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Issue Date: 19 November 2012

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 The Complainant

STANLEY J. BROWN, ESQ.
ELIZABETH M. BORKIN, ESQ.
For The Respondent

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

DECISION AND ORDER ON REMAND

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 her 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

The undersigned issued a Decision and Order on November 5, 2009, based on 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.

Complainant contended she engaged in protected activity when she reported to her supervisors that Respondent was violating the SOX and committing securities fraud by (i) materially misstating the risks to shareholders by failing 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. Complainant alleged 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 on July 8, 2008.

Respondent contended that the overwhelming evidence of record supported a conclusion that Complainant never raised vendor vetting questions relating to DRD Towing since there was not documentary evidence supporting this claim and no witness, except Complainant, testified that she ever raised problems regarding vetting of vendors. Respondent argued that even if Complainant had raised problems regarding vetting, such conduct would not constitute protected activity under SOX.

Respondent argued the record evidence showed that Complainant was terminated for poor performance, including insubordination. Further, Respondent argued that Complainant pointed 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.

In the November 5, 2009 Decision and Order, I determined that Complainant failed to show that she engaged in any SOX-protected activity, but even assuming she did, she failed to show any alleged protected activity was a contributing factor in any of the adverse employment actions she alleged. I further found that Respondent would have taken the same adverse employment actions regardless of Complainant's alleged protected activity. I, thus, dismissed the complaint.

On March 28, 2012, the Administrative Review Board (herein the ARB or Board) issued a Decision and Order of Remand remanding this matter for reconsideration consistent with its opinion.

In conformity with Sylvester v. Paraxel International, LLC, Case Nos. 2007-SOX-039, 2007-SOX-042 (ARB May 25, 2011), the ARB concluded that Complainant was not required to show a reasonable belief that her complaint was related to fraud against shareholders, securities fraud or an actual violation of a specific law. The undersigned determined Complainant had a subjective belief that the conduct of which she complained constituted a violation of the SOX-related laws. The ARB concluded that I erred in analyzing the evidence of Complainant's objective reasonableness of a violation of pertinent law as it related to "fraud against shareholders," establishment of the various elements of securities fraud or describing an actual violation of law. In analyzing the standard for proving protected activity, the Board noted that it recently clarified in Sylvester that the "definitive and specific" standard presents a potential conflict with the express statutory authority of Section 1514A. Although it is further noted that the undersigned's conclusions on protected activity "did not appear to turn on the ALJ's erroneous use of this incorrect standard, we make note of this error so that it can be corrected on remand."[1]

The ARB also concluded that I used an incorrect standard for determining whether Complainant's protected activity was a contributory factor to her termination by conflating the SOX burden of proof standard with the Title VII burden of proof. On remand, the ARB vacated my findings and directed that the undersigned "re-examine this finding in light of pertinent ARB precedent" and the proper legal standard.

Lastly, the ARB received into evidence the Congressional Staff Report of the United States House of Representatives Subcommittee on Coast Guard and Maritime Transportation of the Committee on Transportation and Infrastructure, which the undersigned rejected at formal hearing, involving "an ACL barge that a DRD tugboat was transporting with an unlicensed pilot." The ARB found the Report material and relevant to Complainant's assertion that DRD had used unlicensed pilots and thus her objective reasonable belief that Respondent's form 10-K may have misrepresented the fact that it was actually using unlicensed personnel "during the time that [Complainant] was employed" and to whether she established protected activity by a preponderance of the evidence. The ARB rejected three stock drafts on ACL stock prices taken

[1] It is noted that to date no federal court has explicitly embraced the ARB's abrogation of the "definitively and specifically" standard in Sylvester. The Fifth Circuit, within whose jurisdiction this case arises, agreed with the ARB's legal conclusion that an employee's complaint must "definitively and specifically relate" to one of the six enumerated categories found in § 1514A. Allen v. Administrative Review Board, 514 F.3d 468 (5th Cir. 2008). Two subsequent district court decisions applied the "definitively and specifically" standard and both found complainant's communications sufficient to satisfy the standard. See Sequeira v. KB Home, 716 F.Supp.2d 539, 550-51 (S.D. Tex. Jan. 12, 2009); Hemphill v. Celanese Corp., 2010 WL 2473845, *5 (N.D. Tex. June 16, 2010). Even after Sylvester, district courts in several U.S. Circuits have continued to require or follow the "definitively and specifically" standard: in the Second Circuit, see Andaya v. Atlas Air, Inc., 2012 WL 1871511 (S.D.N.Y. Apr. 30, 2012)(not reported)(required the employee's complaint to "resemble the allegations of shareholder fraud"); in the Third Circuit, see Wiest v. Lynch, 2011 WL 5572608 (E.D. Pa. Nov. 16, 2011)(not reported); in the Sixth Circuit, see Riddle v. First Tennessee Bank, 2011 WL 4348298, * 6 (M.D. Tenn. Sept. 16, 2011)(not reported); in the Eighth Circuit, see Miller v. Stifel, Nicolaus & Co., Inc., 812 F.Supp.2d 975 (D.Minn. Sept. 20, 2011)(the "definitively and specifically" standard applied in a post-Sylvester unpublished opinion; and in the Ninth Circuit, four unpublished district court opinions issued after Sylvester continued to apply the "definitively and specifically" standard, see Kim v. Boeing Co., 2011 WL 4437086 (W.D. Wash. Sept. 23, 2011); McManus v. McManus Financial Consultants, Inc., 2012 WL 937812 (D.Nev. Mar. 19, 2012); Guitron v. Wells Fargo bank, N.A., 2012 WL 2708517 (N.D.Cal. July 6, 2012); and Nordstrom v. U.S. Bank, N.A., Inc., 2012 WL 3000416 (S.D.Cal. July 23, 2012).

from http://finance.yahoo.com (exhibits 2-4) attached to Complainant's Petition for Review which were not previously submitted at the formal hearing, but for which Complainant may move to reopen the record and seek admission before the undersigned on remand. Complainant did not do so on remand.

The formal record in this matter was received from the Board on June 7, 2012. On June 19, 2012, an Order on Remand was issued allowing the parties to file any new relevant evidence by July 31, 2012, briefs by August 27, 2012 and reply briefs by September 17, 2012.

In summary, the issues presented on remand are:

1. whether Complainant engaged in SOX-protected activity or conduct;

2. whether Complainant's protected activity was a contributing factor in the alleged adverse personnel actions taken against her; and

3. whether Respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action against Complainant absent the protected activity.

A post-hearing brief was received from Complainant on August 27, 2012, and a post-hearing brief was received from Respondent on September 4, 2012. Complainant submitted a reply brief on September 17, 2012, and Respondent submitted a reply brief on September 18, 2012. This Decision and Order On Remand is based upon a full consideration of the entire record.[2]

II. THE NEWLY SUBMITTED EVIDENCE

On August 1, 2012, Respondent submitted an affidavit sworn to by Stanley Brown, an attorney with Hogan Lovells US LLP, on July 31, 2012, an affidavit sworn to by Glenn Goodier, an attorney with Jones, Walker, Waechter, Pointevent, Carrère & Denègre LLP, on July 27, 2012, and an affidavit sworn to by Joshua Newcomer, an attorney with Hogan Lovells US LLP, on July 31, 2012. Excerpts from the April 27, 2009 formal hearing transcript were annexed to the Brown affidavit as Exhibit "A." Three exhibits were annexed to the Goodier affidavit including documents related to a sexual discrimination/retaliation complaint filed by Complainant against her former employer Chamberlain, Hrdlicka, White, Williams & Martin as Exhibit "A," a severance agreement between Complainant and her former employer Vinson & Elkins as Exhibit "B," and reports regarding calls placed by Complainant to the City of West University Place Police Department as Exhibit "C." The sexual discrimination complaint and severance agreement records existed prior to the formal hearing. Four exhibits were annexed to the Newcomer affidavit as Exhibits "A-D," which were related to a misdemeanor prosecution against Complainant on the charge of False Report to a Peace Officer. All of the foregoing documents have been marked for identification as Respondent's Exhibit No. 162 (RX-162), for which the record is re-opened and RX-162 is received into evidence for reasons that follow.

[2] 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-___.

On August 22, 2012, Complainant filed a Motion to Strike the newly submitted evidence. Complainant argues the documents relating to her previous employment were available prior to the closing of the record and should be rejected under 29 C.F.R. § 18.54. Alternatively, she argues the documents relating to her previous employment are not material to any issues in the case. Complainant also contends the evidence related to the pending misdemeanor charges filed against her are irrelevant, immaterial, incompetent or hearsay. In her reply brief, Complainant argues the evidence submitted by Respondent is hearsay and should therefore be rejected.

On September 6, 2012, Respondent filed an answer to Complainant's Motion to Strike. Respondent argues the Brown affidavit should be admitted because Complainant did not object to it. It asserts the evidence which existed prior to the formal hearing was not "readily available" to Respondent prior to August 2011 because Respondent did not have the power to subpoena documents from non-parties under the SOX Act. It contends these exhibits are material to Complainant's credibility because the exhibits indicate Complainant repeatedly failed at her jobs and made serial accusations against her employers. Finally, it argues the documents regarding Complainant's arrest, arraignment and prosecution for making a false police report are relevant and admissible because they are additional evidence that Complainant was a wholly unreliable witness. It contends the police records are not hearsay because they are not submitted to prove the truth of the statements.

29 C.F.R. § 18.54(c) provides in pertinent part: "Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." Administrative Law Judges may issue subpoenas "as authorized by statute or law." 29 C.F.R. § 18.24(a). "Most of the whistleblower statutes the Department administers, including Sarbanes-Oxley, contain no third-party subpoena or investigatory power, foreign or domestic." Walters v. Deutsche Bank AG, Case No. 2008-SOX-70 (ALJ Mar. 23, 2009). Complainant's prior employers were not parties in the instant case. Based upon the foregoing, I find the evidence related to Complainant's prior employment was "not readily available" prior to the closing of the record. Therefore, I have found it proper to reopen the record and receive the newly submitted evidence as RX-162. The evidence presented is material because it further buttresses the lack of credibility of Complainant by contradicting Complainant's formal hearing testimony in many salient areas. Specifically, it shows Complainant filed an EEOC complaint against her former employer, which further degrades her credibility because it contradicts her testimony at the formal hearing that she did not file or threaten to file any claims or complaints.

I find the evidence related to the pending misdemeanor against Complainant is also material to the issue of credibility. However, I am not as impressed with this evidence, and I will place little to no value on such evidence.

Complainant argues that the evidence offered by Respondent should be excluded as hearsay. 29 C.F.R. § 1980.107(d) provides that the formal rules of evidence will **not** apply to

hearings under the SOX, but "rules or principles designed to assure production of the most probative evidence will be applied." "The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious." Id. I find it proper to admit this evidence because it is material and relevant. I note that the documents related to Complainant's former employment likely falls within the business record exception because they were "kept in the course of a regularly conducted business activity." 29 C.F.R. § 18.803(a)(6). I also note that the evidence regarding the pending misdemeanor likely falls within the public records exception because they are "factual findings resulting from an investigation made pursuant to authority granted by law." 29 C.F.R. § 18.803(a)(8).

Finally, I note the ARB determined I erred in excluding the Congressional Staff Report submitted by Complainant during the formal hearing. The Congressional Staff Report was issued by the U.S. House of Representatives Committee on Transportation and Infrastructure on September 15, 2008, on the subject of a July 23, 2008 oil spill in New Orleans, Louisiana, and safety on the inland river system. (CX-124). Having reviewed the Congressional Staff Report, I find the important factual findings to be:

1. On July 23, 2008, a barge being pulled by a tug boat, the *Mel Oliver*, owned by Respondent and under the control of DRD Towing collided with another barge on the Mississippi River near New Orleans, Louisiana. (CX-124, p. 2).

2. The Coast Guard issued a press release indicating representatives from the tug boat reported there were no properly licensed individuals on the vessel at the time of the incident. The crew member piloting the tug boat at the time of the collision had an apprentice license, meaning he was authorized to operate a towing vessel only under the direct supervision of a licensed master. The captain of the tug boat was not aboard the vessel at the time of the collision. (CX-124, p. 4).

3. On July 13, 2008, DRD Towing was operating a towing vessel, the *Ruby E*, which collided with another towing vessel and subsequently sank. DRD Towing was operating the vessel with a crewmember who held only an apprentice mate's license. (CX-124, p. 7).

4. The Coast Guard reported that in 2007 a civil penalty was assessed against DRD Towing when one of its towing vessels was operated by a licensed master who did not have a towing endorsement on his license. (CX-124, p. 7).

5. On July 23, 2008, the Coast Guard visited 12 of DRD Towing's vessels operating in New Orleans, and found that all the vessels were properly manned with adequately licensed personnel. (CX-124, p. 7).

6. The Coast Guard reported that in 2004 DRD Towing was cited for manning a vessel without a properly licensed master. (CX-124, p. 7).

7. No penalties were assessed against Respondent in the three years preceding the Congressional hearing for operating a towing vessel without properly licensed personnel. One such penalty was assessed against DRD Towing. (CX-124, p. 13).

III. CONTENTIONS OF THE PARTIES

Complainant contends she made complaints that Respondent was violating SEC rules and defrauding its shareholders by failing to properly vet its vendors contrary to statements made on its Form 10-K. She also argues she complained that Respondent's refusal to file a SEC Form 8-K announcing the hiring of its general counsel misled shareholders.

Complainant argues she had an objective reasonable belief that Respondent's failure to vet vendors was a violation of Section 1348 and constituted securities fraud under SEC Rule 10b-5. She also contends she had an objective reasonable belief that Respondent's failure to file a Form 8-K was a violation of the SEC Form 8-K Rule, Sections 13 and 15(d) of the Security Exchange Act and Securities Fraud under SEC Rule 10b-5.

Complainant further asserts Respondent subjected her to unfavorable personnel actions in retaliation for her opposition to the misleading Form 10-K and failure to file a Form 8-K. She contends she was effectively demoted when she had work taken away from her. She argues Landry began a campaign of harassment against her, which ultimately culminated in her termination. She contends Respondent improperly subjected her to a drug test. She asserts Landry threatened to "monitor" her after receiving the negative drug test results. Complainant argues Landry singled her out to management, had a meeting with management on how to "deal" with her and decided to subject her to specific and unique performance standards and "monitor" her. She contends she sustained substantial financial losses as a consequence of the unfavorable personnel actions taken against her.

Complainant asserts her protected activity was a contributing factor to the unfavorable personnel actions against her. She argues that she established a temporal proximity between her protected activity and the unfavorable personnel actions. She also claims Landry began a "relentless campaign against [her]" following her protected activity. She contends her termination for insubordination falls within the "doctrine of provoked insubordination and gives rise under the totality of the circumstances to the conclusion that all of the unfavorable actions taken against [her] were due to her protected activity."

Finally, Complainant asserts Respondent failed to meet its burden to prove by clear and convincing evidence that it would have taken the same actions against her in the absence of her protected activity. She asserts Landry claimed to have fired her because of her performance, but Landry did not have an opportunity to observe her performance directly. She contends she is entitled to an inference against Respondent regarding its failure to call Jaworski to testify in contradiction to Complainant's testimony.

Respondent asserts the ARB did not disturb any factual findings made by the undersigned in the November 5, 2009 Decision and Order. Respondent further asserts Complainant was incredible in her hearing testimony. It argues the additional evidence submitted on remand

further undermines Complainant's credibility. It avers Complainant cannot meet her burden of proving any facts for which the sole evidence submitted was her uncorroborated testimony.

Respondent contends Complainant has not met her burden to prove that she made complaints regarding DRD Towing. It asserts no reasonable person with Complainant's knowledge and expertise would have believed Respondent's alleged conduct was illegal. It argues Complainant did not have a subjective, good faith belief that Respondent's conduct violated any of the laws identified in Section 1514A because she did not produce any documentation or credible testimony regarding this issue. It contends Complainant did not make a complaint regarding the Form 8-K issue, and she did not have a subjective belief that Respondent improperly failed to file a Form 8-K.

Respondent also contends Complainant did not have an objective reasonable belief that any violation occurred. It argues this standard requires that the undersigned determine whether someone with Complainant's experience would have believed that a violation occurred. Thus, lawyers should be held to a higher standard than non-lawyers. Respondent contends that anyone with Claimant's level of training and experience should know that the violations alleged would require some misrepresentation of fact that was material. It asserts no one with Complainant's level of experience would reasonably believe that Respondent's 2007 SEC Form 10-K contained omissions, misrepresentations or was illegal because the alleged misrepresentations were accurate, trivial and would not have been considered material. It also argues Complainant did not have an objective belief that Respondent violated the SEC by failing to file a Form 8-K. It asserts Complainant simply made a "general inquiry" as to whether a Form 8-K must be filed.

Respondent asserts Complainant did not meet her burden to prove that it retaliated against her for engaging in protected activity. It argues Complainant did not make a proper complaint regarding the Form 8-K because her e-mail to Ruschman was merely a general inquiry regarding SEC rule compliance. It contends Complainant presented no direct evidence that her alleged protected activities were a contributing factor to any of the alleged adverse personnel actions. It asserts temporal proximity was the only indirect evidence presented, which alone is insufficient to prove by a preponderance of the evidence that the alleged protected activities were a contributing factor to the adverse actions. Finally, Respondent argues that the record clearly and convincingly shows it would have taken the same adverse actions absent the Complainant's alleged protected activity.

In her reply brief, Complainant contends Respondent's reply brief should be stricken because it relies upon the newly submitted evidence. She further asserts that Respondent misrepresents the holding of the ARB by contending that the ARB did not disturb any of the factual findings made in the Decision and Order. Complainant contends she has met her burdens of proof, and Respondent has failed to provide clear and convincing evidence that it would have taken the same actions against Complainant absent her protected activity.

In its reply brief, Respondent contends Complainant's claimed belief that it violated any law is not objectively reasonable given Complainant's experience in securities law. It asserts Complainant could not meet her burden of showing her alleged protected activities contributed to the personnel actions taken against Complainant. Finally, it contends clear and convincing

evidence was presented that it would have made the same employment decisions absent Complainant's alleged protected activities.

IV. DISCUSSION

A. The Statutory Provisions

The whistleblower provisions 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., Case No. 2003-SOX-27 (ARB Sept. 29, 2006). 49 U.S.C. § 42121 governs SOX Section 806 actions. See 18 U.S.C. § 1514A(b)(2)(C). "To prevail on her SOX complaint under that standard, [Complainant] must prove by a preponderance of the evidence that: (1) she engaged in activity or conduct that SOX protects; (2) Respondent took an unfavorable personnel action

against her; and (3) the protected activity was a contributing factor in the adverse personnel action." Zinn v. American Lines Inc., Case No. 10-029 @ 5 (ARB Mar. 28, 2012). If Complainant satisfies her burden of proof, Respondent can avoid liability by demonstrating through **clear and convincing evidence** that it would have taken the same adverse action against her absent the protected activity. Id.

B. The ARB's Decision and Order of Remand

In the instant case, the ARB heavily relied upon its recent decision in Sylvester v Paraxel Int'l LLC, Case Nos. 2007-SOX-39, 2007-SOX-42 (ARB May 25, 2011). The Board noted it analyzed the "requirements necessary for establishing the reasonableness of an employee's belief that the conduct of which he or she complains violates the laws identified under Section 806." Id. @ 8. The Board opined that because Complainant's protected activity involved providing information to her employer, she must demonstrate both a subjective and objective reasonable belief that the conduct she complained of constituted a violation of Section 1514. Id. @ 14. "Subjective reasonableness requires that the employee actually believe the conduct complained of constituted a violation of pertinent law." Id. Objective reasonableness is "evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Id.

The ARB noted that the undersigned found Complainant had established the subjective component of the reasonable belief standard. Therefore, the Board only addressed the objective component. The Board noted the element of fraud is not a necessary component of protected activity under Section 806 of SOX. It also found that Complainant need not establish the elements of securities fraud to prevail on a Section 806 retaliation complaint. Thus, "a complainant can have an objectively reasonable belief of a violation of the laws of Section 806...even if the complainant fails to allege, prove, or approximate specific elements of fraud." Sylvester, supra @ 22. The Board opined that the protected activity need not describe an actual violation of law because conduct is protected if the protected activity was based on a "reasonable, but mistaken, belief" that the employer's conduct constitutes a violation of Section 806.

The ARB also held that the undersigned used an incorrect standard for determining whether Complainant's protected activity was a contributing factor to her termination. It noted that the undersigned conflated the SOX burden of proof standard with the Title VII burden of proof, placing a lesser burden on Respondent and a higher burden on Complainant. It opined Complainant could succeed by "providing either direct or indirect proof of contribution." Bechtel v. Competitive Techs., Inc., Case No. 2005-SOX-33 @ 12 (ARB Mar. 26, 2008). The Board noted close temporal proximity between the protected activity and the adverse action, can provide the causal connection to the alleged retaliation. The Board opined that the Complainant need not show pretext.

Respondent argues the ARB's decision did not disturb the factual findings made in the original Decision and Order. Under the "law of the case" doctrine, both trial and appellate courts are bound by any findings of fact or conclusions of law made by the appellate court in a prior appeal of the case at issue. De Tenorio v. Lightsey, 589 F.2d 911, 917 (5th Cir. 1979).

However, when an appellate court vacates an entire judgment, the lower court's judgment is divested of its binding effect. Johnson v. Board of Education, 457 U.S. 52 (1982). The general vacation of a judgment disturbs the original findings of fact. Falcon v. General Telephone Co., 815 F.2d 317 (5th Cir. 1987). When a judgment is vacated "all is effectually extinguished." Id. at 320 (citing Lebus v. Seafarer's International Union, Etc., 398 F.2d 281 (5th Cir. 1968)). Based on the foregoing, I find the ARB's vacation of the Decision and Order disturbed the original factual findings, and the factual findings must be reconsidered on remand.

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 took an unfavorable personnel action against her; and (3) the protected activity was a contributing factor in the adverse personnel action. See Zinn, supra @ 5 (citing Sylvester, supra @ 9). If Complainant satisfies her burden of proof, Respondent can avoid liability by demonstrating with clear and convincing evidence that it would have taken the same adverse action against Complainant absent her protected activity. Id. (citing Menendez v. Halliburton, Case No. 2007-SOX-5 @ 11 (ARB Sept. 13, 2011).

(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).

The Board in Sylvester noted that the Act does not define "reasonable belief." Sylvester, supra @ 14. However, 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 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." Id. (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).

The subjective component of the "reasonable belief" standard is satisfied where the employee actually believed that the conduct she complained of constituted a violation of the law. Harp v. Charter Communications, 558 F.3d 722, 723 (7th Cir. 2009).

The objective component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Allen v. Administrative Review Board, 514 F.3d 468, 477 (5th Cir. 2008). Under SOX, "a complainant can have an objectively reasonable belief of a violation of the laws in Section 806, i.e., engaging in protected activity under Section 806, even if the complainant fails to allege, prove, or approximate specific elements of fraud." Sylvester, supra @ 22. An employee's activity is protected "where it is based on a reasonable, but mistaken, belief that the employer's conduct constitutes a violation of one of the six enumerated categories of law under Section 806." Id. @ 16. A complainant is not required to actually convey reasonable belief to her employer. Id. @ 15.

Complainant contends she engaged in protected activity by reporting concerns 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) Respondent's Alleged Failure to Vet DRD Personnel / Disclose Use of Unlicensed Personnel

Complainant first contends reporting Respondent'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 avers she was reasonable in her belief that Respondent's conduct violated a rule or regulation of the SEC or a provision of federal law relating to fraud against shareholders. Complainant alleges she contacted Doherty regarding DRD Towing, and he stated he had not vetted the company. She asserts that she then reported the vetting problems to Jaworski. She contends she indicated to Jaworski that Respondent's Form 10-K was misleading because it touted its safety policies without disclosing safety problems.

Complainant notes that Jaworski was present at the formal hearing, but Respondent failed to call him to testify. She argues this should entitle her to an inference that Jaworski would have testified unfavorably to Respondent if he were called to testify. I reject this assertion because Complainant also could have called Jaworski to bolster her otherwise incredible testimony as cataloged in my Original Decision and Order and thus provide credence thereto. Even accepting Complainant's position that an adverse inference should be invoked does not enhance her otherwise baseless complaint which is not documented in the present record. In stark contrast to Complainant's argument that an adverse inference should be invoked for Jaworski's failure to testify is the testimony of Doherty and Torok, with whom she worked, who were called as witnesses by Complainant and who both unequivocally rebuked Complainant's vetting claims.

Respondent contends there is no testimony or evidence corroborating Complainant's assertion that she reported concerns regarding DRD Towing. It asserts there are no records of inadequate vetting during Complainant's employment.

Complainant testified that she made complaints to Jaworski regarding Respondent's failure to properly vet its venders. No evidence presented at the formal hearing indicates Complainant's alleged complaints 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.

Complainant also bears the burden of showing her belief was objectively reasonable. The objective component 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.

Complainant testified that through her work on RCAs she encountered several reports involving DRD Towing, and the use of unlicensed or unskilled pilots. However, it is important to note that CX-121, which contains all RCAs submitted into evidence by Complainant, fails to mention DRD Towing in even one report. Further, Complainant's co-worker, Torok, testified that during the time he and Complainant worked together on RCAs, he never reviewed or drafted a RCA that involved DRD Towing, never had an opportunity to comment on anything DRD Towing has done, and never even saw a case involving DRD Towing. Therefore, I find the RCAs do not provide a basis for Complainant's assertion that her belief was objectively reasonable.

Complainant asserts her concerns were well-founded because on July 23, 2008, a barge owned by Respondent being transported by an unlicensed DRD pilot collided with an oil tanker in New Orleans. She also notes that there were several instances where DRD Towing was manning a boat with improperly licensed crew members. Complainant offered the Congressional Staff Report to corroborate her assertion that DRD Towing's pilots were unlicensed or unskilled. The report indicates that no properly licensed individuals were aboard DRD Towing's vessel during the July 23, 2008 collision. The report also indicates that a crewmember with an apprentice mate's license was operating DRD Towing's vessel during the July 13, 2008 collision. On July 23, 2008, the Coast Guard visited 12 of DRD Towing's vessels operating in New Orleans, and found that all the vessels were properly manned with adequately licensed personnel. In 2007 a civil penalty was assessed against DRD Towing when one of its towing vessels was operated by a licensed master who did not have a towing endorsement on his license. In 2004 DRD Towing was cited for manning a vessel without a properly licensed master.

Complainant's employment at Respondent encompassed the period from November 2007 to July 8, 2008. The Congressional Staff Report does not indicate when in 2007 a civil penalty was assessed against DRD Towing. This is the only incident that could have possibly occurred during Complainant's employment with Respondent. The 2007 incident did not involve an unlicensed pilot. The July 23, 2008 collision occurred after Complainant's termination and clearly could not have established a factual basis for Complainant's objective belief that

Respondent was failing to vet it vendors, particularly DRD Towing, or that its vendors were operating vessels without proper licenses. Therefore, I find the Congressional Staff Report does not provide a basis for Complainant's assertion that her belief was objectively reasonable before her July 8, 2008 termination.

The ARB clearly noted that Complainant need not show that a violation of securities law actually occurred, but she must show that someone with her experience would have believed that a violation occurred. Because Complainant has approximately six years of experience in securities law, such expertise must factor into a determination of whether her professed subjective belief was objectively reasonable. Respondent argues someone with Complainant's level of training and expertise would know that the violations alleged would require some (1) misrepresentation of fact that was (2) material. Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)). In Allen, the Fifth Circuit held that because the complainant was a licensed CPA, the objective reasonableness of her belief must be evaluated from the perspective of an accounting expert. Allen**,** supra at 479. I agree that someone with Complainant's level of experience as an attorney in the area of securities law would know this basic principle. Therefore, I find Complainant must show that a material misrepresentation of fact or omission was made by Respondent on the Form 10-K.

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, and is materially misleading. I disagree. Assuming, that Complainant's assertion that Respondent failed to properly vet its vendors 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 Respondent's vendors are licensed and/or annually vetted as provided by customer contractual agreements. Further, Complainant has failed to show that a failure to vet vendors is material because vetting of vendors is an internal policy not required by the United States Coast Guard. Accordingly, I find Complainant has failed to show that someone with her claimed level of experience would

reasonably believe 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.

The ARB clearly indicated that Complainant is not obligated to prove every element of a securities violation, but she must show that a reasonable person with her knowledge and experience would believe that a violation occurred. Such a belief is inconsistent with the facts discussed above that were known to Complainant and which would have demonstrated to a reasonable person with Complainant's training and experience that a violation of securities law had not occurred.

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

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

On May 13, 2008, at 4:44 a.m., Complainant sent Ruschman an e-mail stating 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.[3] Complainant contacted her former colleague via e-mail at 8:08 a.m. on May 13, 2008.[4] 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. Later that day, Ruschman replied that Respondent's outside counsel told Respondent's CEO Mike Ryan that disclosure of Landry's appointment was not necessary. After Complainant received the e-mail from Ruschman advising that Respondent 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.

In my prior Decision and Order, I found there was nothing in the evidence that indicates Complainant's belief that a violation had occurred was not in good faith. Accordingly, I found Complainant had a reasonable subjective belief that Respondent was in violation of the SEC rules. However, I failed to note that the subjective component of the "reasonable belief" standard requires a showing that the employee actually believed that the conduct she complained of constituted a violation of the law. Zinn, @ 6. The only evidence presented regarding

[3] RX-2.
[4] CX-115.

Complainant's subjective belief was her incredible testimony. The e-mail to Ruschman indicates Complainant was unsure whether a violation occurred, and the fact that Complainant made no further mention of the Form 8-K filing indicates that Complainant may not have actually believed that the conduct she complained of constituted a violation of the law.

Additionally, Complainant's burden to show objective reasonableness of the SEC rules violation is lacking. The ARB clearly noted that Complainant need not show that a violation of securities law actually occurred, but she must show that someone with her experience would have believed that a violation occurred. Because Complainant has approximately six years of experience in securities law such expertise must factor into a determination of whether her professed subjective belief was objectively reasonable. The clear language of Complainant's e-mail to Ruschman indicates she was uncertain as to whether the failure to file an 8-K constituted a violation of the SEC. I find the obvious uncertainty in Complainant's e-mail to Ruschman to be evidence that she did not possess an objectively reasonable belief that Respondent violated SOX. Further, considering the fact that she is a licensed attorney with experience in the field of securities law, Complainant "could have ascertained whether [Respondent's] statements failed to comply with [the SEC rules] and informed her supervisors of this fact, but she did not." Allen, supra at 479. While Complainant is not obligated to prove every element of a securities violation, I find that Complainant has failed to show by a **preponderance of the evidence** that a reasonable person with her knowledge and expertise would have believed that Respondent 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.

Further, 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.

As discussed in my Original Decision and Order, Complainant also communicated with Respondent's CEO Mike Ryan on July 1, 2008, and on the date of her termination, July 8, 2008, following-up on various complaints she had previously discussed with him. In neither communique did Complainant raise any issue or discussion of vendor vetting, unlicensed DRD Towing pilots, failure to file a Form 8-K on Landry's hiring, or any issues relating to securities fraud or shareholder fraud.

Given the foregoing, I find accordingly that Complainant was not engaged in protected activity either in reporting Respondent'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 SEC rule or federal law was violated. Additionally, I find Complainant was not engaged in protected activity when she reported Respondent'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.

(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).

In the instant case, the ARB did not disturb my findings as to whether Complainant complained to an appropriate person, and neither Complainant nor Respondent produced additional evidence with respect to this issue. Therefore, with respect to Respondent's failure to properly vet its vendors, I find based on the reasons discussed in my prior Decision and Order, and re-affirmed here, that had Complainant 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.

With respect to Respondent's failure to file a Form 8-K, I find, given the laxity of the communications between Complainant and her supervisors regarding the disclosure of Landry's appointment on the Form 8-K, 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 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. In the instant case, the ARB did not disturb my findings as to whether Respondent was aware Complainant engaged in protected activity, and neither Complainant nor Respondent produced additional evidence with respect to this issue. Complainant testified that Jaworski indicated he was going to speak to upper management and general counsel about the vetting issue. 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 Respondent take unfavorable personnel actions against Complainant, 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). 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. Bechtel, supra at 10, 12. "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 12 (citing Marano v. Dept. of Justice, 2 F.3d 1137, 1148 (Fed. Cir. 1993)). The complainant must prove that the protected activity was a contributing factor by a preponderance of the evidence, an inference of causation alone is insufficient. Peck v. Safe Air International, Case No. 2001-AIR-3, @ 8-9 (ARB Jan. 30, 2004).

A complainant can succeed by "providing either direct or indirect proof of contribution." Bechtel, supra at 12. "Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence." Bobreski v. J. Givoo Consultants, Inc., Case No. 2008-ERA-3 @ 10 (ARB June 24, 2011). If the evidence as a whole demonstrates that "none of the decision-makers knew about the employee's protected activity" the chain of causation between the protected activity and adverse action is broken. Id.

Temporal proximity is commonly relied upon as indirect evidence. Vannoy v. Celanese Corp., Case No. 2008-SOX-64 @ 14, n.8 (ARB Sept. 28, 2011). Temporal proximity is not always dispositive, but the closer the temporal proximity the greater the causal connection to the alleged retaliation. Robinson v. Northwest Airlines, Inc., Case No. 2003-AIR-22 @ 9 (ARB Nov. 30, 2005). Temporal proximity can establish causation in a whistleblower retaliation case. Id. In the instant case, the ARB noted that temporal proximity of seven to eight months may be sufficient circumstantial evidence to prove that the protected activity contributed to the adverse action. However, the ARB has also noted that the presence of temporal proximity does not compel a finding of causation. Klopfenstein v. PCC Flow Techs. Holdings, Inc., Case No. 2004-SOX-11 @ 7 (ARB Aug. 31, 2009). If an intervening event is the employer's reason for the complainant's discharge the inference of causation created by temporal proximity may be defeated. Id.

"To prevail on a complaint, the employee need not necessarily prove that the employer's reasons for the adverse employment action was pretext." Bechtel, supra @ 13. The circumstantial evidence must be weighed as a whole "to properly gauge the context of the adverse action in question." Bobreski, supra @ 13-14.

Complainant alleges unfavorable personnel actions by ACL, including (1) reduction of work; (2) coerced drug testing; (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.

Complainant argues that she was terminated two months after she questioned Respondent's failure to vet DRD Towing and its failure to file a Form 8-K, which she contends establishes temporal proximity between the alleged protected activities and the unfavorable personnel actions. She asserts she has proven more than temporal proximity between her alleged protected activities and her termination. She argues that prior to making her complaints she was praised for her work, and after making the complaints Landry began a relentless campaign against her with the knowledge and concurrence of Jaworski, Ruschman and Brooks. She asserts that she was subjected to an unwarranted drug test, was singled out for special monitoring following a negative drug test and was scrutinized under special performance standards not imposed on other employees.

It should be noted that Complainant's alleged protected activity would have occurred between April and May 2008, and her employment was terminated on July 8, 2008, with the other personnel actions occurring in the same time period. I find that the temporal proximity of two to three months may be sufficient circumstantial evidence to prove that the protected activities contributed to the adverse actions. However, I find, for the reasons discussed below, this circumstantial evidence fails to establish the requisite element of causation because it is overwhelmed by the direct evidence of legitimate intervening bases for the personnel actions. I further note that the record is devoid of any animus directed toward Complainant because of her alleged protected activity.

(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. To the contrary, 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.[5] The e-mail to Jaworski was sent between one and two months after Complainant reported Respondent'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.[6] Further, on June 28, 2008, Complainant refused to work over the weekend to complete the contract.[7]

[5] RX-4.
[6] RX-12.
[7] RX-11.

Complainant has failed to show any direct evidence to support any contention that protected activity was a contributing factor in Respondent's reduction of her work. Instead Complainant relies on the indirect evidence of temporal proximity. Further, the evidence shows Complainant requested the reduction of work because her productivity was admittedly down and she needed time to herself.

Assuming, **arguendo**, Complainant had engaged in protected activity, I find Complainant's reporting of Respondent's alleged failure to vet vendors, failure to disclose DRD Towing's use of unlicensed personnel, and Respondent'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. Therefore, I find the inference of causation created by temporal proximity does not control because it is overcome by the direct evidence of a legitimate intervening basis for the reduction of work.

(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.

Respondent'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."[8] 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 Respondent'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.[9] Therefore, it is apparent that the test was administered at 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.

[8] RX-95.
[9] RX-10.

Complainant has failed to show any direct evidence to support any contention that protected activity was a contributing factor in Respondent's (or Landry's) decision to conduct a drug test. Instead, Complainant relies on the indirect evidence of temporal proximity. Further, Landry has specifically stated and has sufficiently shown that the drug test was conducted due to Complainant's erratic behavior and slurred speech.

Assuming, **arguendo**, Complainant had engaged in protected activities, I find her alleged protected activities were not contributing factors to the administration of the drug test. Complainant admitted that her speech was slurred, which caused other employees to believe she was on drugs or alcohol. Therefore, I find the inference of causation created by temporal proximity does not control because it is overwhelmed by the preponderance of direct evidence of a legitimate intervening basis for 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 Complainant's dealings with Landry 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 intended to monitor Complainant's performance, in the form of an objective performance plan**,** in an effort to continue to encourage Complainant.

Complainant has failed to show any direct evidence to support any contention that protected activity was a contributing factor in Respondent's (or Landry's) decision to monitor her employment. Instead, Complainant relies on the indirect evidence of temporal proximity. Further, Landry has specifically stated and has sufficiently shown that the objective performance plan was instituted in an effort to encourage Complainant and improve her poor performance.

Assuming, **arguendo**, Complainant had engaged in protected activities, I find her alleged protected activities were not contributing factors to the implementation of the performance plan. Significant evidence was presented showing Complainant's poor work performance and erratic behavior. Therefore, I find the inference of causation created by temporal proximity does not control because it is defeated by the preponderance of direct evidence of a legitimate intervening basis for the monitoring of Complainant's employment.

(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.[10]

Additionally, Respondent 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.[11] 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 administered 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 Respondent's ultimate adverse employment action, termination of employment. Respondent 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 Respondent's legal department. She was to fly from 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 contract issues, check lists and form clauses for the meeting **the following afternoon**.[12] 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 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.

[10] CX-14; RX-18.
[11] RX-118; RX-119; RX-120.
[12] RX-18; see Section IV (4)(d).

Complainant has failed to show any direct evidence to support any contention that protected activity was a contributing factor in Respondent's (or Landry's) decision to terminate her employment. Instead, Complainant relies on the indirect evidence of temporal proximity. Further, Landry has specifically stated and has sufficiently shown that Complainant's termination of employment from Respondent was the direct result of Complainant's insubordination on July 8, 2008.

Assuming, **arguendo**, Complainant had engaged in protected activities, her alleged protected activities were not contributing factors to her termination. Significant evidence was presented showing Complainant's insubordination. Therefore, I find the inference of causation created by temporal proximity does not control because it is overwhelmed by the direct evidence of legitimate intervening basis for Complainant's termination.

Complainant asserts that her termination for insubordination falls within the "doctrine of provoked insubordination" and "gives rise under the totality of the circumstances to the conclusion that all of the unfavorable actions taken against [her] were due to her protected activity." She cites NLRB v. Southwestern Bell Tel. Co., 694 F.2d 974, 978-979 (5th Cir. 1982) in support of this assertion, which held:

> It has long been settled that an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee. See, e.g., NLRB v. Steinerfilm, Inc., 669 F.2d 845, 851-52 (1st Cir.1982)(ordering reinstatement of discharged employee where discharge was result of employee's intemperate reaction to unfair treatment by employer); Florida Medical Center, supra, 576 F.2d at 673 (same); NLRB v. Mueller Brass Co., 501 F.2d 680, 685-86 (5th Cir.1974)(also applying the doctrine of provoked insubordination, and explaining its rationale). In this case, the meeting on the second day-which was held to discipline Leuckan unlawfully for his conduct of the previous morning-clearly provoked the outburst that ostensibly justified the four-hour suspension. The doctrine of provoked insubordination thus applies, rendering the suspension illegal.

Complainant contends Landry yelled at her, called her a liar, falsely stated that she overdosed on Klonopin and called her worthless. I note that Complainant's assertions regarding Landry's conduct are only supported by her incredible testimony, and Complainant failed to provide any additional evidence to support this assertion. Further, the e-mails presented by Respondent clearly indicate Complainant used a hostile tone toward Landry and told Landry she could not respect her. Therefore, I find Complainant's insubordination does not fall within the doctrine of provoked insubordination since I find no evidence that Respondent engaged in unlawful activity and thus did not unlawfully provoke Complainant's insubordination.

While there is a degree of temporal proximity between the alleged protected activities and the adverse actions, there were also significant legitimate intervening bases for each of the personnel actions taken by Respondent, namely the Complainant's insubordination, poor performance and erratic behavior. Because Complainant's insubordination constitutes a legitimate intervening basis for which the preponderance of the evidence is overwhelming, I

conclude the temporal proximity between the Complainant's alleged protected activities and adverse actions does not establish causation supportive of discrimination.

(5) Did Respondent demonstrate with clear and convincing evidence that it would have taken the same adverse action against Complainant absent her protected activity?

Assuming, **arguendo**, Complainant had shown any protected activity to be a contributing factor for any of the adverse employment actions she alleges, Respondent 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 Respondent'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.

V. ORDER

On remand, I find and conclude Complainant has failed to show that she engaged in any protected activity when she reported Respondent's alleged failure to vet vendors and alleged failure to disclose DRD Towing's use of unlicensed pilots on its 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 raised a concern about ACL's failure to disclose Landry's appointment on its Form 8-K filed with the SEC.

Assuming, **arguendo**, Complainant had engaged in protected activity, she has failed to show any protected activity was a contributing factor to the alleged adverse employment actions; even if she had, however, Respondent has successfully rebutted such a contention by showing with clear and convincing evidence that it would have taken the same adverse action against Complainant absent her protected activity. Accordingly, Complainant's complaint is hereby dismissed for the reasons explicated above.

ORDERED this 19th day of November, 2012, at Covington, Louisiana.

Digitally signed by LEE J. ROMERO JR
DN: CN=LEE J. ROMERO JR,
OU=Administrative Law Judge, O=Office of Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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