORKIN, ESQ.
For Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Sarbanes-Oxley Act enacted on July 30, 2002, technically known as the Corporate and Criminal Fraud Accountability Act, Public Law 107-204, 18 U.S.C. § 1514A, et seq., (herein SOX or the Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1980, which are employee protective provisions. This statutory provision prohibits any company with a class of securities registered under § 12 of the Security Exchange Act of 1934, or required to file reports under § 15(d) of the same Act, or any officer, employee or agent of such company, from discharging, harassing,

or in any other manner discriminating against an employee in the terms and conditions of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission (herein SEC), or any provision of Federal law relating to fraud against shareholders.

I. PROCEDURAL BACKGROUND

Angelina Zinn, Complainant herein, filed a request for hearing with the Office of Administrative Law Judges on January 23, 2009, as a result of a December 10, 2008 dismissal of her complaint by the Occupational Safety & Health Administration, U. S. Department of Labor. (ALJX-2; ALJX-3).[1]

Pursuant to the Notice of Hearing and Pre-Hearing Order, which issued in this matter on February 5, 2009, a formal hearing was scheduled to commence in Houston, Texas, on April 27, 2009. (ALJX-4). After two days of hearing and a post-hearing evidentiary development period, the record was closed on June 3, 2009. All parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument and file post-hearing briefs.

The following exhibits were received into evidence: Administrative Law Judge Exhibits 1-9; Complainant's Exhibits 1-2, 4, 6-9, 13-14, 16, 21, 62-63, 69, 71-72, 88, 99, 107, 108-111, 115-116, and 120-121; and Respondent's Exhibits 2-7, 10-18, 20, 24-25, 34, 59, 61, 65, 95, 109, 118-120, 149, 152, 156, 159, 160 and 161. A brief due date was set for July 13, 2009, upon which post-hearing briefs were received from Complainant and Respondent.

On February 20, 2009, Complainant filed a 22-paragraph Complaint alleging the nature of each violation, as well as the relief sought in this case. (ALJX-5). On March 6, 2009, Respondent filed its Answer and Defenses. (ALJX-6).

Based on the pleadings as joined, I make the following initial Findings of Fact:

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

1. Respondent, American Commercial Lines (ACL), is one of the largest marine transportation and manufacturing companies in the United States.

2. Respondent is a publicly traded company and its securities are registered under Section 12 of the Securities Exchange Act of 1934 and Respondent is required to file reports under Section 15(d) of the Securities Exchange Act of 1934.

3. Respondent's business includes transportation of various industrial products by barges on navigable and other waterways. In order to meet its contractual responsibilities, Respondent utilizes its own tugboats or charters or otherwise hires other tugboats to transport Respondent's barges to and from the locations called for by contracts between Respondent and its customers. The third party providers of tugboats to Respondent and the third party providers of crews for Respondent's own tugboats that it charters or otherwise hires are known as "vendors." It is Respondent's responsibility both by virtue of contracts with its customers and by virtue of various federal and state statutes to utilize adequate measures to assure that the environment is not damaged by Respondent's operations, as well as to assure the general safety of its operations.

4. Complainant Zinn was hired by Respondent in November 2007 to serve as corporate counsel for Respondent's Liquids Division headquartered in Houston, Texas.

5. When hired, Zinn's primary responsibilities were to work on liquid cargo contracts and other projects that arose in Respondent's Liquids Division.

II. STIPULATIONS

Section 806 of SOX creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. At hearing, the parties stipulated that Complainant is not alleging Respondent engaged in a violation of 18 U.S.C. § 1341 [mail fraud], 18 U.S.C. § 1343 [wire fraud] or 18 U.S.C. § 1344 [bank fraud]. (Tr. 37). No other stipulations of fact were reached.

The Contentions of the Parties

Generally, Complainant contends she is a covered employee for purposes of the Act; she engaged in protected activity; Respondent knew of her protected activity; she suffered an unfavorable personnel action; her protected activity was a contributing factor in the adverse job action; and the same unfavorable job action would not have resulted absent her protected activity.

Specifically, Complainant contends she engaged in protected activity when she reported to her supervisors that Respondent was violating "SEC rules, Sections of the Securities and Exchange Act (sic), and committing securities fraud by (i) materially misstating the risks to shareholders due to [Respondent's] failure to vet its tugboat vendors and remedy safety problems in violation of [Respondent's] customer contracts; and (ii) failing to file with the SEC a Form 8-K to disclose material information related to the appointment of [Respondent's] new senior vice-president/general counsel in order to mislead shareholders by avoiding the perception of executive instability."

In brief, Complainant alleges that Respondent subjected her to "unfavorable personnel actions including effectively demoting her by removing work from her, requiring her to submit to an unprecedented mandatory drug test, singling her out for monitoring despite a negative drug test, imposing special performance standards on her, and ultimately terminating her employment." These acts are considered by Complainant to constitute "an unrelenting campaign of hostile and retaliatory employment actions."

In her pre-hearing complaint, Complainant contends Respondent engaged in an egregious dereliction of duty by failing to adequately vet its vendors "even though Respondent was contractually bound to vet its vendors at least once annually and represented to its customers, its shareholders, and the general public that it did so." She further alleges that this failure "created dangerous conditions, but also resulted in Respondent's greatly understating the likelihood of substantial casualty losses well beyond Respondent's insurance coverage and thereby not providing adequate loan loss reserves in its financial statements duly filed with the SEC and furnished to

all shareholders and the general public through annual reports." Additionally, Complainant alleges that by these acts, Respondent engaged in "fraudulent manipulations" and "has been able to reap in a substantial increase in profits that it otherwise would not have had." (ALJX-5, paragraph 8).

Zinn avers she reasonably believed Respondent's failure to disclose to its shareholders and the investing public that the tugboats and crews it was using to conduct its business in such places as the Mississippi River were not properly vetted "constituted material misrepresentations of Respondent's financial condition in violation of SEC disclosure rules requiring full disclosure of all known risks." (ALJX-5, paragraph 9).

Complainant also contends that where Respondent willfully failed "to disclose that it was operating its business in violation of law," the risk factors set out in its SEC filings are materially misleading, and that she had a reasonable belief that Respondent willfully refused to disclose critical information in SEC Form 8-K and other filings. (ALJX-5, paragraph 12).

Zinn alleges she also complained that a SEC Form 8-K should be filed announcing the hiring of the new senior vice-president/general counsel and voiced concerns that Respondent was refusing to do so because the appointment process would cause shareholders and potential investors to question Respondent's activities and executive instability. (ALJX-5, paragraph 14).

Respondent notes that Complainant alleges she was terminated because (1) she raised issues relating to vendor vetting, specifically that one of Respondent's vendors, DRD Towing, was using unlicensed pilots; and (2) because she informed Respondent that it needed to file a Form 8-K in connection with the employment of Respondent's new General Counsel, Dawn Landry. Respondent contends that the overwhelming evidence of record supports a conclusion that Complainant never raised vendor vetting questions relating to DRD Towing since there is not documentary evidence supporting this claim and no witness, except Complainant, testified that she ever raised problems regarding vetting of vendors. Respondent further

argues that even if Complainant had raised problems regarding vetting, such conduct would not constitute protected activity under SOX. Secondly, Respondent asserts that, evidentially, Complainant can only show an e-mail in which she asked whether a Form 8-K needed to be filed and expressed uncertainty herself, which does not constitute protected activity.

Respondent argues the record evidence is just as overwhelming that Complainant was terminated for poor performance, including insubordination, to which she admitted. Further, Respondent argues that Complainant could point to no facts indicating that her alleged complaints had anything to do with her termination or that Dawn Landry, the person who made the decision to terminate her, was aware of her complaints.

III. ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the SOX Act?

2. Whether Complainant suffered an adverse action(s)?

3. Assuming Complainant engaged in protected activity, was Respondent aware of the protected activity?

4. Assuming Complainant engaged in protected activity and suffered an adverse job action, whether her activity was a contributing factor in Respondent's alleged discrimination against Complainant?

5. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action irrespective of Complainant having engaged in protected activity?

IV. SUMMARY OF THE EVIDENCE

TESTIMONIAL EVIDENCE

Angelina Zinn

Ms. Zinn, the Complainant in this matter, is a thirty-one year old unmarried female with one child. She has been a resident of Houston for the past nine years, having lived in Pasadena, Texas, prior to living in Houston. She obtained a bachelor of science in finance from the University of Houston, and also a Doctorate of Jurisprudence in May 2002. Complainant

is a member of the Texas bar. After law school, she was employed as a law clerk for the 14th Court of Appeals in Houston for one year. (Tr. 43-44). Thereafter, she became employed in the corporate securities section with Vinson and Elkins, a large law firm located in Houston, Texas, for two years. During her tenure at Vinson and Elkins, Complainant worked on several initial public offerings and worked with several NASDAQ and NYSE-listed companies, including the preparation and filing of their SEC form 8-Ks, 10-Ks and 10-Qs. As a result, she became generally familiar with United States security laws. (Tr. 45). Complainant then changed employment to Chamberlain Hrdlicka, a large law firm in Houston, Texas, where she worked on security documents for publicly traded companies. (Tr. 46).

Complainant became employed by Respondent in November 2007. (Tr. 46). She interviewed with Doug Ruschman and Larry Cuculic, who were vice presidents of the legal department of Respondent's company at that time. Complainant was hired to draft and interpret contracts for the Houston Liquids Division, which is the transportation division of ACL that transports toxic chemicals on barges pushed by tugboats. Complainant was the only corporate attorney not headquartered in Jeffersonville, Indiana, where ACL's headquarters and legal department were located. (Tr. 47).

When Complainant began her employment, she reported to Doug Ruschman and Dan Jaworski. Jaworski was vice president of the Liquids Division. Larry Cuculic handled the in-house securities work for the company, but left the company approximately three months after Complainant began her employment. (Tr. 48). Complainant testified she was the only attorney employed in the Houston office, and that she was the only person in the entire legal department that had formal securities experience. (Tr. 48-49).

After Larry Cuculic left employ with the company, Doug Ruschman took over the in-house securities matters, but did not have a securities background. (Tr. 49). Ruschman would consult with Complainant regarding securities questions. Complainant testified that Ruschman and Jaworski told her she was doing an exceptional job and that she had taken initiative, while Debra Schmidt stated Complainant "was the best attorney that had ever come through ACL and learned faster than anyone else who had come through." (Tr. 50-51).[2]

[2] It is noted that upon questioning by the undersigned, Complainant testified that there was never any written, formal evaluation of her work performance with Respondent.

Complainant testified ACL was the second largest barge transportation company in the United States, serving chemical companies such as Lyondell, Shell and Exxon. (Tr. 51). Complainant's job was to work on contracts between ACL and its customer chemical companies. (Tr. 52). The barges carried several thousand tons of liquid cargo, but were not self-propelled; propulsion of the barges was supplied by tugboats either owned by ACL or leased to them from third parties. (Tr. 52-53). The tugboats were manned by either ACL employees or personnel supplied by third party vendors, who loaded the barges with cargo at an established location, then transported the cargo-filled barges to their final destination across the Mississippi River, Port of New Orleans, or Intercoastal Canal. (Tr. 52-53).

Complainant testified that pilots (tugboat drivers) were supervised by the United States Coast Guard, but did not know the name of the license/certification required for pilots. (Tr. 53-54). ACL performed services for its customers, and vendors performed services or supplied equipment and personnel to ACL. (Tr. 54). ACL leased tugboats to DRD Towing, and DRD Towing exclusively leased the same tugboats back to ACL and supplied the personnel to man the tugboats. (Tr. 55).

Complainant testified that Jerry Torok[3] explained to her that in the industry, it was difficult to keep personnel on tugboats because of the working hours and the lifestyle it required to be a pilot or captain. ACL was responsible for taking the necessary steps to ensure that any equipment it leased from vendors was seaworthy. (Tr. 55).

Complainant was presented with a typical contract she worked on between customers and ACL, which contained a Standard of Care provision, stating the responsibility of ACL to assure seaworthiness of the boat and competence of the crew.[4] According to the contract, "ACL has an obligation to notify the company of incidences involving allisions, collisions, groundings or spills within twelve hours of all incidences." (Tr. 57). Incidences may include late or inaccurate arrival of liquid cargo or a stoppage of the barge that affects arrival time. (Tr. 58).

[3] ACL's Director of Regulatory Compliance at the time Complainant was employed with ACL.

[4] The specific "typical contract" was an Inland Waterway Master of Transportation Contract between Lyondell Chemical Company and ACL, which was ultimately marked and entered as CX-9 without objection. (Tr. 58).

Complainant testified when she initially began employment for ACL, root cause analyses (RCAs) were completed in the customer service division. A RCA is a description of an allision or collision, describing the circumstances and reasons for its occurrence and corrective measures to take to prevent recurrence. (Tr. 58-59). Complainant suggested the legal department review RCAs to protect ACL from additional liability. Her suggestion was well-received, and working on the RCAs became part of Complainant's job. She worked on them with Jerry Torok, a non-attorney, who was in the governance unit of the transportation division of ACL. Torok reported directly to Mario Munoz, the head of transportation in the Indiana office. (Tr. 63).

To complete a RCA, the crew or personnel involved in the incident would send an incident report from which Complainant and Torok would create a formal description, state the cause, and develop corrective/preventative measures for the company to take with future undertakings in an effort to avoid an incident of the same type. (Tr. 60). Approximately two to three RCAs were completed each week, and Complainant kept files of all RCAs (complete and in-progress), along with supporting documentation in her office. (Tr. 61). Once the RCAs were complete, they were sent to customer service and then directly to the customers. Initially, the RCAs were reviewed by Mark Stevens, a director in customer service, but later were sent directly to the customer service representative for the particular customer without being reviewed by Stevens. (Tr. 62). If Complainant and Torok received an incomplete incident report, they would investigate river conditions, tide and other variables to complete the RCA. (Tr. 63).

Complainant was presented with a Root Cause Corrective Incident Follow-up.[5] The document contained the standard for creating the RCA, which she used during the time she was employed by ACL. (Tr. 64). Thereafter, Complainant was presented with examples of RCAs that were sent to customers. (Tr. 68).[6] She testified that she had created the new format for the RCAs. The new format was well-received by the customers, as they found them easier to read. (Tr. 71).

[5] CX-8.
[6] CX-121.

Complainant was then presented with a document regarding ACL's performance reviews, to include safety and vendor vetting review. The document purported to explain the requirements for performance review with customers. (Tr.72-74).[7] Complainant then testified that ACL did not carry out its responsibility to its customers to vet its vendors. (Tr. 74). Complainant stated that she received several incident reports involving DRD Towing, to include the employment of unlicensed personnel. In response, in mid-April 2008, she contacted Mark Doherty, who was in charge of vetting ACL vendors, and requested DRD Towing's audit reports (process by which vendors are vetted) from Doherty, in an effort to review its past performance standards. (Tr. 75, 82). In response to Complainant's request, Doherty replied that DRD was a "mom and pop shop, that he didn't have time to vet them, and he had other bigger vendors that needed to be vetted instead." (Tr. 76). Complainant never received any of DRD Towing's audit reports or reviews from Doherty or anyone else, despite DRD Towing's eight to nine year relationship with ACL. (Tr. 78). Complainant testified that Torok was aware of ACL's failure to vet the vendors because she raised her concern with him that there were repeated allisions and collisions involving DRD, and they employed and utilized unlicensed pilots. (Tr. 79).

Because she had not received any of the requested reports from Doherty and was concerned with DRD posing safety issues for ACL, Complainant reported to Jaworski she had seen multiple incidents involving DRD and that she contacted Doherty and discovered that it had not been audited. (Tr. 79). In response, Jaworski and Complainant had a telephone conference with Doherty in mid to late April 2008. (Tr. 80, 82). During that telephone conference, Jaworski confirmed that Doherty did not vet DRD because he did not have time. After the conference, Jaworksi initially told Complainant he was going to speak to upper management and general counsel; however Complainant does not know if he actually did. (Tr. 80). Complainant testified that Jaworski, however, did relay to her that "they have other things that they were involved in and it just; it [vetting DRD towing] wasn't a top priority at the time." Complainant stated she also spoke to Ruschman in late April or early May 2008 regarding DRD Towing's vetting. (Tr. 81-82).

Complainant testified she also contacted Jaworski regarding the hiring of additional personnel. Her concern was that it was also Doherty's duty to follow up on corrective measures outlined in the RCAs; if Doherty did not have time to vet the vendors,

[7] CX-7.

then he would certainly be unable to follow up on corrective measures. Jaworski's response was that the hiring of additional personnel was not on the agenda. (Tr. 83). Complainant testified she had a total of four to five conversations with Jaworski regarding vetting DRD Towing, but was "brushed off." (Tr. 84). Additionally, Complainant testified she, Jaworski and Munoz (Torok's supervisor) corresponded via e-mail with regard to the corrective action measures. (Tr. 94-97).[8]

Complainant did not report in any of the RCAs that DRD Towing was using unlicensed personnel. (Tr. 83). She stated that the reason for failing to do so was to protect ACL from liability for a breach of contract with its customers. (Tr. 83-84). She additionally testified there were other factors that may contribute to allisions/collisions, such as unlicensed pilots and a pilot using a computer in the wheelhouse. (Tr. 84).

Complainant further testified she relayed "securities" concerns to Jaworski because there were safety issues involved, and ACL was under a contractual obligation to uphold safety. The annual Form 10-Ks reported that ACL was upholding safety. However, Complainant believed ACL's risks were actually higher than stated in the Form 10-K. (Tr. 84-85). Complainant attested any misrepresentations or material misstatements constitute defrauding investors and shareholders, which she explained to Jaworski. (Tr. 85). Using unlicensed pilots and crew members are risk factors that should be disclosed as a risk in the "Risk Factors" section of the Form 10-K. (Tr. 86).[9] Complainant also testified that insurance is affected by a failure to disclose ACL's not vetting vendors; insurance will not cover such risks, especially where a violation of the Coast Guard's licensing requirement of pilot/crew is an issue. (Tr. 98).

Complainant stated her relationship with Jaworski deteriorated after she shared securities concerns and safety issues with him. (Tr. 99). Specifically, she testified that prior to relaying her concerns, she was put on a lot of projects and given more assignments/responsibilities, and would go to lunch with Jaworski two to three times a week. After, in mid-May 2008, however, Jaworski became distant, would not return Complainant's e-mails, began taking her off projects, and changed his demeanor toward her. She stated Ruschman's reaction was similar. (Tr. 99-100).

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[8] It is noted no e-mails between Munoz, Jaworski and Complainant have been entered into the record.

[9] See CX-1; CX-2. It is noted that neither Form 10-K discloses the use of unlicensed pilots/crew members.

Complainant testified that a Form 8-K discloses material information to the general public and investors regarding credit agreements, appointment of officers and other corporate activity. (Tr. 101). She stated Ruschman informed her Dawn Landry was appointed by only one member of the board as general counsel of ACL, without interviewing with the rest of the board, and that ACL was not going to file a Form 8-K announcing her appointment. (Tr. 102-104). However, Complainant read from an 8-K form dated March 20, 2006, and filed by ACL, which disclosed that Lisa Fleming's employment agreement was terminated. Fleming served as senior vice president of law and administration, secretary and general counsel since 2003. (Tr. 106).[10] The Form 8-K further stated that Cynthia Maddox will serve as acting general counsel until a permanent replacement could be found. (Tr. 106-107). Complainant further testified Ruschman relayed that his reason for not reporting Landry's appointment on a Form 8-K was "[t]hat there had been a lot of movement in the executives in and out of ACL already, and that there was a concern, that there was another announcement of an appointment of an executive officer. . . . [I]t would look like ACL had instability in its upper management. . . .to [i]nvestors in the general public." (Tr. 104). Complainant also stated Ruschman told her that morale was already down because there was so much movement and it would decline further. (Tr. 105).

Complainant also testified she informed Ruschman that Landry's appointment was not appropriate under the NASDAQ rules, which provide that appointments must be non-biased and the board must be fully informed to make appointment decisions. Complainant sent Ruschman the Form 8-K thereafter, attached to an e-mail stating that it should be reviewed. (Tr. 105, 108). Also attached to the e-mail was a document containing instructions regarding appointment of certain officers, indicating for whom a Form 8-K must be filed. (Tr. 110).[11] Ruschman replied in an e-mail that the issue was closed. (Tr. 118).

Complainant authenticated additional Form 8-Ks filed by ACL that announced appointment of officers, including chief executive officer, senior vice president and chief financial officer. (Tr. 112-115).[12] Thereafter, Complainant authenticated a

[10] RX-152.
[11] RX-152, p. 15; CX-21.
[12] CX-62; CX-63.

stream of e-mails between herself and a former colleague who worked in the corporate and securities section of a Houston law firm, wherein she addressed whether Landry's appointment should be reported. (Tr. 116-117).[13]

Complainant testified that a form 10-Q is a quarterly SEC filing that contains "financials and business updates." (Tr. 118). ACL's 10-Q filed on August 7, 2008, disclosed that Landry was appointed as general counsel, senior vice president and corporate secretary.[14] However, Complainant's employment with ACL was terminated on July 8, 2008. (Tr. 119).

Complainant stated after Landry's appointment, Ruschman told her, "Dawn Landry wanted [her] off of her budget." (Tr. 123). At that time, Complainant had never met Landry, but had spoken with her briefly on the telephone. Complainant was shocked and upset because she "worked all the time and, had been given more and more responsibilities and [she] didn't understand why." Complainant discussed the matter with Jaworski, who assured her not to worry; he would put her on his budget because she had done so much work for ACL. (Tr. 124).

In December 2007, Complainant's mother died after becoming unconscious from hitting her head on a laundry dryer and a subsequent fire. (Tr. 125-126). At that time, Complainant was employed by ACL, and Jaworski and Ruschman flew in from Indiana to attend the funeral. (Tr. 125). Initially, Complainant had been told her mother was killed when she opened the dryer and it exploded. (Tr. 125).

Complainant candidly testified she has a history of emotional illness beginning in 2003, to include severe depression. (Tr. 126). She began taking medication, but when it proved unsuccessful she had "a Vegas nerve simulator inserted that sends shockwaves to [her] brain." When that was also unsuccessful, Complainant began electroshock therapy. She had attempted suicide and was on suicide watch. (Tr. 127). Upon receiving the news of the actual cause of her mother's death (unconsciousness and fire), Complainant saw her psychiatrist, Dr. Pesikoff; he subsequently prescribed Klonopin. (Tr. 127-128). Complainant testified that the known side-effects of Klonopin were slurred speech, dizziness, and difficulty with coordination. She took the medication as prescribed and did not exceed the dosage at any time. (Tr. 128). Complainant disclosed

[13] CX-115; received to show Complainant's effort to ascertain a second opinion and reasonable belief for the need to file a Form 8-K.
[14] CX-72.

to Jaworski that she had been prescribed and was taking Klonopin, and requested his confidence in that regard, to which he agreed. Complainant then worked from home for one day and thereafter returned to work. (Tr. 129).

Complainant also informed Susan Brooks, the head of human resources in Houston, that she was taking Klonopin and requested her confidentiality. Brooks demanded Complainant submit to a drug test four days later. (Tr. 130). Complainant testified that on May 28, 2008, she was told she "had to leave the office immediately and go straight to the drug testing center" under penalty of immediate termination. She was told by Brooks that Landry and Jaworski requested the drug test. (Tr. 131). Complainant tested negative for illegal substance abuse, but was not allowed to return to work for four days, the amount of time required to obtain the results. (Tr. 132). Upon her return to work, Complainant sent an e-mail to Jaworski and Landry informing them that her drug test was negative. Landry contacted Complainant on her cell phone later that evening and told her "[t]hat even though [she] got a negative drug test she would be monitoring [her] from that point forward" because she was overdosing on Klonopin. (Tr. 133-134). Complainant thought Landry's actions were retaliatory and stated that it was against the ethics policy to retaliate against an employee after a negative drug test. (Tr. 135). Complainant testified she specifically never told Landry she was taking Klonopin. (Tr. 134). According to Complainant, Landry called her a liar and stated that she voluntarily submitted to the drug test. (Tr. 134-135).

The day she submitted to drug testing, Complainant spoke to Jaworski who "apologized for administering the drug test because he didn't believe that [she] was actually on drugs, and that he wished he was in Houston, and he felt bad for having it administered." She testified that the administration of a drug test without any prior investigation and discussion by a supervisor was a violation of the ethics policy. Complainant filed an anonymous complaint with the ethics hotline, an internal system at ACL, for what she believed were ethics policy violations. (Tr. 135-136). Additionally, because she never told Landry she was taking Klonopin, Complainant filed an additional anonymous complaint alleging Landry was in unauthorized possession of her confidential health information. (Tr. 136).

Complainant testified that after receiving no response from the hotline, she contacted Bill McCoy, the head of human resources, who told her the claims did not exist and were not in the system. (Tr. 137). She then asked McCoy if she should re-file the complaints, to which he responded that every person involved will be questioned and that it was not a good idea; Complainant's reputation was already tainted because she was administered a drug test. (Tr. 138).

Despite McCoy's assertion that the complaint did not exist, Complainant received a telephone call from ACL's outside counsel, who investigated ethics hotline complaints. She was told the complaint had been filed and sent to outside counsel. Complainant denied making the complaint and stated she wanted to be left alone because she was worried about her job. (Tr. 139). Complainant then received a call from Landry at approximately 7:00 or 8:00 p.m. regarding the ethics complaint. She stated that Landry told her, "I heard you filed an ethics complaint, or a HIPAA complaint against me, and that some outside counsel has called you, and I've contacted every outside counsel we use and nobody knows who you are. And, you've lied about this whole thing . . . you're the one that told me about the Klonopin anyway, you're the one that took the drug test." Complainant told Landry that it was a conflict of interest for her to investigate the complaint while she was a party to it. (Tr. 141). She never heard anything else about her ethics hotline complaints. (Tr. 142).

Complainant made an effort to restart her relationship with Landry. She contacted Landry and asked to come to Indiana to meet with her in person. Landry responded that Complainant could come to Indiana in four months. (Tr. 142). Upon Jaworski's recommendation, Complainant requested she be allowed to come sooner, and Landry informed her that she could come in a week or two. (Tr. 143).

Complainant learned the subject of the meeting through e-mails from Landry. (Tr. 143). Complainant prepared a memorandum of her duties, her history at ACL and the tasks she had completed and was currently performing. She sent Landry the memorandum the evening before her departure for Indiana. (Tr. 144). Ten to fifteen minutes before her ride was scheduled to pick her up and bring her to the airport, Landry sent an e-mail to Complainant requesting her to perform additional tasks before she arrived in Indiana. (Tr. 144-145). In response, Complainant called Landry and said that she was on her way to the airport and did not have time to complete the additional tasks.

Complainant assessed that the additional tasks would require her to meet with Houston Liquids Division, and she did not have time to meet with them fifteen minutes before leaving for the airport. (Tr. 146). Landry responded that everyone else in the legal department could meet her expectations except Complainant; she was the one that needed to be monitored, was overdosing, made the HIPAA complaint and that her abilities were not up to Landry's standards. As a result of the telephone call with Landry, Complainant was unable to make the flight to Indiana. (Tr. 147).

Later that day, Landry sent Complainant an e-mail about calling in for a telephone conference in lieu of her physical presence in Indiana. Complainant was confused by the e-mail as Landry had just belittled her and told her she was worthless. She testified that though Landry's e-mails were fairly temperate, when she spoke with her orally, "her demeanor was hateful, aggressive" and Landry yelled at her. Complainant responded to Landry's e-mail by asking if it was a joke because based on their earlier conversation, she concluded she was no longer employed by ACL. (Tr. 148). Complainant felt harassed and responded to Landry in an e-mail that Complainant did not respect her. (Tr. 149). After the e-mail correspondence between Complainant and Landry, Complainant received a telephone call from Jaworski and Sharon Brooks informing her that she was being terminated for her insubordination. (Tr. 149-150). No mention of the quality of Complainant's work was ever made in the conversation. (Tr. 150).

Complainant's company computer was on as she had been e-mailing Landry. After making the statement "don't destroy e-mails" to Jaworski and Brooks, Complainant physically saw everything being erased from her computer, including all e-mails and all of the work she had completed. (Tr. 150-151). Complainant sought consultation from Dr. Pesikoff as a result of her termination. (Tr. 151).

After her termination, Complainant was contacted by Mark Temple, an attorney with Jones Day law firm, representing ACL, who requested Complainant return her Blackberry and laptop to the company. (Tr. 151-152). She responded that she wanted to first contact her attorney. Temple called Complainant two to three times every day accusing her of stealing from ACL. Complainant asked for severance for what she endured. (Tr. 152).

She also wanted to collect her personal belongings from the office. Instead of collecting her own things, three "beat-up, used-before boxes" were brought via U.S. mail to her home, and everything was broken. (Tr. 153). Complainant returned ACL's computer and Blackberry to them in the exact condition in which she received it. (Tr. 154).

At the time she was terminated, Complainant was earning an average of one hundred thousand dollars per year. (Tr. 156).[15] In addition, Complainant had benefits such as health insurance, vacation and a 401-K matching plan of ten percent. (Tr. 163). Complainant is not currently employed, but has looked into forming a law firm with previous colleagues and real estate development/investment possibilities. (Tr. 163-164). In addition, Complainant has been working on a website to create wills and trusts, which she had done on her free time while employed with ACL. (Tr. 164).

Complainant testified that the loss of her job with ACL devastated her emotionally. Additionally, she began developing severe migraines and back aches after her termination, which she had never experienced prior to the termination. (Tr. 165-166).

On cross-examination, Complainant testified she received and signed for a copy of the code of ethics for ACL when she became employed. (Tr. 166-167).[16] Complainant admitted that the code of ethics requires all employees to notify the company immediately if they believe they are being harassed or discriminated against, and to report violations of laws, regulations and rules, including auditing, accounting and disclosures. (Tr. 167-168). Additionally, Complainant stated she neither filed an ethics complaint nor contacted the SEC regarding the Form 8-K disclosures or ACL's failure to vet its vendors. (Tr. 169-170). Complainant further acknowledged that she has offered no documentary evidence at the hearing which raised issues of inadequate vendor vetting. (Tr. 170).

Complainant was presented with a copy of a letter she sent to Michael Ryan, the CEO of ACL, on July 1, 2008, raising various issues, but the letter lacked all mention of vendor vetting, securities issues or 8-K disclosure/filing requirements.[17] She testified the letter was written approximately one week before she was terminated. (Tr. 171). Additionally, Complainant was presented with three e-mails

[15] See also CX-71; CX-108 – CX-111.
[16] RX-5; RX-6.
[17] RX-3.

written to Mark Temple of Jones Day, wherein no mention was ever made of ACL's failure to vet vendors. (Tr. 172-173).[18] However, Complainant also testified that the last e-mail to Temple, dated July 21, 2008, questions the board of directors, stating that they did not act in the best interest of the stockholders, but provided no specific reference to vendor vetting. (Tr. 173-174).[19]

Thereafter, Complainant was presented with an e-mail she sent to Ruschman, regarding the 8-K disclosure requirements, stating, "Doug, I've been looking at the rules and I think it's vague as to whether certain appointments need to be disclosed . . . I can call the partner I worked for at VE who I've stayed in touch with and ask him." Ruschman's reply was that ACL's counsel informed Mike Ryan that it is not necessary. (Tr. 174-175).[20]

Complainant further testified on cross-examination she was not aware of and did not see a press release that was issued at the time Landry was hired. (Tr. 175). Complainant stated she neither obtained further information nor performed an independent investigation of the circumstances of Landry's hiring. (Tr. 175-176). Thereafter, Complainant was presented with a copy of the press release that went out at the time Landry was hired, to which Complainant testified it was a public document. (Tr. 176-177).[21] However, Complainant stated that the press release did not fulfill the requirements of formally notifying investors and, as a result, did not notify the public that Landry was hired according to the SEC rules. (Tr. 177-178). Complainant further testified she was unaware as to whether an 8-K form was filed when Larry Cuculic[22] was hired, and does not think there was an 8-K filing when Ruschman became vice president of legal. (Tr. 178-179).

Complainant testified further on cross-examination that she was hired by ACL to review contracts and had no responsibility for SEC filings or financial statements, but that Ruschman "bounce[d] things off" her for her opinion. ACL employed outside securities counsel. (Tr. 180). Complainant never attempted to contact ACL's outside securities counsel for a second opinion regarding either vendor vetting or securities issues. (Tr. 180-181).

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[18] RX-20; RX-24; RX-25.
[19] RX-25.
[20] RX-2.
[21] RX-156.
[22] Vice president, legal and assistant secretary of ACL.

Further, Complainant testified that when she was a junior associate as a securities attorney, she filed SEC filings, but reported to a partner. (Tr. 181-182). Additionally, Complainant was formerly employed by Ultra Petroleum, but was terminated after identifying an illegality. Due to a severance and confidentiality agreement, however, Complainant could not disclose the nature of the illegality. (Tr. 182). Though Complainant did not disclose her employment with Ultra Petroleum on her direct testimony, she did discuss it in both her interrogatories and her deposition. (Tr. 183).[23]

With regard to specific DRD pilot licensing violations, Complainant could not recall the name of the boat, the date of the violation or the details of the incident. (Tr. 183-184). Complainant testified she purposely did not put the violations in her RCAs because doing so could lead to the termination ACL's customer contracts. Complainant further testified she did not think it unethical to not report it; if ACL would vet its vendors and take care of the problem, the issue would be resolved. (Tr. 184). Complainant also testified that she did not report the DRD pilot's using a computer in the wheelhouse in her RCAs. (Tr. 185). However, she was presented with an RCA report, which indicated the captain was distracted by the operations management computer in the wheelhouse.[24] Complainant did not recall suggesting to Torok that the computer be removed from the wheelhouse. (Tr. 186). Complainant admitted that Coast Guard regulations did not require vendor vetting. Additionally, Complainant testified she did not know whether Jaworski spoke to upper management about ACL's failure to vet its vendors. (Tr. 187).

With regard to Complainant's being taken off jobs, Complainant was presented with an e-mail that she sent to Jaworski telling him that she was upset to be taken off the O'Rourke deal, which was given to another lawyer in the office, but understood that it was for the best since Complainant's productivity had been down, she needed time to herself, and that she was burned out. (Tr. 188).[25] Additionally, Complainant testified to delays with her work on the Ineos Nova contract, which she had been working on for months. (Tr. 188-189). With regard to that contract and its timely completion and confusion over amendments to it, Complainant informed Jaworski that she was "preparing a detailed letter regarding her drug testing and

[23] See RX-7, p. 6 (Complainant's Answers to Interrogatories).
[24] RX-149.
[25] RX-4.

how it affected her job, future violations, etc., to protect" herself because she did not want people to wonder why she was being pulled off projects or would not work weekends. (Tr. 189-190).[26]

On cross-examination, Complainant testified that she did not know if the drug test was administered in retaliation for raising issues of vendor vetting or not filing the 8-K or why the drug test was "done the way it was." However, she admitted that prior to the test's administration, her speech was slurred when speaking with other ACL employees and she had a reaction to the prescription medication that caused them to believe she may be on drugs or alcohol, but no one ever addressed their concerns with her directly regarding the possibility that she may be on drugs or alcohol. (Tr. 195-196). Complainant testified she spoke with Brooks a few days prior to her drug test about what she learned regarding her mother's death. She then expressed her agreement that a company has the right to be concerned when a lawyer appears to be confused and has slurred speech, giving the company a right to inquire as to whether the lawyer was under the influence of illegal drugs or alcohol, and that such action would not be harassment. However, in this case, Complainant testified that Brooks, who was not her supervisor, was the only person to make that inquiry. (Tr. 198).

Complainant further testified that Brooks apparently was not the person who actually ordered the drug test, that she took it under penalty of immediate termination, and she was happy to give ACL negative results. (Tr. 199). Complainant stated Landry retaliated against her for her negative drug test results. She further testified that as to Landry's unauthorized knowledge of her using Klonopin, Landry told her that the HIPAA complaint was against human resources and not her. (Tr. 200). Complainant stated she never told Landry about taking Klonopin until after Landry already knew. She sent Landry a document on June 16, 2008, regarding the side effects of Klonopin to include drowsiness, dizziness, blurred vision and other side effects.[27] (Tr. 206-207). Complainant further testified Mr. McCoy told her if she had concerns regarding the handing of her HIPAA complaint, she can file a formal complaint using the ethics hotline. After McCoy told Complainant he would take care of the original HIPAA complaint, she thanked him because she did not want to be fired. (Tr. 202).[28]

[26] RX-12.
[27] RX-10.
[28] RX-16; RX-17.

Complainant testified she began having problems with Landry in April 2008. When she was told Landry became employed in mid-May, Complainant stated she did not know when Landry became employed. Complainant further testified Bill McCoy informed her she had a tainted reputation after the drug testing. (Tr. 205). Complainant stated people were not associating with her the way they had in the past. (Tr. 208). She admitted there could have been reasons for her altered working relationships other than retaliation for her raising vendor vetting and/or securities issues. (Tr. 209-211).

Complainant testified that on July 8, 2008, the day she was to leave for Indiana to meet with Landry, she received an e-mail from Landry requesting she "put a straw man together for contract issues, checklists, form clauses."[29] Complainant e-mailed her back reporting, "I am shocked," and called Landry. (Tr. 212). Complainant agreed she could have either not called Landry or concluded the conversation and flown out, but missed her flight because she was on the phone with Landry. (Tr. 213). Landry then sent Complainant a "dial-in" so she could participate in the departmental meeting by telephone, to which Complainant responded, "[i]s this a joke? And if so I do not find it funny and frankly its slightly abusive." Landry responded, "No Angelina, I'm not cancelling our meetings. We put together a schedule of good discussions on important topics for the department. You are a part of the legal department and I expect you to participate. I understand that you decided not to come to Jeffersonville so I have provided a dial-in number for you." Complainant responded she could not respect Landry and was taking time off. (Tr. 214).[30] Complainant testified she could have participated in the meeting by telephone, but thought it was a joke. (Tr. 215). Jaworski called to tell her she was terminated at approximately 2:00 p.m. that day.[31] Complainant sent an e-mail to Mike Ryan the same day, making no mention of vendor vetting or SEC violations. (Tr. 216-217).[32]

Complainant admitted she took company documents home before her termination to bring with her to the Jeffersonville, Indiana meeting, and that many of those documents were used in her exhibits at the hearing. (Tr. 217). ACL asked for the return of the company laptop and the blackberry, which Complainant returned. (Tr. 218-220).

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[29] RX-18.
[30] RX-18.
[31] July 8, 2008.
[32] RX-59.

Regarding damages for emotional distress, Complainant testified on cross-examination she began receiving electric shock treatments prior to her employment at ACL, which continued until December 2008. (Tr. 224-225). Dr. Pesikoff's August 19, 2006 notes indicate she called in reporting that she was hearing voices, but she did not recall making that telephone call. (Tr. 225-227). Complainant additionally stated that in October 2008, she told Dr. Pesikoff she may be receiving federal surveillance. She has seen multiple health care providers since June 2005, due to her severe depression. (Tr. 227). She does not recall ever being diagnosed with "major effective disorder, recurrent, moderate bipolar disorder, anxiety disorder, [or] attention deficit hyper activity disorder." (Tr. 227-228). Complainant further testified she told Dr. Pesikoff she may have reported difficulty with concentration and memory, mood swings and picking fights over the years. (Tr. 228). Additionally, Complainant admitted she has been prescribed multiple medications, but they were ineffective, which led her to getting the implant and the shock treatments. (Tr. 228-229). Complainant was taking Klonopin prior to the incident with her mother, and had taken Zoloft, Wellbutrin, Adderall, Ambien, Keppra, Neurokinin, Lithium and Cymbalta in the time period leading up to October 2007, but not all at once, and not in conjunction with Klonopin. (Tr. 229). However, Complainant admitted she was taking medication in addition to Klonopin at the time she was employed with ACL. (Tr. 230).

Complainant testified her diagnosis of severe depression has not changed since her termination by ACL. Additionally, Dr. Pesikoff's records from March 2009 indicated her condition was clinically stable and adequately controlled, but she did not recall him ever telling her that. (Tr. 231).

Complainant acknowledged she had many life stressors aside from anything that happened at ACL. She testified her father was an alcoholic when she was growing up, but that he no longer drinks. Additionally, her mother suffered from bipolar disorder, and her home life was turbulent. Moreover, Complainant was unable to reconcile with her daughter. (Tr. 232).

Complainant saw Dr. Pesikoff one week after her termination and told him ACL forced her to have a drug test and "was difficult with her." Complainant did not raise any issue of being fired as a result of raising a securities issue with Dr. Pesikoff. (Tr. 233).

Complainant admitted on cross-examination she worked on setting up her private law practice during work hours at ACL. (Tr. 233). She had not developed the website for her private law practice as of the hearing, but did not agree that she has made no progress in developing the practice itself. She stated she was undecided as to how she wanted to approach the idea of a new firm, and was in the process of opening one with previous colleagues, which would change the direction of the firm. (Tr. 235-236). At the time of the hearing, Complainant had not applied for any jobs since her termination from ACL. She testified she did not want to work for a company, and did not hire any headhunters or recruiters, or prepare a resume. Complainant had been looking into real estate investment and other things on her own. (Tr. 236).

When questioned regarding Dr. Santos's and Dr. Pesikoff's 2006 records, Complainant did not recall being "let go" from a job in 2006. (Tr. 237-238). Upon further cross-examination, Complainant denied ever being in a lawsuit with a firm. (Tr. 239). She admitted she got a severance package from Ultra Petroleum, but did not threaten to bring a claim against them. (Tr. 242-243). Complainant testified she signed a confidentiality agreement with Ultra Petroleum, but did not sign any such agreements with any other company. (Tr. 245). With regard to her past employment history, Complainant worked for Cardwell, Franklin, Cardwell & Jones in 2007, but did not report that employment in her Answers to Interrogatories. (Tr. 245-246).[33] She stated she did not list them in her Answers to Interrogatories because she only worked there for two months and it "slipped [her] mind." She then testified her reason for the mutual termination/quitting Cardwell was she and one of the partners of the firm did not get along; she was trained differently and did not think the firm was sophisticated. (Tr. 247).

On further cross-examination, Complainant admitted that she was employed by Hudson Global Resource Management, a temp law firm, in 2005. (Tr. 247-248). Complainant did not recall the particular work she did for them and did not list them as an employer in her Answers to Interrogatories because she did not recall working for them.

[33] RX-7.

Complainant further testified on cross-examination she applied for unemployment compensation benefits after her termination from ACL. (Tr. 250). Her stated reason for termination on the unemployment compensation application was, "[m]y superior thought I was a lawyer and worked too slow." (Tr. 251).

On re-direct examination, Complainant testified she had experience with the ethics hotline, and her expectations as to how her HIPAA complaint would be handled were not met. (Tr. 254-255). She stated she did not attempt to use the hotline again after Bill McCoy told her he would get rid of her complaint if he found it. (Tr. 256). Additionally, Complainant stated McCoy walked her through the process of what would happen, but told her she'd "be better off just leaving alone, and working on fixing [her] reputation to get back where [she] had been." (Tr. 260-261).

Complainant also testified on re-direct she voiced her concerns to Jaworski and Ruschman, who would be under the same obligations as she to use the ethics hotline. (Tr. 256-257). However, no member of ACL's supervisory staff, officers or anyone invoked the ethics hotline to address any issues involving ACL's failure to vet vendors or securities issues. (Tr. 257). Complainant further testified that despite the purpose and scope of the code of ethics, Complainant did not feel she was treated with dignity or respect by ACL. (Tr. 258).

Further on re-direct examination, Complainant clarified the computer she was referring to in the wheelhouse that distracted the pilot was a personal computer, and not a navigational computer. (Tr. 258-259). She also clarified that although she had been on a lot of medication, she tried some and they failed, so she would be put on a different medication, but was never taking a lot of medication at one time. (Tr. 263-264). Complainant further testified on re-direct examination her job was very important to her; it was the only thing she had to focus on to get through her loss. (Tr. 261-262).

Additionally, Complainant testified that though Jaworski said he would take up Doherty's failure to vet vendors and other securities issues with upper management, he never reported back to her concerning those issues. Complainant stated when she

first began working with Jaworski, he would carry through with the things he told her, but in late April 2008, when all these issues arose, he failed to do so. (Tr. 262). She stated her severe depression never kept her from performing her duties at a high level. (Tr. 264).

On re-cross-examination, Complainant stated the conversations she had with Bill McCoy (HIPAA complaint) were in late June 2008. Additionally, she testified she went directly to her supervisor pertaining to ACL's lack of vetting its vendors and did not think to file an ethics complaint with the hotline. (Tr. 265).

Complainant could not recall the name of the boat or any other details revolving around the DRD personal computer incident because she did not have any documentation. (Tr. 266).

Additionally on re-cross-examination, Complainant testified she was on more than one medication at a time. (Tr. 267).

Mark Doherty

Mark Doherty, the Director of Vessel Training and Compliance for ACL, testified at the formal hearing. He had been employed with ACL for almost thirty-one years at the time of the hearing, and was called as an adverse witness by Complainant's counsel. (Tr. 270).

Doherty testified he began working for ACL as a deckhand in 1978 and worked his way up to Director of Vetting in 2004. (Tr. 270-271). At the time of the hearing, Doherty was still in charge of vetting vendors, but had additional responsibilities. (Tr. 271).

Doherty testified "vetting" means to hold someone to expert appraisal. ACL uses five different processes to determine whether a company is fit to be ACL's vendor. Such processes included management and performance reviews, vessel/facility audits, performance monitoring, and participation in vendor workshops. (Tr. 271-272). Doherty testified he vets about 130 vessels per year. As part of management review, Doherty's team looks at a company's training requirements and hiring practices. (Tr. 272). As part of the vessel audit, the team checks for licensure of the master or person on watch, pilots, captains and

apprentices. (Tr. 272-273). Doherty stated vessels are vetted annually, and ACL meets with the vendors two to four times per year. (Tr. 273). Additionally, ACL audits its own vessels annually using the same process for vessels and personnel. (Tr. 274).

Doherty further testified that in 2008, about seven vendors were supplying personnel to ACL to man the tugboats, and each vendor would have one to twelve vessels. (Tr. 274). If a vendor supplied a vessel, it also supplied the personnel. However, ACL used some vendors for personnel to man ACL's vessels. (Tr. 275).

Doherty stated DRD Towing was a service provider for ACL in the Gulf Coast area continuously from 2002 or 2003 until July 2008, and was the vendor for eight of ACL's vessels. (Tr. 275-276). He testified that, in 2007, ACL audited all of DRD's vessels, and in 2008, three vessels had been audited prior to the termination of ACL's contract with DRD Towing. (Tr. 278).[34]

Doherty further testified Complainant never asked him for audit reports on DRD, but he did have them maintained in his file system and they were still there at the time of the hearing. Doherty denied ever telling Complainant he was too busy to vet DRD. (Tr. 279). Doherty also denied having a three-way conversation with Complainant and Jaworski, along with any other conversation with Jaworski regarding vetting DRD Towing. (Tr. 279-280). Doherty additionally denied asking for additional personnel to assist him with vetting during 2007-2008. (Tr. 280-281). Moreover, Doherty denied any knowledge or discoveries by ACL that DRD was using or had used unlicensed personnel to move vessels during the time Complainant was employed, and did not know whether there was a root cause analysis report ever prepared on a DRD vessel or crew. (Tr. 281-284).

Doherty vowed ACL vets its vendors to insure they provide consistent service to customers. When a vendor had an incident that required a RCA, Doherty requested it from the vendor. He would review it, ask additional questions if necessary, and then forward it to ACL's customer account managers. (Tr. 284). Doherty was informed of incidents either by ACL's barge incident identification process or by an e-mail that came out every time there is an incident report. If one of ACL's vendors were involved, he would forward the e-mail to them and request a RCA from them in a timely manner. (Tr. 285). The RCA included the

[34] The record is silent regarding the reason(s) for ACL's termination of its contract with DRD Towing.

incident, the contributing factors, what the vendor believed the root cause was, and any corrective actions the vendor identified. (Tr. 285-286). Doherty testified he sometimes requested RCAs from vendors, but sometimes would not receive them. In that instance, Doherty would usually meet with the vendor, but never met with DRD Towing. (Tr. 286-287). Instead, Ron Socorro, who worked with Doherty, met with them on at least one occasion when a requested RCA was not received because of e-mail problems. (Tr. 287). Doherty stated he did not believe the RCA was ever received, even after DRD Towing's meeting with Socorro. (Tr. 287-288).

Doherty further testified vendors prepare and publish their own RCAs on their own forms, and he stores a copy on his computer. (Tr. 288). Doherty stated he reviews the RCAs and forwards them to ACL's customer account managers. Doherty or the customer account manager would send Torok and/or Zinn an informational copy to check the RCA for correctness and forward it to the customer. (Tr. 289-290). Doherty stated an incident report is merely the initial reporting of an incident by whomever was in charge when the incident occurred. (Tr. 291). After receipt of the incident report, Doherty requested an RCA from the vendor. Doherty testified that one DRD Towing RCA he requested and never received involved a grounding, which is when the barges or the boat touch the bottom of the river. (Tr. 292).

Doherty stated he was the only ACL employee endowed with the responsibility of vetting, and that he and Torok had the responsibility of preparing RCAs. (Tr. 294).

G. Thorn McDaniel, III

G. Thorn McDaniel, III (McDaniel) testified at the formal hearing on April 28, 2009 as an expert witness. McDaniel's report and *curriculum vitae* were entered into evidence.[35] Counsel for ACL stipulated to his status as an expert in the field of computation of economic damages. (Tr. 307).

McDaniel testified he was retained to calculate the lost earnings Complainant may have suffered because of her termination from ACL. (Tr. 307-308). To do so, McDaniel stated he looked at her earnings at the time of termination, along with her historical earnings, both of which were approximately $100,000 per year. In addition, McDaniel looked at her company-matched 401-K contributions at four percent, and other fringe

[35] CX-107.

benefits such as health insurance. (Tr. 308). Complainant's revenue for 2008 was just over ten thousand dollars profit. (Tr. 309-310). McDaniel did two computations of Complainant's projected loss of income and earnings. (Tr. 310).

McDaniel's first computation compared Complainant's current income/earnings versus where she would have been had she continued to be employed with ACL.[36] McDaniel did not factor in any bonuses for the first computation. Using this computation, Complainant's lost earnings to the day, had she remained at ACL, would have been $78,330. In 2008, Complainant earned $467 and has not made a profit in 2009. (Tr. 310). McDaniel added a 401-K match and calculated the total lost earnings and benefits. (Tr. 310-311). After computing six percent pre-judgment interest based on the Texas Code, but not including health benefits, Complainant's total loss of earnings was $82,693 under McDaniel's first computation. (Tr. 311, 313).

McDaniel's second computation involved future losses and post-trial losses, addressing the loss of income three years from the date of termination. (Tr. 311-312).[37] Three years was the time period chosen because it involved an estimate of what Complainant may be earning in three years after starting a new business. (Tr. 313). Using this computation, assuming Complainant had no net profit from her private practice, she would have earned $100,000 plus $4,000 for the 401-K match. Since Complainant had a net profit of $467 in her private practice in 2008, she would have a net loss earnings of $103,000 for the first year. It is estimated Complainant will make half of her ACL earnings in her new practice in the second year, 75% in the third year, and $100,000 by her fourth year, conceptually equivalent to her wages at ACL. Thus, with mitigating projected income, the total loss earnings for three years post-termination was $186,533 under McDaniel's second computation. (Tr. 312, 333).

McDaniel did not project any increase in Complainant's salary or any bonuses that she would have made if she stayed employed with ACL because they were speculative, and none were indicated the immediate year preceding her termination. (Tr. 314). McDaniel classified his projections as conservative.

[36] CX-107.
[37] CX-107.

Complainant's employment allowed two bonuses or extra compensation, which she did not receive the year prior to her termination. (Tr. 314). McDaniel did not use a discount rate or offset method. (Tr. 316).

To perform his calculations, McDaniel testified he reviewed Complainant's W-2, the complaint, interrogatory answers and tax returns. (Tr. 315). He stated he would have preferred to have some more definite information on Complainant's health benefits so that they could be included in the calculations, but was not given such information. (Tr. 315-316).

McDaniel vowed he had no contingent income in the outcome of this case. (Tr. 317).

On cross-examination, McDaniel testified he had one interview with Complainant and spoke with her on the phone one time, but did not speak with anyone else regarding the circumstances of her termination. (Tr. 318). McDaniel also stated he had previously prepared two reports on behalf of complainants in wrongful termination cases for Complainant's counsel. (Tr. 318-319).

Further on cross-examination, McDaniel testified he interviewed Complainant for thirty to forty minutes, and he spoke to her at least twice. (Tr. 321). In performing his calculations, McDaniel operated under the assumption that Complainant had been wrongfully terminated. (Tr. 322). Additionally, he did not consider any of Complainant's employment history prior to her working for ACL. (Tr. 324).

McDaniel further testified on cross-examination the back pay portion of Complainant's lost earnings was approximately $81,000, plus interest of 1.6%. (Tr. 326-327). McDaniel stated he considered the fact that Complainant told him she had not looked for employment since her termination and was starting her own private practice. (Tr. 328-329). However, McDaniel did not consider Complainant's real estate development/investment because the income from it was purely speculative and there was nothing to suggest Complainant was investing in/developing real estate in lieu of opening her own practice. (Tr. 330-332). McDaniel testified the front pay portion of Complainant's projected loss of earnings of $106,000 was not speculative, and in fact, was reasonable. (Tr. 333-334).

Additionally, McDaniel testified on cross-examination he was "pretty sure" he looked at Houston's job market when preparing his report by doing internet research, but did not list that research as information he relied on in forming his opinions. (Tr. 336). His explanation was he did not find anything to rely on in the Houston job market; only the findings of his internet research were considered. (Tr. 337). McDaniel also stated he did not confer with any vocational experts for this case, but also that he has never consulted with one for a wrongful discharge case. (Tr. 337-338).

On re-direct-examination, McDaniel clarified that although Claimant's report was the third report he had prepared for Complainant's counsel, his workload is generally fifty percent plaintiff and fifty percent defendant. (Tr. 338-339).

Jerry Torok

Jerry Torok, ACL's Director of Regulatory Compliance since August 2007, and Houston Fleet Manager of ACL for thirty-days prior to the hearing, testified at the formal hearing. He was called by Complainant's counsel as an adverse witness. (Tr. 341).

Torok testified the Liquids Division of ACL is no longer located in Houston, but that he never worked for the liquids division. (Tr. 341-342). Additionally, the legal department is no longer located in Texas. Torok stated only the Houston fleet managements remain in Texas, with approximately fourteen ACL employees. (Tr. 342).

Torok further testified his duties as Director of Regulatory Compliance have always been the same, but they are "undertaking at a reduced level" in an effort to facilitate holding both that job and his new job as Houston Fleet Manager. (Tr. 343-344). Torok testified that, as Director of Regulatory Compliance, he "coordinated regulatory projects for the company, as well as government liaison, including to the Coast Guard, to TCEQ, to environmental groups, and to the Army Corps of Engineers." Additionally, Torok was assigned membership to the Texas Waterways Operators Association, participated in beneficial committees for the towing industry, and was assigned to the Houston/Galveston security committee by the Coast Guard. (Tr. 344). Torok further clarified he has additional duties since his appointment as Houston Fleet Manager, and must still do all the duties as Director, but to a lesser degree; there is

no active participation in committees, attendance at less meetings, and performing more duties by telephone than traveling. (Tr. 344-345). Torok stated prior to his employment with ACL, he was on active duty with the United States Coast Guard for twenty-two years. He retired as a Grade-05 Commander. (Tr. 345).

When questioned regarding RCAs, Torok testified the purpose of RCAs is to look at facts and information brought forth regarding the incident, attempt to find the cause of the accident, and develop measures to prevent or mitigate future accidents/incidents of the same type. (Tr. 345). In December 2007, Torok was asked to provide assistance by giving advice to the root cause team in Houston reviewing cases and using his background and experience to make recommendations. Torok testified all allisions, collisions, groundings, oil spills, injuries or accidents were investigated internally, but formal RCAs were prepared and sent to the customer only if the customer requested them. (Tr. 346-347). Torok became the process owner for ACL in May 2008, which made it his job to assure that RCAs were timely completed. (Tr. 347).

Torok stated Complainant and other experts in other divisions were involved with the RCA process, and all drafts were provided by the investigator, then reviewed by the customer account manager, and received by ACL for review. Generally, if the accident were a collision, allision or grounding, the investigator was a marine superintendent; barge maintenance issues were investigated by barge maintenance persons. Both marine superintendents and barge maintenance persons were ACL employees. (Tr. 354). If a vendor was involved, the vendor provided the initial investigation and RCA. (Tr. 354-355). Torok testified his involvement in the RCA process was limited to when a customer requested one from the customer account manager. Approximately twenty RCAs were completed on an annual basis. (Tr. 355). Torok stated once a request was made to the customer account manager, the marine superintendent/barge maintenance person would conduct an investigation and provide the RCA to the account manager. If a vendor was involved, the vendor vetting group would request the RCA or investigation from the vendor. The RCA from the vendor was then provided to the customer account manager and then to Torok for review. (Tr. 356). Torok stated, however, that from December 2007 until May 2008, he only reviewed them if requested to do so by Doherty. (Tr. 357). After May 2008, Torok was promoted to process owner, wherein he was given the responsibility to review the cases and build recommendations. (Tr. 357-358).

Torok testified Complainant's role was to provide legal review of the RCAs, and she and Torok participated in drafting the RCAs that went out to the customers. Torok further testified Complainant's specific role in the RCA process was to insure they were legally succinct, the recommendations are implementable, and all facets of the accident were covered and investigated. (Tr. 358). After Torok became process owner in May 2008, his duties remained the same, but he then had the additional duty to make sure the RCAs are completed in a timely manner. (Tr. 358-359). Torok stated that during the time he was working with Complainant, he never reviewed an RCA that involved DRD Towing. (Tr. 359). Further, Torok stated he never had an opportunity to comment on anything DRD Towing has done, never saw a case on them, and never conducted a customer RCA involving them. Torok further vowed he never saw any type of information whatsoever relating to DRD Towing in the course of his duties. (Tr. 360).

Torok testified he is not involved in the auditing process. (Tr. 360). He never looked at the audit of vendors that were involved in any of the accidents. (Tr. 360-361). Torok stated Mark Doherty and Ron Soccoro, along with other ACL employees were endowed with the duty to vet the vendors. (Tr. 361-362). Further, Torok testified he worked with Doherty only to put together an eight-pack towing project, vessel management guide and discuss federal regulations in relation to equipment carriage on ACL's vessels. (Tr. 365).

Torok additionally testified he prepared a character reference to Zinn & Associates on July 21, 2009, to assist Complainant with potential future employment.[38] Torok stated he had a good relationship with Complainant, enjoyed working with her and "felt bad that she lost her job." (Tr. 367-368). He further testified that the final RCAs that were sent to customers were the result of what he and Complainant consulted on and prepared. (Tr. 371).

On cross-examination, Torok testified that when Complainant began working with him, she knew very little, if anything, about the industry and how it worked. (Tr. 371). As a result, Torok requested he be allowed to send Complainant to a Brown Water University, which is a Coast Guard cooperative program lasting two and a half days that gives instruction on the rudiments of the towing business and the regulatory provisions that are

[38] CX-16.

involved. (Tr. 371-372). Torok corrected Complainant's testimony, clarifying that an allision occurs where a vessel runs into an object, whether it be a moored vessel, a tree or a bridge. (Tr. 372).

Dawn Landry

Dawn Landry, Senior Vice President, Corporate Secretary and General Counsel of ACL, testified at the formal hearing. She began her employment with ACL on May 12, 2008. (Tr. 381-382).

Landry stated her duties as general counsel included risk management and overseeing the legal department, including all external litigation and corporate matters. Landry graduated from the University of Nebraska and then law school at Creighton. Thereafter, she worked for Blackwell Sanders in Kansas City then Morse Manning and Martin in Atlanta, then worked as in-house counsel for a public company called Daleen Technologies from December 2001 until she began with ACL in May 2008. (Tr. 382).

Landry testified she never learned Complainant made a complaint in any form regarding vendor vetting or filing an 8-K related to Landry's appointment at any time Complainant was employed by ACL. She stated Doug Ruschman was the vice president of legal and risk management that oversaw risk management and most of the litigation. Complainant, Marianne Gunther, Brooke Egan and Richard Fultz were also members of ACL's legal team. (Tr. 383).

Landry further testified she did not want Complainant out of the legal department budget, but merely questioned whether Complainant's work was legal or business. Complainant was in charge of contracts for the liquids division in Houston, Texas. When assured by Complainant all her work was legal, that was the end of the issue and Landry never initiated any further conversations regarding the issue. (Tr. 384). However, Landry testified Complainant would call and complain that Landry wanted her off the budget and "she didn't know why [Landry] didn't like her." Landry would attempt to dispel Complainant's fears about the budget by telling her it was not an issue. (Tr. 385).

Further on direct examination, Landry testified that on May 23, 2008, at approximately 11:00 a.m., Complainant called her and seemed incoherent, unfocused, and was slurring her words; "[i]t seemed hard for her to put words together in a complete sentence." Immediately after she got off the phone with

Complainant, Landry went to Ruschman's office and inquired whether he had ever experienced the same thing with Complainant. (Tr. 385). Landry testified she and Ruschman called Jaworski and inquired as to his experiences with Complainant as well. (Tr. 386).

After speaking with Jaworski when he came to Indiana the following Tuesday, Landry called human resources for direction on how to handle an employee's slurred speech and exhibiting behaviors similar to what Complainant had exhibited on May 23, 2008. (Tr. 387). After speaking to human resources, Landry had Sharon Brooks call Complainant and inquire as to whether there was a reason for her behavior and suggest a drug test. (Tr. 387-388). Complainant thereafter submitted to the drug test and was out of the office while it was being processed, which took approximately one week. (Tr. 388). The results of the drug test were negative, and the test indicated prescription drugs were taken in the proper dosages. (Tr. 389-390). Thereafter, Landry requested Brooks speak with Complainant, inform her of the negative test results, and ask her to come back to work as soon as possible. (Tr. 390).

Landry testified she called Complainant the day after she returned to the office and Complainant was defensive and combative. Complainant questioned Landry regarding the drug test and the HIPAA violation, to which Landry responded she did not know if a HIPAA violation had occurred. Landry stated she knew the results of Complainant's drug test in her capacity as supervisor, but since the results were negative, that should have been the end of it. (Tr. 390).

Landry further testified she did not know anything about Klonopin, never told Complainant she overdosed on it, and never said she was going to monitor her. Landry additionally denied calling Complainant a liar and telling her she was unproductive. Landry further testified she and Complainant argued about whether the drug test was taken voluntarily; Landry told Complainant she took the drug test voluntarily in a later conversation, which Complainant disputed. Complainant followed up with an e-mail containing information on Klonopin approximately one week after that conversation. (Tr. 391).

Landry testified that she ultimately learned of the investigation of Complainant's HIPAA complaint. Landry's understanding was that Complainant's HIPAA violation was based on Landry's knowledge of the results of the drug test. (Tr. 391-392). However, Landry stated she was not involved in the

investigation, except to the extent Complainant complained to Landry that outside counsel had called her. Landry was unfamiliar with the ethics hotline process at the time because she was still new to ACL. (Tr. 392). She stated Complainant alleged Brooks or Ingersoll (ACL employee) told Landry about Complainant's taking Klonopin. However, Landry testified she did not know Complainant was taking Klonopin until Complainant sent her the e-mail containing the information. Landry also denied furiously calling Complainant because she made the HIPAA complaint. (Tr. 393).

After Complainant returned to work following the drug test, Landry testified Jaworski complained to her because Complainant's projects were falling behind. As a result, Landry shifted the workload and gave another attorney the O'Rourke deal so it could be timely completed. The Ineos Nova contract took weeks, even though it was a short contract. (Tr. 394). Landry stated that in June 2008, her dealings with Complainant were erratic. "There were times when things seemed to be going relatively smoothly, and then [Landry] would get a call out of the blue talking about [Complainant's] HIPAA complaint, the fact that [Landry] wanted her off [the] budget, issues about her reputation" once per week on average. (Tr. 395). Landry reviewed an e-mail, wherein Complainant told Jaworski either she would not work the weekend at all or she would not work the weekend to finish the Ineos Nova contract. (Tr. 395-396).[39]

Landry testified that in late June or early July, she had a meeting with Jaworski, Brooks, Mike Ryan, Shane Ingersoll and Bill McCoy to discuss Complainant's drug testing, events following the drug testing, and performance issues. (Tr. 396-397). The purpose of the meeting was to contemplate how to get things back on track with Complainant and move forward. Landry stated she and the management team were going to continue to encourage Complainant, have her come to Indiana for a meeting with the entire legal department, and put her on a performance plan using objective measures to monitor her performance. Landry sent Complainant an e-mail about the meeting in Indiana. (Tr. 397).[40]

Landry testified she sent Complainant an additional e-mail on July 7, 2008, requesting she put together a straw man for the department meeting, which is a bullet point list of contracts issues, checklists and form clauses.[41] Landry stated it was

[39] RX-109.
[40] RX-61.
[41] RX-18.

unnecessary for Complainant to consult with employees of the liquids division to put together the straw man because it was a purely legal matter. (Tr. 400). Complainant called Landry within an hour after receiving the e-mail and was angry and combative. Landry stated she walked Complainant through exactly what she wanted over the phone, which consisted of a list of contracts issues such as making sure the parties are named correctly, indemnification, limitations on liability, warranties, agreement clauses, and the like. Additionally, Landry wanted a checklist to be sure all specific elements of the contracts were covered, as well as standard form clauses. (Tr. 401). Landry testified Complainant then brought up the HIPAA violation and the fact that Landry did not want her on the budget. Landry told Complainant the conversation was not productive; she could not keep Complainant focused on business and Complainant wanted to talk about her drug testing and go back to other issues. Landry told Complainant she was going to call human resources "about where to go from here," and ended the conversation. (Tr. 402).

Landry testified that during the conversation, Complainant said "she wasn't going to be pushed around and told what to do at the last minute for a meeting. . . [she] is not that girl, sweetie." Landry stated that the meeting was to be held the day after the request for the straw man had been made. Additionally, she stated she asked everyone in the legal department to lead a particular section of the meeting and doing the straw man for contracts was the recommended way for Complainant to lead her section. (Tr. 403).

Landry further stated she learned Complainant did not come to Indiana when Mike Ryan gave her an e-mail of July 8, 2008, from Complainant indicating she missed her flight. (Tr. 404).[42] Complainant sent Landry another e-mail the same day at 12:35 p.m., stating that she had not taken the drug test voluntarily; would not allow anyone to call her a liar and trash her reputation or to question her with anger and bitterness, and Landry was investigating the HIPAA complaint by asking which law firms had called Complainant.[43] Landry stated she was not investigating the process, was not intending to interfere, and

[42] RX-59.
[43] RX-95.

that Complainant was eliciting her help in finding out which outside counsel was investigating her complaint. (Tr. 406). Landry further stated that she was not verbally abusive to Complainant in that conversation, nor had she ever been verbally abusive to her. (Tr. 407).

Landry sent a "dial-in number" to Complainant at 12:42 p.m., so she could participate in the legal department meeting by telephone on July 8, 2008. (Tr. 407). Complainant responded asking if it was a joke. (Tr. 408).[44] Landry responded that the "dial-in" was not a joke, the meeting of the legal department would not be cancelled, and Complainant was a member of the legal department whose participation was expected.[45] Landry testified she had no further communication with Complainant after the e-mail.[46] However, Complainant responded by e-mail at 1:20 p.m., that she could not respect Landry.[47] Landry contacted human resources and requested termination of Complainant's employment. Landry stated she made the decision to terminate Complainant because she had performance issues and was insubordinate. (Tr. 409).

Landry testified Complainant had previously participated in staff meetings by telephone beginning in June. (Tr. 409). She further stated Complainant participated in only some of the meetings and sometimes was not on time. The purpose of the staff meetings was to discuss what was being worked on that week, the "to-do list" for the upcoming week, and to discuss issues within the company between legal and risk management. (Tr. 410).

Landry stated that not once during the staff meetings in which Complainant participated did she raise problems with RCAs, vendor vetting, DRD Towing, securities issues or shareholder fraud. (Tr. 410). Nor did Complainant ever raise any of the above issues with Landry outside of the call-in staff meetings. (Tr. 411).

When questioned regarding her obtaining employment with ACL, Landry testified she interviewed with the senior vice president of human resources and the CEO twice, and a Chicago board member, a Washington, D.C. member and the chairman of the board once. The hiring process took from mid-February to the

[44] RX-18.
[45] RX-18, p. 4.
[46] RX-18. It is noted Complainant continued to e-mail Landry, despite Landry's unresponsiveness.
[47] RX-18, p. 5.

end of April 2008. (Tr. 411). Landry denied being hired by a single board member before having met or being approved by other board members. (Tr. 411-412). She stated she believes Mike Ryan made the decision to hire her. (Tr. 412).

Landry further testified that at the time she was hired, ACL put out a press release announcing her hire. (Tr. 412).[48] She stated that a Form 8-K was not filed with the SEC in connection with her appointment as general counsel. (Tr. 413). Landry was not hired as a principal executive officer, president, principal financial officer, principal accounting officer or principal operating officer, nor does she occupy any of these positions. (Tr. 414). Landry further stated that the 10-Q form referenced the extension of an offer of employment to her. [49] She explained that a contract between a company and a named executive officer is required to be attached as an exhibit to a 10-K or 10-Q form. (Tr. 416). Landry further stated her appointment as general counsel was announced in the company's analyst call for the second quarter of 2008. (Tr. 416-417).

Landry testified she first became aware of Complainant's complaint about ACL's failure to file the 8-K regarding her hiring when she received the Department of Labor complaint. (Tr. 417). She further stated that after the complaint was received, she attempted to ascertain whether or not Complainant had raised the issue prior to the filing of the DOL complaint. (Tr. 417). When questioned regarding Complainant's e-mail referencing the 8-K disclosure requirements,[50] Landry testified that had she seen the e-mail prior to the Department of Labor complaint, she would not have perceived the e-mail as a complaint. (Tr. 418).

Landry testified further that a risk factor disclosure is a required element to a 10-K or 10-Q that discloses the material risks to a company. (Tr. 418). Landry stated the general instructions for a 10-K display the quantitative and qualitative disclosure requirements with reference to market risks. (Tr. 418-419).[51] Landry stated, however, that during the time she and Complainant were employed at ACL together, she was unaware of any deficiencies in vendor vetting processes that would have a material affect on ACL's business sufficient to warrant a risk factor disclosure. (Tr. 419). Landry further stated that in terms of vendor vetting, it is her understanding that ACL is top of the line. Landry also vowed if Complainant had ever claimed

[48] RX-156.
[49] CX-72.
[50] RX-2.
[51] RX-154.

the company should have disclosed its vendor vetting as a risk factor, she would not have considered it as a basis for terminating Complainant's employment with ACL. (Tr. 420).

On cross-examination, Landry clarified Sharon Brooks called Complainant to find out if she had a medical problem and make a determination as to whether a drug test should be administered. (Tr. 426). Landry further stated Complainant volunteered to take the drug test to prove that she was not taking drugs or alcohol. (Tr. 426-427). Landry did not recall ever hearing of Klonopin prior to receiving the e-mail from Complainant discussing its side effects, and does not know whether there was a written report prepared by the drug testing laboratory that showed the results of Complainant's drug test. (Tr. 428).

Landry testified on cross-examination Complainant reported to and was supervised by Ruschman, and most of the contracts on which she was working were for ACL's Houston Liquids Division. (Tr. 428-429). Complainant worked with Jaworski on contracts, but Jaworski did not have the authority to give Complainant a day off without consulting Landry. (Tr. 435). Landry testified she spoke with Complainant on the telephone and told her if she needed a day off or was going to be late, she needed to contact Landry. She never prepared any written document informing Complainant of the lines of authority. ACL employs organizational charts, which show that Complainant and everyone else in the legal department were to report to Landry. (Tr. 436).

When questioned on cross-examination regarding "progressive discipline," Landry testified it means someone is given a verbal warning, written warning, and then terminated. (Tr. 430). Landry stated Complainant's performance issues were almost personality-related, in that she was refusing to work on weekends and was very slow with the work she was completing. (Tr. 431). ACL does not have a formal progressive discipline policy, but Landry stated Complainant's verbal warnings came in the form of pep talks and encouragement to try to get her back on track and working. (Tr. 432). Landry stated she did not recall ever giving any written warnings to Complainant, and there was no written warning in Complainant's personnel file. However, Landry testified ACL does not employ a progressive discipline policy. (Tr. 433).

Landry stated on cross-examination Complainant refused to work on a weekend once during the time Landry was working with her, but did not have any information as to whether Complainant worked late nights or other weekends. (Tr. 434).

Landry testified she did not call the outside firm that handles ethics complaints. She then admitted, however, she called Brian Easley at Jones Day to find out if they contacted Complainant about an ethics complaint she filed. Her stated reason for calling Easley was because she was concerned there was some attorney soliciting Complainant and Complainant thought outside counsel was harassing her. (Tr. 438). Landry testified she told Complainant Jones Day reported they were not investigating anything, but if she gave Landry the name and number of whomever contacted her, she would be happy to find out what she could. Landry denies ever calling Complainant a liar. (Tr. 439).

Landry testified on cross-examination the straw man presentation she requested Complainant to complete for the meeting was a ten-minute exercise for the meeting the following day. Landry stated that at the time, she probably did not know what time Complainant's plane was scheduled to leave. (Tr. 440). However, she stated Complainant told her she was about to go to the airport and asked if she should even come. However, further into questioning, Landry stated Complainant did not tell her she was leaving for the airport, but only told her she had a flight that morning. (Tr. 441). Landry testified she went through a very long explanation of exactly what she wanted and basically drafted the straw man presentation for Complainant while they were on the phone. The telephone conversation lasted between forty-five minutes to an hour. Landry stated she does not think Complainant missed the flight, but instead chose not to get on the flight. (Tr. 442). Landry stated Complainant could have prepared the straw man presentation on the flight, or any time that evening or the next day prior to the meeting. She did not think it was reasonable Complainant felt the need to look at documents or speak to people in the Houston office to complete the presentation. (Tr. 443).

On cross-examination, Landry further testified she recalled an interchange between herself and Complainant whereby Complainant asked for a new start and that she would like to come to Indiana to meet with her. Landry denies telling Complainant she could come four months after she requested the meeting. (Tr. 448). She stated she told Complainant they could

meet in the last week of July or first week of August after discussing scheduling conflicts, but did not recall whether the conversation was on the telephone or by e-mail. (Tr. 448-449). Landry testified the meeting with Complainant to which she was referring was the same meeting with the entire legal department Complainant did not attend either in person or by phone. (Tr. 449-450).

On further cross-examination, Landry testified ACL's failure to vet its vendors was never brought to her attention and that she still was not aware that it was a problem at the time of the hearing. (Tr. 450). Landry further stated she would probably review RCAs if the incident was significant, but has not reviewed any in the normal course of business. (Tr. 451). She further testified she obtained knowledge of the vetting process subsequent to, but had no knowledge of the process before Complainant's termination. (Tr. 453). She testified that with the current vetting process, every boat and every vendor receive management audits once every three years, and ACL also reviews their "RCP status." (Tr. 454). Management audits are for the purpose of documenting safety management programs and insuring all appropriate safety training is completed. (Tr. 454-455). Additionally, ACL annually checks for licensure for personnel on boats owned or operated by ACL, including vessels operated by its vendors. (Tr. 455).

Landry further testified on cross-examination that the Ineos Nova contract was not complete until December 2008, because Ineos Nova sat on it after delivery. (Tr. 457). However, Landry stated her issue with Complainant is that she took weeks to have it drafted. (Tr. 458). Landry further stated that insofar as the legal department meeting, all members of the legal team were requested to complete the same type of straw man presentation as was expected of Complainant. However, Complainant is the only member of the legal department who was in the Houston office not physically located in Jeffersonville, Indiana, and who was required to fly to Indiana for the department meeting. (Tr. 458-459).

V. ANALYSIS AND DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports

or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Generally, I found Complainant's testimony riddled with inconsistencies. I was not impressed with Complainant's failure to recall past employers or potential lawsuits against employers. Given her proclivity to document issues related to her employment, such as the alleged HIPAA violation, her drug testing, and her perceived mistreatment, I found it incredulous that she never documented the basis of her discrimination complaint, i.e., complaints about Respondent's failure to vet vendors or file a Form 8-K upon the hiring of Landry either during or after her employment.

On the other hand, I was not favorably impressed in all respects by the demeanor and testimony of Ms. Landry. I am inclined to believe Landry became aware of Complainant's use of Klonopin through sources other than Complainant contrary to her testimony. Moreover, given the managerial meeting to discuss Complainant, I do not credit the assertion that Complainant voluntarily submitted to a drug test as suggested by Landry. Her involvement in the HIPAA violation investigation or ethics hotline inquiry is rather muddled in the record, to include her denial of contacting outside counsel and her retraction that she did so.

However, my resolution of the issues presented is based on a record which is not otherwise tainted by the credibility flaws noted above.

B. The Statutory Provisions

The whistleblower provision of Sarbanes-Oxley, set forth at 18 U.S.C. §1514A, states, in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
> >
> > > (A) a Federal regulatory or law enforcement agency;
> > >
> > > (B) any Member of Congress or any committee of Congress; or

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

18 U.S.C. § 1514A (a)(1); see also 29 C.F.R. § 1980.102 (a), (b)(1).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). See, Platone v. FLYi, Inc., ARB No. 04-154, Case No. 2003-SOX-27 (ARB Sept. 29, 2006). 49 U.S.C. § 42121(b) reads in pertinent part:

> (i) Required showing by complainant. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a **prima facie** showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (ii) Showing by employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by **clear and convincing evidence**, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

Title 29 C.F.R. § 1980.101 of the implementing regulations of Sarbanes-Oxley defines the term "employee," stating in pertinent part:

> Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

29 C.F.R. § 1980.101.

The whistleblower provision of Sarbanes-Oxley is similar to whistleblower provisions found in many other federal statutes. Since the Sarbanes-Oxley Act is relatively new, reference to case authority interpreting other whistleblower statutes is appropriate. See Welch v. Cardinal Bankshares Corporation, Case No. 2003-SOX-15 (ALJ Jan. 28, 2004), *rev'd on other grounds*, ARB 05-064 (ARB May 31, 2007).

C. The Burden of Proof

In a Sarbanes-Oxley "whistleblower" case, a complainant must establish by a **preponderance of the evidence** that: (1) she engaged in protected activity as defined by the Act; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Allen v. Admin. Rev. Bd., 514 F.3d 468, 475 (5th Cir. 2008); Macktal v. U. S. Dept. of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Zinn v. Univ. of Missouri, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); Overall v. Tennessee Valley Auth., Case No. 1997-ERA-53 @ 12 (ARB Apr. 30, 2001). The foregoing creates an inference of unlawful discrimination. Id. With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation. Id.; see Welch, supra.

In Marano v. Dept. of Justice, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted); see also, Welch, supra.

If complainant fulfills this burden of proof, Respondent may avoid liability under Sarbanes-Oxley by producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. See Yule v.

Burns Int'l Security Serv., Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than a preponderance of the evidence and less than beyond a reasonable doubt. See Id. @ 4.

If Respondent is successful, the burden shifts to the complainant who must then provide some evidence, direct or circumstantial, to rebut the proffered reasons as a pretext for discrimination.[52] Ultimately, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown **both** that the reason was **false**, **and** that discrimination was the real reason" for Respondent's decision. Hicks, 509 U.S. at 515 (emphasis added).

Complainant's Prima Facie Case

(1) Did the Complainant engage in Protected Activity under the Sarbanes-Oxley Act?

Under SOX, protected activity must be based on Complainant's reasonable belief that the employer's conduct constituted a violation of 18 U.S.C., sections 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), 1348 (securities fraud), or any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A (a)(1).

Reasonable Belief Standard

The legislative history of Sarbanes-Oxley states that the reasonableness test "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), 2002 WL 32054527 (citing Passaic Valley, 992 F.2d 474 (3rd Cir. 1993). "The threshold is intended to include

[52] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a **prima facie** case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-511, 113 S.Ct. 2742 (1993). See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a **prima facie** case becomes irrelevant once the respondent has produced evidence of a legitimate non-discriminatory reason for the adverse action.)

all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Id.; see Collins v. Beazer Homes USA, Inc., 344 F.Supp.2d 1365 (N.D. Georgia 2004).

Thus, complainant's belief "must be scrutinized under both subjective and objective standards, i.e., [she] must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." Melendez v. Exxon Chemicals Americas, Case No. 1993-ERA-6 (ARB July 14, 2000). The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." Melendez, supra, (quoting Minard v. Nerco Delamar Co., Case No. 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. @ 7, n.5); see Lerbs v. Buca Di Beppo, Case No. 2004-SOX-8 (ALJ June 15, 2004).

Additional guidance is contained in the legislative history, noting "certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002).

Essential Elements of Fraud actionable under SOX: Intent, Materiality/Significant Deficiency, Impact on Shareholders

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the SOX whistleblower provision. See e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company"). The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." Id.

In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing

SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit. See Hopkins v. ATK Tactical Systems, Case No. 2004-SOX-19 (ALJ May 27, 2004); Tuttle v. Johnson Controls, Battery Division, Case No. 2004-SOX-0076 (ALJ Jan. 3, 2005).

The elements of fraud include: (1) a misstatement or omission; (2) of a material fact; (3) made with the intent to defraud; (4) on which the [complainant] relied; and (5) which proximately caused the [complainant's] injury.[53] Williams v. WMX Technologies, Inc., 112 F.3d 175, 177 (5th Cir. 1997). Hence, a fraudulent activity cannot occur without the presence of intent.

Courts are split on the question of whether or not whistleblower protection is limited to fraud "against shareholders." The Court in Reyna v. Conagra Foods, Inc., 2007 WL 1704577 (M.D.Ga. June 11, 2007), relying solely upon its analysis of the plain language of the statute, held: "alleged violations of mail fraud or wire fraud do (sic) not have to relate to shareholder fraud in order to be protected activity." Id. at 16.

The Reyna holding conflicts with the position of the Administrative Review Board (ARB) that: "an employee's protected communications must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." Platone v. FLYi, Inc., supra, at 17 (ARB Sept. 29, 2006). The ARB reiterated this position in Welch, supra, in which the ARB held that recording of accounting information in violation of generally accepted accounting principles (GAAP), or other industry specific standards, was not ipso facto violation of federal securities laws. Welch, supra, @ 11-12.

[53] In the context of securities fraud claims under section 10(b) of the Securities Exchange Act and Rule 10-b5, the "intent to defraud" element is replaced with "scienter." Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud, or at minimum, highly unreasonable (conduct), involving not merely simple, or even excusable negligence, but an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." In re: Alpharma Inc. Securities Litigation, 372 F.3d 137, 148 (3d Cir. 2004); see also Tuchman v. DSC Communications Corporation, 14 F.3d 1061, 1067 (5th Cir. 1994).

The Reyna Court correctly observed "it is unnecessary (and inappropriate) to rely upon the legislative history of a statute to derive Congress' intent when that intent is readily revealed by a plain reading of the statute." Reyna, supra, citing Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1167 (2003) (citing Fed. Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1239 (11th Cir. 2000)). However, as with any statutory provision, whistleblower provisions should not be viewed in isolation, but must be viewed in the context of the act in which it exists.

Sarbanes-Oxley was enacted for the purpose of eliminating perpetration of fraud against shareholders as evidenced by the plain language of the Act as a whole. SOX goes to great lengths to assure that information assimilated to the investing public is not fraudulent by, among other measures, establishing the Public Company Accounting Oversight Board to ensure auditors' independence, assessing responsibility to the Audit Committee of the Board of Directors of a company, requiring management to attest to the accuracy of internal controls and financial reports, and installing criminal penalties for intentional misrepresentations to the investing public. 15 U.S.C. § 7211; 15 U.S.C. § 7241; 15 U.S.C. § 78j-1; 18 U.S.C. § 1350.

Consistent with the position expressed by the ARB, an allegation of "shareholder fraud" is an essential element of a cause of action under SOX. Therefore, where the conduct complained of involves potential dissemination of false information to the investing public, not all intentionally fraudulent activity may support a cause of action under SOX. Rather, the alleged conduct must be sufficiently material to rise to the level of shareholder fraud. See also, Harvey v. Safeway, Inc., Case No. 2004-SOX-21 (ALJ February 11, 2005).

The Supreme Court, in addressing other types of shareholder fraud, held that to "fulfill the materiality requirement there must be a substantial likelihood that the disclosure of the omitted (or misstated) fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)).

Similarly, the Securities and Exchange Commission, in providing guidance concerning materiality of financial statement items stated: "the omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is

probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item." The SEC further provides that magnitude (amount) alone does not determine materiality. All factors must be considered, as "misstatements of relatively small amounts . . . could have a material effect on the financial statements." (U.S. Securities and Exchange Commission, Staff Accounting Bulletin No. 99, Release No. SAB 99, August 12, 1999).

Therefore, under subjective and objective standards, Complainant must actually and reasonably believe, based on the knowledge available to a reasonable person, that Respondent intentionally acted fraudulently, and that such conduct was sufficiently material so as to constitute fraud against the shareholders. In cases where allegations of shareholder fraud are based on potential or actual dissemination of fraudulent information, there must exist a "substantial likelihood" that the disclosure of the omitted or misstated information would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

(1) Protected Activity Alleged

Although not specifically alleged in her pre-hearing compliant, at the formal hearing, nor in her post-hearing brief, Complainant alleges in her "Proposed Findings of Fact and Conclusions of Law" she engaged in protected activity by reporting concern to her immediate supervisor regarding: (1) securities fraud under Section 1348 of the Securities Exchange Act; (2) violations of Sections 13 and 15(d) of the Securities Exchange Act including SEC Rules regarding filing Form 8-K with the SEC; and (3) violation of Section 10(b)(5) of the Securities Exchange Act and SEC Rule 10b-5 related to fraud against shareholders.

(a) ACL's Failure to Vet DRD Personnel / Disclose Use of Unlicensed Personnel

Complainant first contends reporting ACL's failure to properly vet its vendors and/or discover DRD Towing's use of unlicensed personnel, coupled with the omission of such a fact as a risk on the 10-K Form, constituted protected activity. She contends she was reasonable in her belief that ACL's conduct violated a rule or regulation of the SEC or a provision of federal law relating to fraud against shareholders.

Under SOX, protected activity must be based on ***both*** a Complainant's subjective and an objective reasonable belief that one or more of the relevant laws specifically listed under the SOX statute have been violated. "As to the subjective component, the law is not meant to protect those whose complaints are not undertaken in subjective good faith." Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009). No evidence presented herein indicates Complainant's reports to Jaworski were not made in good faith. Accordingly, I find Complainant had a subjectively reasonable belief the failure to vet vendors and/or report on the 10-K Form that DRD Towing utilized unlicensed personnel constituted a violation of a federal law relating to shareholder fraud.

However, Complainant also bears the burden of showing her belief was objectively reasonable. "A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough." Lewandowski v. Viacom, Inc., ARB No. 08-026, ALJ No. 2007-SOX-88 (ARB October 30, 2009). An objectively reasonable belief of the existence of shareholder fraud requires that Complainant's theory of shareholder fraud "must at least approximate the basic elements of a claim of securities fraud." Id. at 56. Securities fraud under § 10(b) and SEC Rule 10b-5, at a minimum, requires: "(1) a material misrepresentation or omission; (2) scienter; (3) connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." Id., citing Ezra Charitable Trust v. Tyco Int'l, Ltd., 466 F.3d 1, 6 (1st Cir. 2006).

Considering all the basic elements of securities fraud must be satisfied to support Complainant's objective reasonableness that ACL was committing fraud upon its shareholders, I will first address the element of material misrepresentation or omission. Whether a fact is material is dependent upon the level of significance a "reasonable investor would place on the withheld or misrepresented information" and is thus, a fact specific inquiry. Basic, Inc. v. Levinson, 485 U.S. 224, 204, 108 S.Ct. 978, 988 (1988). Though Complainant is neither required to point to a specific statute nor prove actual harm, she must harbor an objectively reasonable belief that material facts were either misrepresented or omitted to investors, showed a risk of loss, and the intent to so misrepresent or omit. Day, supra. To prevail on the element of material misrepresentation or omission, a Complainant must reasonably believe there is a

"likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." Id. citing Basic, supra at 347.

It must be noted that Complainant never offered a basis for her assertion that DRD Towing's pilots were unlicensed or unskilled. There was no corroborating testimony or evidence to support such a contention. In fact, while Complainant testified pilots are regulated by the United States Coast Guard, she did not know what license is required. Further, the testimony of Doherty rebuts Complainant's contentions. His testimony indicates that in 2007, ACL audited all of DRD Towing's vessels, and three vessels had been audited prior to the termination of the contract between DRD and ACL in 2008. It is important to note here that Zinn's employment at ACL was from November 2007 to July 2008, the time period which corresponds with Doherty's testimony. Doherty further testified that auditing includes checking for licensure of the master, pilots, captains and apprentices. Complainant's co-worker, Torok, testified that during the time he and Complainant worked together on RCAs, he never reviewed or drafted one that involved DRD towing, never had an opportunity to comment on anything DRD has done, and never even saw a case involving DRD Towing. Additionally, Doherty denies ever having a three-way conversation with Jaworski and Complainant regarding vetting DRD Towing, Complainant ever asking to see audit reports on DRD, and telling Complainant he was too busy to vet DRD. He additionally denied any knowledge or discoveries by ACL that DRD Towing utilized unlicensed personnel to move vessels during the time Complainant was employed.

In support of the assertion of a material misrepresentation/omission, Complainant submitted an excerpt from ACL's 2007 Form 10-K, filed with the SEC, which, provides, in pertinent part:

> **The loss of key personnel, including highly skilled and licensed vessel personnel, could adversely affect our business.**
> We believe our ability to successfully implement our business strategy and to operate profitably depends on the continued employment of our senior management team and other key personnel, including highly skilled and licensed vessel personnel. Specifically, experienced vessel operators, including captains, are not quickly replaceable and the loss of high-level vessel

> employees over a short period of time could impair our ability to fully man all of our vessels. If key employees depart, we may have to incur significant costs to replace them. Our ability to execute our business model could be impaired if we cannot replace them in a timely manner. Therefore, any loss or reduction in the number of such key personnel could adversely affect our future operating results. (CX-2, p. 25).

Complainant argues DRD Towing's use of unlicensed pilots is inconsistent with the above 10-K statement, is materially misleading and thus, fraudulent. I disagree. Assuming, **arguendo**, that Complainant's assertion is true, I find the statement made on the 2007 Form 10-K was not misleading. The intent of the statement is to disclose the loss or reduction of highly licensed and skilled personnel as a risk; not to suggest all of ACL's vendors are licensed and/or annually vetted as provided by customer contractual agreements. Furthermore, even if ACL failed to vet vendors or used vendors employing unlicensed personnel in violation of contractual agreements, I find such is not sufficient to sustain a claim of shareholder or securities fraud; the appropriate vehicle would be a claim under contract. It should be noted here that Complainant herself arguably committed fraud when she failed to disclose DRD Towing's alleged use of unlicensed personnel in her RCA reports to protect ACL from liability for a breach of contract with its customers. Accordingly, I find Complainant has failed to show an objectively reasonable belief that the failure to vet vendors and the failure to report the alleged use of DRD Towing's unlicensed pilots on the 10-K Form was materially misleading to shareholders and/or investors.

Even if Complainant had shown an objectively reasonable belief that ACL misrepresented or omitted material facts to shareholders and/or investors, "the employee must [also] reasonably believe that his or her employer acted with a mental state embracing intent to deceive, manipulate, or defraud its shareholders." Allen v. Admin. Rev. Bd., 514 F.3d 468, 480 (5th Cir. 2008). Fraudulent intent may be inferred if Complainant either alleges facts showing the employer had the opportunity **and** motive to defraud shareholders and/or investors or allege "facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Chill v. General Electric Co., 101 F.3d 263, 267 (2nd Cir. 1996).

Motive entails "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." Id. at 268. Actions that naturally benefit a corporation, such as the maintenance of contractual relationships and ostensible corporate profitability, do not "entail concrete benefits" and thus do not satisfy the motive requirement. Id.; See also: In re Crystal Brands Sec. Litig., 862 F.Supp 745, 749 (D. Conn. 1994). Here, as expressed above, the statement made on the 10-K form regarding risk of loss is not misleading. There is no evidence that ACL failed to disclose such information to obtain a concrete benefit. Complainant has shown, at best, that the failure to disclose the vetting process (or lack thereof) relates to contractual agreements between ACL and its customers, from which ACL derives a natural benefit.

Complainant's theory of fraud also fails to show conscious misbehavior or recklessness on the part of ACL. "[R]eckless conduct is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care. . .to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Chill, supra at 269, citing Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d. Cir. 1978). "An egregious refusal to see the obvious, or to investigate the doubtful, may in some cases give rise to an inference of. . .recklessness." Chill, supra at 269, citing Goldman v. McMahan, Brafman, Morgan & Co., 706 F.Supp. 256, 259 (S.D.N.Y. 1989). To show an employer's recklessness, a Complainant must allege facts that are "strong circumstantial evidence" of reckless conduct, such that "it gives rise to a strong inference of fraudulent intent." Chill, supra at 269.

As aforementioned, Complainant offered no basis for her assertion that DRD Towing's pilots were unlicensed; nor did she present any corroborating evidence to show that ACL's vendors were never properly vetted. It is important to note here that CX-121, which contains all RCAs submitted into evidence by Complainant, fails to mention DRD Towing in even one report. Assuming, **arguendo**, those two statements are true, however, they do not rise to the level of recklessness or conscious misbehavior as required to support a claim of fraud. Doherty's alleged failure to vet ACL's vendors *may* support a negligence claim if true, but "[m]ere negligence on the part of the employer does not constitute a violation of federal law relating to fraud against shareholders." Allen, supra at 480. See also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

Complainant must also show that she was objectively reasonable in believing that investors and/or shareholders relied upon the material misstatement or omission. As to this element, the United States Supreme Court has adopted the "fraud on the market theory," which offers a Complainant the presumption of reliance by shareholders and/or investors of a publicly traded company.

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendant's fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations. Basic, supra at 241-42.

"[T]he market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." Id. at 246. A Respondent company may, however, rebut the presumption by severing the link between an alleged material misrepresentation and "either the price received (or paid) by plaintiff, or his decision to trade at a fair market price. . . ." Id. at 248. However, for the presumption to apply, there must be first a material misrepresentation or omission by the Respondent company. Here, Complainant has not sufficiently satisfied her burden of showing an objectively reasonable belief that a misleading or omitted material statement was made regarding DRD Towing's use of unlicensed pilots or ACL's failure to properly vet its vendors. Therefore, I find that Complainant cannot avail herself of the invocation of the presumption offered by the fraud on the market theory and thus, has failed to satisfy the reliance element of securities fraud.

Moreover, Complainant has failed to show any economic loss by shareholders and/or investors. She has put forth no evidence of loss such as depreciated share value, loss of investors, or any affect whatsoever on the sale and purchase of ACL shares of stock. Without showing economic loss, Complainant also cannot satisfy the final element of securities fraud, which is that the loss was caused by the misrepresentation or omission of a material fact.

(b) ACL's Failure to Report Dawn Landry's Appointment as General Counsel and Senior Vice President on Form 8-K

Complainant's second contention of protected activity is the reporting of ACL's failure to file a Form 8-K announcing Dawn Landry's appointment as general counsel and senior vice president of ACL. Complainant states she notified Ruschman that the 8-K Form should be reviewed and attached instructions regarding appointment of certain officers, indicating for whom an 8-K must be filed.

As with Complainant's first contention of protected activity, she must show by a **preponderance of the evidence** that she had **both** a reasonably subjective and a reasonably objective belief that one or more of the relevant laws under SOX have been violated. As for her second contention, Complainant argues specifically that ACL is in violation of SEC rules regarding filing Form 8-K with the SEC.

There is nothing in the evidence that indicates Complainant's belief that a violation had occurred was in nothing other than good faith. Accordingly, I find Complainant had a reasonable subjective belief that ACL was in violation of the SEC rules.

However, Complainant's burden to show objective reasonableness of the SEC rules violation is lacking. "The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Allen, supra at 177; See also: Welch v. Chao, 536 F.3d 269; Melendez v. Exxon Chems. Ams., ARB Case No. 96-051, slip op. @ 27 (ARB July 14, 2000). Complainant's status as a licensed attorney with approximately six years of experience in the realm of corporate securities law (as per her own testimony) is vital to the objective reasonableness standard in this matter, as her argument is based on a violation of the SEC filing rules.

Complainant submitted a blank Form 8-K with instructions in support of her contention that failure to disclose Landry's appointment was a violation of the SEC rules.[54] Item 5.02 of the Form 8-K instructions specifically provides, however, for required disclosure on the 8-K Form for appointment of a

[54] See CX-21.

principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar function. No mention is made in the instructions as to a filing requirement for the appointment of senior vice president or general counsel. Moreover, the instructions provide for a delay in filing the Form 8-K if a public announcement is made by means other than a report on the Form 8-K.

Complainant, given her experience in securities law, should have been aware that the instructions specifically did not include either general counsel or the office of vice president. Further, Landry was questioned at the hearing by Respondent's attorney and specifically denied holding any of the offices specifically listed on the 8-K instructions. Moreover, ACL issued a press release announcing Landry's appointment as both general counsel and senior vice president at the time she was hired. ACL's 2008 second quarter analyst call also announced Landry's appointment as general counsel.

Complainant submitted a stream of e-mails between herself and a former colleague regarding the disclosure of Landry's appointment on the Form 8-K to support her contention that she reasonably believed ACL was violating the SEC rules.[55] In the e-mails, Complainant writes the following: "I've read the rules, but they seem a bit unclear. Are you required to announce a new general counsel on Form 8-K? . . . **I just wanted to see what your firm's practice was**." Her former colleague responded that since Landry was also a senior vice president, she ***may*** be a named executive officer and reportable. However, considering the fact that she is a licensed attorney with experience in the field of securities law, Complainant "could have ascertained whether [ACL's] statements failed to comply with [the SEC rules] and informed her supervisors of this fact, but she did not." Allen, supra at 479. Instead, after receiving an e-mail from Ruschman advising Complainant that ACL made the decision not to file the 8-K based on the opinion of outside counsel, and the matter was closed, Complainant made no further mention of the Form 8-K filing.

[55] CX-115.

Given the foregoing, I find that Complainant has failed to show by a **preponderance of the evidence** that she had an objectively reasonable belief that ACL was in violation of the SEC rules regarding required disclosures when it did not report on the Form 8-K Landry's appointment as general counsel and senior vice president.

Additionally, Complainant has not shown that the failure to announce Landry's appointment violates a federal law relating to shareholder fraud. Complainant argues that a Form 8-K discloses material information to the general public and investors, and that any misleading or omitted material facts amount to shareholder fraud. However, as discussed immediately above, I find that the announcement of Landry's appointment as general counsel and vice president was not required at the time Complainant believed there was a violation of the SEC rules. It is noted the Form 8-K was filed in August 2008, announcing Landry's appointment. However, the public was informed of the appointment through the mediums of both a press release and an announcement in the 2008 second quarter call analyst for ACL; as per the Form 8-K instructions, the filing of the 8-K form may be delayed when the public is notified through some other medium. Therefore, the failure to disclose Landry's appointment on the Form 8-K when hired was neither misleading nor fraudulent.

Additionally, Complainant argues she engaged in protected activity when she informed Ruschman that Landry's appointment was not appropriate under the NASDAQ rules because she was allegedly hired by one board member without interviewing with the rest of ACL's board of directors. Complainant's statement was based on Ruschman's telling her that Landry was hired by one member of the board without any consultation with the other members. However, the record indicates through Landry's testimony that she truthfully denied being hired in such a manner. In fact, Landry stated the hiring process took from February to May 2008 before she was actually appointed to the position, that she interviewed with various members of the board, and CEO Mike Ryan was the person who made the ultimate decision to hire her. It should also be noted that, according to Complainant's own testimony, it was Ruschman who informed her of Landry's alleged illegal hiring process. Thus, Complainant never actually reported anything to anyone, much less engaged in protected activity in this scenario.

Given the foregoing, I find accordingly that Complainant was not engaged in protected activity either in reporting ACL's failure to vet vendors or DRD Towing's use of unlicensed personnel because she failed to show that she had an objectively reasonable belief that any federal law was violated relating to shareholder fraud. Additionally, I find Complainant was not engaged in protected activity when she reported ACL's failure to disclose Landry's appointment on the Form 8-K because she failed to show she had an objectively reasonable belief that any of the SEC rules or applicable statutes had been violated. Further, Complainant was not engaged in protected activity when she told Ruschman that the process by which Landry was hired as general counsel/senior vice president was in violation of the NASDAQ rules.

(2) Did Complainant complain to an appropriate person?

Assuming, **arguendo**, that Complainant was engaged in protected activity, the Act requires disclosure to a person with supervisory authority over Complainant or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct. 18 U.S.C. § 1514(A)(1)(c).

(a) ACL's Failure to Vet DRD Personnel / Disclose Use of Unlicensed Personnel

Complainant testified Ruschman and Jaworski were her supervisors when she began her employment with ACL in November 2007. She argues in her post-hearing brief that "safety and vendor vetting review" were part of ACL's internal controls and policies. Landry testified that after she was appointed as general counsel, she was Complainant's immediate supervisor. It should be noted, however, that Complainant reported ACL's failure to vet DRD Towing and failure to disclose the DRD's use of unlicensed personnel to Jaworski and/or Ruschman in April or May 2008, prior to Landry's employment with ACL.

Further, Complainant argued in her brief, as well as testified, she expressed a concern to Jaworski that the 10-K Forms reported ACL was upholding safety. However, because of the failure to vet DRD Towing's personnel and the use of unlicensed personnel, ACL's risks were actually higher than stated; any misrepresentations or material misstatements constituted fraud upon investors and shareholders. Complainant testified that she, Jaworski and Doherty had a three-way conversation regarding Doherty's failure to vet DRD Towing. According to Complainant, Jaworski told her he was going to

speak with upper management regarding the issue, but she does not know if he actually did; he later told her that vetting DRD Towing was not a priority at that time. In addition to Jaworski, Complainant testified she also complained to Ruschman in late April or early May 2008 with regard to ACL's failure to vet DRD Towing's personnel.

Specifically, Complainant testified she reported to Jaworski she saw multiple incidents involving DRD Towing and was concerned with safety issues.[56] Complainant discussed with Jaworski the hiring of additional personnel to assist in the vetting process because Doherty told her he did not have time to vet DRD Towing. Complainant thereafter testified even after requesting audit reports from Doherty, she never received them; DRD had not been audited or vetted in its eight to nine years as an ACL vendor. Complainant stated she spoke to Ruschman in late April or early May 2008 regarding ACL's (specifically, Doherty's) failure to vet DRD Towing.

ACL has provided no evidence to rebut or otherwise contradict Complainant's testimony that Jaworksi and Ruschman were her supervisors; nor has ACL rebutted Complainant's testimony that she complained to them regarding ACL's failure to vet DRD Towing and failure to disclose that DRD Towing utilized unlicensed personnel.[57] Doherty has denied ever having a three-way conversation with Complainant and Jaworski; however, such does not equate to a rebuttal of Complainant's testimony that she complained to her supervisors. Since the Act merely requires a Complainant to complain to someone with supervisory authority

[56] It is noted that CX-121 contains no RCAs involving DRD Towing.

[57] Complainant has argued in her post-hearing brief that because Jaworski was under the control of ACL and not called to testify and rebut her testimony, an adverse inference should arise and it should be presumed Jaworski would have testified in her favor under US v. Wilson, 322 F.3d 353 (5th Cir. 2003). Though Jaworski was physically present at the hearing and could have been called by either party to testify, it is not a witnesses's physical presence, but his connection to one or the other of the parties that determines whether he is actually an available witness. Id. If the party "in control" of the witness does not call that witness, an adverse inference may be drawn in favor of the other party that the unavailable witness would have testified in that party's favor. Here, the record does not indicate whether Jaworski was presently employed by ACL at the time of the hearing. If he were so employed, the adverse inference would arise, as ACL would have been "in control" of him and, by virtue, his testimony. If, however, Jaworski were not employed by ACL at the time of the hearing, no adverse inference would arise, as he would have been equally available to the parties in that instance. However, since I find ACL has failed to rebut that Complainant complained to the appropriate person (Jaworski or Ruschman), I also find the adverse inference rule moot under these circumstances.

over her, I find that had Complainant been engaged in protected activity, reporting her complaints to Jaworksi and Ruschman would have been sufficient to establish that she complained to an appropriate person as required under SOX.

(b) ACL's Failure to Report Dawn Landry's Appointment as General Counsel and Senior Vice President on Form 8-K

For a complainant to receive protection under SOX, she is not required to express her concern in "every possible way or at every possible time," so long as her communications "provide information, cause information to be provided, or otherwise assist in an investigation" regarding a covered violation. Klopfenstein v. PCC Flow Tech. Holdings, Inc., 2006 WL 1788436 (U.S. Dept. of Labor), 24 IER Cases 1036, 1047 (May 31, 2006), citing 18 U.S.C.A. § 1514A.

Here, once Complainant learned of Landry's appointment as general counsel and senior vice president, she thereafter sent Ruschman a Form 8-K with an e-mail stating that it should be reviewed.[58] The e-mail stated that the SEC rules were vague as to whether Landry's appointment was a required disclosure, and she offered to call the partner for whom she worked at her former law firm. Ruschman replied ACL's outside counsel told ACL's CEO Mike Ryan that disclosure of Landry's appointment was not necessary.

Given the laxity of the communications between Complainant and her supervisors regarding the disclosure of Landry's appointment on the Form 8-K, I find Complainant's e-mail to Ruschman was no more than a general inquiry regarding SEC rule compliance. Accordingly, I find Complainant neither sufficiently complained nor raised particular concerns about whether ACL's failure to report Landry's appointment was a violation of the SEC rules.

(3) Was Respondent aware Complainant engaged in protected activity?

Assuming, **arguendo**, Complainant engaged in protected activity, she is not required to prove "direct personal knowledge" on the part of the employer's final decision-maker that she engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's

[58] RX-2.

direct line of management and the final decision-maker. Frazier v. Merit Systems Protection Board, 672 F.2d 150, 166 (D.C. Cir. 1982). Therefore, constructive knowledge of the protected activity can be attributed to the final decision-maker. Id.; see also Larry v. Detroit Edison Co., Case No. 1986-ERA-32 @ 6 (ALJ October 17, 1986); Platone, supra.

Given Complainant's complaint to Jaworski and Ruschman regarding DRD Towing's use of unlicensed pilots and ACL's failure to properly vet its vendors to be sufficient as complaints to the appropriate person, I find constructive knowledge is attributed to Landry, who ultimately terminated Complainant's employment.

However, I find constructive knowledge is not attributed to Landry regarding ACL's failure to disclose Landry's appointment on the 8-K form. As stated above, Complainant did not sufficiently complain or raise particular concerns regarding the potential illegality of ACL's failure to disclose the appointment to anyone with supervisory authority over her.

(4) Did Complainant experience an adverse employment action, and if so, was her protected activity a contributing factor?

An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities. Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000). See also Halloum v. Intel Corp., Case No. 2003-SOX-7 (ARB Jan. 31, 2006); Daniel v. TIMCO Aviation Servs., Inc., supra. Such adverse actions are not limited to "those that are related to employment or occur at the workplace." Burlington Northern and Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 2409 (2006).

To prevail under SOX, the protected activity must be a contributing factor in the termination. Klopfenstein, supra. "A contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'" Id. at 1048, citing Marano v. Dept. of Justice, 2 F.3d 1137, 1148 (Fed. Cir. 1993). Temporal proximity between the protected activity and adverse employment action, without more, is insufficient to establish that the protected activity was a contributing factor. Hendrix v. American Airlines, Inc., 2004 WL 3093326 (U.S. Dept. of Labor), 22 IER Cases 182 (Dec. 9, 2004).

Complainant alleges unfavorable personnel action by ACL, including (1) reduction of work; (2) coerced drug test; (3) monitoring of her employment upon negative drug test results; (4) implementation of increased performance standards solely against Complainant; and (5) termination of Complainant's employment.

(a) Reduction of Work

Complainant first alleges she was subjected to adverse employment action when her workload was reduced by Jaworski. She specifically referred to being "taken off the O'Rourke deal" and being taken off the Ineos Nova contract. I find noteworthy Complainant stated in a June 20, 2008 e-mail to Jaworski regarding the O'Rourke deal that her productivity was down, she needs time to herself and she would appreciate less projects.[59] The e-mail to Jaworski was sent between one and two months after Complainant reported ACL's potential SOX violations to Jaworski.

With regard to the Ineos Nova contract, Complainant testified she took months to complete the contract and there were delays with her work because she was preparing a detailed letter regarding her drug testing; something that was clearly irrelevant to the contract, which she was assigned to complete.[60] Further, on June 28, 2008, Complainant refused to work over the weekend to complete the contract.[61]

Assuming, **arguendo**, Complainant had engaged in protected activity, I find Complainant's reporting of ACL's alleged failure to vet vendors, failure to disclose DRD Towing's use of unlicensed personnel, and ACL's failure to disclose Landry's appointment were not contributing factors to Complainant's reduction of work. To the contrary, she requested the reduction of work because her productivity was admittedly down and she needed time to herself. Even if Complainant's activity were protected activity, she has failed to show the requisite nexus between the activity and the reduction in work.

[59] RX-4.
[60] RX-12.
[61] RX-11.

(b) Coerced Drug Test

Complainant additionally argues she was coerced to take a drug test as a result of her protected activity. However, Landry testified that on May 23, 2008, Complainant called her and seemed incoherent, unfocused, and was slurring her words. Complainant admitted in her testimony that her speech was slurred when speaking with other ACL employees, which caused them to believe she was on drugs or alcohol. Landry testified that as a result of Complainant's demeanor, she was administered a drug test after consulting with Jaworski and Brooks regarding what avenue to take with regard to Complainant's slurred speech and incoherence.

ACL's Drug and Alcohol policy provides, "'under the influence' means that an employee's conduct as demonstrated by physical, behavioral, or performance indicators suggest probable use of alcohol or drugs."[62] Further, the policy provides no employee may report to work or travel to or from work while under the influence of drugs or alcohol. Under the policy, all employees are subject to both random and reasonable cause drug testing as a condition of employment. Despite her contention that the drug test was retaliatory, Complainant stated she did not know why the drug test was administered the way it was and did not know whether her complaints to Jaworski or Ruschman regarding ACL's SOX violations had anything to do with the administration of the drug test. However, Complainant testified a company has the right to be concerned when an attorney appears to be confused and have slurred speech, giving the company a right to inquire as to whether drugs or alcohol were involved, and such would not be harassment.

The record does not indicate on what day the drug test was actually taken. However, Complainant sent Landry and Curt Hawkins an e-mail dated June 16, 2008 listing the side-effects of Klonopin at some point after the drug test was administered.[63] Therefore, it is apparent that the test was administered some time between May 23, 2008 and June 16, 2008, as a result of Complainant's slurred speech and incoherence. It should be noted Complainant tested negative for illegal drugs or alcohol.

[62] RX-95.
[63] RX-10.

Complainant has made no argument as to whether any protected activity was a contributing factor to ACL's decision to administer a drug test to her. Accordingly, I find Complainant has failed to establish any nexus between protected activity under SOX and ACL's administration of the drug test.

(c) Monitoring of Employment After Negative Test Results

Claimant states Landry told her "even though [she] got a negative drug test she would be monitoring [her] from that point forward because she was overdosing on Klonopin." Landry testified Jaworski complained to her because Complainant's projects were falling behind and that her dealings with Complainant became erratic after the drug test. Specifically, Landry testified Complainant would call her once per week on average to discuss issues such as Complainant's reputation, HIPAA complaints, and Landry allegedly wanting Complainant off her budget. Landry stated she did intend to monitor Complainant's performance, but in the form of a performance plan, in an effort to continue to encourage Complainant.

Complainant has failed to make any allegations of any correlation between any protected activity and her being monitored after a negative drug test result. Accordingly, I find Complainant has failed to establish that any protected activity was a contributing factor in Landry's decision to monitor Complainant's employment after negative drug testing results.

(d) Implementation of Increased Performance Standards Solely Against Complainant

Complainant further alleges that increased performance standards were implemented solely against her, and that her protected activity was a contributing factor to their implementation. Specifically, Complainant points to Landry's giving her additional work an hour before her flight was to leave for the department meeting in Indiana. It is undisputed Complainant was the only attorney in the Houston office, and the only member of the legal team required to fly from Houston to Indiana for the meeting. However, the record indicates the department meeting was scheduled for the day **after** Complainant was to arrive in Indiana for the meeting.[64]

[64] CX-14; RX-18.

Additionally, ACL has provided evidence that three other members of the legal team were sent an e-mail at approximately the same time, requesting the same type of additional preparation for the department meeting.[65] All three of the other attorneys involved in the meeting agreed to prepare their presentations with the same short notice as given to Complainant.

Accordingly, Complainant has failed to show that she was given disparate treatment or that increased standards were solely implemented against her. Since she has not satisfied that burden, whether any protected activity was a contributing factor will not be addressed.

(e) Termination of Employment

Complainant finally alleges that her protected activity was a contributing factor to ACL's ultimate adverse employment action, termination of employment. ACL contends, however, Complainant was terminated solely for insubordination to Landry.

On July 8, 2008, Complainant was scheduled to travel to Indiana for a department meeting with Landry and the rest of ACL's legal department. She was to fly out of Houston at 10:30 a.m. and arrive at her destination at 1:52 p.m. That morning, at 7:52 a.m., Landry sent Complainant an e-mail requesting her to put a straw man together for contacts issues, check lists and form clauses for the meeting **the following afternoon**.[66] Complainant responded "I never realized this is what you wanted. I wish I knew this sooner." Eight minutes later, Complainant sent another e-mail to Landry that stated, "I am shocked. This is not what we talked about. Im [sic] about to get on a plane and this is what you send me? Should I even come?" Complainant then called Landry to discuss the straw man presentation and subsequently missed her flight to Indiana. That same day, at 12:42 p.m., Landry sent Complainant a "dial-in" number to participate in the meeting, to which Complainant responded at 12:53 p.m., "Is this a joke? If so, I do not find it funny and frankly its [sic] slightly abusive." Landry responded at 1:04 p.m. that it was not a joke, the meetings were not cancelled and she expected Complainant to participate. Since Complainant did not make it to Jeffersonville, she would participate via telephone in the meeting. At 1:20 p.m., Complainant responded in the following manner: "You dont [sic] understand the severity of

[65] RX-118; RX-119; RX-120.
[66] RX-18; see Section IV (4)(d).

this. I'm done with all the way you break all the rules. I cant [sic] respect you." At 1:58 p.m., Complainant sent Landry yet another e-mail telling her she was taking time off because she needed time to think about things. That same day, Complainant testified she received a telephone call from Jaworski and Brooks terminating her employment for insubordination.

Complainant has failed to show any evidence to support any contention that protected activity was a contributing factor in ACL's (or Landry's) decision to terminate her employment. It should be noted that Complainant's alleged protected activity would have occurred between April and May 2008, while her employment was not terminated until July 8, 2008. Further, Landry has specifically stated and has sufficiently shown that Complainant's termination of employment from ACL was the direct result of Complainant's insubordination on July 8, 2008.

Finally, assuming, **arguendo**, Complainant had shown any protected activity to be a contributing factor for any of the adverse employment actions she alleges, ACL has satisfied its burden of rebuttal by showing through **clear and convincing evidence** it would have taken the same adverse employment action regardless of Complainant's engagement in protected activity. Her work was reduced because she requested a reduction. She was administered a drug test because she exhibited signs of being "under the influence" as defined by ACL's drug policy. Landry monitored her after the negative drug test to encourage a greater performance. Finally, Complainant's employment was ultimately terminated because of direct insubordination to senior vice president and general counsel Dawn Landry.

VI. CONCLUSION

Complainant has failed to show that she engaged in any protected activity when she reported ACL's alleged failure to vet vendors and alleged failure to disclose DRD Towing's use of unlicensed pilots on the 10-K form because she did not have an objectively reasonable belief that one or more of the applicable laws under SOX had been violated. Additionally, Complainant has failed to show she engaged in protected activity when she reported ACL's failure to disclose Landry's appointment on its Form 8-K filed with the SEC.

Assuming, **arguendo**, she had engaged in protected activity, Complainant has failed to show any protected activity was a contributing factor to her adverse employment action; even if she had, however, ACL has successfully rebutted such a contention by showing a legitimate business reason for each adverse employment action stated by Complainant.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Respondent did not unlawfully discriminate against Ms. Angelina Zinn because of her alleged protected activity and, accordingly, Angelina Zinn's complaint is **DISMISSED.**

So ORDERED this 5th day of November, 2009, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

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

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