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Office of Administrative Law Judges
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Issue Date: 05 October 2006

CASE NO.: 2006-SOX-00029

In the Matter of

MICHAEL McCLENDON,
Complainant,

v.

HEWLETT PACKARD, INC.,
Respondent.

Appearances:

Robert F. Huntley, Esq.,
for Complainant

George L. O'Connell, Esq.
Kimberly Sayers-Fay, Esq.,
for Respondent

Before: Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This action involves a complaint under the employee protection provisions of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, et seq. ("Sarbanes-Oxley," "SOX," or "Act" (enacted July 30, 2002) and the implementing regulations at 29 C.F.R. Part 1980.

On July 18, 2005, Complainant, Michael McClendon, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"), alleging that his employer, Respondent Hewlett-Packard, Inc. (hereinafter "Respondent") violated the Act. Complainant alleged that Respondent: (1) removed him from his position as project manager in April 2004; (2) returned him in May 2005 back to a chain of command under the section manager who was responsible for removing him from his project manager position; (3) transferred him in August 2005 to the position of Warranty Program Coordinator; and (4) subjected him to a hostile work environment, all in retaliation for: (a) having reported to senior management officials that Respondent's co-employment program may have violated provisions of the United States Tax Code or provisions of the Fair Labor Standards Act; (b) commencing SOX actions referencing these disclosures; and (c) reporting these SOX actions to congressmen.

A hearing was conducted in two phases from January 25-27 and February 13-16, 2006 in Boise, Idaho. Complainant's Exhibits ("CX") 1-4, 6-41, 47-61, 63-69, 71, 103, 108 at 1073-76, 112, 115, 140, 144, 143, 146-147 were admitted in evidence. TR at 41-44, 131, 241, 843, 1140, 1146, 1152, 1157, 1162, 1253, 1535-36. Respondent's exhibits ("RX") 5, 8, 9, 12-36, 39-41, 48-53, 55, 56, 61, 62, 66-82, 84 were admitted in evidence. TR at 53-54, 241, 758. Administrative Law Judge Exhibits 1-7 were admitted into evidence with the parties' closing briefs being admitted in advance without objections and marked ALJX 8 for Complainant's closing brief and ALJX 9 for Respondent's closing briefs filed March 21 and March 23, 2006, respectively, with Complainant's March 23, 2006 Errata to Post-Trial Brief marked ALJX 10 and admitted into evidence. TR at 55, 243.

STIPULATIONS

The parties stipulate that Respondent is a company within the meaning of 18 U.S.C. § 1514A in that it is a covered employer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)). TR at 509-10.

PROCEDURAL BACKGROUND

On July 18, 2005, Mike McClendon ("Complainant") filed a whistleblower complaint ("SOX II") with the Occupational Safety & Health Administration (OSHA). Complainant claimed, under section 806 of the Sarbanes-Oxley Corporate and Criminal Accountability Act of 2002 ("SOX"), that Hewlett-Packard Company ("Respondent") retaliated against him after he engaged in protected whistleblower activities, including reporting possible co-employment violations to management, filing his first SOX whistleblower complaint ("SOX I") with OSHA, and later removing the SOX I complaint to the United States District Court for the District of Idaho.¹ The

¹ On July 12, 2004, Complainant filed his first whistleblower complaint ("SOX I") under the SOX with OSHA. OSHA issued a determination on September 22, 2004 that the complaint was untimely because it was filed more than ninety days following the adverse employment actions alleged in the complaint. Complainant filed an objection to the OSHA determination on October 12, 2004 and requested a formal hearing before the United States Department of Labor, Office of Administrative Law Judges. On January 24, 2005, Robert C. Huntley, Esq. filed a notice of appearance as counsel for the Complainant.

On January 24, 2005, Complainant filed a request for leave to withdraw his SOX I complaint from the Administrative Law Judge in order to re-file in the United States District Court for the District of Idaho. On January 28, 2005, Administrative Law Judge Karst granted Complainant's request and issued an order dismissing Complainant's SOX I complaint.

Complainant filed his SOX I complaint in the United States District Court for the District of Idaho on March 9, 2005. Respondent filed a motion for summary judgment on March 30, 2005. At oral argument, Complainant filed a motion for equitable estoppel and sanctions. The court stated it would consider Complainant's motion as one for reconsideration if the court in fact granted Respondent's motion to dismiss. On June 9, 2005, the district court granted Respondent partial summary judgment in regards to Complainant's claim regarding his removal from a team manager position.

On July 18, 2005 Complainant filed a First Amended Verified Complaint and Demand for Jury Trial in the district court, seeking to include new acts of retaliation in his SOX I complaint. In the alternative, Complainant presented these new acts of retaliation in a new OSHA whistleblower complaint ("SOX II"), which is the current complaint before me.

On October 27, 2005, the district court dismissed Complainant's remaining SOX I claims because Complainant failed to exhaust his administrative remedies. On February 8, 2006, the court denied Complainant's motion for

SOX II complaint alleged that Respondent took adverse employment actions against Complainant, including terminating Complainant's management position, changing Complainant's pay band classification from level (b)(4) to a lower level of (b)(4) "redlining" Complainant to exclude him from employment opportunities, transferring Complainant to a new section under supervisor Sterling Mortensen, modifying Complainant's reporting structure, and subjecting Complainant to a hostile work environment in retaliation for his involvement in protected activities. On August 23, 2005, Complainant filed an amended complaint with OSHA to include a new adverse employment action as part of SOX III, his transfer to the Warranty Program Coordinator position.

On October 26, 2005, OSHA dismissed the SOX II complaint for failure to make a prima facie showing. OSHA found that Complainant had engaged in protected activities by filing his SOX I complaint in 2004, appealing OSHA's determination of his SOX I complaint, and filing the current SOX II complaint. OSHA determined, however, that Complainant's allegations of pay band reclassification and "redlining" were untimely and that the other employment actions were not adverse. Regarding the transfer to Mortensen's section and the change in Complainant's reporting structure, OSHA found there was no "tangible harm shown" and that the issues were moot because Complainant had been placed in another position. OSHA also found that the evidence did not show that the transfer to the Warranty Program Coordinator position was unfavorable. Finally, OSHA found that even if the employment actions were adverse, Complainant did not meet his burden of showing causation because the temporal proximity between protected activity and adverse action did not infer causation, Respondent engaged in two major reorganizations that generated the transfer to Mortensen's section, and Respondent offered the Warranty Program Coordinator position to Complainant in lieu of a layoff.

On November 23, 2005 Complainant filed an objection to OSHA's dismissal of his SOX II complaint and requested a formal hearing before an administrative law judge. Complainant's SOX II case was assigned to me November 30, 2005.

On December 2, 2005, I ordered the parties to show cause regarding the timeliness of the SOX II complaint and scheduled the hearing for January 25, 2005 in Boise, Idaho. I issued an amended order on December 6, 2005, directing the parties to file a memorandum of points and authorities, affidavits, and any other documentary evidence in support of each party's legal position on whether the complaint should be dismissed due to timeliness. On January 3, 2006, I issued an order dismissing Complainant's removal from project manager, including his pay band and "redlining" claims as untimely, but found good cause for a hearing on the remaining claims,

reconsideration and request for reversal made during the summary judgment arguments. The district court found that the complaint was properly dismissed because the Complainant had not effectively amended his administrative complaint and the only adverse action alleged in the OSHA complaint, which was Complainant's removal from management position, was time-barred.

Complainant sent a letter on November 29, 2005 to OSHA requesting that the dismissal of his SOX I complaint be reversed and that OSHA further investigate Complainant's allegations of false testimony. OSHA referred Complainant's request regarding the false testimony allegations to the Securities and Exchange Commission. Additionally, OSHA forwarded Complainant's request for a "reverse" to the Office of Administrative Law Judges in case it should be consolidated with the OALJ hearing of Complainant's SOX II claim.

including those adverse acts that were or should have been reasonably known to Complainant after April 19, 2005.

On December 20, 2005 Complainant filed a motion for leave to amend his SOX II complaint to add a fourth adverse act, stating that the Warranty Program Coordinator position "is not developing into a real job commensurate with his education and experience, but rather it has in reality become an empty, career-ending shell." Respondent's January 4, 2006 response to the motion asserted that Complainant was "re-hashing" issues already mentioned in his SOX II complaint, which he had amended in August 2005 to include his transfer to the Warranty Program Coordinator position. Respondent filed a motion to strike Complainant's January 4 reply as prohibited by prior order. On January 10, 2006 I granted Respondent's motion to strike Complainant's reply and issued an order denying Complainant's motion to amend because it only repeated allegations already included in the SOX II complaint. I noted that Complainant could present evidence concerning the transfer to the Warranty Program Coordinator position at hearing.

Respondent filed a motion for summary decision on January 10, 2006. Respondent argued that the SOX II complaint consists of either time-barred adverse actions, actions that are not actually adverse, or actions that are not causally connected to any protected activity of Complainant. Therefore, all remaining allegations of adverse actions, including the transfer to Mortensen's section, the change in reporting structure, and the transfer to Warranty Program Coordinator, should be dismissed. Complainant filed his opposition to Respondent's motion on January 20, 2006. On January 23, 2006, I issued an order denying Respondent's motion for summary decision on grounds that there were factual issues as to whether Complainant suffered adverse employment actions. I found that the temporal proximity between protected activities and alleged adverse actions was sufficient here to establish an inference of causation. Additionally, my January 23, 2006 order noticed the bifurcation of the hearing into separate liability and remedies phases.

On January 10, 2006, Respondent also filed a motion for restricted access to the record. Respondent sought a protective order to ensure confidentiality of commercial information in the record. Respondent stated that disclosure of the confidential materials may cause competitive harm but that such information was necessary for its defense in this case. On January 13, 2006, Respondent filed a declaration of George Mulhern in support of its motion. I granted Respondent's motion for a protective order on January 23, 2006, stating that there was no opposition to the motion and that Respondent adequately justified the need for the order. I restricted access to any portion of the record marked as confidential, consistent with my order, and not subject to objection. The parties later stipulated that once a decision is issued, they will confer and file requests that any confidential portions of the decision be redacted from publication.

On January 20, 2006, Respondent filed a motion in limine to exclude evidence of any of the protected activities alleged in Complainant's earlier SOX I complaint, including allegations of co-employment, the falsification of financial records, and Respondent's alleged direction to

destroy documents indicating Respondent's knowledge of co-employment.² Respondent argued that evidence of these activities, which took place between 2003 and 2004, could not be causally related to the alleged adverse actions of May and August 2005, because there was no temporal proximity. Additionally, Respondent stated that these protected activities were alleged in Complainant's SOX I complaint, which has been dismissed by both OSHA and the district court, and therefore it would be prejudicial to allow Complainant to introduce that evidence. On January 24, 2006, Complainant filed a response in which he argued that the SOX I protected activities were admissible because they belonged to a series of retaliatory events that included events within the 90-day notice period that began on April 19, 2005. According to Complainant, *National Railroad v. Morgan*, 536 U.S. 101, 113 (2002) and *Connecticut Light & Power v. Dept. of Labor*, 85 F.3d 89, 96 (2nd Cir. 1996), authorize Complainant's use of the 2003 and 2004 events as background evidence and as evidence of the related and continuing retaliatory activities. On January 25, 2006, I accepted Complainant's view of *Morgan* and ruled that Complainant could introduce the alleged events from 2003 and 2004 as background evidence and also as evidence of an alleged retaliatory hostile work environment. TR. at 23.

I held a first-phase hearing on Complainant's SOX II claim beginning on January 25, 2006 and continuing through January 27, 2006.

Complainant filed a motion on January 26, 2006 to limit the testimony of some of Respondent's witnesses. Complainant stated that during the January 18, 2006 deposition of Sandy Lieske, Respondent's counsel directed Ms. Lieske to not answer questions in a number of areas which were relevant to the complaint or could have led to relevant information regarding the complaint. Complainant therefore moved to bar Ms. Lieske or any other Respondent witness from testifying about those specified areas. I granted the motion in part, to the extent that Ms. Lieske would not testify in regard to those specified areas during the January 27, 2006 hearing. TR. 507-508. The parties agreed, however, that Complainant's counsel would depose Ms. Lieske before trial resumed for phase two in February and would address the outstanding issues. TR. at 508. When the hearing resumed in February, Ms. Lieske testified without limitation. *Id.*

On February 3, 2006, Complainant filed notice of a new issue of retaliation. Complainant alleged that while he was attending the trial proceedings on January 25-27, 2006, he received several voicemails from his supervisor, Dave Miller, criticizing his work performance. Complainant sought to present this new act of retaliation, which he perceived as being a set up for termination, when the hearing resumed. I denied the motion because, as acknowledged by Complainant's counsel, the alleged adverse action was not yet ripe. TR. 759-761.

The hearing continued another four days from February 13-16, 2006. On February 16, 2006, Complainant attempted to call Michelle Marchant, Respondent's in-house counsel, to make an offer of proof concerning Respondent's financial status after quarterly earnings had been released to the media the day before. TR. at 1532. I denied Complainant's request to call Ms. Marchant because the request was untimely and because questioning in-house counsel about the financial

² Specifically, Respondent sought to exclude Complainant's trial exhibits ("CX") 1-16, 42, 60, 62 and 66 and paragraphs 3-22 and 27 of Complainant's affidavit in support of his opposition to the motion for summary decision and exhibits A-C thereto.

status of a company lacked foundation. The hearing ended on February 16, 2006. Both Complainant and Respondent filed post-trial briefs on March 23, 2006.

On April 11, 2006, Complainant filed a motion seeking a ruling either including Respondent's failure to complete Complainant's performance evaluation as a new act of retaliation in the current SOX II proceeding, or requiring a new filing with OSHA. On May 1, 2006, the record closed in this SOX II proceeding as I issued an order denying Complainant's motion to amend the complaint because the new allegation was not within the scope of the original complaint and therefore would violate Respondent's due process right to adequate notice of complaints against it. Additionally, granting the amendment would not advance the determination of the SOX II complaint, but would instead require additional discovery and hearings. I also noted that Complainant had already filed the new complaint with OSHA concerning the failure to complete a timely performance evaluation ("SOX III").

On August 15, 2006, I was assigned the SOX III case and hearing is currently set for October 10-11, 2006 in Boise, Idaho. Respondent filed a motion for summary decision on September 25, 2006 that will be decided before trial commences. The parties were consulted as to whether they wanted to waive trial in place of submitting the SOX III matter on paper with evidence and affidavits but declined.

FACTUAL BACKGROUND/SUMMARY OF TESTIMONY

Complainant Michael McClendon

General Background Information

Michael McClendon ("Complainant") testified that he has Bachelor of Science degrees in general sciences and applied physics from California State University Sonoma, and a Master's degree in electrical engineering from National Technology University in Colorado. He has had several jobs advancing in technological areas. Complainant taught high school math and science in Oregon before joining Hewlett-Packard ("Respondent") in August 1981. TR³ at 90-91.

Complainant worked in Respondent's microwave station lab in 1985 before transferring to the fiber optic test laboratory in 1987. In 1989, Complainant's work duties were half engineering and half management. TR at 92.

In 1992, Complainant became a full-time Microwave and Lightwave manager. TR at 92. From 1992 through 1999, Complainant worked for Respondent's Santa Rosa Microwave Telecommunications Division in lightwave telecommunications. TR at 93. Complainant's job tasks included verification that calibration was accurate for metrology measurements. *Id.*

³ The following are references to the record: CX - Complainant's exhibit, RX - Respondent's exhibit, ALJX - Administrative Law Judge exhibit, and TR. - Transcript of hearing.

Up through 1995, Complainant managed a small staff and only one person reported to him as a technician. TR at 245. In 1997 and 1998, Complainant was a research and development software maintenance manager in the metrology department with one technician and one engineer reporting to him, and he was also a quality assurance manager with five or six people reporting to him, three of those being engineers. TR at 246-47.

In 1999, Complainant moved to Boise, Idaho to be part of Respondent's LaserJet division. TR at 94. Complainant testified that this was highly sophisticated computer display work. *Id.* Complainant later testified that his first job in Boise was as project manager for a computer monitor team. TR at 248.

In late 1999, Complainant joined the laboratory of Sandy Lieske. At that time, Complainant remained a project manager. Complainant's ratings on his evaluations in 1999 through 2002 were three or four on a scale of one to five. TR at 248

From 1999 through 2002, Complainant reported directly to section managers at all times, Tracy Freeman in 1999 and 2001 and then Deborah Owens in 2001 and 2002. TR at 249. Complainant testified that during his performance review with Ms. Owens, he wanted a more technical job but Ms. Owens disagreed and then tried to get rid of him.

Complainant worked under Gary Gruver from April 2002 through November 2002. Complainant testified that Mr. Gruver did not express concerns about Complainant's work. TR at 250.

By 2002, Complainant was a project manager on the paper-handling team. TR at 95. In April of 2002, Complainant became a project manager of the emulator team. *Id.* Complainant described his work as adding circuit boards and software to simulators, which were an essential tool to developing new LaserJet printers. TR at 95-96. Complainant stated that he tried to make the best emulators possible to save Hewlett-Packard millions of dollars rather than have to obtain expensive and scarce engines. TR at 96.

From April 2002 through April 2004, Complainant directed approximately 10 employees and up to 40 independent contractors at one of Respondent's largest teams. TR at 97. Complainant supervised from 41 to 51 people. *Id.* Complainant worked on highly technical research and development and was not involved in payroll or financing work. *Id.* In his position as project manager, Complainant hired several people. TR at 97-98.

By February of 2003, Complainant began having problems with his immediate supervisor Sterling Mortensen.

Complainant admitted on cross-examination that on February 7, 2003, four employees of his department raised concerns about him to Mr. Mortensen. TR at 265. Raising concerns about an employee or manager to that person's supervisor is known at Respondent as an "open-door" process. The concerns of employees were that Complainant was playing favorites with other team members. TR at 266. Complainant testified that this was not a painful experience as Mr. Mortensen mentioned the incident to Complainant "almost in passing." TR at 265. Complainant

further testified that being opened-doored is not necessarily a bad thing for a manager. TR at 267.

As a result of the February 7, 2003 open-door by four of Complainant's subordinates, Mr. Mortensen began to survey Complainant's entire subordinate team members. TR at 265,268. Complainant testified Mr. Mortensen did not mention that the survey related to the open-door incident. TR at 268-69.

Complainant testified that sometime in the first half of February 2003, he had a discussion with Mr. Mortensen. TR at 121-22, 252. Mr. Mortensen discussed one issue about staffing on Complainant's team, and Complainant said that he was not getting his work done because he needed more staff. TR at 253-54. *Id.*

In response to Complainant's request for more staff, Complainant testified that Mr. Mortensen ordered him to hire a dozen independent contractors. TR at 121-22, 254. Complainant did not refuse to hire the contract workers. TR at 259. Complainant stated that he expressed to Mr. Mortensen that he was upset with the order for him to hire contract workers. TR at 261. He felt threatened by Mr. Mortensen, in part because Mr. Mortensen was his manager. TR at 258-59. Complainant did, however, question Mr. Mortensen as to whether the classification of independent contractors was proper. TR at 258-59. Complainant said that hiring contract workers would not comply with the co-employment policies. TR at 257, 261.

At trial, Complainant believed that Mr. Mortensen asked him to engage in an illegal act, but not criminal. *Id.* Complainant believed it violated civil law. TR at 260; *see also* CX 1-3. Complainant believed that he would be hiring contractors in violation of the co-employment standard taught by Respondent's experts and that this practice would violate laws as occurred in the *Viscaino v. Microsoft* case. *Id.* Complainant was aware of the *Viscaino* case prior to the October 14, 2003 training. TR at 259-60. Complainant further testified that the situation at Respondent was worse than what happened at Microsoft in the *Viscaino* case. TR at 134. He testified that Microsoft accidentally violated common law labor rules whereas Respondent was intentionally falsifying financial records to cover up misclassifying independent contractor status.⁴ *Id.*

In addition, Complainant testified that Respondent was intentionally shredding notes to cover up the falsification of independent contractor status when these workers were directed and controlled just like Respondent's employees without the same employment benefits. TR at 133-34. Furthermore, Complainant testified that labor laws were being violated when Respondent would send an independent contractor out to training just like an employee and the contractor's contract agency would be asked to pay for the training so that the charge would not appear in Respondent's accounting records. TR at 143. Later, the contract agency would "back-bill" Respondent for the training expense and Respondent would pay the contract agency the back-billed amount according to Complainant. TR at 143-44.

⁴ The relevance of "intentional" misclassification versus "accidental" may best relate to the difference between a nominal fine for failing to report various payments and intentional disregard of filing requirements which carry a stiffer penalty of as much as ten percent of the amount that should have been reported. See 26 U.S.C. §§ 6721(a)(1) and 6721(e).

Complainant thought that there was a long laundry list of possible consequences for violating the co-employment policy. TR at 260-61. He believed that it could lead to an IRS investigation or a Fair Labor Standards Act violation. TR at 261. Complainant testified further that he also complained about noncompliance with H-1B visa requirements at the February 2003 meeting with Mr. Mortensen. *Id.*

Complainant further testified that Respondent's Boise location used a significant number of contract employees. TR at 254. However, Complainant testified that he did not investigate the financial arrangements between Respondent and the contractor companies. TR at 255.

Complainant conceded that he did not utilize the open-door process to raise his concerns to Ms. Lieske at that time, and that he was aware that he could have also have gone to Human Resources with his concerns. TR at 262-63.

In February or March 2003, Mr. Mortensen eventually discussed with Complainant the feedback he received from Complainant's subordinate team members after the request for information was sent to them in January or early February 2003. TR at 269, 272. Mr. Mortensen discussed and showed Complainant a compilation of surveys from February 10, 2003. TR at 270; *see also* CX 8 at 398-99; RX 77. The survey showed very positive and very negative comments about Complainant. TR at 273; CX 8 at 399. Mr. Mortensen told Complainant that a number of employees were critical of Complainant, and more than half of his team had very serious concerns about Complainant. TR at 269-70, 273-74. Apparently, the hardware engineers liked Complainant, but a group of software engineers were dissatisfied with him. TR at 272-73.

On a few occasions, Mr. Mortensen had discussed with Complainant areas of his performance to "fix". TR at 276, 278-79. Complainant testified that the vast majority of discussions with Mr. Mortensen involved the progress of his team and that it was rare to focus on the survey results about Complainant's performance. TR at 276-77.

Immediately after his February 2003 meeting with Mr. Mortensen, Complainant received a negative performance evaluation from him. TR at 156. Before that time, Complainant had never received a negative performance evaluation. *Id.* Complainant did not believe that his work performance warranted any downgrade. *Id.*

Complainant testified that he was humiliated by Mr. Mortensen in the months of February through April 2003. TR at 159. Complainant testified that at one point, Mr. Mortensen told him "Who in their right mind ever promoted you to manager." *Id.* However, Complainant later testified that, despite this negative performance evaluation, his work performance did not become "a big deal" until April 22, 2003. TR at 279. Complainant testified that Mr. Mortensen was not abusive to him from February 2003 through April 22, 2003. TR at 281-82.

On April 22, 2003, Complainant had a performance evaluation that contained unflattering comments and lower ratings than Complainant had previously received. TR at 282-83. Mr. Mortensen gave Complainant a written list of problems that he needed to address, and Complainant agreed to the need to correct the problems. *Id.* However, Complainant did not think

that he got enough credit for the good things he did at this time. TR at 286; RX 68 at 363-66. Complainant thought the problems were mainly within the software engineers and not with Complainant himself. *Id.* Complainant further testified that Mortensen had only been his manager a short time and did not understand what was going on with his team at this time. TR at 284. At this time, Complainant was supervising five or six Respondent employees and 10 or more contract workers. RX 77. Of these workers, only four had "open-doored" Complainant in February 2003. TR at 265. Complainant admitted, however, that even after taking out the open-door subordinates, good engineers on his team had negative comments about him. TR at 299, *see also* RX 77.

Mr. Veenstra from Human Resources sat in on the performance review with Mr. Mortensen. TR at 278, 283-84. Complainant was surprised that the representative from the human resources department would attend his performance evaluation. TR at 284. Mr. Mortensen told Complainant that he wanted to make a "strong impression" on him to invite an H.R. representative to the evaluation unannounced. *Id.*

Complainant testified that from April 22 through May 2003, Mortensen was degrading to him. TR at 281-82, 289. Mortensen felt that Complainant would not listen to him. TR at 294. Mortensen's attitude was that Complainant needed to improve on his "active listening," a term frequently used at Respondent for managers. TR at 291-93. Active listening is defined as listening carefully enough to understand what is being said and confirming with the speaker, according to Complainant. TR at 291-92. Complainant testified that Mr. Mortensen ordered him to read book and do book reports on improving his listening skills. TR at 159. Mortensen ordered Complainant to do this because Complainant was not listening to Mortensen or following his orders. TR at 292-95. Complainant alleged that this was punishment by Mr. Mortensen. TR at 160. There were approximately five book reports that Mr. Mortensen wanted him to do and after the third book report, Complainant testified that he said he was stopping. TR at 159. At that point, Complainant testified that he expected Mr. Mortensen to fire him since he was not completing all five book reports. TR at 160. Complainant alleged that after he stopped preparing book reports, Mr. Mortensen consulted with Respondent's training coordinator about a remedial class for Complainant in active listening but Mr. Mortensen concluded with the coordinator that Complainant needed psychiatric help instead. TR at 162. Complainant did not open door Mortensen at this time for this alleged treatment. TR at 297-98.

In May 2003, Complainant received a performance warning from Mr. Mortensen, a step that is taken by Respondent just before termination. TR at 158; RX 70. On May 1, 2003, Complainant sent an e-mail to Mortensen summarizing what went on at the performance evaluation meeting. RX 68; TR at 285.

On May 16, 2003 Complainant sent another e-mail to Mortensen in which he apologized for the May 1, 2003 e-mail. RX 69. According to Complainant, the May 1, 2003 e-mail made Mortensen very angry, and Mortensen told him he would be fired if he ever wrote such e-mails again. TR at 288.

Complainant later testified that Mortensen asked Complainant to write the May 16, 2003 e-mail (RX 69), and that Mortensen saw a first draft and had Complainant improve on it. TR at

160, 288-89. Complainant alleges that he was forced to write the second e-mail to save his job. *Id.* Later, however, it was stipulated that Complainant himself actually wrote and intended the second paragraph of the May 16, 2003 e-mail. TR at 1335-36; *see also* RX 69 at 367.

In May 2003, Complainant was still a project manager for the emulator team. TR at 163. At this time, the emulator team reached an all-time record for delivery of emulators with nearly 2 times the production than ever before. *Id.* No overtime was needed despite the increased productivity and the fact that many of the people on Complainant's emulator team did not get along with each other. TR at 164. Despite this, there was no employee turnover and no comment that Complainant's emulator team was not performing well by Respondent. *Id.*

On May 30, 2003, Complainant sent an e-mail to Mortensen that included wording from Mr. Veenstra. TR at 304; RX 71. Veenstra and Mortensen had Complainant correct two drafts of this e-mail with Complainant before the final RX 71 resulted. TR at 305. At this time, Veenstra and Mortensen told Complainant what was required to avoid being fired. *Id.* Complainant further testified that Mr. Veenstra prohibited Complainant from reviewing notes taken at the meetings with Mr. Veenstra, Mr. Mortensen, and Complainant. TR at 307. During this time, Complainant alleges that Mr. Veenstra was available to Complainant and Complainant did talk with him one time without Mr. Mortensen. TR at 305.

Complainant testified that sometime in 2003, Mr. Mortensen told him that he would try to get rid of Complainant. TR at 166.

On August 9, 2003, Complainant met with Ms. Lieske and Mr. Mortensen. TR at 124, 311. Complainant wanted more employees and no more independent contractors. Mr. Mortensen disagreed with this. Mr. Mortensen had the reputation at Respondent of being the leader or champion for bringing independent contractors to Respondent's Boise location as a new business model. TR at 448, 471; CX 8 at 67-68. According to Complainant's testimony, Mortensen hired at a lot of independent contractors from India and saved Respondent lots of money. *Id.*

In October 2003, Complainant attended a meeting that was also attended by Sandy Lieske, Carol Marlowe, Sterling Mortensen, Mark DeMeester, and other section managers. TR at 101. At the meeting, there was a discussion about the way that Respondent characterized its independent contractors and employees. TR at 106-08; *see also* CX 1. Complainant testified that he expressed his concerns to management at that meeting and took notes. TR at 107-19.

When the meeting ended, Complainant stated that Sterling Mortensen told everyone to destroy their notes from the meeting. TR at 108-09. Complainant further stated that Mr. Mortensen said it was important not to have any paper path. *Id.* Complainant testified that he responded by asking if he would be personally liable if later issues arose regarding the destroyed notes. TR at 108-09. Complainant stated that Mr. DeMeester said "no, the people in the room would not be personally liable." *Id.* Complainant testified that Ms. Lieske told everyone again to destroy their notes immediately from the meeting. TR at 109. Complainant added that Ms. Lieske also told them to delete their notes from their computers. *Id.* Complainant also stated that Ms. Lieske stated, "I know we have a co-employment problem. I feel like I'm pressured to do this." *Id.* After the meeting, Complainant shredded his notes, as did others. TR at 110.

Approximately one week after the meeting, Complainant reported the shredding of documents and his concerns about the co-employment issue to manager Carol Marlowe, another attendee at the meeting. Complainant testified that Ms. Marlowe said, "wasn't that just awful." TR at 117-18. Complainant also testified that, throughout 2003, Ms. Marlowe shared his concern about Respondent's alleged co-employment violations. TR at 123.

In January or February 2004, Complainant spoke with Mr. Mortensen. TR at 128. Mr. Mortensen demanded that Complainant write a work plan for independent contractors like he did for employees. *Id.* Complainant told Mr. Mortensen that a work plan for independent contractors would violate the most important part of Respondent's co-employment guidelines. TR at 128-29; *see also* CX 2 and 5.

Complainant testified that Ms. Lieske told him on February 24, 2004 that she would replace him as project manager. TR at 166. Complainant did not think that this was unusual as many times managers rotate positions. TR at 166-67. In response to Ms. Lieske's comments, Complainant testified that he went to Respondent's human resources manager, Kathy Berria, who told him to look for other opportunities at Respondent. TR at 168.

On April 9, 2004, Complainant met with George Mulhern, Respondent's senior vice-president and operations manager in Boise, to discuss the possible co-employment violations, the directed shredding of notes, and Complainant's work problems. TR at 132-33, 145; CX 6.

Also in late April 2004, Complainant teleconferenced with personnel from Respondent's business practices group -- Mr. Berland, the chief investigator, and Mr. Prindiville, a secondary investigator -- about the possible co-employment violations. TR at 135-36. Complainant was told by Mr. Berland that Respondent was not concerned about the co-employment issues because it would only result in a civil law penalty and not a felony violation. TR at 136-38.

On April 26, 2004, Complainant was formally removed from his position on the emulator team. TR at 96-97, 165. At this time, Complainant was taken off all of Mr. Mortensen's e-mail lists and had nothing to do. *Id.* Complainant testified that he did nothing for five weeks. TR at 166, 207.

On May 10, 2004, Complainant asked to meet and met with Mr. Mulhern again. TR at 138-39.

In May 2004, Ms. Lieske asked Complainant to speak to Linda Rhodda, who told him that Gary Gruver told her not to hire Complainant. TR at 172. In June 2004, Complainant filed a formal complaint alleging that Gruver was trying to blacklist him, and that in May and June 2004, Gruver told Rich Forcier not to hire Complainant. TR at 170-72. Gruver had been Complainant's boss in 2002 when he first became emulator project manager. TR at 170.

On June 14, 2004, Rich Forcier offered Complainant a job that was a combination of project manager and project coordinator. TR at 169. Complainant took the job and it led to his

IPv6 work, which was more desirable to him than his emulator team work. *Id.* Complainant testified that Mr. Forcier and he were on good working terms. TR at 169-70.

On June 16, 2004, Complainant e-mailed Mr. Mulhern again with an attachment of 144 pages. See CX 8. The attachments include three survey responses: two from Complainant's emulator and equipment team dated February 10, 2003 and December 2003, and one from the paper handling team dated March 26, 2002. CX 8 at 399-401. Complainant argued that the three survey responses were from teams he managed and that the only explanation for the negative comments is that the emulator and equipment teams had "unusual personality conflicts." CX 8 at 398.

Complainant testified that he received a June 17, 2004 e-mail from Deborah Dunn, the ethics committee member and a high-ranking Respondent official. TR at 173. Complainant informed the ethics committee that Mr. Mortensen had instructed people to destroy their notes and described this as an illegal felony at trial. TR at 173-74.

Complainant testified that because of his concerns about the co-employment situation, Respondent actually made significant changes to its co-employment policy, as evidenced by various documents. TR at 152-55; *see also* CX 11, 12, 13 and 14.

On July 15, 2004, Complainant's pay band demotion occurred. His ranking went from an (b)(4) to (b)(4) which meant that he had a lower maximum salary by \$ (b)(4). TR at 172-73.

SOX II Facts

Complainant testified that he did not have a set job description for his work with Mr. Forcier in June 2004. TR at 175. Complainant testified that his various job duties included System Design Teams ("SDTs"), formatting work, and connectivity work, but these groups did not really need his help. TR at 175-76.

After two months, Mr. Forcier told Complainant that there was a need for help in IPv6. Complainant talked to Respondent's IPv6 employees in Roseville, California and told them he could contribute. TR at 176-77. Complainant described IPv6 as replacing Internet protocol IPv4. TR at 177. Complainant described this as the next-generation and stated that IPv6 would be worldwide and not just for Respondent. *Id.* Complainant's role was to help make Respondent's printers compliant with IPv6. *Id.*

Complainant further testified that at this time in the fall of 2004, the U.S. Department of Defense ("DOD") was transitioning to IPv6. TR at 178. Complainant testified that it was important for Respondent to work with the federal government in meeting the IPv6 compliance demand as it presented an opportunity for Respondent to secure exclusive rights with the US Government. *Id.*

On August 9, 2004, Complainant attended a meeting with Ms. Fuentes-Wegner, Respondent's employee relations manager, and Kathy Berria from human resources. Ms.

Fuentes-Wegner stated that she had concluded her investigation of Complainant's allegations regarding obstruction of justice, co-employment, and retaliation and that Respondent was "unable to substantiate" any of his allegations. TR at 174; CX 8 at 354. A follow-up letter dated August 10, 2004 was sent to Complainant confirming the matters discussed at the August 9, 2004 meeting. CX 8 at 354.

Complainant testified that on May 20, 2005, Ms. Lieske handed out a new organization chart. TR at 178-79. In the chart, Complainant transferred from reporting directly to section manager Mr. Mahoney to reporting to project manager Bret Funke, who was under section manager Mr. Mortensen. TR at 179; *see also* RX 25.

On May 24, 2005, Complainant met with Ms. Lieske and voiced his concerns about the new reporting structure. TR at 179-80. Ms. Lieske told him that he would not attend staff meetings or be on e-mail distribution lists with Mr. Mortensen. TR at 180. Complainant objected because that is where employees get most of their information about what is happening at Respondent. *Id.* Ms. Lieske told Complainant that this organizational change was because of a lawsuit that Complainant had filed, and it had been approved by Respondent's lawyer. TR at 180-81.

Ms. Lieske also suggested that Complainant transfer to work under other section managers, such as Mr. Freeman or Mr. Ciaglo in Roseville for IPv6 work. TR at 181. Complainant testified that he liked the idea of transferring to work with Mr. Ciaglo or Mr. Freeman. TR at 182. Complainant stated that it was not unusual for such a transfer to occur. *Id.* Complainant later asked Ms. Lieske and Mr. Funke whether the transfer could occur and they told him that they were working on it. TR at 182-83.

Complainant testified that he was managing cross-divisional groups as of June 10, 2005. TR at 207-08; *see also* CX 21.

On July 18, 2005, Complainant filed the instant complaint under the Sarbanes-Oxley Act. TR at 183. Complainant testified that this complaint is about the events of May 20, 2005 and May 24, 2005, including the reorganization and his conversations with Ms. Lieske. *Id.*

In August 2005, Complainant sent an e-mail inquiry to Ms. Lieske about the potential transfer. She responded in an August 9, 2005 email that she was still working on it and that he should keep doing what he was doing at that time. TR at 184.

Also on August 9, 2005, Complainant sent a second letter to various congressmen and the Securities and Exchange Commission. TR at 184.

On August 10, 2005, Complainant prepared and sent an e-mail to Respondent's Chief Executive Officer Mark Hurd, containing attachments of letters to the congressmen. TR at 184; *see also* CX 71 and RX 53.

On August 18, 2005, Mr. Funke told Complainant to attend an urgent meeting with Ms. Berria from Human Resources. TR at 184. Complainant testified that he was told that his IPv6

job was being pulled away from him and that a warranty coordinator job was offered and that he had only one day to accept. *Id.*

At that time, Complainant testified that his IPv6 work was full-time and the time demand was growing. TR at 184, 188. Complainant was leading a project team for XIP2 software and he was acting as a project manager. *Id.* Complainant was also leading a team for IPv6 tests. *Id.* Complainant also testified that at that time he was doing several things with the DOD. TR at 184-85. Complainant further testified that the DOD had a test platform called Moonv6, which was used in combination with underdeveloped products so Respondent did not need a finished product at that time. TR at 186. Complainant was busy working with the DOD with respect to Moonv6. *Id.* Complainant testified that all projects involving IPv6 continued without change. TR at 201. Complainant stated that he was the only employee at Respondent let go from IPv6. *Id.* Complainant opined that Respondent made a terrible decision and pulling him away from IPv6. TR at 202. Complainant and Mr. Funke were co-leaders on IPv6 and everyone knew this according to Complainant. TR at 184-86. He stated that Mr. Funke was trying to do his 2006 planning process and asking Complainant how he could do even more IPv6 work because they were shorthanded and Mr. Funke needed to do other work. TR at 188-89.

On August 19, 2005, Complainant accepted the new position as warranty program coordinator. TR at 201; CX 38.

Complainant testified that he only worked for what amounted to two weeks from mid-August 2005 up through January 24, 2006. TR at 208-09. Complainant stated that he has not refused to do any work assigned to him. TR at 209. One of his few tasks involved updating a 10-slide PowerPoint presentation. TR at 209. Although the person who prepares a slide presentation usually would get their name on it and present it, Complainant was not even invited to Mr. Miller's meeting when he used the slides. TR at 209-10.

As of September 22, 2005, Complainant had no one reporting to him for the first time in 13 years. TR at 202. Complainant reports to Mr. Miller as his section manager. TR at 202-03.

Complainant testified that a warranty program coordinator position is not commensurate with his experience and skill level and is "dead ending" his career. TR at 211. In his new position, Complainant was not invited to any technical staff meetings. TR at 210. Complainant is not on any e-mail list. *Id.* Also, although there is normally a transition period from the prior job to the new job, in Complainant's case there was no transition. TR at 214. Complainant was part of Respondent's management, the next day he was not. *Id.*

Complainant testified that Stu Johnson held the same job before him, spent only ten to fifteen percent of his time doing tasks as warranty coordinator. TR at 206. Complainant testified that Johnson's title was project manager and that his grade was at (b)(4) TR at 206-07. Pay grade (b)(4) is (b)(4) a year higher than the top pay Complainant receives at his current grade of (b)(4) TR at 207. Before Johnson, the position was held by Martin Maxwell, who was also a project manager. TR at 207.

In addition, Complainant asserts that there has been a dramatic change in his treatment by others at Respondent. TR at 214-15. When a newspaper article on Complainant's whistleblower case hit the papers, Complainant was thanked by Buffy Hake. TR at 215. Soon thereafter, many people stopped talking to Complainant and would not look at him. TR at 215-16. Brett Dodd barely speaks to Complainant. *Id.* Complainant stopped wearing his name tag because after the newspaper article appeared, he would get stares and glares. TR at 216.

Complainant stated that he has been emotionally affected by the lack of contact with his fellow workers. TR at 216-17. Complainant stated that he is depressed and anxious and wonders whether his job will disappear. TR at 217. Complainant stated that he sought medical care and prescriptions have been obtained that he says are caused by his work environment with Respondent. *Id.*

Sandy Lieske

Ms. Lieske testified that she started working for Respondent directly out of college in 1981. She was a director of a research and development engineering laboratory both at the time of trial and in the years 2003-2005, with approximately 150-180 engineers reporting to her in her lab. TR at 495, 539-42. Ms. Lieske testified that, at all times relevant here, her lab was responsible for work on Respondent's new products that were under development and that had not been released to the marketplace yet. TR at 542. She further described her chain of command as reporting to a vice president manager in Vancouver, who has a senior vice president, an executive vice president, and the chief executive officer above them TR at 648.

Ms. Lieske testified that in 2000, she would have had 15 to 20 project managers including Complainant. TR at 552. At that time, she would generally learn through her section managers whether someone was doing a good or bad job as a project manager. TR at 553. She also stated that she would work with section managers to do the ranking for project managers with the section managers driving the rankings. TR at 553-54.

Ms. Lieske testified that she believed that through 2002 and beyond, Complainant was in the bottom third generally with respect of ranked project managers. TR at 554. Tracy Freeman expressed some concerns about the way that Complainant was managing his team and his ability. TR at 556. Ms. Lieske recalled that Mr. Freeman's main concerns were about Complainant's ability to carry the engine firmware forward, which was an area that was deemed to be a critical path, high-investment area for Respondent. *Id.* Ms. Lieske testified that as a result of her conversations with Mr. Freeman, it was decided that they would move Complainant to try a different job to see if he might be more successful. TR at 557.

Complainant next worked for Debra Owens in the job management area. *Id.* Ms. Lieske testified that she received mixed feedback from Ms. Owens. Some members of Complainant's team really liked him and other members had difficulty with him. *Id.* Ms. Lieske recalled that feedback from both Mr. Freeman and Ms. Owens indicated that there were concerns that Complainant did not listen very well to his team and he seemed to lock in on something particular he wanted to do and was not very flexible terms of adapting to meet the needs of the

employees. TR at 558. Ms. Lieske knew that Complainant had some challenges in that he did not spend much time with its engineers, and he seemed to sit in his cubicle at work and use e-mail and voicemail to communicate with his engineers, which was not very effective. *Id.*

Ms. Lieske testified that from January through mid-May 2003 she had numerous conversations with Mr. Mortensen and Mr. Veenstra concerning Complainant's job performance. TR at 564-70. She further testified that the feedback she got was that Complainant generally was not responsive and that he would not participate in dialogue. They felt they were having a hard time drawing him out and they had a hard time understanding if he was really hearing what they were trying to tell him. TR at 567. Ms. Lieske further testified that her reaction was to talk to other people about splitting Complainant's job as a way to perhaps again put him in a position where he could be more successful. TR at 568.

Ms. Lieske had no recollection of any conversations with Complainant during the first six months of 2003 in which he raised any concerns or issues he had about Mr. Mortensen or on the topic of co-employment related to Respondent's handling of contract workers. TR at 568-69. At no time in 2003 did Complainant ever come to Ms. Lieske either as a formal open door or otherwise to complain about Mr. Mortensen according to Ms. Lieske. TR at 572.

Ms. Lieske did recall meeting with Complainant and Mr. Mortensen in August 2003 to hear Complainant's proposal to hire a number of new employees. TR at 569-70. Ms. Lieske did not recall any discussion in which Complainant attributed a desire to hire more employees to any problems he had with hiring contract workers. TR at 571-72. Ms. Lieske further testified that she reserved judgment after the meeting and wanted to follow-up with Mr. Mortensen as the section manager responsible for this presentation. Her initial reaction, however, was that she no position to hire new engineers into the lab due to the severe head-count constraints in 2003 and the fact that her lab was focused on single-function products and there was less and less investment going into single-function products. TR at 570. Ms. Lieske further explained that "head count" meant the number of employees she was authorized to hire. *Id.*

In October 2003, Ms. Lieske and members of her staff attended the meeting conducted by Mr. DeMeester regarding how they should be managing or interacting with the contingent work force most effectively. TR at 787-88. Ms. Lieske denied that any input or complaints by Complainant motivated her to seek such a meeting. TR at 788. Ms. Lieske recalled that there were a few questions at the meeting, but did not specifically recall any from Complainant. TR at 789. Ms. Lieske did not recall any questioning being cut-off at the meeting. *Id.* Ms. Lieske also testified that when the meeting ended Mr. DeMeester said that he was not providing handouts. In response, some man who she did not recall made a joke that maybe they should shred all of the notes and started laughing and chuckling, as the tone of the statement was clearly meant as a joke. TR at 790-91, 803-04. Ms. Lieske denied that either she or Mr. Mortensen ordered people to destroy notes. TR at 789-90. She did testify that she has on occasion asked people to destroy employee rating survey copies at Respondent. TR at 792-93.

Ms. Lieske was aware that in December 2003, Mr. Veenstra and Mr. Mortensen met with Complainant to provide feedback to him. TR at 573. She further testified that they had made the decision at that time that they were going to remove Complainant from his project management

position. *Id.* She further testified that they wanted to provide him with feedback from the performance evaluation to help him understand that he would be removed from his position. *Id.* She further stated that they spent a lot of time in January trying to test Complainant's understanding of the feedback prior to officially telling him that there were going to take him out of his project management position. *Id.* Ms. Lieske believed that it was some time at the end of January, early February 2004, that it was communicated to Complainant that he would be taken out of his project manager position. TR at 573-74.

Ms. Lieske testified that around this time in early February 2004, Complainant made a request for her to reconsider Mr. Mortensen's decision to remove him as a project manager. Complainant asked Ms. Lieske to get feedback from two employees from his team, Steve Folster and Brett Davis. TR at 573-74, 813-14. In response, Ms. Lieske called both Mr. Davis and Mr. Folster and had quite lengthy conversations with them. TR at 575. In general, Ms. Lieske testified that the comments were mixed but a little more negative toward Complainant. The engineers raised a lot of concerns about the lack of structure and process in the team, the lack of a clear process for handing off deliverables between the hardware and software teams, and the open disclosure of awards, which had caused uproar on the team and led them to question Complainant's judgment. TR at 575-76, 813-14. Ms. Lieske further stated that she was unable to separate the two conversations but that the substance of the conversations very much correlated with what she had heard from Mr. Mortensen that they thought Complainant treated different members of the team unfairly and questioned his judgment. TR at 575. Ms. Lieske also stated that the two engineers felt that Complainant did not listen well, which confirmed the similar feedback she had received from Mr. Mortensen. TR at 575-76. In addition, Ms. Lieske stated that, with her own staff, she aims to give negative feedback in a way that did not suggest where or who it came from because that potentially creates more animosity among the staff. TR at 820.

Ms. Lieske stated told Complainant that, after speaking with Mr. Folster and Mr. Davis, she stood by the decision that Mr. Mortensen had made. TR at 576. Ms. Lieske further stated that Complainant did not make any complaints about Mr. Mortensen to the effect he believed that his removal as project manager was being done to him in retaliation or as an adverse action for anything he had done previously. *Id.*

Ms. Lieske further testified that after April 2004 she was aware of that Complainant had left her lab as an independent contributor to start a new position. TR at 577. She further stated that Complainant went to work for Mr. Forcier in a lab that was responsible, at that time, for LaserJet-based multi-function products. *Id.* She also stated that at that time her lab was doing single-function and multi-function work. *Id.*

(b)(4)

(b)(4)

Ms. Lieske identified RX 12 at page 60 as being an organizational chart from March 31, 2005. TR at 589. (b)(4)

(b)(4)

In February or March 2005, Ms. Lieske spoke with Mr. Mahoney, who was trying to figure out how to get Complainant to focus on some things other than IPv6. TR at 593. Mr. Mahoney felt that the requirements portion of Complainant's IPv6 work was winding down and Ms. Lieske's lab would likely need to redirect Complainant to do something that was more applicable to her organization. *Id.* Ms. Lieske understood to that Complainant's work involved documenting the requirements to enable IPv6 in their firmware. TR at 593-94. She further testified that once the IPv6 work was documented by Complainant, software engineers who wrote code would implement and deliver the work. TR at 594. She further stated that Mr. McClendon was not a software coder. *Id.*

At the beginning of 2005, Ms. Lieske she participated on a team to oversee the placement of people into firmware positions. TR at 595. She further stated that because she knew that her lab was decreasing she was not going to be in a position to accept any of the people from any other organization and to her lab. *Id.* She did, however, become aware of the fact that there was a section manager opening in another lab on-site and she spoke to Mr. Mortensen and Mr. Mahoney about the opening. *Id.* Since her lab's staffing was declining, she was supportive of Mr. Mahoney taking this opening. TR at 596.

Ms. Lieske stated that the obvious replacement for Mr. Mahoney was Mr. Mortensen, given his technical capabilities, the fact that he had managed this type of work before, and the fact that none of the other section managers seemed to be as good a fit. TR at 596-99. Ms. Lieske testified that based on her understanding of what Complainant was doing when Mr. Mahoney left, she believed it was best that he remain on the team with Mr. Funke since this was the team that would be most involved in the implementation of IPv6. TR at 599.

Ms. Lieske testified that she consulted with Kathy Berria from Human Resources about her concern that Complainant might be reporting to Mr. Mortensen after Mr. Mahoney left. TR at 600. Ms. Lieske was aware that Mr. Mortensen had been named by Complainant in at least one of his claims, although she did not know exactly what his issue was. TR at 600-04. Ms. Lieske thought it was a good fit to have Complainant report directly to Mr. Funke for his performance review rather than Mr. Mortensen since Complainant had a good working relationship with Mr. Funke, one of Ms. Lieske's strongest project managers, and he would be working in an area that Mr. Funke's team was responsible for implementing. TR at 600-04. Ms. Lieske further opined that this accommodation of having Complainant report directly to Mr. Funke in place of Mr. Mortensen was in no way a demotion. TR at 604.

Ms. Lieske next identified RX 13 as being an organizational chart for her lab on May 20, 2005. TR at 592. (b)(4)

(b)(4)

After the new reorganization chart came out on May 20, 2005, Complainant called Ms. Lieske on May 24, 2005. TR at 530-31. Complainant said that the reorganization chart was unacceptable because Sterling Mortensen was now in his direct chain of command, and he told her he was going to escalate his concerns. TR at 531, 605-06. Ms. Lieske responded to Complainant by stating that for business reasons her lab had contracted to five sections from six, and that to prevent Complainant from having to report to Mr. Mortensen, Complainant was to report directly to Mr. Funke because Mr. Funke was responsible for the IPv6 implementation work that was being done in the lab. Mr. Funke would be the person responsible for rating Complainant, thereby insulating Mr. Mortensen from having any input into Complainant's rating process. TR at 605-06.

As Ms. Lieske's lab headed into the May timeframe, their primary product at that point was (b)(4) and they had secondary responsibility for one product for Ms. Skurzynski which subsequently had gone away as well. *Id.* Ms. Lieske further testified that as a result by May and June 2005, her lab was focused 100% on (b)(4), as requested by Respondent senior vice president Hatem Mostafa. TR at 585. She further stated that (b)(4) was a program that

(b)(4)

TR at 585-86. Ms. Lieske described the (b)(4) project being done in her lab as multi-functional. TR at 522. She further described it as the first substantiation of a new technology that will be deployed in a multi-function device. TR at 522-23.

Ms. Lieske further testified that when the (b)(4) project reaches its maturity it needs to be IPv6 compatible. TR at 523. Ms. Lieske testified that IPv6 was a new version Internet protocol and a connectivity issue. TR at 588. She stated, however, that in the May-June 2005 timeframe, IPv6 connectivity was about number 17 of 20 on her lab's priority list, with many other priorities that are much more significant than IPv6. TR at 523, 587. She also stated that sometime in 2005, a marketing manager who was directing the priorities for her lab expressed concern that they were spending too much time on trying to drive IPv6 through the system and they were not spending enough time on more important things. TR at 588-89.

On May 26, 2005, Ms. Lieske sent a message (RX 14 at 63-67) to Complainant in which where she raised questions because she had not previously heard anything about the Moonv6 testing and she was wondering who committed Respondent to do this testing. In her professional history, she would never approach a customer or have direct interaction without getting input from Respondent's marketing department input, as research and development's conversations

with customers were usually brokered by the marketing department. TR at 608-10. Ms. Lieske was surprised that her lab was even talking to the U.S. Department of Defense ("DOD") about this testing because she had not heard anything about it. TR at 609-10. She also testified that that she wondered who was going to coordinate what seemed to her to be an enormous task to be managing this with the DOD, and she did not necessarily believe that it fell into her responsibilities. TR at 610. She also wondered whether fulfilling such a commitment would require changing someone's priorities. *Id.* She further stated that she was especially concerned about such a commitment, since at that time in late May 2005, her lab was shrunk to (b)(4) and one other product that was providing some support to Ms. Skurzynski's lab. TR at 610-11.

On May 27, 2005, Ms. Lieske emailed Complainant (RX 15, pages 68-69) asking him to organize a meeting with the research and development directors to discuss the proposal for the DOD testing as she was surprised by the Moonv6 effort and stated that her lab could not support this effort. TR at 612-14, 619-20. The meeting was finally set to take place on July 18, 2005 but was canceled due to travel conflicts from Mr. Freeman. TR at 619-21.

Ms. Lieske testified that as of late May 2005, (b)(4) was not yet ready for testing at a technical level. TR at 611. At that time, it was not a priority for her lab to participate in a DOD IPv6 readiness test because the primary focus for the DOD testing was going to be single-function products, which were being developed outside her lab. *Id.* She stated that the proposed DOD testing was not a priority for her lab and (b)(4), and it was not even a priority at that point for Ms. Skurzynski's lab and her products. TR at 611-14. Ms. Lieske added that Respondent could still participate in the DOD testing with its single-function products in coordination with employees from Roseville. TR at 612-14, 616. Ms. Lieske further opined that the single-function people were not dependent on her lab after the split of the single-function group at the start of 2005. TR at 617. As proof of this, Ms. Lieske credibly testified that for all work outside of (b)(4) there is a contract in place whereby the lab borrowing her lab's engineers would essentially budget and pay for work done by her lab, which was not done for the DOD testing for the single-function printer group in Mr. Freeman's lab. TR at 617-18. She believed that the organizations most affected would be Mr. Freeman's single-function printer lab and Mr. Ciaglo's Roseville connectivity lab, which would benefit tremendously from the DOD testing, and those two labs should be involved in staffing and coordinating the work. TR at 613-14.

Ms. Lieske testified that Complainant's role at this time was to focus on the elements of IPv6 that were needed to deliver her lab's program, as there was already an IPv6 program manager in Roseville that she thought was Marc Sordi. TR at 613. Ms. Lieske also testified that as of June and July 2005, Mark Lucas was the overall program manager for IPv6 in Roseville for Mr. Ciaglo's lab and that Complainant was primarily doing coordination of IPv6 in her lab, while in other Boise labs, Steve Taylor and John Bagley were involved with IPv6. TR at 808-09. Ms. Lieske described the connectivity lab in Roseville as having broader responsibilities for multiple classes of products, as they develop hardware cards and software resulting in a much broader range of responsibilities. TR at 543-44. Ms. Lieske further testified that Complainant was not told that he could continue working on IPv6 only within her lab, as it would not be typical for anyone in her lab to not change their jobs weekly or monthly depending on the status of marketing priorities. TR at 618-19.

On June 27, 2005, Ms. Lieske emailed Complainant (RX 20, pages 82-83) concerning IPv6/Juice. TR at 621-22; RX 20. Ms. Lieske testified that in late June or early July 2005, Ms. Skurzynski stated that she was unwilling to commit resources from her lab for IPv6/Juice testing because she felt that her products were not ready for any testing. TR at 621. Ms. Lieske further testified that IPv6/Juice was another form of testing that she had never heard of before. TR at 622. Once again, Ms. Lieske stated that she was surprised to hear that they would commit to yet another level of testing, especially because they had not yet been able to get commitment from the directors on who was going to support the Moonv6 testing. *Id.* She became motivated to write the e-mail to Complainant because it was clear to her that the first set of products targeted for testing were single-function products and her lab did not have responsibility for that testing. Again, she felt that she was not going to commit resources to a new second level of testing and she felt that Complainant really needed to transition this work to somebody in the business imaging organization. TR at 622.

Ms. Lieske sent an e-mail to Complainant on June 27, 2005 (RX 21, page 84), in which she asked him if Steve Taylor could take over the coordination work with IPv6/Juice as it would be a long time before her lab would be ready with (b)(4) for this new testing work. TR at 623; RX 21 at 84. Ms. Lieske exchanged more emails on June 27 and 28, 2005 (RX 22, pages 86-93) in which Complainant requested direction and stated that he was open-dooring her for asking him to transition his efforts on IPv6/Juice to someone in the business imaging organization. TR at 624-26; RX 22 at 86-88. Ms. Lieske further explained that this new testing did not fit into her lab's business priorities, and she had a hard time understanding why Complainant continued to persist in trying to do work that was not in her lab's objectives. TR at 624-25. She further stated that she did not take this position in order to cause an adverse action or retaliate against Complainant or complaints he had made in the past. TR at 625-26.

Near the end of June 2005, it was becoming clear to Ms. Lieske that Complainant had a real passion for the DOD testing, so she talked with Mr. Freeman and Mr. Ciaglo to see if Complainant could move to their groups. TR at 626-27, 827-29. Mr. Freeman stated that he already had two people who filled this role in his lab and he could not absorb another head-count for this work. TR at 627. Ms. Lieske traded a couple of messages with Mr. Ciaglo in the late June through July 2005 timeframe, and he was open to taking Complainant in Roseville but he needed to clear it with his management to see whether they could add a head count to do this job in their lab. TR at 628. Ms. Lieske also testified that when she approached Complainant about moving to either Mr. Freeman's lab or Mr. Ciaglo's lab, he was happy for that to happen. TR at 629-30. On August 9, 2005, Ms. Lieske told Complainant that there continued to be discussions about what options there are to move him to another organization. TR at 630-33; CX 69 at 971-72. At that time, she knew that Mr. Freeman could not take Complainant but things were still up in the air about whether Mr. Ciaglo could take Complainant into his lab. TR at 631.

For several weeks before August 18, 2005, there had been discussions about moving Complainant to a new position. TR at 518. The discussions were about Complainant working under different management and taking him out of IPv6 work. TR at 519. At this time she also asked Brett Funke to look at broadening Complainant's responsibilities. TR at 520.

Ms. Lieske further testified that her lab went through a second major reorganization in July 2005 [REDACTED] (b)(4)

[REDACTED] (b)(4)

Ms. Lieske described IPv6 as a feature and not a product. TR at 821-22, 837-39. She further testified that IPv6 was one of 500 and some requirements for [REDACTED] (b)(4) and that her priorities in August 2005 for [REDACTED] (b)(4) involved approximately 20 or 21 categories with connectivity being one of the categories and IPv6 being a subset of connectivity as one of its features. *Id.* She further stated that, in August 2005, connectivity was prioritized by Respondent's marketing department as 17 or 18 on the list of 20 or 21 categories for Ms. Lieske's lab. *Id.* Ms. Lieske further testified that at that time, Mr. Funke was not working exclusively on connectivity issues. TR at 823. With respect for Complainant's work in August 2005, Ms. Lieske discussed the performance objectives from November 2004 through October 2005. Ms. Lieske testified that she had seen Complainant's performance plan from November 2004 through October 2005 before. TR at 799-801; RX 8 at 45-54. She also testified that at pages 51 and 52 of RX 8, the twelve operational objectives are all IPv6-related. TR at 799. She opined that in August 2005, her lab had not slowed down their implementation work with IPv6, but that the IPv6 objectives for Complainant in her lab were winding down although they might have been totally appropriate for him in a different lab. TR at 825.

Ms. Lieske testified that in August through December of 2005 there were probably less than 25 people working on IPv6. TR at 511. She further stated that in August 2005 she made the decision not to prioritize the investment in IPv6 for her organization but did not make the same decision for the rest of the organizations involved. TR at 516. Ms. Lieske also testified that she had no responsibility for the IPv6 testing with the DOD and that she was focusing her efforts on the single product that she was responsible for at that time. *Id.*

As of August 2005, Ms. Lieske's lab could not afford to spend a head count totally on IPv6 coordination because the requirements work for IPv6 had wound down and her lab was transitioning into an implementation phase. At that stage, she could rely on one of her project managers to be responsible for the coordination with Roseville. TR at 632. Because Ms. Lieske decided she would not have a job dedicated to IPv6 coordination in her lab, she spoke with Kathy Berria about options for Complainant if Mr. Ciaglo's new manager, Sharon Jones, decided that Mr. Ciaglo's lab could not afford to spend another head count for Complainant's IPv6 work. TR at 632-34, 828-29. She further stated that because of enhanced early retirement at Respondent, she and Ms. Berria thought that there might be an opening in some other organization. TR at 634. Ms. Lieske became aware, as a result of his open-dooring her, that Complainant wanted to focus on IPv6. This awareness had a role in her continuing to persist with Mr. Ciaglo to see if perhaps Complainant could fit into his lab. TR at 636. Ms. Lieske stated that eventually, through Ms. Berria, she discovered that Mr. Ciaglo's lab had decided that

they could not invest an entire head count in Complainant's work and they were not willing to move him into their organization. TR at 635.

Ms. Lieske stated that the last communication that she had with Complainant was around August 8, 2005 when she still was not aware exactly into what position Complainant would be placed. TR at 810. She further testified that she was not involved in any of the discussions around placement opportunities for Complainant at that time and that Ms. Berria would have been one of the people involved in Complainant's new placement. TR at 810-11. Ms. Lieske denied directing anyone to not speak to Complainant or to give him blank looks or scowl at him at any time. TR at 637. Ms. Lieske also denied having seen or being aware of the August 10, 2005 e-mail (RX 53, page 222) from Complainant to Mark Hurd or any attachments thereto regarding Complainant's Sarbanes-Oxley Lawsuit or letters to Senators and SEC. TR at 646-47. In addition, Ms. Lieske testified that the first time that she became aware of the August 10, 2005 e-mail was at trial in January 2006. TR at 647.

Ms. Lieske testified that in the year 2005 Complainant's pay band was (b)(4) TR at 545. She further stated that Respondent tries to align the pay band with job, job titles, job scope and responsibilities. TR at 546. As an example, she stated that the bulk of her engineers were called specialists at a level of (b)(4) or (b)(4) *Id.* The next level on the engineering career path is an expert level engineer, which is one pay band higher. *Id.* She further testified that the next level higher is a master level engineer, which is equivalent to a section manager with a pay band of (b)(4). *Id.* She stated that when you move up through those roles, the job scope gets much larger and Respondent expects higher levels of responsibility for the higher scope positions. *Id.*

Ms. Lieske testified that an individual contributor as someone who has people reporting to them. TR at 544. Ms. Lieske further testified that an individual contributor could work for a project manager or for a section manager. TR at 545.

Ms. Lieske further testified that program managers are generally responsible for integrating multiple elements of a program. TR at 547. Generally, she stated, the program manager could be responsible for integrating all the elements of the program across the different areas of the matrix. *Id.* She further described a matrix organization as one where no single organization has complete responsibility for delivering the whole device. *Id.* As an example, Ms. Lieske testified that she delivers the firmware, someone else delivers the electronics, and another lab may deliver the engine, but they all have to work together to deliver that program. *Id.*

Ms. Lieske also stated that she was familiar with people with the title of program manager in the last five years who did not have people reporting directly to them. TR at 546. She further testified that typically a program manager will not have employees reporting to them. She had a program manager in her lab at the time of trial who did not have any individuals reporting to him. TR at 546-47. She also stated that there are a number of program managers in the product labs and now those individuals have people reporting to them. TR at 547.

Ms. Lieske further testified that within her own lab she has 20 to 25 project managers that have teams. TR at 548. They manage teams that are contributing to the release of firmware for her lab. *Id.* Ms. Lieske stated that she had a firmware manager who was responsible for work

across all the teams to ensure that all the deliveries were coming together at the appropriate points in time. *Id.* In that case, the person would not have any one reporting to them according to Ms. Lieske. TR at 548-49. She further testified that this structure has generally been the same over the last five years. TR at 549.

Ms. Lieske further testified that at Respondent a person's title is less descriptive of where they would report. TR at 549. For example, Ms. Lieske stated that she has a master level engineer reporting directly to her, whereas the majority of other master level engineers report to section manager. On occasion, she has had master level engineers report to project managers, even though their pay grade would be higher than their project manager. *Id.* Similarly, Ms. Lieske testified that she is aware of program managers who have reported directly to her as the lab director, to section managers, or to project managers. TR at 549-50. She further testified that she receives information about activities within her lab from her section managers, project managers, and occasionally from individual contributors, depending on the topic. TR at 807.

Ms. Lieske testified that before she became a lab director she had been a project manager for about five years. TR at 550. Ms. Lieske opined that Complainant did a different type of work when he was a manager of a technician in a metrology lab than when he supervised engineers in her research and development lab. TR at 551. She further opined that Complainant's work doing quality assurance was generally less sophisticated than the work that comes out of a research and development lab. TR at 551-52.

Ms. Lieske further testified that her lab had a maximum number of people that it could have on board as Respondent employees, a number that changed from time to time. TR at 571. She further testified that the exception process is one that usually required her to go to her vice president and perhaps the senior vice president for authority to go above her staffing level. *Id.* She further testified that at the time of trial it would not be uncommon for her request to increase staffing to have to go up to a level right below Respondent's President and Chief Executive Officer, Mark Hurd. *Id.*

Don Ciaglo

Mr. Ciaglo has worked for Respondent for 27 years and at all relevant times was a director of engineering within the connectivity lab of the business imaging and printing group ("BIP") at Respondent's Roseville, California location. TR at 1350-51. In 2005, Mr. Ciaglo's lab organization had overall program and project management responsibility for the IPv6⁵ program so that the overall functionality between Respondent's multiple platform organizations and different printer groups was consistent after transferring to an IPv6 format. TR at 1351. As part of Mr. Ciaglo's oversight for IPv6, his group worked closely with Ms. Lieske's MFP lab out of the enterprise imaging and printing organization, as well as several labs in the BIP and other non-imaging and printing ("IPG") organizations as well. TR at 1351, 1365.

⁵ Mr. Ciaglo explained IPv6/IPSec as a very, very complicated technology that "requires inner-operability of hardware and software and routers and all kinds of stuff." TR at 1367.

Mr. Ciaglo credibly testified that in 2005, his group's focus was *horizontal* meaning that his organization was responsible for making sure that from a customer experience perspective, each customer had a very consistent experience when compared to other customers' experiences with respect to Respondent's different printers regardless of whether they were multi-function products ("MFPs") or single-function products ("SFPs"). TR at 1351-52. Mr. Ciaglo added that his lab's horizontal focus was in contrast to other Respondent labs, such as Ms. Lieske's, where the focus was *vertical* and product specific, such that the specific printer labs were responsible for assuring that functionality was developed within the printers whether it be MFPs or SFPs. *Id.* Stated differently, Mr. Ciaglo added that his organization was responsible for making sure that the IPv6 functionality, as well as other connectivity and networking functionalities, were done in a very consistent manner across Respondent's different printer platforms, whereas other Respondent labs would be focused on product-specific functionality. *Id.*

Mr. Ciaglo explained that in 2005, his lab was also responsible for IPsec, which he stated stands for Internet Protocol Security. IPsec is a security protocol in and of itself, and a subset of the IPv6 protocol. TR at 1352-53.

Mr. Ciaglo confirmed that Respondent underwent reorganizations in 2004 and 2005, which ultimately downsized his specific lab (b)(4) in 2005 including fewer executives and managers. TR at 1353. Mr. Ciaglo further testified that company-wide, the 2005 transformation of Respondent resulted in (b)(4) fewer executives, (b)(4) fewer managers, and (b)(4) fewer resources overall. *Id.*

Sometime in the April to June 2005 timeframe, Ms. Lieske first contacted Mr. Ciaglo about Complainant possibly transferring over to Mr. Ciaglo's lab. TR at 1354-55. Mr. Ciaglo testified that Ms. Lieske inquired about transferring Complainant because of his broader horizontal role with IPv6 and expressed strong interest of continuing to stay involved in the IPv6 program did not fit with her lab's head-count needs and the vertical responsibility she had as lab director. TR at 1354-56. Mr. Ciaglo immediately understood that Ms. Lieske was thinking of transferring Complainant over to Mr. Ciaglo's lab because Complainant was playing a more horizontal role than the vertical role needed by Ms. Lieske's lab. TR at 1355 and 1361.

Mr. Ciaglo further opined that Complainant's role with IPv6 had ended in the summer of 2005 with the establishment of the partner relationship with DOD and the decision that future engineering and testing of IPv6 would proceed with a very simple SFP rather than a complicated MFP that was the focus of Ms. Lieske's lab. TR at 1361-63 and 1369. Mr. Ciaglo concluded by stating that, given the business decision away from testing IPv6 on MFPs, it "made all the sense in the world" that Ms. Lieske was attempting to transfer Complainant away from her MFP lab at this time. TR at 1362-63. *See also* RX 7 at 39-43.

Mr. Ciaglo responded to Ms. Lieske's inquiry and told her he would get back to her. TR at 1355-56. While never having met Complainant, Mr. Ciaglo was familiar with his work in phase one with IPv6, and he thought Complainant was in marketing because he was playing that type of role. TR at 1355-1362. Mr. Ciaglo understood that his overall IPv6/IPsec project and program manager, Mark Lucas, had many tasks to perform in 2005. Complainant had stepped in place of Mr. Lucas and did a great job establishing a new complicated contract relationship with

DOD, thereby ending phase one of the multi-phased effort involving IPv6 and IPsec. TR at 1356, 1361-62; CX 24. Mr. Ciaglo also understood that Complainant had laid the foundation to help Respondent establish the contracts and the relationships so that Respondent could participate in DICE, JUICE, and Moonv6. TR at 1367. Mr. Ciaglo stated that Mr. Lucas thought it would be great to add Complainant to Mr. Ciaglo's lab. TR at 1356.

Given Mr. Lucas' positive feedback about Complainant's IPv6 work, his proven track record, and the fact that finding an individual like Complainant who thinks horizontally is fairly rare, Mr. Ciaglo was very interested in bringing Complainant into his lab. TR at 1357-58. Mr. Ciaglo testified that he did not follow up with Ms. Lieske, however, because he assumed that she was just planting a seed with him about Complainant transferring in the future, as staffing for fiscal year 2006 was up in the air with Respondent's recent transformation. TR at 1358.

Mr. Ciaglo stated that he did follow-up with his manager, Chris Kirkoff, about the idea of expanding his lab into the IPsec security space and adding Complainant but Mr. Kirkoff "made it pretty clear" that Mr. Ciaglo's lab was not going to get additional head count to add Complainant. TR at 1358-59. Mr. Ciaglo further testified that although he wanted to bring Complainant into his lab in 2005, he did not have that prerogative. TR at 1359.

Mr. Ciaglo testified that Sharon Jones became his manager near the end of July or early August 2005 as a result of the new formation of the LaserJet business organization. TR at 1359. At that time, Mr. Ciaglo spoke with Ms. Jones about bringing Complainant over to his lab, and she confirmed that Mr. Ciaglo would not be able to add Complainant to his lab. TR at 1359-60. Mr. Ciaglo communicated this to Ms. Lieske sometime in early August 2005. TR at 1360.

Finally, Mr. Ciaglo testified that from early August 2005 to the time of trial, his lab lost additional resources. On the IPv6/IPsec program in particular, his lab lost a very important lead engineer/architect and Mr. Ciaglo was unable to replace him. TR at 1369.

Terry Mahoney

At the time of trial, Terry Mahoney had worked for Respondent for 18 years. TR at 670.

In November 2004, Complainant reported to Mr. Mahoney because Mahoney was a section manager responsible for low-level firmware for products at Respondent's research and development lab under Ms. Lieske. *Id.* Mr. Mahoney further explained that, at that time, his team was specifically responsible for 20 to 40 various tasks and features for delivering the software that connects hardware pieces to other software pieces in Ms. Lieske's lab. TR at 670-71.

Mr. Mahoney testified that below him, he had project managers who had direct report engineers that did the development work, along with program managers who coordinated the plans between project teams. TR at 671. He further stated that this continued through May 2005 when he remained responsible for approximately the same number of features, but fewer less products with more complexity within the product. *Id.*

Mr. Mahoney further testified that from November 2004 to May 2005, his section in Ms. Lieske's lab went through two reorganizations and a voluntary severance program, which resulted in a head-count reduction (b)(4) and a reduction in his section's product focus (b)(4). TR at 672-73. Mr. Mahoney's group went from delivering low-level firmware for laser printers, low-end MFP products, and high-end printers to delivering a single product in May 2005. *Id.*

According to Mr. Mahoney, in November 2004, Complainant, along with Bret Funke and his team of engineers, came to Mr. Mahoney's section as part of the first of two reorganizations – this one involving all of the low-level firmware being centralized to Mr. Mahoney's section. TR at 673. At that time, Mr. Mahoney believed that Complainant came in as a program manager. *Id.* Mr. Mahoney did not believe that Complainant was a project manager because Complainant did not have any people directly reporting to him. TR at 735. Instead, Mr. Mahoney testified that he thought the accurate job description for Complainant was project coordinator. *Id.*

Mr. Mahoney believed that in Complainant's role as program manager, he would lead a couple of System Design Teams ("SDTs") and run meetings and coordinate activities between Ms. Lieske's research and development team and other product teams. TR at 673-74. Specifically, Mr. Mahoney hoped that Complainant would run weekly meetings, publish the notes of the meetings, follow up during the week on action items that happened, and develop overall program schedules for the different key features that were being developed. TR at 674.

Mr. Mahoney further testified that the referenced SDTs were not specific to IPv6 and that he anticipated that they would occupy approximately ten percent of Complainant's time at the start. TR at 674. Mr. Mahoney further explained that he expected Complainant to use the remaining ninety percent of his time to broadly coordinate the 10 to 20 other features that had to be planned and tracked within the SDTs. TR at 674-75.

Mr. Mahoney stated that he observed Bret Funke taking charge of and running the SDT meetings in late 2004, rather than Complainant as he had expected. TR at 676-77, 715. Mr. Mahoney further testified that at this time, he had envisioned Complainant taking a broader role in leading the SDTs to help lessen the overload on Bret Funke. TR at 677, 715.

Instead, Mr. Mahoney supported Complainant evangelizing IPv6 and showing the laser printer, copier, and the MFP groups in Boise the importance of the IPv6 functionality. TR at 677-78, 772. Mr. Mahoney opined that Complainant did a good job reading up on and understanding the specifications of IPv6 and making other product teams aware of it to the point where the groups were demanding this functionality in their future products. TR at 678. Mr. Mahoney further testified that IPv6 was an important feature positioning Respondent in the global market. TR 717. Mr. Mahoney also testified that he understood that becoming IPv6 compatible was an important requirement for the U.S. Government. TR 718. Nonetheless, in late 2004, Mr. Mahoney testified that he told Complainant that he needed him to stop doing the broader evangelization and demand creation for the IPv6 feature. TR at 725.

Mr. Mahoney had discussions with Complainant about transitioning from evangelization of IPv6 to overall planning of the delivery of the IPv6. TR at 678. Mr. Mahoney further

explained this transition as going from working with *outside* product teams making a demand for the IPv6 functionality to a role working *within* the project teams inside Ms. Lieske's lab. In Ms. Lieske's lab, Complainant was to develop a specific work breakdown for implementing IPv6 into each of their areas to deliver this functionality, to show their interdependencies and the delivery points, and to ultimately determine when each project team would finally be able to deliver that to market. TR at 678-80. Mr. Mahoney further explained that he expected Complainant to leave the evangelization of IPv6 to implement IPv6 to Ms. Lieske's lab by preparing a work breakdown schedule for the three project teams in the lab summarizing each team's coordination and timing of interfacing with each other to eventually reach a functionality that will enable one to three products' connection to the network, as well as allowing the end-user to see this connectivity on a user interface and put in numbers for IP addresses. TR at 679-80, 693, 715-16.

Mr. Mahoney credibly testified that Complainant did not perform well in accomplishing this task of implementing IPv6 tasks specific to Ms. Lieske's lab. TR at 680. Mr. Mahoney further explained that he would have regular one-on-one discussions with Complainant weekly or every other week, during which he discovered that Complainant was not preparing the necessary work plan. *Id.* Mr. Mahoney also testified that by December 2004, he was getting very concerned and had conversations with Complainant to let him know that he really wanted Complainant to move from the evangelizing role to the very important implementation role of planning and delivery. TR at 680-81, 694.

In response to Complainant's poor performance in December 2004, Mr. Mahoney approached Ms. Lieske and told her that he had some concerns about Complainant's work performance implementing IPv6. TR at 682. At that time, Mr. Mahoney testified that he knew there were some legal activities going on with Complainant and that he was uncomfortable not knowing what he could or could not do. He thought Ms. Lieske could help guide him in his treatment of Complainant. *Id.* Mr. Mahoney testified that Ms. Lieske told him nothing of Complainant's background or past history. Ms. Lieske told Mr. Mahoney to treat Complainant like any other employee on his team, do whatever he would normally do, work with Human Resources ("HR"), and check into Complainant's background a little more. *Id.*

In response, Mr. Mahoney talked briefly with Human Resources to let them know that he was going to get additional background information on Complainant. TR at 682-83. Next, Mr. Mahoney spoke with Complainant's previous manager, Rich Forcier. TR at 683. In his conversation with Mr. Forcier, Mr. Mahoney discovered for the first time that Complainant was not a program manager. Mr. Mahoney learned that in his earlier work for Mr. Forcier, Complainant had been a program coordinator, a role with fewer responsibilities where one assists a program manager in facilitating meetings and does not coordinate work between research and development project teams. TR at 683-84.

Mr. Mahoney explained that a program manager is paid more than a program coordinator and is responsible for 10 to 15 or more features. *Id.* Between November 2004 and May 2005, Mr. Mahoney had three or four, an unusually large number of program managers, reporting to him and each responsible for 15 to 50 features. TR at 684, 773. In conducting their work, each program manager would typically focus intensely on one program feature for several days or

weeks and get some resolution, and then move on to the next feature, continually moving through all features. *Id.*

Mr. Mahoney stated that discovering that Complainant was not a program manager lessened his expectations of Complainant considerably and he was no longer concerned of Complainant's inability to do program management. TR at 685. In addition, Mr. Mahoney did not have Complainant join his staff meetings any longer because only Mr. Mahoney's managers attended those meetings and Mr. Mahoney opined that it was not important to Complainant's work to attend those management meetings. *Id.*

Mr. Mahoney further testified that he talked to Complainant about later developing into a broader program manager position. Mr. Mahoney stated that Complainant was very receptive to this idea as Complainant had a lot of respect for the program managers under Mr. Mahoney at the time and looked forward to working with them. TR at 686. Mr. Mahoney had one of his experienced program managers, Shah Bhati, forward to Complainant a set of basic tools for program management, a set of program scheduling tools, issues tracking information, and overall data sheets for functionality for a product. *Id.* Mr. Mahoney also asked his three program managers, Mr. Bhati, Alice Antonelli, and Bret Funke, to mentor and help Complainant. He also asked Ms. Lieske's Senior System Architect, Patrick Arnold, to help Complainant gain experience and learn to become a program manager. TR at 686-87.

Mr. Mahoney e-mailed Mr. Arnold that he had asked Complainant to be the program manager for IPv6 in February 2005. TR at 688-89; RX 4 at 16. Mr. Mahoney stated that he referred to Complainant being a "program manager" at this time even though he was aware that he was a program coordinator because it was a commonly understood way to indicate responsibility for more interdependency planning. Interdependency planning was something Mr. Mahoney was mentoring Complainant to do in anticipation of his eventually become a program manager. TR at 689; *see also* RX 4 at 16.

Mr. Mahoney next testified that it is common at Respondent that one's actual title is different from the title contained in an annual performance plan and review. TR at 690. For example, Mr. Mahoney's actual title in November 2004 was research and development section manager while his performance plan referenced him as a Manager Level 2. *Id.* Mr. Mahoney further testified that by calling Complainant the IPv6 program manager, he meant that Complainant was to do the work planning for about three project teams in Ms. Lieske's lab to deliver the functionality to one to three products. TR at 693. Mr. Mahoney further clarified the responsibilities given to Complainant did not extend outside Mr. Mahoney's own authority as section manager under Ms. Lieske and they did not extend to IPv6 work outside Ms. Lieske's lab, to all of Respondent's Boise work, to work with DOD, to work with the University of New Hampshire, to the outside testing of Respondent's products, or to obtaining certification for IPv6 products. TR at 691-93.

Toward the first part of 2005, Mr. Mahoney changed Complainant's performance objectives to reinforce the broadness of the contribution needed as Mr. Mahoney believed that Complainant's focus had become too narrow and directed on one single feature – IPv6. TR at 694. Mr. Mahoney testified that he explained to Complainant once again that he needed to

transition into planning IPv6 and that in the long term Mr. Mahoney could not afford to have a program manager or a project coordinator focused on a single feature. *Id.* Mr. Mahoney anticipated that the planning of IPv6 would be complete in early 2005 because they needed to move on to the implementation and designing to deliver the functionality. TR at 694-95, 700.

In 2005, Mr. Mahoney testified that he wanted Complainant to do many other things besides IPv6, but also do the specific work for IPv6 which was coordinating planning with the other project managers and architects for work breakdown to develop the software code. TR at 721-28. As an example, Mr. Mahoney testified that CX 23 at 21-24 was not something typical of what Mr. Mahoney wanted Complainant to be doing because it was not detailed enough. TR at 729-30. Mr. Mahoney further opined that Complainant did not possess the skills or experience to do the engineering development of the IPv6 feature or to write the code necessary to implement the IPv6 feature. TR at 711-12. Instead, Mr. Mahoney expected Complainant to track the progress of the IPv6 work, while the tracking of the actual engineering work would be done by project managers such as Brad Funke as they have engineers report directly to them. TR at 776. Mr. Mahoney further testified that program managers do not follow-up with engineers directly and that a program manager will coordinate between the various teams, such that it would not have been a good match for Complainant to manage engineers directly in 2005. TR at 776-77.

At the beginning of 2005, Mr. Mahoney also had several conversations with Complainant about the need to broaden his focus and also the need to mentor and work with some of the other project teams, serviceability teams, and the new hardware bring-up office, neither of which involved IPv6-related tasks. TR at 695. Mr. Mahoney also stated that he communicated his alteration in Complainant's job objectives in the annual review where he wrote the 2005 objectives and sent them to Complainant. TR at 695-96, 699; RX 5 at 23, 29-31. At no time did Complainant express any unhappiness with the new objectives or did he ever express to Mr. Mahoney that he did not understand them to be final. TR at 708.

Mr. Mahoney further testified that he never looked for someone to be a project manager on IPv6 because it would be too narrow a role and Mr. Mahoney could not afford having an individual manage a single feature. TR at 701-02, 708-10, 773-74. Mr. Mahoney further testified that Ms. Lieske's lab would prioritize the various features in combination with Respondent's marketing organization. TR at 774. Mr. Mahoney further testified that from November 2004 to May 2005, IPv6 ranked high enough to make it into Ms. Lieske's lab's planning but it was not a feature that was going to stop them from being able to deliver the products and he had features that were ranked higher than IPv6. TR at 774-75.

Mr. Mahoney next testified about Complainant's disclosure to him that he was talking to DOD. TR at 702. Mr. Mahoney stated that in response he told Complainant not to contact any customers directly without talking to Mr. Mahoney and Respondent's marketing personnel. TR at 703. The fact that Complainant was speaking directly to a big customer like DOD scared Mr. Mahoney because a research and development person at Respondent never talks directly to the customer, especially about testing. *Id.* Mr. Mahoney added that Ms. Lieske's lab does not test externally with customers as it has its own internal testing. TR at 704. Instead, the research and development team builds and designs products. TR at 703. Respondent has a marketing team and there are several layers between the research and development people and the customer. *Id.* Mr.

(b)(4)

Mr. Mahoney stated that some time in 2005, he left Ms. Lieske's lab to pursue another job opportunity as a result of another reorganization that reduced the scope of Ms. Lieske's (b)(4) (b)(4) and required her to reduce her staff (b)(4) (b)(4) TR at 704-06.

Mr. Mahoney testified that at no time while he worked in Ms. Lieske's lab did he see evidence that Ms. Lieske had a grudge against Complainant or that she did not want him to succeed. TR at 707.

When Mr. Mahoney left Ms. Lieske's lab in May 2005, her lab was down to one lone product, (b)(4), and there were no single-function products left. TR at 713. At that time, Mr. Mahoney estimated that (b)(4) code development was maybe a year out and everyone in Ms. Lieske's lab was dedicated specifically to (b)(4) TR at 712-13.

Prior to departing Ms. Lieske's lab, Mr. Mahoney had an understanding that Complainant would report to Mr. Funke, a very experienced project manager who understood program management and could mentor Complainant. TR at 713-14. Mr. Mahoney stated that he was sure that Mr. Funke understood the need to broaden Complainant's role. TR at 715-16, 769, 784-85. Mr. Mahoney defined "broadly" as involving a number of features rather than being focused on a single piece of functionality. TR at 719.

Bret Funke

At the time of trial, Mr. Funke testified that he was a project manager with Respondent and had worked for Respondent for almost 10 years. TR at 845. Mr. Funke he testified that he also worked in Ms. Lieske's lab in the ESL embedded systems part of the imaging and printer group. *Id.* Mr. Funke also testified that he had an electrical engineering degree from the University of Idaho and started out as an engineer in firmware until becoming a project manager in 1999. TR at 845-46.

Mr. Funke further testified that he has known Complainant probably since 2000 or 2001 when he transitioned into Ms. Lieske's lab. Complainant was a project manager and a peer of Mr. Funke's on the project management team in Ms. Lieske's lab. TR at 849. Mr. Funke he left Ms. Lieske's lab in late 2002 to join the common hardware organization in the other lab. *Id.*

Mr. Funke testified that in October 2004 he came over to Ms. Lieske's lab as part of reorganization from reporting to Rich Forcier. TR at 848. Mr. Forcier was part of Ms. Skurzynski's lab which was organized around delivering common functions primarily hardware, formatters, printed circuit boards, and a low low-level firmware. *Id.* Her lab delivered hardware that Ms. Lieske's lab could use. *Id.*

Mr. Funke testified that when Complainant was brought in to Mr. Forcier's section in 2004 he was a planning facilitator reporting directly to Mr. Forcier for two system design teams whose purpose was to do planning and development requirements and develop solutions for certain technology disciplines. TR at 850, 854. Mr. Funke continued by stating that Complainant's job at that time was to document the life cycle or facilitate the mechanics of moving these technology requirements through the SDTs. TR at 851.

Mr. Funke further testified that he remembered Complainant attending both SDTs and being a member of both but later not attending the low-level SDT while attending the connectivity SDT exclusively. TR at 851-52. At that time, Mr. Funke was supervising eight to 15 people. TR at 852. He was supervising a group of individual contributors who were writing, coding, testing, and delivering firmware. TR at 853.

Mr. Funke stated that months after Complainant left the low-level SDT, Mr. Forcier asked Mr. Funke if he had a problem with Complainant focusing on IPv6 since the other role was not working out so well. TR at 854-55. Mr. Funke he further testified that at that time Mr. Forcier's section had 50 different requirements with IPv6 just being one and IPv6 protocol being one type of connectivity while USB device, USB host, fax, foreign interface harness, and Bluetooth being other conductivity solutions around Respondent's devices. TR at 855. Mr. Funke further testified that just like any other feature and requirement, IPv6 was new and one simply had to go out and understand it in terms of what one will need to do to their products to incorporate the new technology. TR at 855-56.

Mr. Funke noticed even before Complainant reported directly to him that one of Complainant's roles was simply communicating with people in other labs and in other groups about what they were planning on doing with IPv6. TR at 856. Mr. Funke further testified that Complainant was identifying training courses and communicating these courses to engineers in getting changes in place so far as developing and putting together test carts that can be used and a kind of hardware that would be needed for testing IPv6. TR at 857.

Mr. Funke he continued testifying by stating that at this time before going to Ms. Lieske's lab, Complainant worked with him as partners simply in the IPv6 technology area, as Mr. Funke had many other things that he was working on and Complainant was focused solely on IPv6. TR at 858.

Mr. Funke testified that in May 2005 he worked as a project manager in Ms. Lieske's lab responsible for "connectivity," which he defined as communications in and out of the products that he worked on. TR at 846. Mr. Funke testified that he is also responsible for the print pipeline or the actual processing of data as it moves through the printing computer which is much different than conductivity. TR at 846-47. At that time, Mr. Funke was supervising nine individual contributors. TR at 847. Mr. Funke defined an "individual contributor" as one who does not have any direct reports. *Id.*

In late 2004 and early 2005, Mr. Funke testified that (b)(4) was top priority in Ms. Lieske's lab where he worked. TR at 861. Mr. Funke further stated that it was such a top priority

that he and others would have to explain why they were working on something other than (b)(4). *Id.* Mr. Funke further testified that when he came to Ms. Lieske's lab as part of a reorganization there was picking and choosing of engineers for the various labs due to the cutbacks and that Complainant was not part of the group that managers negotiated to retain. TR at 862.

Mr. Funke further stated that because of the priority of (b)(4), he told Complainant that both he and Complainant needed to focus on (b)(4) and disengage their efforts from the other labs. TR at 863. Even after Mr. Funke became Complainant's direct supervisor in May 2005, he stated that Complainant continued to act broadly in IPv6 working on issues and communications that reflected working on IPv6 across all Respondent products, not just the product that Ms. Lieske's lab was responsible for- (b)(4) TR at 865. Mr. Funke then identified RX 12 and RX 13 as organization charts for Ms. Lieske's lab in March 31, 2005 and May 20, 2005. TR at 870.

Mr. Funke described his working relationship with Complainant in May 2005 as being good. TR at 872. Mr. Funke next described his conversation with his new supervisor Mr. Mortensen as the same as he had had with his former supervisor Mr. Mahoney as the desire to focus Complainant's activities on (b)(4), number one, and secondly, on getting Complainant's focus away from the military contracts or contacting customers but just on (b)(4) delivery. TR at 873. Mr. Funke also testified that he became uncomfortable as did Mr. Mortensen, and Ms. Lieske when they discovered that Complainant was working directly with and contacting a potential customer like the Department of Defense because that not Ms. Lieske's lab's role. TR at 874, 876.

Mr. Funke began to communicate to Complainant that he had to focus out of that role once Mr. Funke understood what was going on there. TR at 874-75. Mr. Funke stated that Complainant resisted the requested change of focus and Mr. Funke pointed out to Complainant that the product that had been selected for testing with the DOD was simple and Complainant wanted to change the testing to the multi-function product in their lab. TR at 875-82.

Mr. Funke prepared a position plan for Complainant in July and August 2005 which included Complainant transitioning out his role as a contact with the DOD and to hand over that role outside the lab to the Roseville connectivity organization so he could focus on (b)(4). TR at 876-78, 884-85. Mr. Funke said that Complainant's response was that the DOD work was very important to Respondent. TR at 878. Mr. Funke further stated that the rumors at this time was that if (b)(4) did not get done, Ms. Lieske's lab of 200 people would be dissolved and everyone would be severely impacted so much so that mortgages would not be paid. TR at 878-79. Mr. Funke testified that in response that he change his focus to (b)(4) Complainant was insubordinate and never acknowledged to Mr. Funke that he would drop everything outside of (b)(4). TR at 879-80.

Mr. Funke identified RX 21 as two e-mails dated June 27, 2005 where Ms. Lieske was politely asking Complainant to transfer the DOD testing work to Steve Taylor because the single-function product was part of Tracy Freeman's lab where Mr. Taylor worked outside of Ms. Lieske's lab. TR at 880-82. Mr. Funke identified the second page of RX 21 as an e-mail he sent Complainant on June 27, 2005 trying to make it clear to Complainant that he needed to

transition the responsibility of working with the DOD around IPv6 outside Ms. Lieske's lab TR at 883-84; RX 21 at 85.

Mr. Funke testified that he followed up with Complainant after the June 27 e-mail and saw Complainant in the hall to repeat the request that he transition out of the DOD work to focus on (b)(4) and Complainant begrudgingly acknowledged he would but Mr. Funke further stated that Complainant continued to work outside Ms. Lieske's lab up until August when he stopped working for Mr. Funke. TR at 884-85.

Mr. Funke further testified about a conversation he had with Ms. Lieske in July or early August 2005 about Complainant and his great interest in IPv6 that he would be more effective in the Roseville connectivity organization. TR at 894-95. Mr. Funke understood that Ms. Lieske would contact Mr. Ciaglo to see if Complainant could transfer to Roseville. TR at 895. Mr. Funke further testified that the positioning Roseville did not pan out and that Complainant was qualified for the warranty program manager position that had opened and he participated with Ms. Berria in informing Complainant of the job and offering it to him. TR at 896-906. Mr. Funke testified that he did not think Complainant was qualified to write code and what Ms. Lieske's lab needed in August 2005 was someone to write code to help (b)(4) become a product. TR at 896, 937-38

Mr. Funke further communicated to Complainant on August 18, 2005 that the IPv6 program manager job no longer existed as it did prior to the May 2005 reorganization and Ms. Lieske's ESL lab had no charter or business objective to support broad IPv6 coordination across single-function laser, multi-function laser, page-wide array, JetDirect and host software products. TR at 906-07.

John Steven Folster

Mr. Folster testified that he worked for Respondent until July 29, 2005, when he accepted a voluntary severance package and retired after 26 years with the company. TR at 952, 1004. He testified that he had worked as a lead software engineer on Respondent's emulator team in Ms. Lieske's lab before and during the period when Complainant served as the team's project manager from November 2002 until April 2004. TR at 953.

Mr. Folster testified that he got along well with Complainant and praised him as a "visionary" who "did an excellent job of thinking ahead" to Respondent's long-term needs. TR at 954. As for working under Complainant, however, Mr. Folster opined that one of the deficiencies in Complainant's management was that he was not "forceful" in holding one-on-one meetings with his subordinates to discuss weekly or monthly objectives on a regular basis. TR at 955-56. Mr. Folster explained that the purpose of one-on-one meetings on the emulator team was to prioritize items on a work schedule in order to make sure they matched any priority changes that came down from upper management. TR at 957.

According to Mr. Folster, Complainant also had trouble with or failed to execute project management in that every project seemed to be "priority number one." TR at 985. Mr. Folster

said that nobody was willing to make the "hard decisions" that some other division would not get their emulators or engines or whatever they needed from the emulator team. *Id.* Mr. Folster testified that as a result, the entire team was overworked without a clear understanding of upper management's real priority list, which caused a lot of contention within the team. *Id.*

Mr. Folster further testified that when he later took over for Complainant as project manager in April 2004, he would meet individually with his engineers on a weekly basis to go over the next week's activities and the deliverables schedule, and to make sure any roadblocks anticipated by the engineer would be helped with new resources from other places. TR at 957, 992. Mr. Folster opined that team morale improved after he replaced Complainant. TR at 992.

Instead of regular one-on-one meetings, Mr. Folster believed Complainant conducted them only "as needed." TR at 957. It therefore fell on the lead engineers to communicate the priorities of upper management to the other engineers on the team. TR at 958. According to Mr. Folster, one problem which resulted from the project manager's lack of communication was that deliverables were not well defined and the project schedules for the hardware and software were not well integrated, leading to conflicts and finger-pointing between the hardware and software engineer groups. TR at 958-59. Mr. Folster opined that what Complainant should have done was to implement a defined hand-off process so that the hardware engineers could not sign off and deliver hardware to the software engineers until certain functionality criteria had been met and tested. TR at 960-61. Similarly, the hardware engineers needed reliable software in order to test the hardware, but the software engineers did not have those defined deliverables either. *Id.*

Mr. Folster testified that he was the lead software engineer when the emulator group worked on the smaller (b)(4) project with 8-9 engineers, as opposed to the larger and more complex (b)(4) project during Complainant's time as project manager, which involved up to 29 engineers. TR at 959-60, 995, 1003. Mr. Folster further testified that while working on the (b)(4) project, the morale among the emulator team suffered because Complainant allowed some of the strong personalities on the team to say or do disrespectful things, causing hard feelings. Mr. Folster felt that this, combined with an undefined production process and little or no management of the process, "makes for a bad situation." TR at 962. In Mr. Folster's opinion, the emulator team was chaotic and dysfunctional while Complainant was the project manager. TR at 1001. Mr. Folster stated that he would have expected Complainant to deal with the strong personalities with individual meetings rather than to ignore the situation. TR at 962-63. Instead, Mr. Folster believed that Complainant hoped the team's personality conflicts would go away eventually or work themselves out. TR at 963.

Mr. Folster testified that in or around February 2003, he and two or three others from the team open-doored Complainant to his supervisor Mr. Mortensen, in order to raise their concerns about Complainant's management of the emulator team. TR at 963-64, 972. Mr. Folster acted as spokesman for his group of software engineers. TR at 965. He testified that he had never before open-doored a supervisor in his 26 years with Respondent, as it is unofficially frowned upon unless it is for a valid purpose or reason. TR at 977.

Mr. Folster, as the spokesman for the group, began the open-door process. TR at 965. He testified that the complaints about Complainant were brought forward at this time because the

emulator team was not functioning due to bickering and back-biting. TR at 964. Mr. Folster presented Mr. Mortensen with the group's concerns about Complainant's management style, referring to the lack of consistent one-on-one meetings, the absence of accountability for project schedules, and the personality problems which were causing a dysfunctional team. TR at 965-66. Mr. Folster felt he was qualified to provide criticism of Complainant's management because he himself had previously served as a project manager in another division at Respondent, and he believed he knew what Complainant needed to do to improve the team's management. TR at 973-74. Mr. Folster further testified that the other employees told Mr. Mortensen that in addition to Mr. Folster's concerns, Complainant had threatened that they would lose their jobs if they did not change their behavior. TR at 966.

In response to the open-door process, Mr. Mortensen distributed performance surveys to the emulator team members for comment about Complainant on or about February 16, 2003. Mr. Folster explained that the survey appeared to be a standard form available on the web. TR at 978-79; *see also* RX 66 at 334. Mr. Folster testified that in his responses to the survey, he would have checked boxes similar to the sample at RX 66 at 334 and commented that overall, the team "had some problems that needed to be fixed." TR at 979. He further testified that he never observed any unfairness or negativity toward Complainant from Mr. Mortensen. TR at 1000.

Mr. Folster testified that the team's situation did not improve after the open-door meeting with Mr. Mortensen and that in May 2003, Complainant did some things in performance reviews that "kind of flared everybody up." TR at 975. Specifically, Mr. Folster stated that Complainant had each team member provide comments about every other member. According to Mr. Folster, some of the results were "very negative comments," which Complainant then showed everyone by name so that each team member knew what had been written about the others and by whom. This increased the problems with team morale. TR at 975-76. Mr. Folster testified that in his time with Respondent, he had never before received feedback that was tied directly to individual peers. TR at 976, 1003-04.

Upon being presented at trial with a May 20, 2003 performance warning given to Complainant, Mr. Folster agreed with the list of Complainant's failures to meet job expectations, except he was not aware whether and to what extent Complainant communicated with upper management regarding staff shortages. TR at 980-84; CX 137 at 1203. He further testified that most of the team was working extremely hard during this time, and he himself had been putting in 50 to 60 hours a week, including some weekends. TR at 983-84; 996.

Mr. Folster testified that by December 9, 2003, he felt that Complainant had made significant progress in holding productive team meetings and discussing the prioritization of projects. TR at 988, 998, 1001; CX 147 at 1272-74. Mr. Folster further opined, however, that Complainant was unsuccessful at conducting regular one-on-one meetings, preparing integrated project schedules, and solving the problems with the hand-off from hardware to software. *Id.*

Mr. Folster testified that the emulator team's problems basically remained unchanged from December 2003 through early 2004. TR at 991. He first became aware of a planned change in management of the emulator team in February or March 2004, when Complainant called a team meeting and told everyone that he was being reassigned. *Id.* Mr. Folster testified that he did

not know that he would be replacing Complainant as project manager until April 2004, when he took over for him. He stayed over a year, until he retired in July 2005. TR at 991-92.

Mr. Folster opined that morale on the emulator team improved after he took over for Complainant because he held weekly one-on-one meetings, would meet to resolve conflicts, and held people accountable for their objectives and results. TR at 992, 1003. He further opined that team morale improved because he made each member's accomplishments visible to upper management; he had open, honest discussions with team members about their weekly progress, including accomplishments and roadblocks; and he asked the members to explain why they had not accomplished their objectives. *Id.* Mr. Folster testified that he also worked with team members to help fix the roadblocks. TR at 992-93.

Despite the problems which existed while Complainant was project manager of the emulator group, Mr. Folster agreed that the team's (b)(4) project was a success and was praised by lab manager Ms. Lieske in early 2004. TR at 996-97. He concluded his testimony by opining that Complainant was in the "middle of the pack" in relation to Mr. Folster's past managers, but he said that while Complainant managed the emulator team from late 2002 to early 2004, the problem was that "we were a nonfunctional team and it wasn't getting any better." TR at 1005.

Sterling J. Mortensen

Sterling Mortensen worked for Respondent for just over 31 years and elected early retirement, his last day being October 14, 2005. TR at 1007-08. Mr. Mortensen testified that at all times relevant to this case, he worked as a research and development section manager in Ms. Lieske's lab. TR at 1008.

Mr. Mortensen testified that Complainant first came to work for him in December 2002. TR at 1008. He further testified that he first became aware of problems with Complainant's work performance in early February 2003, when four of the ten employees managed by Complainant open-doored him to Mr. Mortensen. TR at 1008, 1169-71. Mortensen testified that prior to that time, he had had several meetings with Complainant but did not recall any discussions regarding a need for additional staffing. TR at 1009.

Mr. Mortensen testified that in his 31-year career with Respondent, he was open-doored fewer than five times and never by more than one person at a time. TR at 1009-10. Mr. Mortensen felt it was an unusual occurrence for four engineers working under Complainant to have open-doored him on February 7, 2003. TR at 1010, 1012, 1014.

Mr. Mortensen explained that he was familiar with the work of two of the four engineers who open-doored Complainant – Steve Folster and Steve King – because Mr. Mortensen had been section manager of the emulator team in 1999 and part of 2000, when there was a different project manager. TR at 1010-11. Mr. Mortensen described Mr. Folster as being a "good engineer" and "very easy to work with." TR at 1011. He described Mr. King as being a lead engineer who helped the project manager do team planning, was looked to by other engineers to make technical decisions, and was ranked at the top of his band. TR at 1011-12.

Mr. Mortensen identified his notes from the February 7, 2003 meeting with Steve King, Steve Folster, Wayne Caro, and Jeff Baird, and testified that the four engineers told him of their frustration and surprise at Complainant's bad feedback on their performances. TR at 1013-14; RX 75 at 389. The four engineers were surprised that Complainant was blaming them for projects being behind schedule. TR at 1015. Mr. Mortensen noted that the four team members were angry and frustrated, and did not enjoy coming to work because they felt their ratings were at risk based on what they had heard from Complainant. TR at 1023-24.

Mr. Mortensen relayed that his notes indicate that the four engineers were surprised because the entire team had been busy with many ongoing projects which required work from multiple engineers, and it was the disorganization of multiple peer engineers that prevented getting the projects done on time. TR at 1015. In addition, Mr. Mortensen noted that the four engineers complained that they reviewed these issues with Complainant, but he seemed to indicate that he did not care about excuses and expected the team to get the results. *Id.*

Mr. Mortensen next noted that the team did not have a sense of closeness and that Complainant was not having the usual one-on-one weekly meetings with each team member to discuss objectives and review accomplishments. TR at 1015-16. Mr. Mortensen said that the emulator team alleged it had gone months without one-on-one meeting with Complainant which, in Mr. Mortensen's opinion, would tend to lead to surprises and disconnect between a manager and his employees. *Id.*

Mr. Mortensen next explained that his notes of the open-door meeting provide that most of the team members had different priorities and believed the team was not coordinated. TR at 1016. He continued by stating that at this early February 2003 meeting, the four engineers felt that the lack of coordination was the underlying cause of deadlines not being met. TR at 1017. Complainant would delegate leadership of portions of projects to different team engineers with the result that everyone thought their own lead assignment was most important, because that was how they were being measured. There was no ability for the team to work together, which was necessary to get projects finished. *Id.* Because the team members did not have the same priority scheme in mind, there was no opportunity to discuss, argue, make a tradeoff, or negotiate to complete a project in a timely manner. It was felt that this was due to Complainant's lack of coordination and failure to create work schedules to follow. TR at 1017, 1019.

Mr. Mortensen further testified that his notes reflect that the four engineers also complained that Complainant would bring up scheduled items which he expected them to complete but which they claim Complainant never told them about. TR at 1018. What mystified the team members was that Complainant would ignore their protestations that they had not been told about the scheduled item before, and he would tell them it was ridiculous to suggest they had never discussed the item, even though there were no e-mails or recollection of prior discussions by any team member. *Id.*

Mr. Mortensen acknowledged that not all of the team's problems in late 2002 and early 2003 were the fault of Complainant. TR at 1020. However, another problem he felt was attributable to Complainant was that he had unreasonable expectations of the software engineers.

When the team was moving to a new (b)(4) system in fall 2002, the software engineers were precluded from completing software planning because the selection of the motherboard hardware had been continually delayed. When they were told that they had missed deadlines, the software engineers approached Complainant with the issue. According to Mr. Mortensen's meeting notes, Complainant responded by indicating that they were supposed to get the work done anyway. TR at 1020-21. The four engineers also felt Complainant unfairly favored the hardware engineers over the larger group of software engineers on the team. TR at 1020-21. The team members indicated to Mr. Mortensen that they would have preferred that Complainant spend time managing and coordinating the team rather than studying personal computers and different hardware books and "digging into being a hardware engineer." TR at 1021-22.

Mr. Mortensen testified that his notes indicate that Complainant did not have a sense of closeness with his team and that there was a lot of back-biting and finger-pointing between the hardware and software engineers on his team. TR at 1023. Finally, Mr. Mortensen testified that his notes from the February 7, 2003 meeting show that the four engineers believed that Complainant was focusing on things he thought were "cool or interesting to him," rather than on what the other engineers in the lab or other Respondent labs were asking for. TR at 1022. The engineers felt this prevented the team from functioning properly. *Id.*

Mr. Mortensen testified that he was shocked by the occurrence of the open-door, thought it was quite serious, and had to figure out how to fit into his schedule an investigation of the concerns raised. TR at 1024. Mr. Mortensen said he wanted to see if other people's perceptions of Complainant matched with what the team members had told him, so he intended to talk to Complainant's previous two managers, Gary Gruver and Debra Owens. TR at 1025-27. Mr. Mortensen further testified that he never let Complainant know about the open-door from his four team members in February 2003. TR at 1190.

Mr. Mortensen contacted each of Complainant's last two managers, neither of whom was aware of the situation in Complainant's emulator group in February 2003. TR at 1026-27. Mr. Mortensen testified that his impression after talking to Mr. Gruver and Ms. Owens was that neither considered Complainant to be a strong project manager. In addition, there had been problems on previous teams which Ms. Owens had talked to Complainant about and given him negative feedback. TR at 1027; *see also* CX 37 at 693, 699-700. Mr. Mortensen said that after talking with Mr. Gruver and Ms. Owens, he believed Complainant had been effectively moved out of two other teams, which is how he ended up as manager of the emulator team. TR at 1027.

Mr. Mortensen testified that he obtained a feedback survey form from Ms. Owens, which she had used and thought worked well. Mr. Mortensen e-mailed it to the emulator team members on February 10, 2003, requesting feedback on Complainant within the next month and a half. TR at 1038-40. Mr. Mortensen testified that when he received the feedback, it showed low marks and problems with Complainant's management which were consistent with the complaints from the open-door engineers, even after their comments were omitted from the survey results. TR at 1040-51, 1086; RX 66 at 333-59. In addition, Mr. Mortensen stated that Complainant received only forty percent of comments in the positive top two bands while other project managers under Mr. Mortensen had received eighty percent of comments in the top two bands. TR at 1050-51; RX 66 at 333-59.

In response to the feedback, Mr. Mortensen said he started talking to the other engineers on Complainant's emulator team, without announcing that he had been open-doored by other team members, in order to get a general understanding on how things were going on the team. TR at 1027-28. Mr. Mortensen testified that he got a lot of feedback indicating problems in the team, tenseness and a lot of back-biting. TR at 1028. These other engineers also indicated that Complainant was not really planning and coordinating the work, there was a lot of work for the team, and a number of things were "slipping" thereby creating a tense atmosphere in February and March 2003. *Id.*

Mr. Mortensen testified that he began having his own one-on-one meetings with Complainant and the team members who open-doored him to find out more about Complainant's schedules and priority lists, and to get an overall understanding about how things worked with the emulator team in February and March 2003. TR at 1029-30. He found the team engineers to be committed people who were working 70 to 80 hours a week, including many evenings and weekends, to try to complete projects on schedule. *Id.* He also found they were frustrated with their inability to make it happen. TR at 1030. Complainant, on the other hand, left at 5:00 p.m. every day. To Mr. Mortensen, it seemed that Complainant was not putting in the same effort or commitment as certain team members and that this was unfair. TR at 1036.

Mr. Mortensen next testified about the evaluation process in 2002-2003 at Respondent. TR at 1030-31. He explained that the rating period began after October 31, the close of Respondent's fiscal year. *Id.* He said that evaluation information normally had to be input by the end of March, and the evaluations would be reviewed with the employees later. TR at 1030. The process would finish and raises would come out around the first of May. *Id.*

Mr. Mortensen testified that Complainant also had to rate his team members in early 2003, and that at the end of February 2003, Complainant indicated to him that he was thinking of ranking three of the open-door engineers, Steve King, Wayne Caro and Jeff Baird, with "I's" meaning "improvement needed." TR at 1031. According to Mr. Mortensen, an "I" rating is a temporary thing, indicating a problem that must be solved; but if the issue is raised again the next year, action would have to be taken. *Id.* Mr. Mortensen opined that it is unusual for a manager to want to rank a number of people on his team with an "I," and that Complainant seemed to strongly believe that these three people were problems on the team. TR at 1032. Mr. Mortensen said that this increased the urgency of him finding out what was happening with Complainant and his team as inputs were due by the end of March 2003 and at the end of February, it seemed like everyone was pointing their fingers at each other. *Id.*

Mr. Mortensen added that he continued to get more involved with Complainant's team by attending staff meetings, talking to people, looking at the work. Mr. Mortensen had previously been a first level manager over engineers and said he felt comfortable doing that kind of discussion and assessment of people. TR at 1032-33. Mr. Mortensen discovered that he did not believe that Mr. King, Mr. Caro, or Mr. Baird were deserving of "I's" as his impression was that each man was one of the most technically competent people on the team, and they were all hard-working people committed to making their team and Respondent successful. TR at 1033.

Mr. Mortensen testified that there were clearly problems with teamwork on the team and that his investigation revealed to him that Complainant was affecting the teamwork as well. TR at 1033. He said he did not inform Complainant he had been open-doored in order to get a true understanding of how the team worked and to prevent any retaliation or shift of behavior by Complainant toward the four engineers. TR at 1033-34.

Mr. Mortensen testified that in February and March 2003, he had one-on-one discussions and casual conversations with Complainant during which he told Complainant that he had been talking to the team and finding some problems. Specifically, he told Complainant that he had found that a number of team members were working long hours, and that there was an overabundance of work such that people cannot get everything done. TR at 1035. He said it was clear that the electrical engineering staff was smaller than the software staff and could not keep up with all the needs the software staff. *Id.* He also told Complainant that there were teamwork issues, and not enough planning, coordination, or prioritization. *Id.* Mr. Mortensen testified that Complainant's responses varied by topic but that what surprised Mr. Mortensen was that Complainant did not have a plan to reduce the long work hours. He felt that Complainant was misusing his engineers while not putting in the same long hours. TR at 1036.

Mr. Mortensen testified that he struggled with how to evaluate Complainant since he had not been in the section long, yet some type of ranking had to be submitted by the end of March. TR at 1037. In March 2003, Mr. Mortensen discussed this with his supervisor, Ms. Lieske, who told Mr. Mortensen that Complainant was the lowest ranked project manager in her lab. *Id.* Mr. Mortensen confirmed that Complainant had been ranked as "M" in previous years' rankings and that in a top to bottom ranking, Complainant was at the bottom of the list. *Id.* In light of this information, Mr. Mortensen decided that rather than rank the previously top-ranked three open-door engineers with an "I", he would rank Complainant with an "I". TR at 1037-38.

Mr. Mortensen testified that the topic of increasing the size of Complainant's staff came up in discussions with Complainant in March and April 2003, when Mr. Mortensen questioned him about the workload of his engineers. TR at 1051, 1053. Mr. Mortensen explained that Complainant had requested to hire an engineer scientist to whom he could delegate planning for the team, management of the people, and task allocation. Mr. Mortensen stated that this was consistent with what Ms. Owens had told him about the way Complainant had used an engineer scientist on previous teams. TR at 1051-52. Mr. Mortensen further testified that in March 2003, he first talked to Complainant about hiring more contractors. TR at 1141. Mr. Mortensen testified that at that time, Complainant did not complain about the possible complications of co-employment. TR 1142.

Mr. Mortensen responded to Complainant's request to hire an engineer scientist by saying that he wanted Complainant to do the planning, managing, and allocating tasks, as this was what the other managers were typically doing; he called it "owning the schedule." TR at 1052. Mr. Mortensen said he told Complainant that it was clear there were problems with prioritization on the team. He opined that so long as Complainant did not take on that role, he did not have to deal with the prioritization problems he was creating. Mr. Mortensen believed that Complainant needed to engage in prioritization in order to come to understand that a particular engineer can

only do certain amount of work in a given week, and that he needs to line up his engineers' schedules to accomplish the necessary tasks, which he had not been doing. *Id.*

According to Mr. Mortensen, Complainant responded by saying that if he could get more Respondent employees, he would be happy to put them on the projects. TR at 1053. Mr. Mortensen told Complainant that it was impossible to get additional employees at that time. 1053, 1055. Mr. Mortensen testified that Complainant expressed that he did not think hiring more contractors would help the situation because he needed people who could interact with marketing and the hardware architects in order to talk about future products and needs. Complainant opined that exposing contractors to this confidential information, which upper management wanted kept quiet, would be inappropriate. TR at 1053-54. Mr. Mortensen responded by telling Complainant that Brett Davis, the senior lead electrical engineer, would be freed up to work on future architecture plans if a contractor was hired to take some of the immediate design tasks from him. TR at 1054. According to Mr. Mortensen, Complainant said he could do this, although he would prefer to have Respondent employees over contractors. Mr. Mortensen testified that in the first six months of 2003, Complainant never told Mr. Mortensen that he could not hire contractors on grounds that it would be a violation of law or the co-employment training. The only concern Complainant raised was over Respondent's intellectual property. TR at 1055.

Mr. Mortensen testified that he told Complainant that he could hire more contract or contingent workers to resolve the workload problem on his team. TR at 1056. He further stated that most co-employment issues were handled by the first level managers such as Complainant. He said that Complainant had received training from Respondent on how to interact with the contractors in an appropriate way. Mr. Mortensen felt it was within Complainant's power to treat contractors appropriately or go to Mr. Mortensen or personnel if he had questions or needed help. *Id.* He further testified that one of his goals in 2003 was to increase the capacity of how much code they could do in Ms. Lieske's lab. TR at 139; CX 112.

Mr. Mortensen testified that he was occasionally responsible for contract negotiations and managing relationships with the service companies which provided contractors to Respondent, as this task would rotate among Respondent's section managers. TR at 1056-57. He further testified that in 2000, this work included some outsourcing in India. TR at 1057. He added that it became Respondent's policy to utilize outsourcing, as many of its competitors were doing so and it provided Respondent with flexibility and cost savings. TR at 1058-59. Mr. Mortensen stated that his division manager Hatem Mustafa recommended outsourcing to India at this time and later, in 2001, section manager Tracy Freeman put together a second proposal for outsourcing in India to develop a research and development lab for simpler products. TR at 1060. Mr. Mortensen took over the second source project in India when Mr. Freeman left to fill a vacant lab manager position. TR at 1060-61. Mr. Mortensen also stated that two-thirds of the way into the second source project he was replaced due to reorganization in May 2003. TR at 1061-63. He denied ever learning that Complainant believed Mr. Mortensen gained professional accolades for his work on the second source project, or that Complainant believed Mr. Mortensen was angry with him for his alleged objections to the use of contingent workers. TR at 1063-64.

Mr. Mortensen testified that in 2003, he decided to give Complainant "I" for "needs improvement", rather than "S" for "superior", "E" for "exceeds expectations", or "M" for "meets expectations." TR at 1064. He explained, however, that he was required to obtain his manager's approval and to consult with personnel before such rating could be communicated to Complainant. TR at 1065. Mr. Mortensen was referred for this purpose to Bert Veenstra. *Id.* He testified that he communicated with Mr. Veenstra by e-mail or in meetings. TR 1066; RX 78 at 401. Mr. Mortensen further testified that he prepared a summary of the emulator team's comments of Complainant. TR at 1069-70; RX 79 at 402-09. In late May 2003, he also recorded patterns in Complainant's behavior to help improve his performance and sent this along with the emulator team's comments about Complainant to Mr. Veenstra, to help him determine whether the proposed "I" rating was appropriate. TR at 1066-68; RX 79 and 84. Mr. Mortensen also sent Mr. Veenstra the survey results for two other project managers, Shari Gonzales and Lee Landin, and he testified that their survey results were more positive than Complainant's. TR at 1068-69.

Mr. Mortensen testified that he and Mr. Veenstra first met with Complainant about his performance feedback in late April 2003. TR at 1073-74. He explained that the purpose of the meeting was to communicate that there had been negative feedback comments from employees about Complainant. TR at 1074, 1086. In response, Complainant acted surprised and defensive and refused to believe the comments. He felt the problem was not him, but instead the problems were caused by the three people he had identified on the team as having performance issues. TR at 1074-75. Mr. Mortensen also testified that the meeting lasted over two hours and that he showed Complainant a summary of the feedback from the team. TR at 1075; RX 79 at 403.

After the first meeting, Complainant sent an e-mail dated April 23, 2003 to Mr. Mortensen and several others. TR at 1076; RX 67. Complainant wrote that he agreed with Mr. Mortensen's criticisms and proposed solution. TR at 1076. Mr. Mortensen testified that he was surprised by the email because at the meeting Complainant had disagreed with the criticisms provided and blamed the three engineers on his team whom he wanted to rate as "I's." TR at 1076-77; RX 67. Mr. Mortensen also disagreed with Complainant's characterization of the primary problem discussed at the meeting as being that the software engineers needed more of Complainant's time and attention. TR at 1077. Mr. Mortensen believed that the primary problem discussed at the meeting was Complainant's failure to manage the team by spending adequate time with the software people, planning and managing the schedules and priorities, and not showing favoritism within the team. TR at 1077-78. Mr. Mortensen further disagreed with Complainant's recap of their meeting, stating that he felt that the two dominant causes of Complainant's performance problems were that the team was doing too many project initiatives and Complainant was not managing the team properly. TR at 1079.

Mr. Mortensen next identified an April 28, 2003 e-mail from Complainant which expressed his concern that it was a problem that Respondent had JetLink outsourced to another company. Mr. Mortensen testified that he explained to Complainant that it was not a problem or a co-employment issue. TR at 1154-55, 1201-02; CX 108 at 1075. Mr. Mortensen further testified that Complainant never expressed concern that when Mr. Mortensen was asking him to employ contractors he was violating principles referenced in CX 103, the IRS 20-plus common-law factors to determine if a worker is classified as an employee. TR at 1160-61; CX 103.

Mr. Mortensen described a second meeting with Mr. Veenstra and Complainant about a week later, to let Complainant know that his performance rating would be an "I." TR at 1080. He further stated that the meeting lasted about 45 minutes. After he informed Complainant he was getting an "I", Complainant stopped talking and interacting with Mr. Veenstra and Mr. Mortensen. TR at 1080-81. Mr. Mortensen said Mr. Veenstra asked Complainant if he wanted a break and to get back together later. TR at 1081. Mr. Mortensen next identified a document from Complainant dated May 1, 2003, a memo sent after the second meeting. TR at 1081; RX 68. Mr. Mortensen's impression after reading the memo was that Complainant did not listen to him or Mr. Veenstra at either meeting, because the gist of the lengthy memo is that most of what Complainant had been doing was great and that there were only a few small problems which Mr. Mortensen improperly presented as big problems. Complainant's memo indicated that he felt Mr. Mortensen's presentation of the issues was inaccurate and unfair. TR at 1082.

The determination to give Complainant an "I" for his performance rating was made by Mr. Mortensen, Ms. Lieske, and Mr. Veenstra from Respondent's personnel office. TR at 1064-66. Mr. Mortensen stated that Mr. Veenstra's role was to determine whether the rating was appropriate, he was involved in the communication of the rating to ensure that Complainant understood the reasons why there was an issue, and he was to act as an advocate for the employee. TR at 1065-66.

Mr. Mortensen next denied ever expressing disbelief that Complainant had been promoted to manager or ever having treated Complainant disrespectfully or in a humiliating way in the process of giving him a negative evaluation. TR at 1084.

Mr. Mortensen testified that on May 15, 2005, he met with Complainant for 45 minutes or more to discuss the team's comments about him as their manager, after removing the comments from the three employees who had open-doored him. TR at 1086-88. Mr. Mortensen stated that Complainant's demeanor changed during their meeting and that Complainant started to believe there was a problem with his performance. TR at 1087. Mr. Mortensen further testified that he pointed out the team's feedback to Complainant because he believed Complainant had not yet internalized or admitted his management problems. Mr. Mortensen also thought that he could possibly save Complainant's management career by specifically pointing out the team's feedback to Complainant before he was to meet with lab manager Lieske later on May 15, 2003. TR at 1088. Mr. Mortensen then identified RX 69 as a May 16, 2003 e-mail he received from Complainant, which contains Complainant's apology for events over the prior several weeks, his defensiveness to performance criticism, and his gratitude to Mr. Mortensen for providing team feedback on May 15, 2003 and for helping him understand his performance issues. TR at 1091-94; RX 69. Mr. Mortensen denied ordering Complainant to write the e-mail and did not recall seeing any other draft versions of the e-mail. TR at 1093-94.

Mr. Mortensen also testified that after May 16, 2003, he met with Mr. Veenstra to work on Complainant's performance warning and plan for improvement. TR at 1094. He testified that Mr. Veenstra had the final authority to issue a performance warning to Complainant. TR at 1197. He also stated that Complainant's project manager job was split at a later date to have someone else manage a part of the emulator team. TR at 1094-95. Also at this time, Mr. Mortensen testified that he met with Complainant, recommended he get training on active listening, and

ordered books on communication styles so that Complainant could improve his problems with active listening. TR at 1099-1100.

According to Mr. Mortensen, a performance warning was given to Complainant on or about May 20, 2003. TR at 1100-01; RX 70. In response, Complainant prepared an action plan to resolve the concerns in the performance warning. TR at 1102; RX 71. Mr. Mortensen testified that it was a good plan and that Mr. Veenstra made some suggestions for Complainant on making some of his goals more measurable. TR at 1104.

Mr. Mortensen recalled that in the months of June, July, and August of 2003, the reports he received about Complainant's management performance from team members indicated that there were still problems, but that things were improving. TR at 1105. Mr. Mortensen testified that at that time, he had no thoughts of taking Complainant out of management. TR at 1105.

Mr. Mortensen testified that in August 2003, Complainant sent an e-mail to him and Ms. Lieske wherein he proposed to increase his team by adding six employee engineers and one engineer scientist. TR at 1105-06. Mr. Mortensen testified that he felt that Complainant's assessing the needs of his team and coming up with proposals was "totally appropriate and the right thing to do." TR at 1106. But, he was disappointed that Complainant had sent the proposal directly to Mr. Mortensen's manager, Ms. Lieske, without first discussing it with him to work on a successful strategy. TR at 1106-07. Mr. Mortensen did not recall prepping Complainant for a later meeting with Ms. Lieske about increased staffing except to say that they discussed how to emphasize why the people were needed. TR at 1108. Mr. Mortensen testified that he discussed Complainant's e-mail with Ms. Lieske, who stated that the request was "silly" because there was no way they could get so many employees. TR at 1107.

Mr. Mortensen testified that at the meeting with Ms. Lieske, Complainant explained that he felt it important to get new engineers who would be Respondent employees rather than independent contractors because they could take on more tasks than contractors. TR at 1108-09. According to Mr. Mortensen, Mr. Lieske indicated that she could not get extra employees but they were approved to get a few more contractors if they wanted them. *Id.* Mr. Mortensen further testified that at that meeting, Complainant did not mention that hiring contractors in place of employees was illegal or inconsistent with training he received from Respondent. TR at 1109.

Mr. Mortensen next testified about an October 2003 extended staff meeting where a Respondent attorney was present. TR at 1109-12. He testified that when he sent the invitation for Complainant to attend the meeting, Complainant said he was glad they were having a meeting because he had some concerns. TR at 1161. Mr. Mortensen recalled that someone requested a copy of notes from the meeting, but the attorney was not handing out notes. TR at 1109-10. Mr. Mortensen testified that he did not order anyone to destroy their notes from the meeting or make any other comment about what should be done with any notes. TR at 1110, 1181. Mr. Mortensen also did not recall Complainant asking any question or speaking at the meeting. TR at 1110-11. Mr. Mortensen did recall someone making a joking reference to the fact that he had made notes and kept documents which were later used in a deposition for a lawsuit while Mr. Mortensen worked for Respondent in Colorado. TR at 1183-85. Mr. Mortensen testified that he felt the

comment was inappropriate, and said that he responded that he thought the notes were useful because they had helped him in a lawsuit. TR at 1184.

Mr. Mortensen further testified that in also October 2003, he saw some feedback about Complainant indicating that "things were getting worse," that there was "more blaming going on," and that the one-on-one meetings regarding monthly business objectives were dropping. TR at 1114. By December 2003, Complainant wanted Mr. Mortensen to meet with two team engineers who worked under him to hear what they had to say about where the problems were coming from. *Id.*

Mr. Mortensen met with Steve Folster and Brett Davis in mid-December 2003. Mr. Mortensen testified that Mr. Folster did most of the talking and told him he was upset with some of the other team members and with Steve King in particular. He was not sure he could continue to work with Mr. King. TR at 1115. Mr. Folster explained that Complainant had told him that Mr. King had made negative comments about Mr. Folster's work performance. TR at 1115-16. Mr. Mortensen testified that Mr. Folster also told him that Complainant had shown him the results of survey feedback about Mr. Folster's performance plan in such a way that he could tell by the comments who on the team made them, and that Mr. Folster was angry at other people as well. TR at 1116-17. Mr. Mortensen said Mr. Davis was upset for similar reasons and had received particularly low rankings and very negative comments from others team members. He felt he knew who some of those people were and was angry with them. TR at 1117-18.

Mr. Mortensen testified that Complainant had Mr. Folster and Mr. Davis meet with him so that he would see it was Mr. King, Mr. Caro, and Mr. Baird who were causing the problems. TR at 1118. Instead, Mr. Mortensen testified that he concluded that Complainant was causing the problems himself by showing his team members the specific results of the surveys and not hiding the identity of the people making the negative comments. TR at 1118-20. Mr. Mortensen forbade Complainant from showing anyone else the survey results. TR at 1119-20.

Mr. Mortensen next stated that he immediately discussed what had occurred with Mr. Veenstra. He expressed to Mr. Veenstra that Complainant had "no clue" he was causing problems with his team members. TR at 1120. Mr. Mortensen testified that his conversation with Mr. Veenstra made it clear to him that there was a "major judgment issue" with Complainant. TR at 1121. Shortly thereafter in January 2004, after further input from Complainant's team members showed only slight improvement over 2003, the decision was made to remove Complainant as project manager. TR at 1121-22. Mr. Mortensen cited reasons for the decision as including that Complainant had not improved on three of the five areas in his performance warning such as planning, no clear priorities, and team work falling apart. TR at 1125-28. He also cited Complainant's lack of judgment including his failure to see the divisive nature of showing team members survey feedback so they could identify the person making negative comments. *Id.* Finally, Mr. Mortensen testified that Complainant continued to show favoritism of some team members over others. *Id.*

Mr. Mortensen stated that in late February or March 2004, he and Mr. Veenstra met with Complainant in a series of meetings as part of his performance review to announce the intention to remove Complainant as project manager. TR at 1122-23. Mr. Mortensen denied that he removed Complainant from his project manager position because he resisted or protested the suggestion from Mr. Mortensen to hire contingent workers. TR at 1136. He further testified that he did not remove Complainant because he had made allegations that Respondent was using contingent workers or contract workers in a way that he believed was unlawful. TR at 1137. Mr. Mortensen stated that they posted the open project manager position and by April 26, 2004, Mr. Folster took over as project manager of the emulator team in place of Complainant. TR at 1125.

Mr. Mortensen assisted Complainant in finding a new individual contributor position. However, he stated it was difficult because budgets were tight at that point in time and there were not many openings. In addition, Complainant's skill set did not easily apply as his electrical engineering experience was in microwave and they did not do microwave in Boise, and Complainant had not done any software development or testing or ASIC development. TR at 1129. According to Mr. Mortensen, in late May 2004, a position was finally found for Complainant with Rich Forcier, a section manager in a different lab. TR at 1130. Complainant was transferred from Mr. Mortensen's section in June 2004. TR at 1113.

In May 2005, Mr. Mortensen discovered that Complainant moved back into his section when Mr. Mahoney left. TR at 1131-32. Mr. Mortensen opined and told Ms. Lieske that he did not think it was a good idea for Complainant to report directly to him because he was aware that Complainant was "out petitioning that I had done wrong things." TR at 1133. Mr. Mortensen felt Complainant did not like him and that he would be uncomfortable reporting directly to Mr. Mortensen. TR at 1133. Mr. Mortensen suggested that Complainant report to Mr. Freeman but Mr. Freeman already had a person working on IPv6 and he did not want to add another employee, or "head count." TR at 1133-34. Mr. Mortensen explained that Complainant ultimately reported to Mr. Funke because Mr. Funke thought that IPv6 was moving toward implementation, "some of the IPv6 things were wrapping up," and he had other things Complainant could work on. TR at 1134.

Lee Landin

Lee Landin testified that at the time of trial she had been working for Respondent for 13 years, and for the last five years in Ms. Lieske's lab as a project manager. TR at 1207. Ms. Landin further testified that in 2003, she was a project manager responsible for firmware integration. She attended the October extended staff meeting with Respondent attorney Mark DeMeester, at which the topic was understanding how to write better contracts and work better with contractors. TR at 1208-1210. She stated that about 15-20 people attended the meeting, and she did not think she took notes because she had recently completed an eight hour employment law course that covered the same material. TR at 1210, 1214.

Ms. Landin further testified that she attended the entire meeting, which lasted 1.5 to 2.0 hours. While she was certain no one at the October 2003 specifically asked people to destroy or delete from their computers notes from the meeting, she did not recall anything specifically said

by Ms. Lieske or Mr. Mortensen, whether copies of the Power Point slides were handed out, or whether she or anyone else took notes or asked any follow-up questions to Mr. DeMeester's presentation. TR at 1210-1212, 1222-23. Ms. Landin testified that after the meeting, she did not observe anyone go to the shredder to destroy notes from the meeting. TR at 1212. Ms. Landin felt that she would have remembered if either Ms. Lieske or Mr. Mortensen had asked people at the October 2003 meeting to destroy their notes, because it would have been out of character for both Ms. Lieske and Mr. Mortensen to make such a request. TR at 1212-14. Ms. Landin further believed that she would have remembered if someone asked her to destroy her notes because she believes that would have been the wrong thing to do. TR at 1214.

Ms. Landin testified that she did not recall any inappropriate treatment of Complainant in 2003 and early 2004, nor had she ever observed Mr. Mortensen treat Complainant in a degrading or abusive way at staff meetings. TR at 1214. In addition, Ms. Landin testified that no one instructed her not to greet Complainant or to isolate him in any way. TR at 1215.

Ms. Landin explained that she had a peer relationship with Complainant at work and would see him from time-to-time at meetings, in the hall, or in the parking lot. TR at 1215. She testified that in 2004, Complainant indicated without elaboration that there was something going on between Respondent and him. Ms. Landin said that also in 2004, Complainant asked her for a lawyer referral and she referred him to her personal family lawyer. TR at 1215, 1220-21.

Richard Forcier

At the time of trial, Rich Forcier testified that he had been working for Respondent for fifteen years and had been a research and development section manager for three and a half years. TR at 1224-25. Mr. Forcier stated that in mid-2004, he worked for lab manager Jan Skurzynski, and as of February 2006 he worked for lab manager Tracy Freeman. TR at 1225. In 2004, Mr. Forcier testified that his group focused on the midrange work group, high end, single-function and multifunction products. *Id.*

Mr. Forcier stated that Complainant came to work under him in May or June 2004, after he was approached by Ms. Lieske and Ms. Skurzynski several times over six to eight weeks about Complainant looking for a position and them trying to find a spot for him. TR at 1226-27. Mr. Forcier testified that he had previously worked with Complainant for many years, had a fairly good feeling for his skill set, and quickly had a job in mind for Complainant. TR at 1227. Specifically, Mr. Forcier stated that he was interested in utilizing Complainant's skills in organization, detail management, and some technical depth. *Id.*

Mr. Forcier further testified that before Complainant came under his supervision, Gary Gruver suggested to Mr. Forcier that he not hire Complainant. TR at 1250. Mr. Forcier stated that Mr. Gruver's comment was not very specific and that he knew that Mr. Gruver had previously managed Complainant. *Id.* Mr. Forcier testified that after more discussion about Complainant's background and people management skills with Mr. Gruver, Mr. Forcier decided to hire Complainant anyway, as Mr. Gruver's opinions about Complainant playing favorites with some of his managed employees were not important to the job Mr. Forcier had in mind, as the

job did not involve Complainant's people management skills or his direct supervision of anyone. TR at 1250, 1252.

Mr. Forcier testified that he and his staff along with Complainant came up with a job description for Complainant's new job. TR at 1227-29; RX 1 at 1-11. He met with Complainant to discuss the job he had in mind and to gauge Complainant's interest in the position, given that there was potential for a pay grade decrease because it was not the same type of position that Complainant had previously and it was not a supervisory position. TR at 1231. Specifically, Mr. Forcier testified that he told Complainant the position was that of "a program manager, as in an individual contributor but not engineering level." TR at 1232. Mr. Forcier defined an "individual contributor" position as having "no direct reports and that you're doing something as an individual for the company." TR at 1233. According to Mr. Forcier, the actual job description contains boilerplate language but at the bottom of page three of the job description, Mr. Forcier wrote that Complainant's specific role will be twofold - one as Requirements Coordinator, and the second role as Process Coordinator. TR at 1236-39; RX 1 at 3-4.

Mr. Forcier testified that he remembered having an upbeat meeting with Complainant, who thanked him for the opportunity and for working with him on the position. TR at 1233. He also testified that at this first meeting, he told Complainant the exact job title and corresponding pay grade had not been decided but it probably would not be at his current level of (b)(4) TR at 1233-34. Mr. Forcier testified that he and Kathy Berria, one of Respondent's HR directors, later decided that Complainant's pay grade would be (b)(4) for the new position. TR at 1234.

Mr. Forcier described how he decided on the job title for Complainant. TR at 1235. He stated that he selected from a certain predefined set of job titles and searched all job titles with engineering, program manager, and project coordinator descriptions looking for the best possible fit, and he came up with one at the (b)(4) level and a second one at the (b)(4) level. *Id.* He explained that after consulting with Ms. Berria, they decided on the (b)(4) position, meaning that Complainant would not take a pay cut. *Id.*

The specific job description for the "Requirements Coordinator" function of Complainant's new position as per Mr. Forcier stated that he was to be a member of Mr. Forcier's two system design teams ("SDTs"), he was to help Mr. Forcier with creating the list and maintaining a spreadsheet of where each observable feature is at in its implementation phase, and to help Mr. Forcier with requirements management. TR at 1237-38. The second "Process Coordinator" function would require Complainant to track information or metrics on the SDTs' formatter process, the hardware design for the motherboard for Respondent's printers, including gauging the group's efficiency through the design, implementation, and design review phases. TR at 1239-40. Mr. Forcier later testified, however, that the formatter process work never did get started with Complainant. TR at 1248; *see also* RX 1 at 4.

Mr. Forcier continued by testifying that when Complainant first started in June 2004, he was allowed to get up to speed with what Mr. Forcier's SDTs were doing. The thought was that later Complainant would actually run a SDT by helping with the requirements tracking. On top of this general work, there were a couple key focus areas regarding one or two of the dozens of features that really needed some help. TR at 1241. Complainant offered to help bring that

together. *Id.* Mr. Forcier stated that the two features in particular were IPv6 and IPSec, internet protocols which his group planned to add to their products. *Id.* Mr. Forcier testified that Complainant approached him about this work and proposed that "he could really add value," and that Mr. Forcier saw it as a good fit for his group. *Id.*

Mr. Forcier stated that he and Complainant started the IPv6 work within three or four weeks of when Complainant transferred to a different manager in October or November 2004. TR at 1242. Mr. Forcier explained that the transfer came about because Ms. Skuzynski and Ms. Lieske made an agreement that all firmware would be consolidated underneath Ms. Lieske, so Mr. Forcier transferred 13 to 15 people to Ms. Lieske's lab, including Complainant. *Id.*

Mr. Forcier next discussed attending a meeting in October 2003 when he was a member of Ms. Lieske's lab. TR at 1242-43. The meeting was with Respondent attorney Mark DeMeester and Ms. Lieske and her extended staff, and it concerned contract workers in general, how to classify them, and how to put practices in place to ensure there were no co-employment issues. TR at 1243. Mr. Forcier further testified that this was not a new topic at Respondent and that he had previously received training on the topic year after year. TR at 1243-44, 1249.

Mr. Forcier testified that he attended the entire meeting and took notes. At the time of trial, he still had his notes. TR at 1244. He further testified that no one at the meeting gave any direction to destroy notes and specifically, neither Mr. Mortensen nor Ms. Lieske directed people to destroy notes. *Id.* Mr. Forcier also testified that he left the meeting with everyone else and did not witness anyone go to the shredder to shred their notes. TR at 1244-45.

Mr. Forcier further testified that when they worked together in 2004, Complainant informed him that there were some things happening to him outside work "of a legal nature." TR at 1245. Mr. Forcier felt he did not need to know such information as Complainant's immediate supervisor. *Id.* Still, Mr. Forcier testified he was concerned and discussed the issue with Ms. Berria, who told him it should not take away from Complainant's ability to work full time and that Mr. Forcier should expect Complainant to work and be measured like any other employee. *Id.* Mr. Forcier testified that he sees Complainant occasionally at Respondent's facility and says "hi" when he sees him. TR at 1245-46. He also testified that at no time did anyone suggest to him that he should isolate or not treat Complainant in a reasonable, friendly fashion. TR at 1246.

Bert Veenstra

Bert Veenstra testified at trial that he had been employed by Respondent for 27 years. He is an employee relations consultant in human resources ("HR"), where he provides support to managers and employees in dealing with a variety of people and performance issues. TR at 1254-55. Mr. Veenstra testified that starting in January 2003, he provided consultation and advice to Mr. Mortensen and Complainant regarding Complainant's performance issues as project manager of the emulator team. TR at 1255-1349.

Mr. Veenstra testified that in late 2002 and early 2003, generally all areas in the research and development lab were feeling overworked. TR at 1325. In addition, he testified that

Respondent's downsizing reorganizations were ongoing from late 2002 onward and involved a hiring freeze or cap on how many people could be added to Respondent's workforce. *Id.*

Mr. Veenstra testified that starting in January 2003 and through at least March 21, 2003, Mr. Mortensen conferred with him several times concerning the performance issues which Mr. Mortensen had witnessed or heard of from members of the emulator team in connection with Complainant's position as the team's manager. TR at 1255-59; RX 78 at 401. Mr. Veenstra further testified that he recommended that Mr. Mortensen collect more data by surveying team members, customers, and peers about Complainant's management style. TR at 1257-58. Complainant's performance issues at this time included a split between positive and negative reviews from team members, an open-door complaint against him, poor planning, a lack of defined priorities resulting in missed milestones, and poor morale. RX 78 at 401.

Mr. Veenstra testified that at no time did he review Complainant's past performance evaluations from 1998 through 2000 to see what remarks were made about him or how his work was characterized. TR at 1323. He further testified that typically does not review earlier evaluations unless there is insufficient data or feedback consistent with and supporting the alleged problem with the employee. TR at 1347. Mr. Veenstra felt that in Complainant's case this was not an issue because he personally observed that Complainant's behaviors and communication were consistent with the concerns that had been raised about him, including problems listening, not being open, and not integrating inputs. *Id.*

Mr. Veenstra explained that after March 2003, Mr. Mortensen would send Mr. Veenstra extensive data and copies of survey responses and comments received from emulator team members and peers of Complainant. TR at 1260. Mr. Veenstra next identified various documents as being the data he received from Mr. Mortensen. TR at 1260-66; RX 66 at 333-359. Mr. Veenstra testified that Mr. Mortensen's collection of survey feedback and documentation concerning Complainant was not unusual at Respondent and that it represented a "360-degree evaluation, where you get kind of a full picture of the person's performance, and have a tool like this that you would solicit specific responses on." TR at 1261-62; RX 66.

Mr. Veenstra stated that after reviewing the data on Complainant he received in March 2003, he felt that overall the feedback seemed below average in terms of the number of issues and the pervasiveness of the issues that were raised. Mr. Veenstra was concerned because there were a number of different issues and they were having quite a bit of impact on people. TR at 1262-63. Mr. Veenstra further testified that he compared the survey results concerning Complainant with the survey results of other managers which Mr. Mortensen sent him, and he noted a contrast in terms of both the markings and the continuum on the surveys being more positive more consistently for the other managers than for Complainant. In addition, he noted that the other managers' surveys were significantly different in terms of number of issues and concerns that were expressed. TR at 1264; RX 66.

Mr. Veenstra testified that he and Mr. Mortensen discussed summarizing the survey results and sharing the feedback with Complainant, and he talked with Mr. Mortensen about how to address the performance problems. TR at 1265. Mr. Veenstra next identified a document dated April 11, 2003 as a summary of the negative feedback which was prepared by Mr. Mortensen

concerning Complainant's management, and which he planned to use to convey to Complainant the concerns that Mr. Mortensen and Mr. Veenstra were having about Complainant's performance in April 2003. TR at 1265-66; RX 79 at 402-409. Mr. Veenstra opined that the survey results summary prepared by Mr. Mortensen were consistent with the individual survey results he reviewed from each team member. TR at 1267-68.

Mr. Veenstra testified that one of the key issues that concerned Mr. Mortensen in April 2003 was that the software engineers on Complainant's emulator team were disorganized and running at low efficiency. TR at 1268-69. Mr. Veenstra added that at that time there was a growing gap between Complainant and his staff, with even the hardware engineers commenting on Complainant's focus on hardware issues to the detriment of the software engineers. *Id.* Mr. Veenstra said that Mr. Mortensen wanted Complainant to first internalize the feedback and agree to make a major improvement. *Id.* Mr. Veenstra also testified that before receiving the April 11th document from Mr. Mortensen (RX 79), he had summarized his own conclusions after reviewing the survey feedback and other data and his conclusions were consistent with those put forth by Mr. Mortensen. TR at 1269.

Mr. Veenstra testified that in response to Mr. Mortensen's suggested proposals to address Complainant's poor performance as of April 2003, he recommended a performance warning and initiation of a corrective action process, which is stronger action than that proposed by Mr. Mortensen, which had included only coaching and having a discussion with Complainant. TR at 1269-70, 1277-78. After further thought and discussions between Mr. Mortensen, Mr. Veenstra, Ms. Lieske, and Kathy Berria, it was agreed that the stronger performance warning with corrective action would be issued, but only after further discussions and a meeting with Complainant himself to gauge his reaction to the performance issues. TR at 1270, 1277-1280.

Mr. Veenstra testified that he had his first meeting with Complainant and Mr. Mortensen on April 23, 2003, to discuss Complainant's performance issues. TR at 1280. At no time did Mr. Veenstra meet separately with Complainant before this meeting, although Mr. Veenstra testified that while he had no specific recollection of offering to meet with Complainant separately, his standard is to offer a separate meeting. He said that it struck him as unusual that Complainant did not follow up with a request for a separate meeting. TR at 1320, 1345-50. In addition, Mr. Veenstra testified that he never heard Mr. Mortensen or anyone else tell him that they were having problems with Complainant due to Complainant's thinking that Respondent was inappropriately engaging in violation of co-employment rules either before or during any of the meetings of the three men. TR at 1338-39.

According to Mr. Veenstra, Complainant did not acknowledge that there were management or performance problems on his part during that first meeting. TR at 1289. Mr. Veenstra testified that his impression was that Complainant would change the subject, he would focus on external contributing factors or difficulties within the group, but Mr. Veenstra did not hear Complainant say anything that indicated understanding or acknowledgement. *Id.*

Mr. Veenstra further testified that Complainant's lack of acknowledgment concerned him, particularly as it continued for several meetings. Mr. Veenstra explained that this raised questions as to whether Complainant was able to make adjustments in his view of things, and

whether he was able to incorporate the new data and understand what was happening to the extent that he could change and improve things. TR at 1289. Mr. Veenstra shared these concerns with Mr. Mortensen, saying that in his experience and given the amount of time they were spending to make little headway in terms of Complainant's understanding, Mr. Veenstra was concerned about whether Complainant was able to understand the changes that were necessary. TR at 1290. Mr. Veenstra further testified that he told Mr. Mortensen that he was concerned about whether Complainant could turn these things around, in terms of his acknowledgment, ownership, and understanding of the issues. *Id.* He wondered whether Complainant should continue as a manager, and indicated that it was a decision for Mr. Mortensen as to whether to keep Complainant in a management job. *Id.*

Mr. Veenstra explained that while Complainant pointed out understaffing and over-tasking as reasons for his negative performance evaluation in early 2003, Mr. Veenstra and Mr. Mortensen recognized that these issues applied to just about every manager in Ms. Lieske's lab. They felt these issues alone could not explain Complainant's underlying performance issues such as not listening to feedback, not incorporating inputs, and essentially operating in a vacuum, all of which created extra pressure and stress on his emulator group aside from the understaffing and over-tasking issues. TR at 1334, 1348. Mr. Veenstra further stated that what distinguished Complainant's problems was what he did to manage the people, to prioritize and plan, and to minimize the impact of understaffing and over-tasking. TR at 1348-49.

Mr. Veenstra also admitted that he did not do any in-depth assessment to quantify how much of Complainant's performance problems at this time were attributable to understaffing. TR at 1331; *see also* RX 67 at 360-61. In addition, Mr. Veenstra never wrote a report to Respondent's upper management saying that they had a problem in the emulator group with staffing. TR at 1332.

Mr. Veenstra testified that at that point in time, Mr. Mortensen decided to keep Complainant in the management job. TR at 1290. Mr. Veenstra stated that "we decided we would go to a performance warning to make sure that [Complainant] understood the seriousness of the issue." *Id.* Mr. Veenstra also testified that Mr. Mortensen decided to keep Complainant in the management job because he believed that Complainant was starting to show "some sense of ownership." TR at 1290. Mr. Veenstra believed that Mr. Mortensen wanted to give Complainant a second chance to address the issues and turn things around. TR at 1289-1291.

On April 30, 2003, Mr. Veenstra met a second time with Mr. Mortensen and Complainant to try to get Complainant to acknowledge that he was having management problems. TR at 1292-93. Mr. Veenstra opined that all three of the meetings he had with Mr. Mortensen and Complainant were similar in that Complainant would try to control the meetings, and would constantly talk about different contributing factors rather than listening to Mr. Mortensen's points and showing insight or reflection in response to issues concerning Complainant's poor management. In Mr. Veenstra's view, Complainant seemed to struggle with the process of considering ideas that were inconsistent with his view of things. TR at 1293-95. In addition, Mr. Veenstra stated that Complainant wanted the discussion to focus on three of his software engineers. Mr. Veenstra felt that the problems were coming not just from three people on

Complainant's team, but from "pretty much everybody in the group." TR t 1295-96; RX 68 at 364.

Mr. Veenstra testified that on May 16, 2003, he received an e-mail from Complainant which referenced a "break-through" moment at one of the meetings when Mr. Mortensen showed him the employees' surveys with the four disgruntled employees' surveys removed. TR at 1297; RX 69 at 367-68. Mr. Veenstra was not sure exactly when this occurred but he testified that he was pleased and hopeful that Complainant understood and accepted that there was some validity to the feedback. TR at 1297-99. Mr. Veenstra further testified that there were no indications that Mr. Mortensen wrote or dictated the May 16, 2003 e-mail for Complainant to send, or that he demanded that Complainant phrase things as contained in the e-mail. TR at 1297-99; RX 69.

Mr. Veenstra next identified the performance warning given to Complainant on May 20, 2003, and stated that he was involved in its preparation and concurred with its issuance, as did others at Respondent. TR at 1298-1302; RX 70 at 369. Mr. Veenstra opined that the issuance of the performance warning was appropriate but he remained concerned that Complainant might not be able to make the necessary changes, especially because Mr. Veenstra had his doubts whether Complainant had the necessary understanding and ownership of the problems. TR at 1300-01.

Mr. Veenstra testified that in connection with the performance warning, Respondent usually has the employee and their manager develop an action plan to address the problems and for the employee to deliver on the plan. TR at 1301-02. One such corrective plan was prepared by Complainant and Mr. Mortensen and e-mailed to Mr. Veenstra on May 30, 2003. TR at 1302-04; RX 71 at 372-74. Mr. Veenstra opined that Complainant's corrective plan was a bit mechanical without insight, reflection or consultation by Complainant with Mr. Mortensen or others to get a more diverse or deeper view. TR at 1304-06.

Mr. Veenstra further testified that in the timeframe of April and May 2003, he never heard Complainant mention co-employment concerns or complain that Respondent had engaged in unlawful activities with regard to contract workers. TR at 1305-06.

Mr. Veenstra became involved again with Complainant's performance issues when Mr. Mortensen approached him in mid-December 2003. TR at 1307-08. Mr. Veenstra stated that Mr. Mortensen believed that Complainant had shown improvement in many areas but there were continuing issues with Complainant's communications with other internal Respondent customers in terms of not integrating inputs, as well as some communication and judgment issues involving feedback amongst team members, leading to poor morale within the group. TR at 1307-08. In particular, Mr. Veenstra spoke of an incident where Complainant shared feedback from employees within his group with each other where the information shared was not sanitized to hide the identity of the surveyed employee. This caused conflicts and teamwork issues between the employees involved. TR at 1308-1310.

Mr. Veenstra testified that in January and February 2004, he participated in the decision to remove Complainant from his position as manager. He took into consideration the December 2003 incident as an example of a judgment issue for a manager where the appropriate thing to do would have been to use the collected data points to review an employee, as the identity of the

provider of the data points is irrelevant. TR at 1311. Overall, Mr. Veenstra understood that Complainant continued to have problems that were a variation of the same issues which had been discussed with him in April and May 2003. TR at 1312-13. He further testified that at that time, he and Mr. Mortensen consulted with Ms. Lieske and Ms. Berria to approve the Complainant's removal. TR at 1313-14.

Mr. Veenstra testified that in February 2004, he attended a meeting with Mr. Mortensen and Complainant to communicate the decision to remove Complainant from his management position on grounds that, while there were improvements, Complainant's performance issues were still occurring in different forms and ways. TR at 1314-15. In response, according to Mr. Veenstra, Complainant cut the meeting short, saying he could not discuss the decision and needed more time to think about it. TR at 1315.

Mr. Veenstra stated that the three met the next week and Complainant was again told of the decision to remove him as project manager and the reasons for the decision. TR at 1315-16. He further testified that Complainant contested everything presented to him and debated the different points. TR at 1316. In response to Complainant's questions, Mr. Mortensen would respond and clarify his position. *Id.* The meeting ended with Complainant being told that the decision had been made, and Mr. Veenstra recalled telling Complainant that they should move forward. *Id.* Mr. Veenstra next testified that he and Mr. Mortensen told Complainant they would work with him to get him an individual contributor job. *Id.* Mr. Veenstra recalled talking to Mr. Mortensen about allowing Complainant to "save face" and to have some transition time to find another position and announce the change in tandem for a "cleaner appearance." TR at 1316-17.

Mr. Veenstra testified that Complainant did not make any statements to the effect that he believed he was being retaliated against, nor did he raise any issues as to his belief that Respondent had engaged in unlawful behavior in connection with its use of contract workers before February 2004. TR at 1317, 1344. Mr. Veenstra understood that Complainant had complained about the co-employment issues to George Mulhern some time after he was removed as a project manager in February 2004. TR at 1344. Mr. Veenstra further testified that he never heard anything along the lines that Complainant attributed his negative performance reviews and warning to complaints he had made on those subjects. 1317-18. Finally, Mr. Veenstra testified that from 2003 through the time Mr. Mortensen left Respondent, Mr. Veenstra never observed Mr. Mortensen take any abusive or unfair actions toward Complainant. TR at 1318.

Kathleen Berria

Ms. Berria testified that at the time of trial she had been involved in Respondent's Boise facility HR department for a little over 25 years. TR at 1372. Ms. Berria also testified that she supported Ms. Lieske's lab for six or seven years, including through the September 2005 timeframe. *Id.* Ms. Berria described her fundamental role in HR as working with a business organization to provide initiatives around the work environment from an HR standpoint and to participate in the different business planning and staff meetings of a particular business management team. TR at 1373. With regard to human resources issues, she described having

responsibility for reviewing situations and partnering with her colleagues in HR with staffing or compensation functions. *Id.*

Ms. Berria listened to Mr. Veenstra's earlier testimony and stated that nothing in it was factually inaccurate or incomplete in her opinion. TR at 1374. She further opined that she approved the 2003 performance warning for Complainant and believed that the process was fair, thorough, and complete. TR at 1373-74. She stated that in that process she did not perceive any animosity or intent to retaliate on the part of Mr. Mortensen toward Complainant. TR at 1375. Ms. Berria testified that later she approved the 2004 decision to remove Complainant from his position as a project manager under Mr. Mortensen. TR at 1375. She opined that that decision was not unusual in her experience but was appropriate because Complainant's performance had not improved sufficiently over a sustained period of time. TR at 1375-76. Ms. Berria, however, did not personally investigate or quantify how much or little Complainant had improved in those four or five months. TR at 1413. She further opined that Mr. Mortensen did an exceptional job in collecting feedback. TR at 1376.

Ms. Berria testified that the decision to remove Complainant as project manager was made in January or February 2004 and was communicated to Complainant in February 2004. TR at 1376. She further testified that she did not hear Complainant complain about Respondent improperly hiring contractor workers, destroying notes, co-employment issues, or that any actions being taken against Complainant were personal or in retaliation for complaints he made against Respondent before he was removed as project manager. TR at 1377, 1411, 1413-14. Ms. Berria stated that she became aware that Complainant was making these allegations a couple of months after the decision was made to remove him as project manager. TR at 1377-78.

Ms. Berria testified that once the decision to remove Complainant was made, she worked with Complainant, Mr. Mortensen, Ms. Lieske, and Mr. Veenstra to find Complainant an individual contributor position. She also encouraged Complainant to look for a position himself, particularly with managers who knew his skills and abilities. TR at 1379, 1381. Ultimately, Ms. Berria heard that Rich Forcier had an opening in his section which was similar to the type of work Complainant had expressed an interest in doing. TR at 1380-81. The position with Mr. Forcier was at a lower pay band but would not change Complainant's actual pay, according to Ms. Berria. TR at 1381-82.

Ms. Berria testified that she worked with Mr. Forcier in developing a match between what he listed as Complainant's job responsibilities, the scope of the job, its requirements, and what seemed to be a good match in a job architecture system for job title and pay band. TR at 1384; RX 1 at 3. Ms. Berria further testified that the "Manager Systems/Software" description in Complainant's November 2003 to October 2004 performance plan was a job title left over or pre-programmed from when Complainant was the manager of the emulator group. Ms. Berria told Complainant in late spring or early summer 2004 that he would be in an individual contributor position and would not be managing people. TR at 1385-86. She did not recall Complainant having any objection to taking the job with Mr. Forcier. TR at 1387.

Ms. Berria stated that she was aware that in or about November 2004, Complainant moved from Mr. Forcier's group back into Ms. Lieske's lab. TR at 1388-89. Ms. Berria also

described another Respondent reorganization in early 2005, when the Voluntary Severance Program was offered solely to people in Respondent's image and printing group ("IPG"). TR at 187-88. IPG as a whole was reduced by about (b)(4) employees with about (b)(4) people leaving Respondent in Boise, according to Ms. Berria. *Id.* Ms. Berria further testified that Ms. Lieske's lab was in the IPG and her lab lost 50 to 55 employees at this time. TR at 1388.

Ms. Berria testified that she was aware that on or about May 20, 2005, a reorganization in Ms. Lieske's lab was announced through which Complainant was shifted from directly reporting to Terry Mahoney to a direct report to Bret Funke. TR at 1389. (b)(4)

(b)(4) Ms. Berria stated that at this time she had conversations with Ms. Lieske about her rationale for having Complainant report directly to Mr. Funke. *Id.* Ms. Berria recommended to Ms. Lieske that Complainant not report directly to Mr. Mortensen. TR at 1390-91. Ms. Berria explained that she made this recommendation because she knew Complainant had expressed some concerns about working for Mr. Mortensen. TR at 1390-91.

Also in May 2005, Ms. Berria spoke to Terry Mahoney. His comments about Complainant's work were mixed as he opined that there were some things Complainant did well and others he did not so well. TR at 1391.

Ms. Berria testified that it is not unusual to change an employee's direct report situation such as when there is a personality conflict, or the more common situation where there is a family member in the same reporting chain as another family member. TR at 1392. In Complainant's case, he was really being managed by Mr. Funke, so Mr. Funke was the most likely person for Complainant to report to according to Ms. Lieske in her conversation with Ms. Berria. TR at 1392-93. Ms. Berria agreed to this setup with Complainant reporting to Mr. Funke in place of Mr. Mortensen, who would not have any input in Complainant's rating process. TR at 1393-95. Ms. Berria testified that in the days and weeks that followed this new reporting arrangement for Complainant and Mr. Funke, Complainant did not approach Ms. Berria with any complaints. TR at 1395.

In June and July 2005, Ms. Berria testified that Respondent's president and chief executive officer had announced that Respondent would experience an additional (b)(4) reduction of its workforce, further reorganization, and there was soon to be an enhanced early retirement program. TR at 1397. At this same time, Ms. Berria testified that she learned from Ms. Lieske that Complainant's work with IPv6 was ending as that part of the project was complete. *Id.* In addition, Ms. Berria stated that she became aware that the IPv6 work was moving to more of the product specific engineering work that would be done on a different phase with different people. TR at 1398-99. Ms. Berria also testified that Mr. Funke confirmed to her at this time that Complainant's IPv6 work was ended. TR at 1399.

By August 2005, Ms. Berria was involved in finding an alternative position for Complainant as she had done in 2004, according to her testimony. TR at 1400-02. Ms. Berria stated that she facilitated locating an open position with Tracy Freeman. *Id.* She testified that she engaged Respondent's legal counsel before offering the Warranty Program Coordinator position to Complainant in August 2005. TR at 1400.

On Thursday morning, August 18, 2005, Ms. Berria and Mr. Funke met with Complainant and offered him the option of either accepting the Warranty Program Coordinator position or being laid off. TR at 1402-04. One benefit to Complainant was that the new position had no impact on his pay band or salary, as it was a lateral move. TR at 1402. In addition, the job was a direct placement in that Complainant did not have to compete for it, interview for it or apply for it, according to Ms. Berria. TR at 1403. Complainant was told that if he did not accept the new position, he would have to participate in Respondent's work force restructuring program and likely be laid off as part of a reduction in force. *Id.* Ms. Berria also testified that it was standard procedure to allow Complainant a little over 24 hours through the close of business on Friday to decide whether to accept the new position. TR at 1404.

Ms. Berria testified that her participation in locating new positions for Complainant in 2004 and 2005 was not intended as an act of retaliation for anything he had previously done. TR at 1375, 1391, 1404-05, and 1408. In particular, she opined that the Warranty Program Coordinator position was an accommodation to Complainant, as other people were laid off during these reorganizations, and it had the added benefit that it was in an organization away from Ms. Lieske and Mr. Mortensen. TR at 1405. Ms. Berria further testified that she disagreed with Complainant's statements contained in his August 19, 2005 acceptance letter that she received. TR at 1406-09; RX 56 at 247. Instead, Ms. Berria testified that at the August 18th meeting, she and Mr. Funke communicated to Complainant that the Warranty Program Coordinator position was a real job, that his IPv6 work was ending, and that Ms. Lieske did not have a different logical job for him in her lab. TR at 1409; RX 9 at 55. Complainant was described by Ms. Berria as being quiet but professional and cordial throughout their entire meeting on August 18, 2005. *Id.*

Tracy Freeman

Mr. Freeman testified that at the time of trial he was employed by Respondent as an engineering director of the All-In-One and MFP business lab. TR at 1418-19. In 2005, Mr. Freeman was in charge of his own lab, like Ms. Lieske, as a research and development director for the color work group LaserJet products. TR at 1419.

Mr. Freeman testified that he led a set of other Respondent directors to help design a new organization for Respondent from August 2004 to May 2005, when a transformation occurred that reduced expenditures, budgets and head count (b)(4) TR at 1419-25. Prior to the reorganization, BIP had two divisions, a low end monochrome and color organization and a high end monochrome and color organization. TR at 1420-21. Mr. Freeman further stated that the business team he led was trying to design a new organization to go after Respondent's top growth areas. TR at 1421.

Mr. Freeman stated that in order to start the (b)(4) decrease in head count, Respondent offered two programs, an early voluntary severance process and an early retirement process. TR at 1421. Mr. Freeman and others encouraged low performers and people that did not

want to work to accept these opportunities. More than (b)(4) accepted the offers. TR at 1421-22.

Next, Mr. Freeman testified that of the remaining (b)(4), many went to different jobs as the directors tried to match job sets to people's wants and desires. When everything was reorganized, there were four positions left unfilled in the BIP organization – two engineering positions, a warranty position, and a software project or program manager position in Sharon Jones' organization. TR at 1423-25, 1443-44. Mr. Freeman testified that these four open positions were critical so leaving them unfilled was not an option. TR at 1423-24. Mr. Freeman stated that he looked to fill the positions with employees from the BIP group before going to the enterprise imaging and printing group ("EIP"), which consisted of Sandy Lieske's lab, Jan Skurzynski's lab, and one or two other labs including a CMS or digital copier lab. TR at 1424. Mr. Freeman met with the directors of the various EIP labs and HR people Kathy Berria and Marsha Van Skyber, and they discussed the open positions and people from EIP that potentially needed jobs after the reorganization. TR at 1424-25.

Mr. Freeman said that Complainant's name was mentioned during one of these meetings as being available for a position. TR at 1425. Mr. Freeman knew of Complainant because he had hired Complainant as a project manager when Mr. Freeman was a section manager. TR at 1425-26. Mr. Freeman further testified that he was familiar with Complainant's work on the IPv6 initiative as he was copied on emails and voicemails discussing the status and Complainant's work not as a manager, but in a technical position understanding the details of IPv6 and working with a number of different divisions and parties. TR at 1426. Because of Complainant's work with IPv6, Mr. Freeman suggested that Complainant take the warranty coordinator position at BIP. *Id.* Mr. Freeman opined that IPv6 was a complicated technology and he believed that if Complainant could manage IPv6, he would be a good fit for the warranty coordinator position given his technical background and the fact that it was not a management position. 1426-27 and 1430.

Mr. Freeman was asked about his prior experience as Complainant's direct supervisor in 1999 or 2000, when Complainant was a project manager of a firmware team of eight to ten direct reports for the engine and paper handling team. TR at 1427 and 1447. Mr. Freeman testified that Complainant worked for him for a year or so and at the end he had issues with Complainant's management capability and his ability to take feedback, listen to management, and manage his peers. TR at 1427-28. Mr. Freeman further recalled that when he and his successor section manager Debra Owens met with Complainant to provide him with feedback as part of Respondent's rating process, the meeting was contentious and Mr. Freeman ranked Complainant at a 3 on a 1 to 5 scale. TR at 1428-30.

Mr. Freeman testified about the job duties of the Warranty Coordinator position that he created in 2002 or 2003. TR at 1430. One objective for the position was to bring the color printer warranty costs lower and more in line with those of the black and white printers. TR at 1431-32. Mr. Freeman stated that Paul Cooperider was the first person in the Warranty Coordinator position and that Mr. Cooperider had a technical background of some kind and was not personally responsible for driving down warranty costs but, instead, he had engineers reporting

to him tasked to do that job. TR at 1432. Mr. Freeman further testified that Mr. Cooperider left the job when a new opportunity came along for him. TR at 1433.

Mr. Freeman further testified that Martin Maxwell succeeded Mr. Cooperider as Warranty Coordinator. TR at 1433. Mr. Maxwell also managed a team of eight engineers in the position of Warranty Coordinator, handling beta team responsibilities and warranty work with a reliability aspect to that task. TR at 1433-35. Mr. Freeman continued by stating that at some point Mr. Maxwell's team of engineers was disbanded, with some engineers leaving Respondent as part of the reorganization in 2005. TR at 1435. Mr. Freeman stated that both Mr. Cooperider and Mr. Maxwell were project managers supervising engineers to work on multiple things while holding the warranty position, which is different from Complainant's current position as Warranty Coordinator because after the reorganization, there was not enough head count to staff another project team. TR at 1435-36.

Mr. Freeman further described the history of the Warranty Coordinator position by noting that from May to August 2005, the position was handled by Steve Johnson, a program manager for Respondent's color engine product, who filled in to perform what Mr. Freeman termed as the "critical" Warranty Coordinator position while also doing his other job. TR at 1436.

Mr. Freeman opined that the Warranty Coordinator position held by Complainant is a full-time job as it evolved out of the reorganization. TR at 1437. Mr. Freeman testified that he believes that the position has a bigger impact on Respondent's bottom line than the IPv6 initiative, and that the warranty coordinator position is a critical job because Respondent needs to extend the reduced black and white printer warranty costs to color printer warranty costs. TR at 1439-40. Mr. Freeman further opined that the warranty coordinator position held by Complainant is not a "shell of a job" or a "dead-end position." TR at 1439.

Mr. Freeman also testified that the current warranty coordinator position requires someone with a technical background who understands technical issues and can look at data and understand trends and the customer experience. TR at TR at 1437-38. Mr. Freeman further opined that the position has a huge upside with a lot of visibility, because it requires one to be able to work with a large set of people including all of the engine team project managers and their section managers, and to present to the lab and division managers things they should go after or tradeoffs that need to be made. TR at 1437-40. Mr. Freeman pointed out that in the past, Mr. Maxwell or Mr. Cooperider were asked to make presentations to Respondent's customer assurance vice president, to come into the office of Mr. Freeman's boss, and also to work with other California directors and make presentations on what are the top issues, things that have been fixed, and achievements that have been made in terms of warranty work with Respondent's printers. TR at 1440.

Mr. Freeman also testified on the subject of the second source project that he created to reduce Respondent's development costs by looking overseas for extra personnel capacity at a much lower cost. TR at 1440-42. He stated that he never implemented the project because he was promoted to a director of engineering position and he transitioned the second source project to Sterling Mortensen. TR at 1441. Mr. Freeman stated further that reducing development costs and

strategically managing Respondent's financial results by utilizing offshore sources has been and remains among his performance objectives and those of the 240 people in his lab. TR at 1442.

Mr. Freeman concluded his testimony by stating that he had no reason to believe that anyone at Respondent had retaliated against Complainant for any protestations he made and that he never saw or heard of Sterling Mortensen, Sandy Lieske, or anyone else saying anything disrespectful or derogatory about Complainant. TR at 1442-43.

Chris Weyand

Mr. Weyand testified that he was a research and development section manager in Mr. Freeman's MFP lab with Respondent at the time of trial. TR at 1451.

Mr. Weyand stated that in October 2003, while working in Sandy Lieske's lab, he attended a short presentation by Respondent attorney Mark DeMeester in Ms. Lieske's staff meeting room with her direct reports staff of eight to ten people. TR at 1451-52. The presentation lasted less than an hour and involved a slide set of legal issues relevant to the contingent work force. TR at 1452-53. While Mr. Weyand admitted taking notes at the meeting (see RX 73), he did not recall any specific questions asked at the meeting, nor any comments about destroying, deleting, or shredding notes of the meeting, including any comments from Sterling Mortensen or Sandy Lieske, or any jokes at the meeting. TR at 1453-54.

Mr. Weyand's notes start with a reference to "Sandy's staff, 10/14" and the first bullet point reads: "MFP lab, short-term help." TR at 1456; RX 73 at 334. Mr. Weyand interpreted his notes as reading that Ms. Lieske's lab was looking for various Respondent employees who could help out in the multifunction peripheral lab, and various employees were suggested. *Id.*

Mr. Weyand's notes reflect only a small portion of the meeting with Mr. DeMeester, consisting of a bullet point entitled "Employment Law, (co-employment)." TR at 1454 and 1457; RX 73 at 334. The next note from the meeting states: "Should our integrators be ETWs?" TR at 1457, RX 73 at 334. Mr. Weyand explained that this meant, 'should the engineering specialists who handle the source code for Respondent's software/firmware products be external temporary workers?' TR at 1457-58. Mr. Weyand testified that his notes further provide: "Yes or consolidate into a true managed service." TR at 1458; RX 73 at 334. Finally, his notes from the October 2003 meeting read: "Manage the contract, not the employee." *Id.*

David Miller

Mr. Miller testified that he has worked at Respondent for 19 years and had been the customer assurance manager under director Terry Crozier of the color laser printer group research and development lab for approximately four months, since October 2005. TR at 1459 and 1462. Mr. Miller further testified that before then, he was a marketing director for Respondent for the color laser printers for approximately two years. TR at 1459-60.

Mr. Miller testified that in his current position, he has twelve employees reporting to him, including Complainant as Warranty Coordinator. TR at 1460. Mr. Miller further stated that as customer assurance manager, he has three primary responsibilities: (1) technical marketing activities by Respondent managers with technical backgrounds to respond to customers concerned about how Respondent's products are functioning; (2) five engineers who monitor daily production and shipment of Respondent's current products, which makes sure Respondent addresses technical problems in its current produced printers so they will not fail once they reach the field; and (3) warranty reduction and overseeing the Warranty Coordinator position across all of Respondent's LaserJet business. TR at 1460-61. Mr. Miller further clarified his work responsibilities and testified that his first two responsibilities are focused on a particular product line of color laser printers while the warranty responsibility spans across all of Respondent's LaserJet business. TR at 1461-62.

Mr. Miller further discussed his responsibilities regarding the Warranty Coordinator position by stating that the primary goal is to reduce warranty expenses and provide a better experience for Respondent's customers. TR at 1462. The second responsibility is to predict how warranty expenses will flow over time and monitoring progress on providing better experiences for their customers. *Id.*

Mr. Miller stated that he learned more of the warranty responsibility issues either just before or at the time he began his work in October 2005 by discussing his role with his peers, other customer assurance managers, as well as research and development managers to assess the various initiatives that needed to be addressed to make Respondent's products better. TR at 1463. In those discussions, Mr. Miller testified that the group identified a list of 23 initiatives that needed to be pursued, some of which were easier than others and all of which benefit Respondent's end customers. *Id.* Mr. Miller further stated that in early October 2005, his general manager, NorRae Spohn, indicated to him that warranty cost was one of the two most important strategic initiatives she had for the upcoming year. TR at 1463-64.

Mr. Miller discussed the 23 warranty initiatives with Complainant in October 2005, emphasizing the need to reduce warranty expenses and to provide a better experience for Respondent's customers. TR at 1465. As of January 2006, however, Mr. Miller told Complainant they would have to wait on the prioritization of the 23 initiatives because there was no agreement with all of the managers involved. TR at 1481. Mr. Miller opined that although there was no agreement on which initiative was top priority, Complainant could go ahead with any of the objectives and continue with his long learning curve. TR at 1472 and 1481-85. Mr. Miller further explained that all 23 initiatives were agreed upon as needing to be addressed and all of the managers involved had slightly competing interests as to which initiative would best help their product line. TR at 1484. Consequently, Mr. Miller testified that Complainant would not be wasting his time if he chose to work on an initiative that turned out to be less than a top priority because each initiative had been flagged as needing to be addressed. *Id.*

Mr. Miller testified that when he first started his job in October 2005, Complainant brought him a list of responsibilities with respect to the Warranty Coordinator position that had been developed by Rich Beauford as a previous description of his job. TR at 1464-65; RX 35 at 177-78. Mr. Miller identified RX 35 as the two-page list of responsibilities received from

Complainant. *Id.* Mr. Miller further testified that he discussed with Complainant in his series of weekly one-on-one meetings his understanding of the position, which was that it required a technical background, expertise, and judgment in order to determine the feasibility of engineering changes needed to reduce warranty costs. TR at 1465-66. Mr. Miller also stated that he informed Complainant that he could work with engineering or development teams in the course of his warranty work, as the 23 initiatives are very large and one person cannot accomplish all of them without help from program management teams who have the resources to actually implement anticipated mechanisms to reduce Respondent's color printer warranty costs. TR at 1466-67.

Mr. Miller explained that since Complainant first began his work as Warranty Coordinator, he had authority and autonomy to work directly with program management teams, Mr. Miller's peers, and with the research and development managers. TR at 1467. Complainant was provided with an engineering spreadsheet model for use in his position by Martin Maxwell and Rich Beauford, two Respondent employees with prior experience with warranty coordination. TR at 1478-79. On request from Complainant, Mr. Miller delivered to Complainant a new computer for his work and there was nothing else that Complainant asked for in performing his position that was refused by Mr. Miller. TR at 1477.

Mr. Miller further testified that in January 2006, he gave Complainant a list of six specific objectives to focus on as fiscal year 2006 goals and objectives as contained in a focal point review ("FPR") document and performance plan prepared by Mr. Miller. TR at 1467-69; RX 39 at 184. Mr. Miller stated that he prepared similar FPR and performance plans for all Respondent employees reporting to Mr. Miller at that time. TR at 1468.

With specific regard to Complainant in early January 2006, Mr. Miller discussed the six objectives as being more than a full-time job engaging not only all of Complainant's time but also engaging the resources of others to participate with him in, among other things, applying his technical and engineering judgment to determine which initiatives provide the highest achievable return on investment ("ROI") for improving warranty issues such as changing the design of components; working with Respondent's partners like (b)(4) and analyzing failure rates in (b)(4) engines that power Respondent's printers; or using a spreadsheet model to identify future trends for warranty analysis and what the warranty projections would be over the next two or three years, so that Respondent's printer or printer components do not wear out as frequently and Respondent customers are satisfied with the printers. TR at 1469-76. Mr. Miller also testified that he would have been surprised if Complainant was only spending 10 to 15 percent of his time on this job because Mr. Miller anticipated the position to be more than simply number counting and would have a fairly long learning curve for Complainant to come up to speed on warranty issues and how to manage the issues with individuals within and outside of Respondent. TR at 1472-74.

Mr. Miller concluded by opining that Complainant's Warranty Coordinator position was a highly visible, long-term position with opportunity for advancement requiring Complainant to interact with and make presentations to senior research and development managers and customer assurance managers. He said that warranty work was one of Respondent's top two initiatives for 2006. TR at 1474-76.

I. ISSUES IN DISPUTE FOR THIS SOX II CASE:

- A. Did Complainant engage in a SOX protected activity?**
- B. Was Respondent Aware of the Protected Activity?**
- C. Did Complainant suffer an adverse employment action?**
- D. Did Complainant's participation in a protected activity contribute to Respondent's decision to take allegedly adverse actions against him?**
- E. Would Respondent have taken the action in absence of the protected activity?**

II. CREDIBILITY ANALYSIS AND FACTUAL FINDINGS

Complainant

Generally, I find Complainant's testimony to be credible with his overall chronology of events and the fact that from April 2002 through April 2004, he directed ten Respondent employees and interacted with up to 40 independent contractors to form one of Respondent's largest teams in the emulator group.⁶ TR at 97. It is also true that Complainant worked on highly technical research and development in his position as project manager and while evangelizing the IPv6 protocol to Ms. Lieske's lab and other departments from approximately November 2004 through mid-August 2005.

Complainant's testimony is inconsistent, misleading, and contradicted, however, by an overwhelming amount of other evidence in the record completely undermining his credibility. For example, I find Complainant's credibility impeached as follows:

1. Complainant's 2001 and 2002 performance evaluations were not as favorable as described by him at trial (4 on a scale of 1-5, 5 being best TR at 248) and he was not credible when he testified that he never received a negative performance evaluation until the spring of 2003 from Mr. Mortensen as Tracy Freeman, Debra Owens, and Gary Gruver all questioned his management skills and Ms. Lieske ranked Complainant in the bottom third of her project managers. I find that before November 2002, Complainant was an average manager with a 3 rating on a scale of 1-5 and a poor manager with his emulator team from November 2002 through April 2004 when he was removed as project manager.⁷ TR at 156, 554-58, 1027, 1037, 1250, 1252, 1426-30, CX 36 at 645; CX 37 at 699-700.
2. Complainant described the reason for his four engineers open-dooring him as being confined to his favoritism toward the hardware engineers when, in fact, his management problems were much more serious and included his failure by February 3, 2003 to prioritize tasks, plan, and schedule assignments as well as his

⁶ The relevance of this time period is limited to Complainant's hostile work environment claim as background evidence.

⁷ Mr. Mahoney gave Complainant a good evaluation for a four-month period from July – October 2004 when Complainant was no longer a manager. RX 5.

failure to conduct regular one-on-one meetings with his engineers to keep projects on track. TR at 266, 1013-23; RX 75 at 389.

3. Complainant's reference to any co-employment discussions with Mr. Mortensen post-date the February 7, 2003 open door problem where Complainant's management performance was brought into question and I found Mr. Mortensen's testimony more believable that he started meeting with Complainant in late February and early March to discuss Complainant's problems with planning, coordination, and prioritizing resulting in long work hours for his team, teamwork issues, work slippage, and debugging problems. TR at 121-22, 254, 257-59, 269-72, 1029-30. Complainant, who regularly documented his conversations with everyone at Respondent, simply states he is uncomfortable about using many contractors without any disclosure of any SOX-related protected activities with Mr. Mortensen in his April 28, 2003 e-mail well after his management problems were made apparent to him. TR at 1154-55, 1201-02; CX 108 at 1075. Mr. Mortensen more credibly stated that in all of his discussion with Complainant, he never expressed a concern that when Mr. Mortensen was asking him to hire contractors that he was violating the principles referenced in CX 103, the IRS 20-plus common-law factors to determine if a worker is classified as an employee. TR at 1160-61. I find that Complainant first raises allegations that Respondent's use of independent contractors may violate IRS or Fair Labor Standards Act regulations until he communicates with Mr. Mulhern in April 2004 after he has been informed that he will be replaced as project manager of the emulator team and not in February 2003 as alleged by Complainant. *See* CX 6; ALJX 8 at 10-11.
4. Complainant's direct testimony was misleading as it omitted reference to the fact that more than the four emulator team engineers were critical of his management of the emulator team in 2002-2003 and he also omitted reference to his lack of judgment in December 2003 when he conducted his own survey and shared the results with at least two of his team engineers to the point that they became upset because they knew of the identity of the other team members giving negative comments. *See* TR at 1091-94, 1115-21; RX 69.
5. Complainant's May 16, 2003 e-mail apology was not believably forced on Complainant by Mr. Mortensen as Complainant testified but later contradicted himself and admitted and stipulated that he actually wrote the second paragraph. TR at 160, 288-89, 1335-36; RX 69 at 367. Mr. Mortensen was much more credible when he testified that when Complainant saw the results of the full survey of his emulator team members omitting the three or four open-dooring engineers, Complainant believed for the first time that his management problems extended beyond the four engineers who open-doored him and he apologized without any prompting or arm-twisting from Mr. Mortensen. TR at 1086-94.
6. Complainant said that Mr. Mortensen humiliated and degraded him since February 2003 but later testifies that it started in late April through May 2003. TR at 159, 281-82, 289. Once again, I find that not until faced with the performance

warning in late April 2003 did Complainant first begin to raise co-employment issues and allege problems with how Mr. Mortensen and Mr. Veenstra conducted his performance evaluations.

7. The circumstances surrounding the October 14, 2003 meeting with in-house counsel Mr. DeMeester concerning co-employment training as testified by Complainant were not confirmed by any other witness despite his unsubstantiated reference that Carol Marlowe shared his concerns and they were completely contradicted by numerous Respondent witnesses. These witnesses credibly testified that neither Mr. Mortensen nor Ms. Lieske or anyone else seriously instructed anyone to destroy their notes from the meeting. TR at 101, 106-19, 787-93, 1110, 1181, 1208-23, 1242-49, 1451-58.
8. Complainant testified that Mr. Forcier hired him in June 2004 as a project manager. TR at 169. Mr. Forcier more credibly testified that Complainant's position was that of a program manager/individual contributor but not at an engineering level. TR at 1232.
9. Complainant provided no evidence in support of his allegation at trial that he acted as a project manager for XIP2 software and led a team for IPv6 tests. TR at 184-85. As a result, I do not find this statement credible.
10. Complainant testified that there was no work for him as a warranty program coordinator from August 2005 through the February 2006 trial but his supervisor, David Miller credibly described many objectives and a list of 23 initiatives for Complainant to learn and contribute to in the position. TR at 208-09, 1463-67, 1472, 1481-85.
11. Complainant presented no evidence other than his testimony that he has been shunned at work. TR at 215-17. I do not find this to be credible.

In conclusion, I witnessed Complainant's demeanor at trial and find that his temperament and reaction to criticism were consistent with many of his performance reviews that state that he is defensive, does not take criticism well, and somewhat stubbornly holds onto an opinion or position despite evidence to the contrary. A good example is when Ms. Lieske and Bret Funke informed Complainant in May or June 2005 that the decision had been made for IPv6 testing to begin *outside* Ms. Lieske's lab with the single-function products so Complainant should let go of his IPv6 work or find a position with Mr. Ciaglo's lab in Roseville or Mr. Freeman's single-function product lab because Ms. Lieske's lab was dedicated to a lone multi-function product known as (b)(4) and she could not afford an unproductive head count. *See* TR at 181-82, 611-33, 855. In addition, I find that Complainant's true reporting of alleged co-employment violations did not begin until his April 9, 2004 meeting with George Mulhern *after* he had been removed as a project manager. *See* CX 6. If he had raised concerns about the legality of the co-employment situation at Respondent, there would have been documentary evidence of this or at least one other witness other than Complainant.

Based on the foregoing inconsistencies and contradictions in Complainant's testimony and behavior, I conclude that he was not a credible witness and accord little weight to his testimony concerning the events and motivations taking place from April 2002 through February 2006.

Sandy Lieske

I found Ms. Lieske to be a witness who bordered on being evasive at times but credible nonetheless in her position two to three levels above Complainant. I find that she cannot be expected to be familiar with as much day-to-day minutia as Complainant's peers, subordinates, and direct supervisors. Ms. Lieske's most credible testimony confirmed Respondent's downsizing and attention to cutting costs and head counts in late 2004 and all of 2005 when its new chief executive officer took over. Ms. Lieske believably testified that Complainant's IPv6 work for her lab had run its course by August 2005 and even though Mr. Funke continued to do some IPv6 work, her lab could not support Complainant as a head count particularly given his limitations as a manager and software code writer. In addition, I find that Ms. Lieske properly accommodated Complainant in May 2005 by having him report to Mr. Funke in place of Mr. Mortensen due to their prior history in 2003/2004 and the fact that Complainant had openly complained about Mr. Mortensen to Mr. Mulhern and others. As a result, I found Ms. Lieske to be a credible witness.

Sterling Mortensen

While I found Mr. Mortensen's methodology for reviewing Complainant in 2003/2004 to be sound and supported by objective evidence, he was an evasive witness at trial not responding directly to questions on numerous occasions. I found Mr. Mortensen to be slightly arrogant in his criticism of Complainant and there was a clear personality conflict between the two of them. I find that while their differences might have resulted in an employment grievance of some type, it does not rise to a SOX action. Mr. Mortensen's testimony was consistent with the overwhelming amount of evidence put forth by Respondent as well as Complainant's documentation up through early April 2004 and Mr. Mortensen was a credible witness with the exception of his not remembering his own joke at the October 14, 2003 co-employment training while he did admit to an earlier incident when his notes actually helped Respondent in litigation. Whether his retirement the year before, the lapse of time, or motivation by arrogance or animosity, I find that Mr. Mortensen's inconsistent testimony between what he said at trial and what he told Ms. Marchant in September 2004 as the originator of a joke concerning destroying notes is immaterial to this case when weighing all the evidence. *See* TR at 1183-85 and CX 10 at 503.

Don Ciaglo, Bret Funke, Terry Mahoney, Tracy Freeman, Steven Folster, and Rich Forcier

I find the group of engineers listed above to be the most credible of all the witnesses at trial as their testimony was consistent and effortless as Complainant's contemporaries and managers. Mr. Ciaglo in particular was most credible in describing Complainant in flattering terms. Ultimately, Respondent's head count concern led to Complainant's transfer to the Warranty Program Coordinator position, a horizontal-thinking position well-suited for Complainant. Complainant did not get laid off like many others at Respondent in 2005/2006.

Everyone credibly testified that Complainant was performing well when educating people about the new technology known as IPv6. Everyone of the above-referenced group consistently said that Complainant's work as a teacher of IPv6 was coming to an end and that he was unqualified to proceed in Ms. Lieske's lab as a software coder or implementer of IPv6.

Mr. Ciaglo credibly testified that he tried to get Complainant into his lab in Roseville but his new manager could not spare another head count. Mr. Funke credibly testified that Complainant was not among the group of coveted workers when the May 2005 reorganization came about and lab directors and other managers selected who stayed and who was laid off while facing many workers choosing voluntary early retirement. Along these same lines, Mr. Mahoney and Mr. Forcier credibly criticized Complainant's failure to broaden his focus beyond IPv6 in 2004/2005 to better help Mr. Funke and Ms. Lieske's lab. Mr. Freeman credibly testified that while he did not respect Complainant's management skills, he did agree that Complainant was the right fit for the Warranty Program Coordinator position which has high visibility amongst different departments and the potential for providing other career options for Complainant.

Mr. Mahoney credibly testified that he did not stay around to transition Mr. Mortensen or Mr. Funke with the work going on as Ms. Lieske's section manager when he left in May 2005. TR at 707-08. Similarly Complainant left Ms. Lieske's lab in August 2005 with little or no transition. TR at 201.

The Remaining Witnesses

The remaining witnesses were credible with their testimony which was consistent with Respondent's theme of its case particularly describing the events of the October 14, 2003 co-employment training meeting and Complainant's current position as Warranty Program Coordinator. Ms. Berria and Mr. Veenstra predictably testified about the various personnel actions concerning Complainant and their roles in support of Mr. Mortensen, Ms. Lieske, and, finally, Mr. Funke. Other than with respect to credible testimony regarding Respondent's personnel policies and procedures, I give less weight to the testimony from Respondent's Human Resources witnesses because they are generally less objective and more trained in the area of employment litigation than Respondent's engineers.

III. CONCLUSIONS OF LAW

Actions brought under SOX 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 (AIR 21), 49 U.S.C.A. §42121 (West. Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail on a complaint of retaliation under SOX whistleblower provisions, Complainant must show by a preponderance of evidence that he engaged in a protected activity, the employer was aware of the protected activity, he suffered an adverse employment action, and the protected activity was a contributing factor in the adverse action. *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005); AIR 21, §42121(a)-(b)(2)(B)(iii)-(iv); *see also Peck v. Safe Air Int'l, Inc. d/b/a/ Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. 6-10 (ARB Jan. 30, 2004). An employer may escape liability if it

can establish by clear and convincing evidence that it would have taken the same adverse action in absence of the Complainant's protected activity. 18 U.S.C.A. § 1514A(b)(2)(C).

It is necessary to first establish that both a protected activity and adverse action are present in this claim. I will then address whether Complainant has shown by a preponderance of the evidence that his protected activity contributed to Respondent's decision to take an adverse employment action. Finally, I will discuss whether Respondent has presented clear and convincing evidence that it would have taken the adverse employment action in the absence of the protected activity.

A. Did Complainant engage in a SOX Protected Activity?

Employees of publicly traded companies engage in protected activity under SOX when they "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, 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . ." 18 U.S.C.A. 1514(A).

Complainant alleges three potential instances of protected activity: 1) Reporting co-employment violations and related attempts to conceal those violations; 2) reporting H-1B Visa noncompliance; and 3) filing and appealing the SOX I and SOX II whistleblower claims.

1. Co-employment allegations and related complaints are not a protected activity

a) Co-employment allegations

Complainant contends that he engaged in a protected activity when he reported co-employment violations. According to Complainant, he first reported his concern about co-employment practices in February 2003, when his supervisor, Sterling Mortensen, requested that he hire more contract workers as opposed to hiring more employees. Complainant claims that he alerted his second-level supervisor, Sandy Lieske in May 2003, as well as Respondent Business Manager Carol Marlowe. On October 14, 2003 Complainant attended a staff meeting with section managers from Sandy Lieske's lab. At the meeting, Mark DeMeester, Respondent's in-house legal counsel, discussed co-employment and a Ninth Circuit case, *Vizcaino v. Microsoft*,⁸ involving the misclassification of employees. Complainant further reported the alleged co-employment violations along with his subsequent claim of retaliation to Senior Vice President George Mulhern on April 9, 2004. See CX 6 at 229; CX 7 at 271. Complainant also attempted to meet with Mr. DeMeester to discuss co-employment, but DeMeester directed him to Mr. Mulhern or to seek independent counsel for legal advice. CX 8 at 103-106.

In his April 9, 2004 "Meeting Outline," Complainant lists potential consequences of a co-employment violation, including a lawsuit, an investigation by the IRS, and adverse publicity. CX 6 at 233. Complainant based his co-employment allegations on Respondent's legal and

⁸ 97 F.3d 1187 (9th Cir. 1996) and 120 F.3d 1006 (9th Cir. 1997).

human resource training sessions and, in particular, *Vizcaino v. Microsoft*.⁹ Complainant testified that he believed the co-employment violations would result in significant consequences including an IRS or OSHA investigation and possible violations of the Fair Labor Standards Act or ERISA. Such consequences, Complainant argued, would concern a reasonable shareholder. Complainant also states that a co-employment violation constitutes unethical conduct and goes against Respondent business practices. CX 6 at 244.

Respondent argues that Complainant's claims of co-employment violations do not constitute a SOX protected activity because such complaints "[bear] no reasonable relation to laws protecting shareholders from fraud." ALJX 9 at 2. Additionally, Respondent claims that Complainant is "recycling" the co-employment claims from his earlier SOX I action which was dismissed as untimely. To allow reassertion of protected activities, Respondent contends, would cause employers to be "paralyzed into inaction once an employee has lodged a complaint." RS Post-Trial Brief at 4 (citing *Brooks v. City of San Mateo*, 229 F.3d 971, 928 (9th Cir. 2000)).

In *Klopfenstein v. PCC Flow Techs. Holdings Inc.*, the ARB explained that a Complainant engages in protected activity when he provides information relating to "not only just fraud, but also [the] 'violation of . . . any rule or regulation of the Securities and Exchange Commission.'" *Klopfenstein v. PCC Flow Techs. Holdings Inc.*, DOL ARB, No. 04-149, 3, 17 (May 31, 2006); See 18 U.S.C.A. §1514A(a)(1). Further, the ARB emphasized that a Complainant need not make the first report or utilize every opportunity to report a concern, "so long as the Complainant's actual communications 'provide information, cause information to be

⁹ McClendon bases his co-employment violation allegations on the *Vizcaino v. Microsoft* case, which is distinguishable from the facts of the current action. In 1989 and 1990, an IRS investigation revealed that Microsoft improperly treated certain freelance workers as independent contractors, when they were actually common law employees for withholding and employment tax purposes. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1190 (9th Circuit 1996). Microsoft took the necessary actions to remedy this misclassification, including issuing W-2 forms and paying overdue taxes. *Id.* at 1191. Microsoft also converted some of the freelancers to permanent employee positions and gave others the option to become temporary employees. *Id.* The freelancers who did not get offered permanent employee positions sought access to employee benefits including employee pension plans, the Savings Plus Plan, and the Employee Stock Purchase Plan. *Id.* Microsoft denied their benefit, arguing that they were independent contractors and were personally liable for all of their own benefits. *Id.* The workers brought an action in Federal court against Microsoft, seeking a determination regarding their entitlement to both ERISA and non-ERISA plan benefits. *Id.* The district court granted summary judgment in favor of Microsoft. *Id.* at 1200.

The Ninth Circuit Court of Appeals, three judge panel, found that the plaintiffs were eligible to participate in the Savings Plus Plan and the Employee Stock Purchase Plan, reversed the district court decision, and remanded the case. *Id.* at 1196, 1200.

In 1997, the Ninth Circuit reheard the case en banc and again reversed the district court decision and remanded the case, holding that because the employer recognized the workers as employees, they were eligible for ERISA benefits, regardless of the independent contractor language of their employment agreements. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1008 (9th Circuit 1997). The court determined that the source of payment issue should be determined by the Microsoft plan administrator and the district court should determine the appropriate remedy for worker's unable to participate in the stock purchase plan. *Id.* At no time did the Ninth Circuit rule that Microsoft committed fraud on its shareholders or employees by misrepresenting actual employment status or eligibility to participate in its pension plan.

Contrary to the current action, it is significant that the misclassification of the workers had already been investigated by the IRS and determined and accepted by Microsoft in *Vizcaino*. The plaintiffs' claims involved additional employee benefits not provided to the admittedly misclassified workers, whereas here Complainant's co-employment claims allege *possible* and undetermined mischaracterization of Respondent's contract workers where there had been no prior third-party agency investigation.

provided, or otherwise assist in an investigation' regarding a covered violation." 18 U.S.C.A. 1514(A)(a)(1).

The ARB further clarified the scope of activities covered by the SOX whistleblower provisions in *Harvey v. Home Depot*, holding that SOX only protects activities "directly related to the listed categories of fraud or securities violations." *Harvey v. Home Depot*, ARB No. 04-114, 04-115, ALJ No. 04-SOX-20, 04-SOX-36, 14, 15 (ARB June 2, 2006). The ARB explained that a Complainant must reasonably believe that the alleged violations constitute mail, wire, radio, TV, bank, or securities fraud, or violate a SEC rule or regulation, or provision of Federal law pertaining to fraud against shareholders. *Id.* In *Harvey*, where Complainant Harvey's allegations related to discriminatory practices, management discretion, or *possible* violations of the Fair Labor Standards Act, the ARB held that they did not meet the definition of a SOX protected activity. The ARB stressed the requirement that a whistleblower's allegations relate to either Federal provisions governing fraud against shareholders or a SEC rule or regulation, as stated in the statutory language. *Id.* at 15. The ARB further specified that "[a] mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough." *Id.* (Emphasis added.)

I find that Respondent's training resources, as well as Complainant's testimony and exhibits, advise that an actual co-employment violation may result in lawsuits, penalties, and legal fees, but do not establish that a co-employment violation would result in shareholder fraud or would violate any SEC rule or regulation. *See* CX 1 at 8; CX 6 at 233; TR at 260-261. Respondent's co-employment resources state that as a result of a co-employment violation, the company may be liable under tax and labor laws and/or exposed to Federal and state audits and penalties. CX 8 at 368. Another slide from one of Respondent's co-employment presentations lists the impact of misclassification of workers as including "benefits, back taxes, tort liability, Worker's Comp[ensation], Wrongful discharge, Severance Benefits Claim, FLSA, EEO, ADA, FMLA, IRCA, NLRA, or OSHA." CX 1 at 8.

Moreover, the ARB statement in *Harvey*, that "[a] mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough," properly describes Complainant's co-employment allegations. *See Harvey* at 15. A co-employment violation by itself is not a violation of any SEC rule or regulation, or any Federal law pertaining to fraud against shareholders. Further, I find that a mere *possibility* of a co-employment violation and the *potential* withholding of the effects of co-employment on the financial condition of a corporation are not enough to secure the protection of the SOX whistleblower provisions.

b) Falsification of financial records to conceal improper contractor training

In relation to his co-employment allegations, Complainant claims that Respondent managers attempted to conceal their knowledge of co-employment violations by ordering him to "falsify H-P financial records to conceal thousands of dollars of H-P required training of contingent workers." TR at 133-34, 143-44, 260-61; CL Post-Trial Brief at 8.

Complainant did not present sufficient evidence to prove this claim. I find that while Complainant's trial testimony was well-prepared, detailed and consistent with his discussion with Mr. Mulhern on April 9, 2004 and thereafter, Complainant was not credible with respect to the timing and detail of his disclosures to Mr. Mortensen prior to his announced removal from his emulator team project manager position in February/March 2004. As a result, I find that the weight of the evidence shows that Complainant did not disclose that Respondent was potentially violating IRS regulations or regulations under the Fair Labor Standards Act until he was informed on February 27 by Ms. Lieske that he was being replaced as project manager of the emulator group. TR at 166-68.

Alternatively, I further find that even if Complainant disclosed the long laundry list of possible consequences for Respondent violating its co-employment policy that potentially could lead to an IRS investigation and civil penalties, Complainant has failed to prove his case by a preponderance of the evidence that his co-employment disclosures before he was removed as a project manager fall under anything that can be described as a protected activity under the SOX Act. I find that these allegations of possible wrongdoing are not covered by the Act as conduct that an 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 (see, e.g. 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders. *See Platone v. FLYi, Inc.*, ARB Case No. 04-154 (September 29, 2006) at 15. Therefore I find that his report that Respondent attempted to conceal its knowledge of co-employment by falsifying financial records does not constitute a protected activity.

c) Order to destroy notes from October 14, 2003 meeting

Complainant claims that Respondent further concealed knowledge of co-employment violations when, following the October 14, 2003 meeting on the legal consequences of co-employment, meeting attendees were ordered to destroy all of their notes. Complainant claims that he discussed the order with business manager Carol Marlowe in late October. TR at 117-18, 123. He first reported the "intentional obstruction of justice" to Senior Vice President George Mulhern on April 9, 2004. TR at 132-38; CX 6. On June 16, 2004, Complainant again alerted Mr. Mulhern that the order to destroy all notes was a violation of SOX section 802.¹⁰ Complainant claims that reporting this instance of "obstruction of justice" constitutes a protected activity under the SOX whistleblower provisions.

Complainant alleged, in a June 16, 2004 email attachment to Senior Vice President Mulhern, that the order to destroy documents was illegal because the notes from the October 14,

¹⁰ 18 U.S.C.A. §1519 states, "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

2003 meeting had contemplative legal value; they represented Respondent's knowledge of the co-employment violations, and therefore would be significant in any action involving the alleged co-employment violations. CX 8 at 70.

At the hearing, Respondent presented witnesses Sterling Mortensen, Sandy Lieske, Richard Forcier, Chris Weyand, and Lee Landin to rebut Complainant's allegation. Mr. Weyand testified that he was present at the October 14, 2003 meeting, but did not recall any such order to destroy notes. TR at 1451-54. Further, Mr. Weyand had his notes and a copy was presented into evidence at trial. RX 73 at 384. Mr. Mortensen and Ms. Lieske testified that they heard someone make a joke about destroying notes. TR at 1181-1185 (Mortensen); TR at 790-791, 803-804 (Lieske). Neither Mr. Mortensen nor Ms. Lieske could identify who made the joke. Respondent conducted an in-house investigation of these charges and determined them to be without merit. CX 8 at 354.

Outside of Complainant's testimony, there is no other evidence to support his claim of obstruction of justice. In fact, Respondent's witnesses credibly testified that they do not recall hearing any serious instruction to destroy their notes and the presence of at least one set of notes supports Respondent over Complainant. Complainant did not call Carol Marlowe as a witness yet he attributed unsupported statements to her. I do not find Complainant's claim of obstruction of justice based on the alleged order to destroy notes to be credible. Therefore his report of this order does not constitute a protected activity. *See also* CX 9 at 354.

2. H-1B visa noncompliance

In addition to the co-employment complaints, Complainant also alleged that he complained to his supervisor, Mr. Mortensen in February 2003 about Respondent's noncompliance with H-1B visa requirements. In *Harvey*, the ARB held that the Complainant's claim of overtime pay violations was not protected under SOX because it did not involve a securities or fraud violations. *Harvey* at 15. Similarly, Complainant's H-1B visa complaint is not protected under SOX, because, as discussed above with respect to the alleged co-employment violations, it does not relate to one of the categories of fraud or securities violations. Therefore, like the co-employment allegations, Complainant's reporting of alleged H-1B visa noncompliance does not constitute a protected activity. Moreover, Complainant failed to provide any credible evidence that Respondent had, in fact, violated any securities laws or had committed fraud against shareholders in relation to its H-1B visa workers.

3. Complainant's Filing of SOX I and SOX II Claims are Protected Activities

SOX specifically protects employees who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding . . . 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." 18 U.S.C.A. 1514(A)(a)(2) Therefore, the filing of a whistleblower complaint is a SOX protected activity. *Hendrix v. American Airlines*,

Inc., 2004-AIR-00010, 2004-SOX-00023 (ALJ December 9, 2004) (citing *Gain v. Las Vegas Metropolitan Police Dept.*, ARB No. 03-108, ALJ No. 220-SWD-0004 (ARB June 30, 2004)).

Respondent admitted in its Post-Trial Brief that for this administrative action, Complainant's filings of the SOX I action in federal court and his filing of the SOX II administrative complaint constitute protected activities. ALJX 9 at 2. Therefore Complainant engaged in a SOX protected activity by filing his initial SOX I whistleblower complaint on July 8, 2004. Proceedings related to this SOX I claim, including Complainant's filing of the SOX I claim in United States District Court are included as part of the protected activity. Additionally, Complainant engaged in a protected activity when he filed his SOX II claim with the Department of Labor on July 18, 2005.¹¹ I also find that Complainant's August 9, 2005 senator Grassley, Senator Patrick Leahy, Senator Larry Craig and SEC Chairman Christopher Cox with a copy to CEO Mark Hurd forwarding a prior March 15, 2005 letter to the same people describing his SOX case and also whistleblowing articles appearing in USA Today are also a protected activity. See CX 71.

F. Was Respondent Aware of the Protected Activity?

Following from the above analysis, the protected activities left to be considered in this case are Complainant's filing of both the SOX I and SOX II actions. Respondent was aware that these actions were filed and admitted in its Post-Trial Brief that for this administrative action, the Complainant's filing of the SOX I federal court action and the filing of the SOX II administrative complaint constitute protected activities. ALJX 9 at 2. In addition, Respondent CEO Hurd was sent the letters to Senators on August 9, 2005. CX 71.

G. Did Complainant suffer an Adverse Act?

The third element of a SOX whistleblower claim is the adverse act. Under SOX, a covered employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because of the employee's involvement in a protected activity. 18 U.S.C.A. 1514(A)(a). Administrative decisions have used different interpretations of what constitutes an adverse action under whistleblower law, but they generally agree that while Title VII case law influences whistleblower decisions, differences in statutory language signify that adverse action should be interpreted more broadly under whistleblower claims than under Title VII claims. See *Hendrix v. American Airlines*, 2004-AIR-00010, 2004-SOX-00023 (ALJ December 9, 2004); *Daniel v. TIMCO Aviation Servs., Inc.*, 2002-AIR-26 (ALJ June 11, 2003); *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004).

The United States Supreme Court recently decided, in the context of a Title VII retaliation action, that to prove an adverse action a plaintiff "must show that a reasonable

¹¹ Complainant's SOX II claim is included as a protected activity because an alleged adverse action followed its filing. On August 23, 2005, Complainant amended his July 18, 2005 SOX II claim to include the August 18, 2005 transfer to the Warranty Program Coordinator position as an adverse action. The inclusion of this alleged adverse action, which occurred following the filing of the SOX II claim with OSHA, makes it possible for the filing of the SOX II claim to be considered as a protected activity.

employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259, 2006 WL 1698953 (U.S.) (2006). In using the term "material adversity," the Court wanted to prohibit "employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Id.* at *10 (citing *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997)).

Because adverse actions under whistleblower claims should be interpreted more broadly than adverse actions under Title VII, the *Burlington Northern* decision serves as a starting point for the analysis of adverse acts under SOX. I will determine whether the alleged adverse acts in this case might have dissuaded or deterred a reasonable employee from engaging in a protected activity.

Since the filing of his SOX I action, Complainant has alleged numerous adverse actions. In January 2006, I dismissed Complainant's payband and "redlining" claims as untimely filed. My January 25, 2006 order, however, permitted Complainant to introduce evidence of alleged related and continuing retaliatory activities as evidence of a retaliatory work environment. Therefore, for consideration in this action, Complainant alleges three timely adverse actions: 1) the transfer to Mr. Mortensen's section and the change in reporting structure in May 2005; 2) the transfer to the Warranty Program Coordinator position in August 2005; and 3) a hostile work environment.

1. Transfer to Mr. Mortensen's section and change in reporting structure are not adverse acts

I examine the Complainant's transfer to Mr. Mortensen's section and the change in Complainant's reporting structure together, as related alleged adverse acts. Based on *Burlington Northern*, Complainant must show that he found the acts materially adverse, that they would have dissuaded a reasonable employee from whistleblowing. *Burlington Northern*, No. 05-259, at *10

Following Complainant's removal from his position as the emulator team project manager, he worked under Terry Mahoney. At some time in 2005, a second reorganization in a year reduced the scope of Ms. Lieske's lab. TR at 704-06. The lab reorganized to focus on delivering only one product, (b)(4), and therefore Ms. Lieske needed to reduce her staff by (b)(4). *Id.* In response to the reorganization, Mr. Mahoney left Ms. Lieske's lab to pursue another job opportunity. *Id.* On May 20, 2005, Ms. Lieske transferred about thirty people from Mahoney's section to Sterling Mortensen's section. RX 13 at 61-62.

Complainant was one of the people transferred to Mr. Mortensen's section. Based on his previous experience with Mr. Mortensen,¹² Complainant contacted Ms. Lieske to voice concern

¹² Complainant had worked under Mr. Mortensen in 2003 and 2004. During this time, Complainant disagreed with Mr. Mortensen's staffing decisions, received a performance warning, and was ultimately removed from his position as team project manager for the emulator team. Complainant further alleges that Mr. Mortensen forced him to

about his new placement under Mr. Mortensen. Ms. Lieske explained that Complainant would have no interaction with Mr. Mortensen. Complainant would not attend staff meetings or be included on email lists. Additionally, Mr. Mortensen would not complete Complainant's performance evaluations. Instead, Complainant would report to project manager Bret Funke. Complainant expressed concern over this arrangement as well. Ms. Lieske advised Complainant that she would work on moving him to another organization in line with his IPv6 work. TR at 588-606, 627-33, 827-29; CX 69 at 971-72.

Complainant argues that his 2005 transfer to Mr. Mortensen's section and the subsequent change in reporting structure constitute adverse acts. Complainant states that he suffered a demotion in reporting structure when he was transferred to Mr. Mortensen's section. Complainant had reported to a section manager or higher level employee for the previous thirteen years of employment. Following his transfer to Mr. Mortensen's section, Complainant reported to and was reviewed by a lower-level project manager. Complainant claims that he was the only employee to be excluded from staff meetings and the section email list. Due to this exclusion, Complainant feared he would be uninformed as to the major activities at HP Boise. He also felt he was labeled as an outcast.

Respondent contends that Complainant failed to show that after his transfer to Mortensen's section, his position was "objectively 'less desirable.'" ALJX 9 at 6 (citing Order Denying Respondent's Motion for Summary Decision, at 4 & n.1 (citing cases)). Citing factors such as no change in pay or job responsibilities, Respondent argues that the transfer was not adverse. Further, Respondent contends that Complainant did not show that the change in reporting structure adversely affected his ability to do his job. Respondent argues that Complainant only presented his "unsupported fear that he might miss important information" and this was shown to be unwarranted by Respondent witnesses Ms. Lieske and Kathy Berria. TR at 829, 1394. Taking Complainant away from directly reporting to Mr. Mortensen who Complainant thought had previously retaliated against him and was abusive was a reasonable accommodation that Ms. Berria credibly testified is not that unusual at Respondent when there is a conflict between two employees or family members involved. TR at 1392.

Again, the test is whether a reasonable employee would be dissuaded from whistleblowing based on the alleged adverse action. *Burlington Northern*, No. 05-259, at *10. The transfer to Mortensen's section and the change in reporting structure do not constitute adverse acts. Under Mr. Mortensen, Complainant continued to do the same job that he had under Mr. Mahoney. TR at 392. Complainant's transfer did not change his pay. Removal from the email list and exclusion from staff meetings also did not materially affect Complainant because he communicated with Mr. Funke, who could alert him of any news or events. Further, Complainant was working primarily on more independent initiatives, such as IPv6, which were not the central focus of work in Mr. Mortensen's section. There was no credible testimony put forth that being in Mr. Mortensen's section interfered with Complainant's ability to work or prevented him from doing anything. A reasonable employee would not be dissuaded from

complete book reports, write apology letters and told him that he needed psychological counseling. TR at 96-97, 121-66, 254-307.

whistleblowing based on the transfer and change in reporting structure; therefore the transfer to Mr. Mortensen's section and the change in reporting structure do not constitute an adverse act.¹³

Moreover, Complainant's adverse act claim in regard to the transfer and change in reporting structure is contradictory. Complainant is claiming that the transfer was adverse and that he was adversely affected by the accommodation made to alleviate his concerns regarding the transfer. It is reasonable to believe that, based on his past experience under Mr. Mortensen, Complainant had concerns about working under him. Respondent attempted to accommodate Complainant's concerns by allowing him to report to and be reviewed by Mr. Funke. By alleging that both the transfer *and* the change in reporting structure were adverse acts, Complainant immobilizes Respondent. Neither the transfer nor the change in reporting structure adversely affected Complainant.

2. Transfer out of the IPv6 Position and into Warranty Program Coordinator Position was an Adverse Act

On August 8, 2005, Complainant received a "Performance Plan" from Mr. Funke, identifying the remaining tasks for IPv6. The following day, in response to his inquiry, he received an email from Ms. Lieske, which stated that she was still looking for options to move Complainant to another organization. *See* CX 27. On August 18, 2005, Complainant attended a meeting with Mr. Funke and Ms. Berria. Complainant was told that his IPv6 job had been eliminated and that he could transfer to the Warranty Program Coordinator position or be placed on a layoff list. Complainant was given one day to make a decision. On August 19, 2005, Complainant sent a letter accepting the transfer but noting that he disagreed with the decision. CX 38 at 702. In his first six months as Warranty Program Coordinator, Complainant updated a 10-slide PowerPoint presentation. *See* CX 40.

Complainant argues that that the transfer to the Warranty Program Coordinator position constitutes an adverse action because it was discriminatory and the transfer significantly changed his job responsibilities. He claims that he was the only employee working on IPv6, to have his position eliminated, and therefore, the action was discriminatory. Additionally, the transfer to the Warranty Program Coordinator position materially altered his job responsibilities. Prior to his transfer, Complainant had worked on IPv6 initiatives, communicating with the United States Department of Defense and leading a team for IPv6 tests. Complainant was also leading a project team and acting as project manager for XIP2 software. He argues that the IPv6 program continued without any changes. Complainant testified that after six months at the Warranty

¹³ In *Burlington Northern*, the Supreme Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id.* at *11. Given the context of this situation, it is clear that the transfer and change in reporting structure were not adverse. Even if the action was found to be adverse, Respondent showed clear and convincing evidence that it would have taken the same action in absence of the protected activity. Respondent had to fill Mr. Mahoney's vacancy with a new section manager and Mr. Mortensen was a qualified and available candidate. Subsequently, the lab was reorganized. After reviewing the history of Mr. Mortensen and Complainant's relationship, Ms. Lieske attempted to ease tensions by changing the reporting structure, such that Complainant would report to Mr. Funke. Complainant and Mr. Funke had a good working relationship through the years of working together. TR at 872. The transfer was a legitimate reorganization based on Mr. Mahoney's departure from his position as section manager. Respondent made the accommodation for Complainant to ensure that he could communicate within the reporting structure without difficulty or discomfort.

Program Coordinator position, he only had one assignment to complete, a slide presentation. *See* CX 40. Complainant did not present the slides nor did he receive credit for preparing the presentation. Complainant argued that previous employees in the Warranty Program Coordinator position held superior titles, such as project manager, were paid more, managed a staff of engineers, and dedicated different amounts of time to the job's responsibilities. Complainant further testified that the way others treat him has changed. He contends that being transferred from his IPv6 program manager position to the Warranty Program Coordinator position was a "severe job demotion," and therefore, it constitutes an adverse act.

Respondent counters that Complainant's preference to continue IPv6 work does not make the transfer to the Warranty Program Coordinator position an adverse action. Respondent offered testimony that Complainant's IPv6 work was not "significant to the mission of Ms. Lieske's lab, while the warranty program position was critical to the entire division." RS Post Trial Brief at 8. Ms. Lieske, Mr. Funke, Mr. Ciaglo, and Mr. Freeman all credibly testified that Complainant's IPv6 work was winding down and being turned over to engineers for implementation. Tracy Freeman, who created the Warranty Program Coordinator Position, testified that the position is a full-time job with the objective to decrease printer warranty costs. While previous Warranty Program Coordinators managed project teams, Mr. Freeman explained that due to the reorganizations, Respondent did not have the "head count to staff another project team." TR at 1435-36. Mr. Miller testified that Complainant had the opportunity to work on a number of projects, including twenty-three initiatives focused on warranty-cost reduction. Mr. Miller further testified that Complainant had the authority to work directly with program management teams and research and development managers. Mr. Miller opined that the position was highly visible, had opportunities for advancement, and required full-time attention. Respondent claims that Complainant's opinion, alone, cannot make the transfer objectively less desirable and adverse.

An adverse action is one that would dissuade a reasonable employee from engaging in a protected activity. According to Complainant, he experienced a significant decrease in job responsibilities after his transfer to the Warranty Program Coordinator position. Respondent has a very different view of the position, claiming that it is "critical to the entire division." RS Post Trial Brief at 8. While placement on a lay-off list has been held to be an adverse act, (*Hendrix*, at 14) Complainant was given the option to avoid a lay-off, by accepting the Warranty Program Coordinator position. The Ninth Circuit has stated that a transfer to a position of the same pay and status may constitute an adverse employment action. *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000). In *Yartzoff v. Thomas*, the Ninth Circuit found that where the employer permanently transferred significant job duties away from the plaintiff and gave below-average performance reviews, the actions were adverse. 809 F.2d 1371, 1373, 1376 (1987). In *Nidds v. Schindler Elevator Corp.*, however, the Ninth Circuit found that although plaintiff viewed his transfer as a demotion, the transfer did not constitute an adverse action. 113 F.3d 912, 920 (1996) (declining to view Nidds' transfer from a service route to the restoration department as an adverse employment action). In *Ray*, the Ninth Circuit emphasized that the rule "focuses on the deterrent effects." *Ray*, 217 F.3d at 1243.

I find that the transfer to the Warranty Program Coordinator would dissuade a reasonable employee from engaging in a protected activity. Complainant was enjoying and succeeding in

his IPv6 work. He worked with various departments within Respondent and outside entities such as the U.S. Department of Defense. Complainant had discussed a transfer to another department with Ms. Lieske, but it was in the context of potentially continuing his IPv6 work. Complainant had only one day to decide whether to accept the Warranty Program Coordinator position and faced placement on the lay-off list if he declined. His workload decreased significantly upon placement in the Warranty Program Coordinator Position. Further, the scope of the Warranty Program Coordinator position as Complainant filled it varied unfavorably from the scope of the position when past employees filled it. Complainant has shown by a preponderance of the evidence, that the transfer constitutes an adverse act under the SOX whistleblower provisions.

3. There was no hostile work environment.

The final alleged adverse action is Complainant's hostile work environment claim. A hostile work environment, which originated under Title VII case law, is also actionable as an adverse action under the whistleblower statutes. *Hendrix*, at 17 (citing *Varnadore v. Oak Ridge Nat'l Laboratory*, 92-CAA-2 and 5, 93-CAA-2 and 3, 95-ERA-1 (ARB June 14, 1996)).

According to the United States Supreme Court, to establish a hostile work environment, the conduct must be "sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment." *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)). The Court instructed judges to look at all of the circumstances, including: the frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *Id.* The Court emphasized that it is sufficient if the conduct could reasonably be perceived and was perceived as "hostile or abusive." *Id.* at 23. Therefore, according to *Harris*, to establish a claim of a hostile work environment under Title VII, a plaintiff must show 1) the harassing conduct was sufficiently severe or pervasive so as to alter the conditions of employment and 2) harassment would have detrimentally affected a reasonable person and did so affect the complainant. *Id.* The ARB accepted this interpretation in *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 at 10 (ARB Jan. 31, 2006) (citations omitted).

Under this theory of recovery, a Complainant is required to prove that:

1) he engaged in a protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the Complainant.

I have found that Complainant engaged in a protected activity by filing and appealing the SOX I and SOX II claims and reporting his SOX complaint filings to senators and the SEC in March and August 2005. Next, I must consider whether Complainant suffered harassment that was severe or pervasive enough to create an abusive work environment. *Brune, supra.* at 10 n.23. As Respondent's Post-Trial Brief points out, while Complainant has referred to a hostile work environment, he has never specifically alleged a hostile work environment claim. ALJX 9 at 8. Therefore it is not clear as to what acts Complainant claims made his work environment

hostile or abusive. Administrative decisions, including *Brune*, have cited *Nat'l Railroad Passenger Corp. v. Morgan* to address when alleged adverse acts may be introduced as part of a hostile work environment claim. *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

A hostile work environment is based on the cumulative effect of separate acts, which together create one adverse act. The *Morgan* Court distinguished between a hostile work environment, which "involves repeated conduct" and discrete discriminatory acts, which "are easy to identify . . . [and] constitute a separate actionable 'unlawful employment practice.'" *Id.* at 114, 115. I will first address the events Complainant alleged in his SOX I claim. Next I will address the events alleged in this SOX II claim.

a) *Events from the SOX I claim are discrete, time-barred, and therefore are only to be used as background evidence.*

Pursuant to my January 25, 2006 order, Complainant was allowed to introduce information regarding the SOX I protected activities as well as time-barred adverse acts. This information, however, is only to be considered as background evidence for his hostile work environment claim. In his SOX I claim, Complainant alleged that he suffered adverse acts including, a performance warning, a demotion from his team project manager position, and a payband demotion. Mr. Mortensen gave Complainant a performance warning on May 20, 2003 based on poor performance. *See* RX 70 at 369. On February 27, 2004, Ms. Lieske notified Complainant that he would be replaced as Emulator team project manager. On April 26, 2004 Complainant was removed from the position. Around this time, Complainant's payband level was also changed from level (b)(4) to a lower level (b)(4). These events do not involve "repeated conduct" but instead are "easy to identify" as separate acts. *See Morgan*, 536 U.S. at 114, 115. They occurred at separate times. Each is distinct and could be actionable on its own, if found to be adverse. These acts are discrete discriminatory acts with tangible effects.

The Court in *Morgan* noted that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113. Under SOX, a complaint must be filed within ninety days of the alleged adverse action. 18 U.S.C.A. 1514A(b)(2)(D). Each of the above events occurred at least one year prior to Complainant filing this SOX II claim with the Department of Labor. Therefore Complainant's 2003 performance warning, 2004 removal from project manager position, and 2004 payband demotion are not actionable, individually or as part of the hostile work environment claim, because as discrete acts with tangible effects, they are time-barred. These events may, however, be considered as background evidence.

b) *Events of the SOX II claim are not repetitive or related and therefore do not constitute severe or pervasive conduct sufficient to create a hostile work environment.*

I will analyze the hostile work environment claim based only on the alleged adverse acts included in this SOX II action. I find that each of the acts is of the discrete type identified in *Morgan*. The transfer to Mortensen's section and change in reporting structure occurred in May

2005. It was a distinct occurrence rather than a series of repeated acts with a cumulative effect. Following the transfer, Complainant experienced an extended period of time, while working on IPv6 initiatives under Mr. Mortensen/ Mr. Funke, where he enjoyed his working conditions. TR at 182-89, 202-08, 629-30; CX 21. Next, the transfer to Warranty Program Coordinator, which occurred in August 2005 was also a discrete occurrence. The transfer was unrelated to the May 2005 transfer and change in reporting structure. While the transfer to the Warranty Program Coordinator position may have altered Complainant's job responsibilities, the act alone had the effect. Even in consideration of the background evidence of 2003 and 2004 events, this does not constitute a pattern of repeated conduct and there was no resulting cumulative effect.

Complainant has also referred to different treatment by following the filing of his SOX claims co-workers. Complainant testified without corroboration that he receives glares and co-workers do not interact. I did not find this testimony credible from Complainant and it was contradicted by others. Nonetheless, different treatment is not sufficiently severe to constitute a hostile work environment. *See Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) (stating that ostracism suffered at the hands of coworkers cannot constitute an adverse employment action).

None of the alleged actions were particularly frequent, severe, humiliating, or abusive. Instead, each action was distinct and in response to changes within the work environment. There was no pattern of action against Complainant and none of the acts were sufficiently severe or pervasive to constitute a hostile work environment. I find that Complainant has not shown by a preponderance of the evidence that he was subject to a hostile work environment.

H. Was the protected activity a contributing factor to the adverse action? (Causation)

As discussed above, Complainant engaged in a protected activity when he filed his SOX I and SOX II claims. Respondent was aware of these protected activities. Further, Complainant suffered an adverse employment action when he was transferred to the Warranty Program Coordinator position. Next, I must consider whether Complainant has shown by a preponderance of the evidence that his filing of the SOX I and SOX II claims was a contributing factor in Respondent's decision to transfer Complainant to the Warranty Program Coordinator position.

Under SOX, a Complainant must prove, by a preponderance of the evidence, that his protected activity was a "contributing factor" in the adverse action. 18 U.S.C.A. 1514A(b)(2). A contributing factor need not be significant, motivating, substantial, or predominant and can be "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Halloum v. Intel Corp.*, 2003-SOX-00007 (ALJ March 4, 2004) (quoting *Marano v. Dept' of Justice*, 2 F.3d 1137, 1140 (Fed Cir. 1993)); *see also Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365 (N.D.Ga. Sept 2, 2004)). To establish a causal link, a protected activity must precede an adverse action. *Slattery v. Swiss Reinsurance American Corp.*, 248 F.3d 87, 95 (2nd Cir. 2001). Causation "may be inferred from 'proximity

in time between the protected action and the allegedly retaliatory employment decision.'" *Ray*, 217 F.3d at 1244 (citing *Yartzoff*, 809 F.2d at 1371).

Complainant filed his SOX I whistleblower complaint with OSHA on July 8, 2004. On January 24, 2005, he filed a request for leave to remove his claim. Complainant filed his SOX I claim in the United States District Court for the District of Idaho on March 9, 2005. On March 13, 2005, Complainant sent a letter to Senators Charles Grassley, Patrick Leahy, and Larry Craig, as well as SEC Chairman William Donaldson. CX 71 at 984-988. His letter discussed SOX whistleblower protection and detailed his SOX I claim against Respondent. *Id.*

Complainant filed his SOX II whistleblower claim with OSHA on July 18, 2005. On August 9, 2005, Complainant again sent letters to Senators Charles Grassley, Patrick Leahy and Larry Craig as well as SEC Chairman Christopher Cox. CX 71 at 974. In the letters, Complainant explained his experience as a whistleblower and noted two recent articles in USA Today about whistleblowing. *Id.* On August 10, 2005, Complainant sent a letter to Mark Hurd, Respondent's CEO and President, in which he stated that he had filed a SOX lawsuit against Respondent. CX 70 and 71, RX 53. Complainant offered to discuss the claim with Mr. Hurd and attached his August 9, 2005 letter to the Senators and SEC Chairman. On August 17, 2005, Mr. Mulhern responds to Complainant's open-door of Ms. Lieske's decision to pull Complainant off broad IPv6 work explaining Respondent's business plan to consolidate the IPv6 work in the connectivity group in Roseville and for Ms. Lieske's lab to focus on implementing the IPv6 work requiring Firmware engineering expertise done at the engineering level and coordinated by the project manager with responsibility for networking. CX 30 at 636.

Respondent eliminated Complainant's IPv6 position and offered him the Warranty Program Coordinator position on August 18, 2005. Complainant accepted the Warranty Program Coordinator transfer on August 19, 2005.

Complainant argues that Respondent transferred him to the Warranty Program Coordinator position in retaliation for his protected activities. According to Complainant, the temporal proximity of the events, along with the discriminatory nature of the transfer, proves that his protected activity was a contributing factor to the decision to transfer him to the Warranty Program Coordinator position. Complainant's Post-Trial Brief at 15-17. Respondent argues that they did not transfer Complainant in retaliation. Instead, Respondent states that it had legitimate reasons for the transfer.

The transfer to the Warranty Program Coordinator position occurred one year after Complainant filed his SOX I claim with OSHA and five months after he filed the SOX I claim in United States District Court. I do not find the temporal proximity between that protected activity and the adverse action to be significant enough, without other evidence, to warrant an inference of causation.

Only one month lapsed, however, between Complainant's filing of his SOX II claim with OSHA and his transfer to the Warranty Program Coordinator position. Further, only a little over a week lapsed between Complainant's letters to the senators, SEC Chairman, and Mr. Hurd, and his transfer to the Warranty Program Coordinator position. The temporal proximity between this

protected activity (filing the SOX II claim and sending the August 9, 2005 letters to senators and SEC) and the adverse action (transfer to the Warranty Program Coordinator position) is significant. Courts have found that a two to three month gap is sufficient to create an inference of causation and overcome summary judgment. *See Yartzoff*, 809 F.2d 1371 at 1376. Where Respondent was aware of Complainant's SOX II filing only one month earlier and presumably CEO Hurd aware of the letters to the senators and SEC the next day, I infer from the temporal proximity that the protected activity contributed to Complainant's transfer to the Warranty Program Coordinator position.

Complainant uses the temporal proximity between the events as his primary evidence that Respondent retaliated against him. Complainant's Post-Trial Brief at 15. Nonetheless, Complainant must prove causation not just temporal proximity. "[T]emporal proximity merely provides an evidentiary basis from which an inference can be drawn." *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 178 (3rd Cir. 1997). He also argues that the discriminatory nature of the transfer shows that the transfer was made in response to Complainant's protected activity. However, I do not find this credible. Complainant emphasizes that he was the only employee to have his IPv6 position eliminated. Complainant's Post-Trial Brief at 17. When viewed in context however, it is clear that Complainant had a very unique and limited role in IPv6 work. Mr. Funke testified that IPv6 was a type of connectivity device. TR at 855. Further, IPv6 was only one of fifty different requirements for devices in Mr. Forcier's section. *Id.* Mr. Mr. Funke further testified that Complainant's task in regard to IPv6 was to communicate with the various divisions and inform them about IPv6 and how it related to existing Respondent products. TR at 856. Once the various divisions understood IPv6 and its connection to the section work in August 2005, however, it would follow that Complainant's task of communicating IPv6 information and objectives would be complete and the lab would move on to implementing IPv6. TR at 897. Complainant did not have experience implementing IPv6 or coding. TR at 594, 896, 937-38. Ms. Lieske, Mr. Funke, Mr. Forcier, Mr. Mahoney, and Mr. Freeman all testified that Complainant's role with IPv6 was coming to an end and Ms. Lieske was quite credible that IPv6 was a low priority in her lab and she could not justify a head count where the IPv6 testing was confined to single-function products outside her lab and her lab's lone product, (b)(4), was a multi-function product in August 2005. Since Complainant's role in regard to IPv6 was limited to informing other divisions, it would not be discriminatory that his job would be eliminated once the divisions understood IPv6 in relation to their existing products.

Further, the transfer process, though not to a specific organization or position, began in May 2005, prior to Complainant's filing of his SOX II claim. As stated above, a protected activity must precede the adverse act. *Slattery*, 248 F.3d 95. Therefore, "[w]here . . . gradual adverse job actions began well before the plaintiff had engaged in any protected activity, an inference of retaliation does not arise." *Id.*; *See also Halloum*, ARB No. 04-068, 2003-SOX-00007, at 7 (ARB Jan. 31, 2006) (holding that the performance improvement plan was imposed before employee alleged securities fraud and therefore could not have a retaliatory purpose, but adverse modifications to the plan after the protected activity could have retaliatory purpose). From the time that Complainant was transferred to Mr. Mortensen's section in May 2005, he and Ms. Lieske discussed a transfer, based on his concern about working under Mr. Mortensen. Complainant preferred a transfer to an IPv6 organization, such as Don Ciaglo's section. However, by early August 2005, a transfer to Mr. Ciaglo's section was no longer available.

Regardless of where Complainant was ultimately transferred, he established a desire to be transferred in early May 2005, prior to his SOX II filing on July 18, 2005. Where Complainant had initiated the process of locating a transfer prior to his SOX II filing, it may be characterized as a gradual action that began prior to the protected activity yet culminated following his SOX II filing.

The temporal proximity between the protected activity and the adverse action is evidence of a causal nexus. Complainant's role in IPv6 was limited and there had been discussion of a transfer since May, weakening the inference that the Complainant's protected activities affected Respondent's decision to transfer Complainant. I find that Complainant has not shown by a preponderance of the evidence that his protected activities were a contributing factor in Respondent's decision to transfer Complainant to the Warranty Program Coordinator position.

I. Respondent would have taken the same adverse employment action in absence of the protected activity.

Alternatively, if Complainant presented sufficient evidence that his protected activity contributed to Respondent's decision to transfer him, Respondent has presented clear and convincing evidence that it would have taken the same action in absence of the protected activity.

Under SOX, once a Complainant has established by a preponderance of the evidence that his participation in a protected activity was a contributing factor to the employer's decision to take an adverse employment action, the employer has the opportunity to avoid liability if it can show, by clear and convincing evidence, that it would have taken the same employment action in absence of the protected activity. 18 U.S.C.A. § 1514A(b)(2)(C). In other words, the employer must show that it had a legitimate reason to take the employment action and was not influenced by the Complainant's protected activity. Respondent has presented clear and convincing evidence that it would have taken the same action, i.e. transferred Complainant, in the absence of Complainant's protected activity.

1. Process of Transfer Began in May 2005.

As stated above, from the time Complainant was transferred to Mr. Mortensen's section, in May 2005, he and Ms. Lieske discussed a transfer to another section, including a potential transfer to Mr. Ciaglo's section in Roseville, California for IPv6 work. However, in early August 2005, a transfer to Mr. Ciaglo's section was no longer viable. According to Mr. Ciaglo's testimony, due to a reformation of the LaserJet business organization, his manager changed in late July or early August 2005. TR at 1359. Mr. Ciaglo's new manager, Sharon Jones, informed him that he would not be able to bring Complainant to his lab. TR at 1359-60. Mr. Ciaglo relayed this information to Ms. Lieske in early August 2005. TR at 1360.

Complainant testified that he asked Ms. Lieske about the status of a transfer in August 2005. An August 9, 2005 email from Complainant does not specify a position or organization for transfer, but instead states, "Am I remaining in your organization, or being moved to another organization as you explained in your phone call to me?" CX 27 at 627. Ms. Lieske responded

that "[t]here continue to be discussions about what options we have to move you to another organization . . . HR is working on it." *Id.*

Around this time, Mr. Freeman, a research and development director, became aware that Complainant was available for a position. TR at 1425. He testified that he was familiar with Complainant's work on IPv6. Mr. Freeman thought that Complainant would fit well in an open position in his organization, the Warranty Program Coordinator position. TR at 1426-27, 1430. Because Complainant's IPv6 work was complicated and forced him to deal with different divisions, Mr. Freeman anticipated that Complainant could use similar skills in the Warranty Program Coordinator position. Mr. Funke and Ms. Berria offered Complainant this transfer on August 18, 2005. Complainant's only alternative, however, was placement on the lay-off list.

2. Complainant's "horizontal" focus did not meet needs for Lieske's lab which had "vertical" objectives.

While working in Mr. Mortensen's section, Complainant's IPv6 work initiated relationships with outside organizations including the U.S. Department of Defense. This was acknowledged as a significant accomplishment, however, it did not assist Ms. Lieske's lab in completing its specific objectives in regard to its sole product focus, (b)(4). TR at 611-35, 863, 873, 875-85. Further, Ms. Lieske's lab worked with Multi-Function Printers (MFPs), printers that conduct other functions such as fax, Bluetooth, USB, and scan. TR at 855. Respondent preferred that more established Single-Function Printers be incorporated with outside testing, such as the Department of Defense Moonv6 testing. TR at 611-14.

As early as June 2005, a month prior to Complainant filing his SOX II claim, Ms. Lieske sent an email to Complainant directing him to transition the Department of Defense work to someone in "BIP," so that they may coordinate the testing for the "MFPs" at some future point in time when and if Ms. Lieske's lab would do MFP testing although her opinion at that time was that her MFP lab could not do the single function products in Mr. Freeman's lab. CX 26 at 620, 622. Ms. Lieske requested that Complainant "focus on the MSI Products to ensure we are delivering on all the components for IPv6 and IPsec for (b)(4)," the sole focus of Lieske's lab at that time. CX 26 at 620. Ms. Lieske further states that Complainant thoroughly disagreed with Ms. Lieske's decision to use only Single-Function Printers, so much so that he "open-doored" Ms. Lieske to upper management, including Mr. Mulhern.¹⁴ Mr. Mulhern responded to Complainant on August 17, 2005, instructing him that,

Leadership of our IPv6 work has been consolidated in the Connectivity group within the new LaserJet Business (LJB) organization. There is no change at this time in the program management leadership under Don Ciaglo. He and his team will work with the Department of Defense and coordinate implementation efforts through the engineering teams in the relevant product labs. . . . For the Embedded LaserJet Systems (ELS) [Ms. Lieske's lab] specifically, work in the IPv6 area will continue, focused on completing the implementation. This work requires Firmware engineering expertise and will be done at the engineering level . . . RX 56 at 246.

¹⁴ The process of "open-dooring" someone at Respondent was described as going above the normal chain of command to report to higher management a perceived flaw or mistake of judgment by one's immediate supervisor.

To the extent that Complainant was involved in IPv6 work, his task had been completed. TR at 593-94, 632-34, 896, 937-38, 1134, 1397-99. He was not qualified to create codes or otherwise partake in the implementation of IPv6 with Respondent products, specifically Ms. Lieske's (b)(4) focus. TR at 594, 896, 937-38. In addition, his horizontal initiatives had been redirected to Mr. Ciaglo's section. TR at 863-85; CX 30. Complainant needed to focus on Ms. Lieske's vertically focused objectives, or look for another position.

Further, while Complainant cites Mr. Funke's completion of Complainant's 2006 Performance Plan and Review as an indication that he continued to have work, the plan reveals that at least parts of his work were coming to an end and that Complainant was to focus more on ELS (Ms. Lieske's Lab) objectives. See RX 8 at 45-54. In his August 8, 2005 "Performance Plan" email to Complainant, Funke states

I have not heard anything more about your possible placement in Don Ciaglo's organization, so I have decided to move ahead with finishing and uploading your performance plan. . . . You will notice a few changes designed to focus more on ELS deliverables as I indicated that I would do. Also, please take special note of objective 2.12 and the timeframe to transfer all liaisons with DoD and non-(b)(4) liaisons with UNH. That is pretty much next week, so we will need BIP to either identify someone for you to transfer everything to, or you can archive the documents, correspondences, and write a 'next-steps' memo for them. RX 8 at 45.

Complainant was repeatedly told to focus more on the vertical objectives of (b)(4) in Ms. Lieske's lab. Complainant however, was far more interested in the horizontal objectives of linking Respondent to outside organizations for testing. TR at 863-85. While Respondent attempted to meet Complainant's preference by transferring him to either Mr. Freeman's or Mr. Ciaglo's organizations, due to limited head counts, in August 2005, these were no longer viable options. TR at 1359.

As Respondent experienced reorganizations and diminishing head count requirements, it was important to keep efficient, objective-focused employees in position and find alternative available positions for remaining candidates. Again, Mr. Freeman became aware that Complainant was available to fill a new position. TR at 1425. He knew of Complainant's cross-division communication work on IPv6 and thought that Complainant may be a viable candidate for the Warranty Program Coordinator position, which would require communication with various divisions and an understanding of Respondent products, and Mr. Freeman thought that Complainant would do well in the position. TR at 1426, 1437-40. Where other employees faced lay-offs due to limited headcounts and reorganizations, Complainant was given the opportunity to apply his skills in a new position.

Based on the above, I find that Respondent has presented clear and convincing evidence that it would have taken the same action of transferring Complainant to the Warranty Program Coordinator position in absence of the protected activities. The rationale for Complainant's transfer was because his IPv6 was ending and not benefiting Ms. Lieske's lab when (b)(4) was a much higher priority.

CONCLUSION

Having considered all of the evidence, having read the parties' briefs and being otherwise fully informed, I recommend that Complainant's Complaint, filed on or about July 18, 2005, as amended, be **DISMISSED**.

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

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

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).