In the Matter of:

J. SCOTT BECHTEL,	**ARB CASE NO. 09-052**
COMPLAINANT,	**ALJ CASE NO. 2005-SOX-033**
v.	**DATE: September 30, 2011**
COMPETITIVE TECHNOLOGIES, INC.,	
RESPONDENT.	

Appearances:

For the Complainant:
R. Scott Oswald, Esq.; Jason M. Zuckerman, Esq.;[1] ***The Employment Law Group, P.C.;*** **Washington, District of Columbia**

For the Respondent:
Mary E. Pivec, Esq.; ***Keller and Heckman, LLP;*** **Washington, District of Columbia**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge.*** **Judge Brown filed a separate dissenting opinion.**

FINAL DECISION AND ORDER

J. Scott Bechtel filed a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002.[2] Bechtel alleged that Competitive Technologies,

[1] Attorney Zuckerman filed a notice of intent to withdraw as counsel for Bechtel on June 21, 2011. D. Bruce Shine, Esq., Kingsport, Tennessee has replaced him.

[2] 18 U.S.C.A. § 1514A (Thomson/West 2011) (SOX).

Incorporated (CTI),[3] fired him in retaliation for, among other actions, his refusal to sign shareholder disclosure statements. A Department of Labor Administrative Law Judge (ALJ) concluded that CTI had not violated the SOX and dismissed Bechtel's complaint.[4]

Bechtel appealed to the Administrative Review Board (ARB or Board), which remanded the case for the ALJ to correct legal errors (2008 remand order).[5] On remand, the ALJ again concluded that Bechtel had failed to establish that CTI had fired him in violation of the SOX and dismissed his complaint.[6] Bechtel appealed to the ARB. We affirm.

INTRODUCTION

At the outset, it is important to note that the Board expressly limited its 2008 remand order and did not address many of the issues in the ALJ's 2005 decision. In her 2005 decision, the ALJ ultimately found in favor of CTI, but it was difficult to determine whether her ultimate conclusion was correct because she made three legal errors related to the burdens of proof. In reviewing her 2005 decision, the Board expressly noted that its review was "limited to an articulation of the correct burdens of proof in a SOX case, and to discussion of the manner in which the ALJ failed to apply those burdens. . . ."[7] The Board stated that its recitation of the factual background in its 2008 remand order was "solely for background purposes." Nowhere did the Board expressly or implicitly adopt or affirm any findings of fact or conclusions of law. The Board made it clear that it did not know whether the outcome would change or not.[8]

In the end, the ALJ was required to issue a decision that applied the legal principles consistent with the Board's decision and fully set forth her findings of fact, conclusions of law, and the reasons and basis for her conclusions. Unfortunately, the

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[3] We note that Competitive Technologies, Incorporated used "CTI" to abbreviate its name in its response brief, the reason being self-evident. Yet, Bechtel and the ALJ used "CTT" frequently in referring to the Respondent. We will use the Respondent's abbreviation.

[4] *Bechtel v. Competitive Techs., Inc.*, ALJ No. 2005-SOX-033 (ALJ Oct. 5, 2005) (2005 decision).

[5] *Bechtel v. Competitive Techs., Inc.*, ARB No. 06-010, ALJ No. 2005-SOX-033 (ARB Mar. 26, 2008) (2008 ARB remand).

[6] *Bechtel v. Competitive Techs., Inc.*, ALJ No. 2005-SOX-033 (ALJ Jan. 20, 2009) (2009 remand decision).

[7] *Bechtel*, ARB No. 06-010, slip op. at 3.

[8] *Id.*, slip op. at 5.

ALJ erroneously assumed that the Board had affirmed portions of her first decision. Consequently, she issued a new decision that is not easily deciphered. As explained below, we believe that the ALJ considered all of the evidence, both direct and circumstantial, that the parties offered and found that Bechtel did not establish by a preponderance of the evidence that his protected activity was a contributing factor to any adverse action by the Respondent. We affirm that decision.

BACKGROUND

Bechtel joined CTI in February 2001 as vice president of technology commercialization.[9] His job was to assist inventors and patent owners to manufacture and market their products and technologies.[10] For example, Bechtel developed a business plan to market the Aerielle Bug[11] after the inventor assigned his patents to CTI in exchange for royalties.[12] To carry out his duties, Bechtel attended consumer electronics shows, sought out prospective licensees, and convinced inventors to assign their patents and licenses to CTI.[13]

Additionally, Bechtel's first assignment was to conduct the due diligence research necessary to help CTI evaluate the acquisition of a competitor, Arthur D. Little. Bechtel developed a business plan for that company, and also oversaw the progress of a start-up-company, Digital, in which CTI had invested resources.[14] CTI paid Bechtel $125,000.00 a year along with stock options, relocation expenses, health insurance, an incentive bonus, and other benefits.[15]

In mid-June 2002, John Nano took over as CTI's president and chief executive officer (CEO). Nano immediately changed its marketing direction because CTI had shown a net operating loss for the past two years.[16] He testified that he advised CTI

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9 Respondent's Exhibit (RX) 3, Hearing Transcript (TR) at 95.

10 TR at 95-96.

11 This is a wireless transmitter of music.

12 RX 8.

13 TR at 97-101.

14 TR at 108-109.

15 RX 3, TR at 105.

16 CTI reported net losses of $2.5 million for fiscal year ending July 31, 2003, $4 million for fiscal year ending July 31, 2002, and $1.9 million for fiscal year ending July 31, 2001. RX 123.

employees that certain business models, such as investing in other companies, were not effective. Instead, he proposed that CTI focus primarily on licensing patents, identifying market needs, and finding technologies that would match those initiatives.[17]

Nano testified that his goal was to reduce overhead and generate immediate rather than long-range revenue for the company. He stated that CTI wanted him to save the company from bankruptcy because it had lost $4 million in revenue the previous year.[18] Nano added that he constantly preached "revenue, revenue, revenue" to Bechtel and the marketing vice president, Wil Jacques.[19]

In August 2002, during a trip to New York to meet with a Japanese company's representatives, Bechtel and Nano argued about his proposal to change the employee incentive compensation plan by eliminating the old bonus system. Nano explained that the old plan was based on a share of the profits, and CTI was losing money at the time, so the plan was a negative rather than a motivating factor for the employees. Nano wanted to reward individuals based on their ability to bring in new business and garner immediate net revenues for the company.[20] Bechtel testified that Nano told him that "he knew how to work the numbers so we would never see a penny of that [bonus] money," but Nano denied this statement and pointed out that the Board of Directors would decide on bonuses.[21]

Nonetheless, CTI rewarded Bechtel for his job performance. Nano authorized a $10,000.00 bonus for all employees and commented to Bechtel, "Great job on project management of the Aerielle opportunity."[22] Nano also recognized Bechtel's achievement with a slide presentation at the annual shareholders meeting, and congratulated him for obtaining a license from Fujikon. CTI awarded Bechtel about $800.00 worth of stock placed in his retirement account.[23]

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17 TR at 114, 883-84.

18 *See* RX 100, TR at 778-80.

19 RX 13, 15.

20 RX 117, TR at 781-86.

21 TR at 165-166, 786.

22 Complainant's Exhibit (CX) 12, RX 43. Nano's bonus letter to employees emphasized that CTI's past financial results were "clearly unacceptable," but despite "the unfavorable results," the Board of Directors had authorized bonuses as an incentive to employees to focus on the strategic business plan and generate profitable revenue growth.

23 CX 19, RX 11; TR at 117-20.

In October 2002, Bechtel testified that he had a suspicion that a CTI director had learned of the outcome of its LabCorp litigation from the deciding judge's chambers before the decision was officially issued. On October 18, the same day he retrieved from the trash a draft press release announcing that CTI had won the lawsuit, he overheard Nano saying on the telephone, "how can I buy 10,000 shares without . . .." [24] Bechtel thought that Nano might have engaged in insider trading because 12,500 shares of CTI stock were traded that day.[25]

Bechtel discussed his concerns with general counsel Paul Levitsky, who advised him that Nano usually drafted press releases in advance. Bechtel testified that he felt threatened by his exchange with Levitsky after he remarked: "You're right. You can't be fired for Sarbanes-Oxley but we can find another, or there can be another reason to fire you . . . ."[26] Bechtel testified that Nano told him "that he learned about it [the judge's dismissal of post-trial motions] the same time as everyone else did, and that would have been when the clerical staff interrupted our meeting [of November 21, 2002], our management meeting, and brought in the news . . . that said we won."[27] Bechtel admitted that he knew that CTI had received news of a favorable verdict in November 2001, a year earlier, and that the defendants had filed post-trial motions.[28]

In early December 2002, following passage of the SOX, CTI asked Bechtel and others to participate on a committee that would review CTI's financial transactions and make recommendations on what was required to be disclosed to shareholders under the new SOX regulations. At the first committee meeting on December 9, 2002, Bechtel expressed concerns about issues that he believed needed to be disclosed. These included certain oral agreements involving a licensee's commission, the threat of litigation from a client, and CTI's intent to replace its incentive compensation plan[29] and to limit litigation to enforce patents.[30] The six-member committee decided that Bechtel's issues did not

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[24] RX 5, TR at 193-98.

[25] Bechtel testified that this volume was unusual, but from September 12 through December 13, 2002, share volume topped that figure on nine days, with a high of 75,000 shares on November 25. RX 36.

[26] TR at 209, 796.

[27] TR at 204-205, 799-802, RX 12, 102.

[28] RX 5, TR at 356-67, 792.

[29] The Board of Directors did not approve the new incentive plan until March 28, 2003. CX 53, RX 106.

[30] CX 28, TR at 130.

need to be disclosed, and Bechtel refused to sign the disclosure forms, despite some pressure from other committee members.[31]

Bechtel testified that he felt that the issues had not been properly addressed and that another committee member, Frank McPike, insisted that he should sign the form. Bechtel recalled that McPike told him he had to sign because he was a company officer and he responded, "or what? I'm fired?"[32]

Because of his concerns, Bechtel sought the advice of CTI's counsel about his potential liability for signing a document that he believed had errors and omissions and about whether the company's liability insurance covered him. In response to Bechtel's concerns, Nano clarified that Bechtel was not an officer of the company and would therefore not be liable. Bechtel testified that Nano told him, "is this what you want? You are a good employee. I would hate to lose you."[33]

On March 13, 2003, Bechtel participated in a second disclosure committee meeting after Levitsky informed him that CTI needed his input. Bechtel spent some time looking for disclosure risks in CTI's financial documents and again raised concerns. These included the previous general counsel's departure and potential lawsuit against CTI, disclosure of CTI's oral agreements and the changes to the incentive compensation plan, and the correct amount of the withdrawal of proceeds from a venture capital firm.[34]

The next day, Bechtel discussed his concerns with Nano for two hours and told him he was thinking of reporting the October trading incident to the SEC (Securities and Exchange Commission). Bechtel testified that Nano responded, "the second you go that route, . . . you're out of here immediately." Bechtel testified that he told Nano that such action would be illegal termination, but Nano denied the entire exchange. Bechtel acknowledged that Nano convinced him, after a long discussion about trust, to let the trading incident go and move forward. After Bechtel aired his other concerns, he signed the disclosure form.[35]

Bechtel recalled that after the March meeting, Nano became more critical of his progress in developing the Carlson technologies – an emergency warning brake light and a rollover mirror – and obtaining revenues out of it. Bechtel testified that Nano was more

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31 RX 61, RX 103; TR at 500, 660.

32 TR at 152-53, 377-78.

33 CX 35, 160; TR at 158-60, 428-29.

34 TR at 220-23.

35 TR at 216-18, 383-89, 828-29.

demanding at the weekly staff meetings, and there was a general air of hostility and tension.[36]

CTI continued to show cash shortages and garnered few significant new revenue sources. Nano emphasized revenue production at the weekly staff meetings.[37] Bechtel admitted that the Aerielle bug project did not produce any new income in 2002 despite CTI's agreement with a manufacturer to provide the product for a trade show in Las Vegas in 2003.[38] Bechtel also testified that he was unable to license the Carlson technologies as planned after CTI had paid $50,000.00 for the rights.[39] Nano testified that Bechtel also failed to generate income from the Rufalo mussel technology and the Bobby Kim box technology.[40]

In May 2003, CTI developed a presentation for a Korean enterprise, KTTC, to sell that business on developing and commercializing CTI's technologies. Bechtel advised Nano that CTI did not have the rights to represent all of the technologies that it had marketed to KTTC, but CTI sent Bechtel to Korea to try to attract the business.[41]

In late May 2003, the Board of Directors learned that CTI had lost $1.2 million over the past six months, despite Nano's efforts to raise operating funds.[42] Nano stated that CTI was close to bankruptcy and estimated that CTI would run out of cash within five months if the status quo continued. He proposed three options to try and keep the company alive for about 12 months or until the U.S. Supreme Court ruled on the Materna litigation, from which CTI would gain substantial revenue.[43] The directors approved Nano's plan to cut operating expenses by about $100,000.00 a month through personnel discharges and payroll savings. Nano told the directors that Bechtel should be discharged because of his "extremely limited" contribution to CTI's bottom line.[44]

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36 TR at 228-29.

37 RX 68-69.

38 RX 8, 14, 16, 20, 72; TR at 334-41, 803-08.

39 TR at 352-56, 425, 808-09.

40 TR at 810-12, 838-39.

41 TR at 234-236.

42 TR at 859.

43 RX 9, 108-11; TR at 886-88.

44 TR at 830-34.

In mid-June 2003, the SEC issued a Wells notice[45] to CTI, "a serious black mark" on the company's credibility.[46] Nano testified that the notice dried up the capital he had hoped to obtain to maintain CTI's cash flow and prompted him to implement the discharge of three employees, including Bechtel. CTI also sold at a discount some of the expected monetary proceeds from the Materna litigation that had been ongoing for 11 years but had not yet been resolved.[47]

On June 30, 2003, at the weekly status meeting, Nano expressed his displeasure about the lack of revenue and chastised Bechtel and others for failing to produce badly needed income.[48] Later that day, Nano fired Bechtel and another vice president and placed another officer on unpaid leave because CTI "was in severe financial difficulty" and had to "reduce costs . . . to survive." Nano testified that Bechtel accused him of SEC violations, stated that CTI was "a walking dead company," and refused one month's severance pay.

JURISDICTION

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX.[49] The ARB reviews the ALJ's factual determinations under the substantial evidence standard.[50] The ARB reviews the ALJ's conclusions of law de novo.[51]

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[45] The SEC issues this notice when it intends to bring a civil injunctive action against a company's client for alleged violation of stock trading statutes, including maintaining sufficient assets to remain trading as a public company. The notice permits the client to explain why the SEC action should not be brought. RX 22A.

[46] TR at 390.

[47] TR at 834-35.

[48] CX 83.

[49] *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). 29 C.F.R. §1980.110(a).

[50] *See* 29 C.F.R. § 1980.110(b).

[51] *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

DISCUSSION

The employee protection provision of the SOX generally prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to categories listed in the SOX whistleblower statute. More specifically, the provision states:

> (a) Whistleblower Protection For Employees Of Publicly Traded Companies.— No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(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—
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> (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—
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> (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); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange

> Commission, or any provision of Federal law relating to fraud against shareholders.[52]

Specifically, section 806 of the SOX protects employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission[53] or any provision of federal law relating to fraud against shareholders.[54] In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such alleged violation.[55]

SOX complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.[56] To prevail, pursuant to the statute, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable action.[57]

Procedural history

Bechtel filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) on September 23, 2003.[58] After investigating, OSHA found that

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[52] 18 U.S.C.A. § 1514A. On July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010), which amended the SOX whistleblower law in a manner which does not impact the outcome of this case.

[53] *See, e.g.*, 17 C.F.R. Part 210, Form and Content of the Requirements for Financial Statements.

[54] *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020, -036, slip op. at 14 (ARB June 2, 2006).

[55] 68 Fed. Reg. 31864 (May 28, 2003).

[56] 49 U.S.C.A. § 42121 (Thomson/West 2007) (AIR 21). 18 U.S.C.A. § 1514A(b)(2)(C).

[57] *Getman*, ARB No. 04-059, slip op. at 7. *See Peck v. Safe Air Int'l, Inc*., ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

[58] RX 25.

CTI had violated the SOX in firing Bechtel and ordered his reinstatement.[59] Bechtel and CTI requested a hearing, which the ALJ conducted on May 17-20, 2005, in New Haven, Connecticut. The ALJ ruled in CTI's favor and dismissed Bechtel's complaint (the 2005 decision). Bechtel appealed to the ARB, which vacated the decision and remanded the case for further proceedings because of certain legal errors.

In deciding the first appeal (the 2008 ARB decision), the ARB set forth the correct burdens of proof in a SOX case and then limited its review to the manner in which the ALJ failed to apply those burdens. The ARB based its remand for further proceedings on three errors the ALJ committed. First, the ALJ substituted an inference of discrimination for Bechtel's burden to prove "contributing factor" by a preponderance of the evidence.[60] Second, the ALJ required CTI to prove by clear and convincing evidence that it had legitimate, non-discriminatory reasons for firing Bechtel.[61] Third, the ALJ analyzed CTI's affirmative defense before she conclusively determined whether Bechtel proved his case by a preponderance of the evidence. In remanding the case, the ARB did not address the merits of the ALJ's factual findings or her conclusion that CTI proved by clear and convincing evidence that it would have fired Bechtel absent his protected activity.[62]

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[59] RX 27, *see* RX 28

[60] In her 2005 decision, the ALJ incorrectly explained that it was the complainant's burden to "raise an inference that protected activity was likely a contributing factor in the unfavorable action." 2005 decision, slip op. at 26. The ALJ used similar language later in her opinion when she stated that the Complainant's vocalized objections and concerns were sufficient to establish the "inference of a causal nexus." *Id*. at 37. Contrary to Bechtel's argument, these statements fall short of a finding that the ALJ ultimately accepted the inference as a proven fact. *Cf. Brune v. Horizon Air Indus.*, ARB No. 04-37, ALJ No. 2002-AIR-008, slip op. at 14-15 (ARB Jan. 31, 2006) (the ALJ created similar confusion by speaking only in terms of an inference and "initial burden" rather than conclusively finding whether causation was or was not proven). Bechtel incorrectly reasons that the ALJ changed her mind when she rejected this inference in her 2009 remand; she never expressly ruled that she accepted the inference as proof. Complainant's Brief at 5.

[61] In pointing out the ALJ's error in analyzing CTI's proffered business reasons for firing Bechtel, the Board did not hold that CTI's reasons were irrelevant in determining causation. *Cf. Brune*, ARB No. 04-37, slip op. at 14 (the ALJ may consider the legitimacy of the respondent's proffered reasons to determine whether protected activity was a contributing factor). *See also Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011) (circumstantial evidence related to the issue of causation includes a wide variety of evidence, including shifting explanations, pretext evidence, and temporal proximity).

[62] *Bechtel*, ARB No. 06-010, slip op. at 5-7. On remand, the ALJ erroneously concluded that the ARB found no merit in Bechtel's stated grounds for appeal and upheld her factual findings as supported by the record and her conclusions regarding Bechtel's allegations of post-discharge blacklisting, insider trading, and hostile work environment.

On remand, the ALJ again concluded that Bechtel failed to establish that his protected activity contributed to CTI's termination of his employment and she dismissed his complaint (2009 remand decision). Bechtel's appeal is now before us.

Protected activity, knowledge, adverse action

In Bechtel's initial appeal to the ARB, CTI did not challenge the ALJ's conclusion that Bechtel engaged in protected activity when he refused to sign SEC disclosure reports in December 2002 and March 2003 and complained that the new employee compensation plan, oral agreements with companies, and potential litigation over patents needed to be disclosed in reports to shareholders; that CTI knew of Bechtel's protected activity; or that its firing of Bechtel in June 2003 was an adverse action.[63] Nor does CTI challenge the ALJ's conclusions in this regard in the present appeal. Therefore, we do not address these issues.[64]

Bechtel's protected activity was not a contributing factor to his discharge

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."[65] The contributing factor standard was "intended to overrule existing case law, which required that a complainant prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor" in a personnel action.[66] Therefore, a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected" activity.[67] The ability to prove causation through either direct

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2009 remand decision at 3-4. As we have stated, the ARB limited its review to legal error and did not affirm any findings of fact or conclusions of law. *See* discussion, *infra*.

63 2005 decision at 32-36, 2009 remand decision at 7-8.

64 *Hall v. United States Army*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 6 (ARB Dec. 30, 2004).

65 *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Clark v. Airborne, Inc.*, ARB No. 08-133, ALJ No. 2005-AIR 027, slip op. at 7 (ARB Sept. 30, 2010).

66 *Allen v. Stewart Enter., Inc*., ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062; slip op. at 17 (ARB July 27, 2006).

67 *Walker v. Am. Airlines, Inc*., ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007).

or circumstantial evidence has not changed.[68] Thus, if a complainant shows that an employer's reasons for its action are pretext, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor.

Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, shifting explanations for an employer's actions, and more.[69] As Judge Posner stated, discrimination can be proved "by assembling a number of pieces of evidence none meaningful in itself, consistent with . . . statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction."[70]

On appeal, Bechtel argues that the ALJ applied the wrong standard of causation under the SOX by requiring the complainant to prove that his employer's reasons for discharge were pretext.[71] We agree that a complainant is not required to prove pretext as the only means of establishing the causation element of a SOX whistleblower claim. As the ARB has stated, to prevail on a complaint, the employee need not necessarily prove that the employer's reason for the adverse action was pretext. However, doing so provides the complainant with circumstantial evidence of the mindset of the employer, which may be sufficient to establish by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse employment decision.[72]

In her 2009 remand decision,[73] the ALJ correctly stated that Bechtel must prove by a preponderance of the evidence that his protected activity was a contributing factor in CTI's decision to fire him. She then found "no nexus" between Bechtel's protected

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[68] *See, e.g., Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031 (ARB Sept. 30, 2003). As the amicus curiae brief of the National Whistleblowers Center points out, most cases of employer retaliation against whistleblowers lack a "smoking gun:" the result is that employees usually have only circumstantial evidence and inferences drawn from such evidence to prove their cases. Brief at 10-11.

[69] *Sylvester v. Parexel Int'l. LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 27 (ARB May 25, 2011).

[70] *Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006).

[71] Complainant's Brief at 3-5.

[72] *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 19 (ARB May 31, 2006).

[73] On remand the ALJ incorporated from her 2005 decision the parties' stipulations to jurisdiction and timeliness of the complaint, summaries of the testimony of the witnesses, and the documentary evidence. 2009 remand decision at 4.

activity and his firing and therefore concluded that Bechtel failed to prove by a preponderance of the evidence that any of his protected activity contributed to CTI's decision to fire him.[74] In addition to referring back to her 2005 decision, the ALJ also provided reasons and bases in her 2009 remand decision.[75] The ALJ based her conclusion primarily on the substantial evidence related to CTI's poor financial condition.[76] She also relied on several other facts: (1) despite Bechtel's efforts to insulate himself from disclosure meetings and reports, CTI continued to require him to participate; (2) Bechtel's concerns about SEC disclosure requirements covered several months, but resulted in no adverse consequences during those months; (3) despite Bechtel's complaints that CTI had no right to represent certain technologies, CTI funded these developments and sent him to Korea in June 2003 to promote the projects; (4) Bechtel felt threatened by a company attorney in December 2002 when he refused to sign a disclosure statement, but the attorney was not on the company payroll when Bechtel

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[74] *Id.* at 6, 9. Despite a few passing references to the "clear and convincing" standard for an affirmative defense, the 2009 remand decision addressed only whether Bechtel established by a preponderance of the evidence that his protected activity was a contributing factor to CTI's termination of his employment. In her "Analysis," the ALJ first discussed "protected activity" and "adverse action," essential elements of Bechtel's claims. 2005 remand decision at 7-8. This was followed by a discussion of CTI's proffered "legitimate business reasons" for firing Bechtel, an appropriate issue to analyze in deciding the essential element of causation. 2005 remand decision at 8-9. In her final subsection, the ALJ examined whether Bechtel's protected activity was a "contributing factor" in CTI's adverse action. 2005 remand decision at 9-14. These preceding sections relate to elements that Bechtel needed to establish to prevail on his complaint. As we previously stated, ultimately the ALJ found "no nexus" between Bechtel's protected activity and his discharge. 2005 remand decision at 10. We agree with the Respondent that, in her "Analysis," the ALJ did not discuss or refer to the "clear and convincing" standard related to the affirmative defense. *See* Respondent's Brief at 22. Consequently, in winding down her opinion, the ALJ's stray statement that "Respondent would have terminated Complainant's employment regardless of his protected activity" was a legally deficient finding on the issue of the Respondent's affirmative defense as well as superfluous, given her finding of no causation.

[75] The ALJ's relation back to the 2005 decision is somewhat troubling given that she made fundamental legal errors in that decision and that the ARB did not rule on anything else beyond the three legal errors discussed in the 2008 ARB decision. In addition, the 2005 decision did not clearly analyze the essential issues of causation and affirmative defenses. Nevertheless, standing alone, we believe that the 2009 ALJ Decision sufficiently explained that Bechtel failed to meet his burden of proof on the issue of causation. Although not with the same detail, the ALJ directly or indirectly discussed virtually all of the same evidence as in the 2005 decision.

[76] *See, e.g.*, 2009 remand decision at 11 (the ALJ found that the evidence was "clear" that the decision to discharge the Complainant was made in "direct reaction" to the "potential for bankruptcy" and the Board of Directors' vote on cost-cutting measures, among other reasons).

was fired; and (5) Bechtel's conversation with another employee about allegations of insider trading by Nano was not considered when CTI fired Bechtel six months later. In sum, the ALJ determined that Bechtel's perceptions of CTI's actions did not show discriminatory animus because CTI continued to assign him work, authorized him to represent the company, and expected him to review SEC disclosures.[77]

Substantial evidence supports the ALJ's findings of fact that underlie her legal conclusion that Bechtel failed to establish that his protected activity contributed to the end of his employment.[78] First, the ALJ found no temporal proximity between Bechtel's protected activities through March 2003 and his discharge in June 2003. This is a debatable point but substantial evidence supports the ALJ's findings. As noted above, CTI faced many challenges and difficulties in 2002 and 2003 that make temporal proximity a weak basis to establish or even infer causation, including insufficient operating income, the threat of de-listing, and possible bankruptcy.

The attorney who pressured Bechtel to sign the disclosure statements in December 2002 left CTI shortly afterwards, and Nano told Bechtel then that he was a "good employee. I would hate to lose you." Bechtel's allegations and conversations about Nano's insider trading proved groundless; a summary of stock transactions from October through mid-2003 shows nine daily occurrences of more than 10,000 trades. At the March 2003 meeting, Nano did not object to Bechtel's disclosure concerns and Bechtel did not record these concerns as the SEC form provided.

Second, substantial evidence supports her finding that CTI's financial condition and revenue problems concerns were the reasons for discharging Bechtel, not his protected activity. It is undisputed that CTI had been losing money for several years.[79] When CTI's audit committee met on September 9, 2002, the chief financial officer noted that if CTI reported another loss on July 31, 2003, the end of its fiscal year, the company

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77 *Id*. at 10.

78 As previously stated, we reject Bechtel's argument that the ALJ initially found causation to be established and thus her later ruling to the contrary is not supported by substantial evidence. Complainant's Brief at 5-20. In her 2005 decision, the ALJ found only that the evidence – Nano's expression of admiration for loyalty, his denial of conversations about serious accusations involving insider trading, and his hiring of consultants two months after Bechtel's discharge – was "sufficient to establish the inference of a causal nexus." 2005 decision at 36-37. The ALJ did not conclude that Bechtel proved protected activity to be a contributing factor. Rather, she found "no nexus" between his discharge and (1) a threat from CTI's attorney in December 2002 over his refusal to sign the disclosure statement, (2) a conversation with Levitsky concerning the possibility of being fired, and (3) and a threat by Nano that he would be fired if he reported the alleged insider trading. *Id*. at 37. In her remand decision, the ALJ found that none of Bechtel's protected activities contributed to the termination of his employment. 2009 remand decision at 10.

79 *See* n.16.

would fall below the $4 million shareholder interest required and would thus trigger AMEX procedures for being delisted.[80]

Subsequently, CTI's controller, Jeanne Wendschuh, prepared cash flow projections and plans to reduce costs, which involved the discharge of some employees, including Nano, extension of timeframes for accounts payable, and negotiations for a reduction in rent. Wendschuh testified that CTI's projected expenses were "nearing $6 million annually and the company needed $4.5 million of revenue just to break even."[81]

At a meeting of the board of directors on March 28, 2003, the chief financial officer reported that CTI had lost $1.2 million in the previous six months, which was less than expected, but still showed no increase in revenue. Nano testified that he raised about $600,000 by selling a portion of the Materna litigation award at a discount, but was unsuccessful in obtaining funds through debt or equity financing.[82] By the end of May, Nano testified that CTI "was months away from bankruptcy." At the May 28, 2003 board meeting, Nano proposed three options to save the company. First, CTI would run out of money in eight months if it maintained the status quo. Second, CTI could "get rid of almost all the people in the company" including "letting myself go . . ." and basically "mothball" the company.[83] Third, CTI could stay alive until the rest of the $6 million award from the Materna litigation was realized by cutting operating expenses of about $100,000.00 a month through payroll reductions and the elimination of bonuses.[84] Nano recommended the third option, and the directors agreed.[85]

Finally, it is undisputed that Nano changed CTI's business strategy when he became president in June 2002 because CTI had posted net revenue losses for the previous three years. Bechtel testified that Nano continually urged him and all employees to "focus primarily on licensing patents, finding technologies, identifying market needs," and matching technologies that would meet those needs.[86] While Bechtel

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80 RX 99.

81 TR at 683-85, 691-92.

82 RX 128, TR at 815-17.

83 TR at 829-31.

84 CX 76, RX 109; TR at 830-32, 859-60.

85 In its Form 10-K submitted to the SEC on October 29, 2003, CTI reported its "substantial operating and net losses in the three years ending July 31, 2003" and advised that, while it had "taken certain steps to reduce ongoing cash operating expenses," including staff reductions, it likely would not continue as a going concern unless its plan to generate sufficient cash to sustain its operation at least into fiscal 2005 was successful. RX 70 at 44.

86 TR at 114.

agreed that securing licenses was "a viable way to make money," his testimony at the hearing and statements during his exit interview show that he disagreed with Nano's emphasis on producing short-term revenue.

Bechtel admitted that he persuaded Nano to invest $50,000.00 in purchasing the rights to a Carlson brake technology but testified that despite an early performance incentive in the contract, he did not promise or guarantee Nano that revenues would be realized within nine months.[87] Bechtel also admitted that he had told the board of directors in September 2002 that the Aerielle bug technology would generate the highest net present value in the company's history in the near term and promised that the Aerielle products would be selling in the stores by Christmas. But there were problems getting the product to market, and the product realized only about $15,274.92 in retained earnings in fiscal 2003. CTI gave up the product in 2004 because receipts did not offset expenses.[88]

CTI's financial records showed that during Bechtel's employment from February 26, 2001, through June 30, 2003, he was paid a total of $449,613.58 in compensation, benefits, and travel expenses. However, three of the four clients he handled during that time produced no revenues for the company, despite requiring more than $100,000.00 in direct expenses.[89]

At his exit interview, Bechtel argued with Nano about how he "trashed" the old guard when he took over and threatened to fire Bechtel for not signing off on SEC disclosure forms. Nano told Bechtel that his discharge had nothing to do with Sarbanes-Oxley and everything to do with the fact that he and others had not produced revenues and that CTI did not have the operating income to support the staff that it had. Bechtel claimed that he had produced, but Nano responded not "more than your cost." Nano informed Bechtel that CTI had "just run out of options" and needed to reduce staff and costs.[90]

While Bechtel was not required to prove pretext to prevail on his complaint,[91] his failure to convince the ALJ of pretext negated a substantial portion of his circumstantial evidence regarding the issue of causation. Bechtel's pretext evidence comprised a

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87 CX 158 at 153-57.

88 RX 70, TR at 802-07, 894-95.

89 RX 72.

90 RX 22 at 1-14.

91 The ALJ's error was harmless because the ALJ did consider all of Bechtel's evidence and rejected his circumstantial evidence as unpersuasive for reasons that were supported by substantial evidence.

substantial portion of his evidence and consisted of suggestions that Nano's explanations for ending Bechtel's employment were false, shifting, and contradictory.[92] The ALJ considered and rejected these inferences in light of the ample evidence of the financial and regulatory difficulties facing CTI in 2002 and 2003.[93]

In addition, while disputing their significance, Bechtel in fact corroborated the existence of some of these difficulties. For example, Bechtel pointed out that the minutes of an audit committee meeting forecast the possibility of CTI being "out of cash in January 2004." This evidence certainly confirms that CTI faced financial difficulties well before Bechtel was discharged. Arguably, the company could have filed for bankruptcy protection before it was "out of cash." Bechtel also conceded that CTI faced a de-listing threat, received the Wells notice from the SEC, and sold its Materna litigation proceeds at a discounted rate to raise revenues.[94]

While Bechtel's circumstantial evidence of animus and temporal proximity are noteworthy, substantial evidence supports the ALJ's rejection of Bechtel's assertions as sufficient to establish a violation of SOX's whistleblower provision. Bechtel's own admissions demonstrate that his relationship with Nano had rocky moments as early as August 2002, when the two argued about Nano's proposed changes to the incentive program, which was well before Bechtel's first protected activity occurred in December.[95] The evidence of temporal proximity spans several months, a time period during which Nano and CTI faced the many difficulties already discussed; therefore, inferences of pretext on the part of Nano cannot be as clearly drawn without more.

As the ARB stated in *Henrich v. Ecolab, Inc.*, "a party cannot prevail on appeal simply by demonstrating that substantial evidence supports his view. Rather, in order to convince us not to adopt an ALJ's recommendation a party must demonstrate that substantial evidence did *not* support the findings necessary to that recommendation."[96] In sum, Bechtel failed to establish that any of his protected activity, intermixed as it was with his ongoing disagreements and heated discussions with Nano over business decisions, contributed to his discharge.[97]

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92 Complainant's Brief at 9-18.

93 *See* 2009 remand decision at 10-14.

94 TR at 291-93, 389-90. *See* Complainant's Brief at 14, 22.

95 TR at 164-68.

96 ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 18 (ARB May 30, 2007).

97 *Spelson v. United Express Sys*, ARB No. 09-063, ALJ No. 2008-STA-039, slip op. at 3 n.3 (ARB Feb. 23, 2011) (temporal proximity alone generally cannot support an inference of causation in the face of substantial evidence that supports the ALJ's finding that Spelson was fired for gross insubordination).

Bechtel's other arguments

CTI argues on appeal that Bechtel's other arguments – the ALJ's dismissal of his post-discharge blacklisting claim, exclusion of pretext evidence from two CTI directors, and denial of discovery of CTI's financial documents – should be deemed waived because Bechtel raised these issues in his Petition for Review but did not brief them.[98] We reject CTI's argument because these issues were fully briefed in Bechtel's first appeal, but were not addressed in view of the ARB's remand.[99]

The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard, i.e., whether, in ruling as he or she did, the ALJ abused the discretion vested in him or her to preside over the proceedings.[100]

The blacklisting claim

Bechtel was fired on June 30, 2003. He filed his complaint on September 22, 2003. OSHA found for Bechtel on February 2, 2005.[101]

On April 22, 2005, Bechtel took the deposition of Todd Robinson, Chief Executive Officer of Pen-One, who explained that in February 2004, he attended a trade show breakfast and talked with Richard Carver, chairman of the board of CTI.

Robinson recalled Carver saying that Bechtel no longer worked at CTI, that he was "part of the housecleaning they had to do" because of financial problems at the company. Robinson explained that he later pressed Carver about Bechtel because Pen-One was doing some work with Bechtel's new consulting company. Robinson stated that Carver mentioned something about Bechtel being "slow getting out of the Aerielle deal" and "the market passed him by," but the conversation prompted Robinson to "grill" Bechtel about his employment at CTI. Robinson added that he made no changes in Bechtel's consulting work after he talked with him.[102]

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98 Respondent's Brief on Appeal at 2 n.1.

99 2006 Complainant's Brief at 3-13. On appeal on remand, Bechtel has abandoned his allegations of a hostile work environment and insider trading.

100 *James v. Suburban Disposal, Inc.*, ARB No. 10-037, ALJ No. 2009-STA-071, slip op. at 4 (ARB Mar. 12, 2010).

101 CX 136.

102 CX 150 at 6-8.

At the hearing, Bechtel's attorney asked whether Bechtel had ever learned about any statements CTI people had made about him after his firing. The ALJ asked for an offer of proof after a hearsay objection. The attorney stated that Carver's conversation with Robinson was an attempt to blacklist Bechtel. The ALJ asked if that would not be the focus of a new complaint. The attorney responded that Bechtel's previous attorney wrote to OSHA explaining the blacklisting claim as soon as Bechtel learned about it, but the claim was not addressed in OSHA's February 2005 findings, so Bechtel objected on that basis, stating that the claim should be heard at the ALJ level.[103]

The ALJ found that Bechtel's allegation of blacklisting was a discrete act and that he failed to file a timely complaint; accordingly, she dismissed this claim. The ALJ noted that OSHA did not investigate Bechtel's attempt to amend his claim, and concluded that she had no jurisdiction to remand the matter for investigation.[104]

On appeal, Bechtel argues that the ALJ erred in dismissing his claim that CTI blacklisted him after he was fired. Bechtel argues that OSHA's failure to treat the "timely-filed blacklisting claim" as a separate complaint does not deprive the ALJ of jurisdiction because section 1980.109(a) provides that if there is otherwise jurisdiction, the ALJ will hear the case on the merits. [105]

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide for amendments to complaints. The relevant regulation states that an ALJ may allow appropriate amendments to a complaint when he or she determines that the "controversy on the merits will be facilitated," the public interest and the parties will not be prejudiced, and the amendment is "reasonably within the scope of the original complaint."[106]

The record, however, does not contain any letter to OSHA amending the complaint before or after OSHA's February 2005 decision letter. A March 4, 2005 letter to the Chief ALJ entitled, "Amended Notice of [Bechtel's] Objections to the Secretary's February 2, 2005 Findings," stated that the OSHA findings did not address all of CTI's adverse actions, including "disparaging remarks" made by CTI chairman Carver to Robinson. Beyond the attorney's allegation about what another attorney did, however, the record does not show that Bechtel attempted to amend his complaint to include

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103 TR at 250-51.

104 29 C.F.R. § 1980.109(a). 2005 R. D. & O. at 26-27.

105 Complainant's Brief at 3-8.

106 29 C.F.R. § 18.5(e).

blacklisting.[107] All that exists is an attorney's reference to a non-party's allegedly disparaging remarks. Therefore, we find no abuse of discretion in the ALJ's decision to reject Bechtel's attempted amendment.[108]

Exclusion of evidence

At the hearing, the ALJ admitted complainant's exhibits CX 1-160, including CX 150 and 151, the depositions of Carver and Robinson.[109] The ALJ then "disregarded" evidence regarding the blacklisting allegation, "except that evidence necessary" to her determination that she had no jurisdiction.[110]

Bechtel argues that the ALJ erred in disregarding this evidence because the deposition testimony showed that Carver's remarks to Robinson about CTI's need to "clean house" contradicted CTI's stated reason for firing Bechtel – the company's financial straits – and thus constituted pretext.[111] In effect, however, the ALJ considered this evidence in her pretext discussion and concluded that Nano targeted Bechtel for discharge because his contribution to the company's bottom line was limited.[112] We find no abuse of discretion in the ALJ's disposition of this evidence.

Denial of discovery

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[107] *Cf. Kerchner v. Grocery Haulers, Inc.*, ARB No. 08-066, ALJ No. 2007-STA-041, slip op. at 4 (ARB June 30, 2010) (ARB reversed ALJ's decision remanding timely blacklisting claim to OSHA for investigation).

[108] *Jay v. Alcon Lab., Inc.*, ARB No. 08-089, ALJ No. 2007-WPC-002, slip op. at 5 (ARB Apr. 10, 2009). Bechtel admitted in his pre-hearing report that the conversation between Carver and Robinson only amounted to an "attempted" blacklisting. Pre-Hearing Statement at 25-28. In his post-hearing report, Bechtel admitted that the blacklisting allegation was "only about liability," Complainant's Proposed Findings of Fact and Conclusions of Law at 56-59, but proffered no evidence of any harm to his business or reputation. Bechtel testified that he "felt" that some "trust" was not there from Pen-One or Robinson, but Bechtel admitted that he had monthly billings with Pen-One from January 2004 through April 2005. TR at 262.

[109] TR at 87.

[110] 2005 decision at 27.

[111] 2006 Complainant's Brief at 8-9.

[112] 2005 decision at 38-39. Certainly, the discharge of Bechtel and Jacques, and the unpaid leave of McPike due to financial conditions could be construed as "cleaning house."

On May 5, 2005, the ALJ denied Bechtel's motion to compel CTI to produce its general ledger because the information in it would be irrelevant to the issues in the case.[113] The ALJ found that while some of the information could corroborate or impugn the testimony of CTI officials, the general ledger would be mainly irrelevant to the issues, could be obtained by other means, and was unduly burdensome for CTI. The ALJ admitted summaries of CTI's personnel and direct expenses for the first and last six months of 2003 and of Bechtel's retained revenues and expenses.[114]

Bechtel argues that the ALJ abused her discretion because section 18.1006 requires a party offering a summary of evidence to make the source documents available for examination or copying. Bechtel claims that because of the ALJ's denial of his motion to produce the general ledger, he was unable to compare financial information in the summaries with that in the general ledger to show that CTI's financial reasons for firing him were pretext.[115]

The ALJ rule states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined at the hearing may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The judge may order that they be produced at the hearing.[116]

At the hearing, the ALJ stated that CTI's whole general ledger would be relevant only if the whistleblowing activity concerned receipts, profits, or income, and that was not the case. She added that the summaries went only to the weight to be given to CTI's allegation of its need to cut operating costs and increase revenues, but that the general ledger was not proof of anything. The ALJ noted that CTI was calling its controller as a

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113 Order Denying Cross-Motions to Compel Discovery and for Sanctions.

114 RX 72, 124.

115 2005 Complainant's Brief at 10-13.

116 29 C.F.R. § 18.1006.

witness, and Bechtel could question her on the figures in the summaries.[117] We conclude that Bechtel has shown no abuse of discretion here.[118]

CONCLUSION

Substantial evidence supports the ALJ's findings of fact that underlie her conclusion that Bechtel failed to establish that his protected activity was a contributing factor in his discharge. We find no abuse of discretion in the ALJ's rulings on the blacklisting claim, exclusion of evidence, and denial of further discovery. Therefore, we **DISMISS** Bechtel's complaint.[119]

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, dissenting:

I am unable to join with the majority in affirming the ALJ's 2009 Decision and Order on Remand (RD&O) because of two fundamental errors of law that were made by the ALJ governing the burdens of proof and evidentiary requirements under SOX. First, the decision errs in its requirement that until a complainant meets his initial burden of proof under SOX, the respondent "need only articulate a legitimate business reason for its action" and, if such evidence is presented, "the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination."[120] This requirement goes against the SOX statutory burden of proof standard that requires that the complainant merely prove that the protected activity was a

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117 TR at 59-62, 73-74.

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118 Indeed, as detailed by CTI, Bechtel had ample opportunity and numerous documents with which to attempt to demonstrate pretext. 2005 Respondent's Brief at 14-18.

119 On July 21, 2011, Bechtel's attorney, D. Bruce Shine, Esq., filed a Motion for Judicial Notice, asking the ARB to take judicial notice of a pleading submitted in *Competitive Technologies, Inc. v. American Arbitration Assoc.*, Case 3:11-cv-00922, which is pending in the U.S. District Court for the District of Connecticut. We decline to do so.

120 ALJ Decision and Order on Remand (RD&O or "2009 remand decision") at 6.

"contributing factor" for the adverse action taken, for which the employer will be held liable unless the employer shows by "clear and convincing" evidence that it would have taken the same action in the absence of the protected activity. Secondly, the decision errs in requiring Bechtel, in order to carry his burden, to prove "the same elements as required for a prima facie case, with the exception that the complainant must prove them by a preponderance of the evidence *and not by mere inference*."[121] This requirement goes against long-standing ARB and court precedent that permits proof of unlawful retaliation in whistleblower cases by circumstantial evidence and the inferences to be drawn from such evidence. Both errors were clearly material to the ALJ's final determination. Consequently, they cannot be ignored.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the Supreme Court set forth the basic allocation of burdens of proof and, secondly, the order of presentation of such proof in Title VII cases alleging discriminatory treatment.[122] Section 806 of SOX replaces the *McDonnell Douglas* Title VII burdens of proof standard[123] by incorporating the legal burdens of proof imposed by AIR 21,[124] while leaving in place, as appropriate, the *McDonnell Douglas* burden-shifting methodology (order of presentation of proof) for analyzing and discussing the parties' respective burdens.[125]

Leaving the *McDonnell Douglas* analytical methodology in place has at times proven a point of confusion in whistleblower cases.[126] Nevertheless, reliance upon the

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121 *Id*. (emphasis added).

122 411 U.S. at 802-804. *See, St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981).

123 The Title VII employment discrimination burdens of proof standard has been adopted under several of the environmental whistleblower acts. *See e.g., Abdur-Rahman v. Dekalb Cnty.*, ARB No. 08-003, ALJ No. 2006-WPC-002, slip op. at 7 (ARB May 18, 2010)(applying Title VII mixed-motive analysis to FWPCA anti-retaliation case); *Dixon v. U.S. Dept. of Interior*, ARB No. 06-147, ALJ No. 2005-SDW-008, slip op. at 8. (ARB Aug. 28, 2008), *See also* 29 C.F.R. § 24.109(b)(2).

124 *Getman*, ARB No. 04-059, slip op. at 8. *See* 18 U.S.C.A. § 1514A(b)(2)(C), incorporating the provisions of 49 U.S.C.A. § 42121(b)(2)(B). The AIR 21 burdens of proof are modeled after the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851 (ERA), which in turn were modeled after the Employee Health and Safety Whistleblower Protection Action (Whistleblower Protection Act), 5 U.S.C.A. § 1221(e).

125 *See Peck*, ARB No. 02-028, slip op. at 9-10 (citing *Kester*, ARB No. 02-007, slip op. at 4-9 (interpreting the similar provisions of the ERA)).

126 *See, e.g., Stone & Webster Eng'g v. Webster*, 115 F.3d 1568, 1572 (11th Cir. 1999) (involving interpretation of the provisions of the ERA upon which AIR 21's and SOX's burdens of proof standards are modeled).

Title VII analytical methodology does not alter the fact that the parties' respective evidentiary burdens of proof under SOX have been significantly modified. As the ARB has held, in establishing that his protected activity was a "contributing factor" to unlawful retaliation under SOX a complainant need not prove that the protected activity was the only or primary motivating factor in order to establish causation, or that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in the challenged personnel action.[127] Instead, a SOX complainant need only prove, by a preponderance of the evidence, that his protected activity, "alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision."[128] Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity."[129]

In the instant case, the ALJ found "that the preponderance of the evidence fails to demonstrate that any of Complainant's protected activity contributed to Respondent's decision to terminate his employment."[130] The ALJ reached this conclusion based on the requirement that Bechtel's proof of "contributing factor" overcome any "legitimate business reason" articulated by CTI for its action and that he "prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination."[131] In so doing, the ALJ conflated the SOX burden of proof standard with that under Title VII,[132] resulting in an analysis that effectively imposed upon Bechtel

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127 *Klopfenstein*, ARB No. 04-149, slip op. at 18; *Allen v. Stewart Enter., Inc*., ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062, slip op. at 17 (ARB July 27, 2006). *See Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act).

128 *Klopfenstein*, ARB No. 04-149, slip op. at 18; *Evans v. Miami Valley Hosp.*, ARB No. 07-118, ALJ No. 2006-AIR 022, slip op. at 17 (ARB June 30, 2009). *Accord*, *Marano*, 2 F.3d at 1140.

129 *Walker*, ARB No. 05-028, slip op. at 18.

130 RD&O at 9. *See also* RD&O at 10 ("I find that the preponderance of the evidence demonstrates no nexus between Complainant's protected activity and Respondent's adverse action against him. Even if I were to find so, in order to prevail, Complainant would need to show that the rationale offered by the Respondent was pretextual, and not the actual motivation for the adverse action.")

131 RD&O at 6.

132 Notwithstanding SOX's clear statutory rejection of the *McDonnell Douglas* Title VII employment discrimination burdens of proof standard, the ALJ cited to and relied upon numerous Title VII employment discrimination court decisions in articulating the parties' respective burdens of proof, including *Burdine*, 450 U.S. 248; *Hicks*, 509 U.S. 502; *Blow v. City of San Antonio*, 236 F.3d 293 (5th Cir. 2001), and ARB decisions applying the Title VII

a significantly higher burden of proof than SOX requires and, ultimately, a lesser burden of proof on CTI.

The requirements that an employer "need only articulate a legitimate business reason for its action" and that, where presented, the burden shifts to the complainant to prove pretext, are aspects of the *McDonnell-Douglas* Title VII burden of proof requirements.[133] As the Supreme Court explained in *Texas Dept. of Community Affairs v. Burdine*, the requirement that the defendant articulate a legitimate business reason for its action is an intermediate evidentiary burden by which the defendant rebuts the presumption of discrimination that is created under Title VII by a plaintiff's prima facie showing of unlawful discrimination.[134] Where the defendant successfully rebuts the plaintiff's prima facie showing, the ultimate burden of proof returns to the plaintiff to prove, by a preponderance of the evidence, that he or she has been the victim of intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[135]

The ALJ's incorporation of the Title VII proof standards into the "contributing factor" burden of proof requirement effectively negates the lesser burden of proof that is required of a SOX complainant. Rather than a burden of proof standard requiring that Bechtel merely prove that his protected activity "alone or in combination with other factors tend[ed] to affect in any way the outcome of the [adverse personnel] decision,"[136] Bechtel was required to provide sufficient evidence to overcome any legitimate business

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burden of proof standards, i.e., *Yule v. Burns Int'l Sec.* No.1993-ERA-012 (Sec'y May 24, 1995), *Pike v. Public Storage Co.*, ARB No. 99-72, ALJ No. 1998-STA-035 (ARB Aug. 10, 1995), *Mitchell v. Link Trucking*, ARB No. 01-59, ALJ No. 2000-STA-039 (ARB Sept. 28, 2001), and *Overall v. Tennessee Valley Auth.*, ARB No. 98-111, ALJ No. 1997-ERA-053 (ARB Apr. 30, 2001).

133 "In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' *Id.* at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.* at 804." *Burdine*, 450 U.S. at 253.

134 *Burdine*, 450 U.S. at 253.

135 *Id*., 450 U.S. at 255, citing *McDonnell Douglas*, 411 U.S. at 804-805.

136 *Klopfenstein*, ARB No. 04-149, slip op. at 18.

reason articulated by CTI for the adverse action, *including* proof, by a preponderance of the evidence, that CTI's articulated business reason was pretext.

Evidence of pretext is one basis upon which to defeat a respondent's demonstration of "clear and convincing evidence" that it would have taken the adverse personnel action had there been no protected activity. Nevertheless a complainant is not *required* under SOX to prove pretext in order to defeat such a showing because a complainant alternatively can prevail by showing that the respondent's reason, "while true, is only one of the reasons for its conduct," and that another reason was the complainant's protected activity.[137] Nor, for that matter, does such a requirement exist under Title VII case law.[138] It thus stands to reason that if a complainant is not required to prove pretext in order to defeat a respondent's ultimate burden of proof, a complainant certainly cannot be required to prove that a respondent's articulated business reason is pretext in order to sustain his initial burden of proving that his protected activity was a "contributing factor" in the adverse action taken against him.[139]

The second ground upon which I dissent concerns the ALJ's failure to consider the circumstantial evidence Bechtel submitted in support of his claim in assessing whether Bechtel met his initial burden of proof.[140] While the ALJ considered

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137 *Id.*, slip op. at 19 (citing *Rachid v. Jack in the Box, Inc*., 376 F.3d 301, 312 (5th Cir. 2004)). *See also Majali v. Airtran Airlines*, ARB No. 04-163, ALJ No. 2003-AIR-045, slip op at 11-12, n.11 (ARB Oct. 31, 2007).

138 For the legal proposition that a complainant must prove that the employer's articulated legitimate reason is pretext for discrimination the ALJ cites *Burdine*. See RD&O at 6. However, *Burdine* merely holds that upon the articulation by the defendant of a legitimate business reason, the complainant must be afforded "*the opportunity* to demonstrate that the proffered reason was not the true reason for the employment decision." 450 U.S. at 255 (emphasis added). Accord, *Hicks*, 509 U.S. at 507-508, citing *McDonnell Douglas*, 411 U.S. at 804 ("respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext").

139 The majority's response to the ALJ's requirement that Bechtel prove pretext in order to succeed in this claim is less than persuasive. Acknowledging that the ALJ erred in requiring Bechtel to prove pretext, the majority nevertheless finds the error "harmless because the ALJ did consider all of Bechtel's evidence and rejected his circumstantial evidence as unpersuasive for reasons that were supported by substantial evidence." *See* note 91, *supra*. Stated another way, the majority in effect reasons that the ALJ's requirement that Bechtel prove pretext was harmless error because the substantial evidence of record supports the ALJ's conclusion that Bechtel failed to prove pretext. This is but fallacious circular reasoning wherein the majority's rationale is nothing more than a restatement of the conclusion posing as the reason for the conclusion.

140 As previously mentioned, the ALJ imposed upon Bechtel the requirement that, to carry his burden of proof of retaliation under SOX, he prove "the same elements as required

circumstantial evidence in assessing whether CTI's rationale for discharging Bechtel was pretext, the ALJ did not consider that evidence in determining whether Bechtel met his burden of proving that his protected activity was a contributing factor in CTI's decision to terminate his employment. Thus, it is not necessarily the case, as the majority would have it, that the substantial evidence of record supports the ALJ's findings and conclusion that Bechtel's protected activity was not a contributing factor in CTI's decision to terminate his employment.

A complainant need not provide direct evidence of retaliation in order to meet his burden of proof, but may instead satisfy his burden through circumstantial evidence and the inferences it supports.[141] Indeed, rarely in whistleblower cases is there direct evidence of discrimination or retaliation, and the finding of causation will turn on whether the complainant has met his or her burden of proof based on circumstantial evidence alone.[142] Noting the utility of circumstantial evidence in Title VII employment discrimination litigation, the Supreme Court has explained that "the reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[143]

Circumstantial evidence of retaliation may include antagonism or hostility toward a complainant's protected activity,[144] the falsity of an employer's explanation for the adverse action taken,[145] an employer's shifting or contradictory explanations for the adverse action,[146] a change in the employer's attitude toward the complainant after he or

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for a prima facie case, with the exception that the complainant must prove them by a preponderance of the evidence and not by mere inference." RD&O at 6.

141 *Evans,* ARB No. 07-118, slip op. at 17-18.

142 *See e.g. Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006); *Kester,* ARB No. 02-007, slip op. at 4.

143 *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)(quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)). *Accord, Majali,* ARB No. 04-163, slip op. at 11-12, n.11.

144 *See, e.g., Timmons v. Mattingly Testing Servs., Inc.*, No. 1995-ERA-040, slip op. at 5-6 (ARB June 21, 1996); *Evans,* ARB No. 07-118, slip op. at 17-18.

145 *Klopfenstein,* ARB No. 04-149, slip op. at 18. See *Clemmons v. Ameristar Airways*, ARB No. 08-67, ALJ No. 2004-AIR-011, slip op. at 7-8 (ARB May 26, 2010). *See also*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

146 *Hobby v. Georgia Power Co.*, No. 1990-ERA-030 (Sec'y Aug. 4, 1995). *See Clemmons,* ARB No. 08-067, slip op. at 9-10, n. 41.

she engages in protected activity,[147] and temporal proximity.[148] In the instant case, in addition to the close temporal proximity of Bechtel's discharge to his protected activity,[149] there exists evidence of record indicating that Respondent's CEO demonstrated retaliatory animus, offered false and inconsistent reasons for discharging Bechtel, and changed his favorable attitude towards Bechtel shortly after he engaged in protected activity. The ALJ considered this and other circumstantial evidence in her initial 2005 decision in finding an "inference of a causal nexus" between Bechtel's protected activity and the termination of his employment.[150] With the exception of considering this evidence within the context of erroneously requiring of Bechtel that he prove pretext, this circumstantial evidence was not considered in the ALJ's 2009 decision now before the Board on appeal.[151]

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147 *See e.g., Overall,* ARB No. 98-111, slip op. at 16-17.

148 *Overall,* ARB No. 98-111; *Clemmons,* ARB No. 08-067, slip op. at 6.

149 The majority discounts the significance of temporal proximity. It is difficult to understand the majority's rationale in light of the fact that CTI's Board of Directors identified Bechtel for employment termination in May of 2003, fewer than two months after Bechtel raised concerns that the ALJ found to be protected activity, and notwithstanding that Bechtel was informed of his discharge on June 30, 2003, a mere 18 calendar days following his last act of protected activity.

150 *See* ALJ's 2005 decision at 36-37.

151 In the ARB's Order of Remand of March 26, 2008, the Board identified as reversible error the ALJ's substitution of an inference of a causal connection for Bechtel's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. On remand, the ALJ appears to have misinterpreted the ARB's ruling on this error of law to mean that circumstantial evidence and the inferences to be drawn from such evidence are not to be considered when assessing whether Bechtel met his burden of proving that his protected activity was a contributing factor in his discharge. Clearly such evidence can be considered and in this case should have been considered, and the Board did not mean to hold otherwise. What the ARB in its prior ruling was directing its holding to is the distinction between a complainant's burden of proof at the investigatory stage and the burden of proof that is required of the complainant once a case reaches the hearing stage. Before OSHA an inference of causation is sufficient to establish the *prima facie* showing required to warrant an investigation. *See* 29 C.F.R. § 1979.104(b)(1)-(2). On the other hand, an inference of causation alone is insufficient once the case goes to hearing before an ALJ, where proof of a contributing factor is required by a preponderance of the evidence. *Peck,* ARB No. 02-028, slip op. at 8-9. See also *Brune,* ARB No. 04-37, slip op. at 13 (distinguishing complainant's respective burdens of proof at the investigatory and hearings stages of litigation under AIR 21).

The ALJ's failure in the RD&O now on appeal to consider the circumstantial evidence of record (and the inferences to be drawn therefrom) in determining whether Bechtel met his burden of proving that his protected activity was a contributing factor in his discharge clearly constitutes reversible error. As enticing as it may be for the majority to evaluate the adequacy of that circumstantial evidence and reach its own conclusion on whether Bechtel met his initial burden of proof, that determination requires findings of fact that are not within the ARB's purview, but reserved to the ALJ to decide upon remand.

Citing the circumstantial evidence of record in affirming the ALJ's decision in the instant case, the majority concludes that "[s]ubstantial evidence supports the ALJ's findings of fact that underlie her legal conclusion that Bechtel failed to establish that his protected activity contributed to the end of his employment," and "her finding that CTI's financial condition and revenue problems concerns were the reasons for discharging Bechtel, not his protected activity."[152] However, as the ARB has previously recognized, while substantial evidence of record to support an ALJ's findings of fact may exist, reversal is nevertheless required where the ALJ has, as in this case, applied the wrong legal standard in reaching those findings.[153] I would thus vacate the ALJ's decision and remand for reconsideration of all of the evidence of record, direct and circumstantial, under the burden of proof standards applicable under SOX.

E. COOPER BROWN
Deputy Chief Administrative Appeals

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[152] Finding that Bechtel failed to demonstrate that CTI's rationale for his termination was pretext, the ALJ ultimately concluded that "Respondent would have terminated Complainant's employment regardless of his protected activity." RD&O at 14. This conclusion is semantically no different from the ALJ's conclusion that was rejected by the ARB in *Klopfenstein*. There the ALJ, in denying the complainant's claim, concluded that "the same unfavorable personnel action would have been taken in the absence of any protected behavior on Complainant's part." *Klopfenstein*, ARB No. 04-149, slip op. at 20 n.24. This, the Board held, was clearly erroneous on the part of the ALJ inasmuch as it not only ignored the complainant's correct burden of proof under SOX, it "did not indicate whether this final conclusion was supported by clear and convincing evidence, and did not indicate that the Respondents had the burden in this regard." *Id*.

[153] *Klopfenstein*, ARB No. 04-149, slip op. at 20 (recognizing that factual findings cannot necessarily be relied upon where "made under the wrong legal standard"). *Accord Romberg v. Nichols*, 953 F.2d 1152, 1156 (9th Cir. 1992); *Mackowiak v. Univ. Nuclear Systems*, 735 F.2d 1159, 1164 (9th Cir. 1984); *Turner v. Texas Instruments*, 555 F.2d 1251, 1256 (5th Cir. 1977).