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Office of Administrative Law Judges
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Issue Date: 19 December 2006

CASE NO. 2005-SOX-00073

In the Matter of:

THERESA HAGMAN,
Complainant,
v.

WASHINGTON MUTUAL BANK, INC.,
Respondent.

Appearances:

Mr. Marc Susswein and Mr. Jeffrey Zimmerman,
for Complainant

Mr. Robert Pattison,
for Respondent

Before:

Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AWARDING FRONT PAY AND REDUCED ATTORNEY'S FEES

This case arises out of a complaint of retaliation filed on May 14, 2004 by Theresa Hagman ("Complainant") against her former employer, Washington Mutual Bank, Inc. ("Respondent"), pursuant to the whistleblower protection provisions of section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("Sarbanes-Oxley," "SOX," or "the Act").

PROCEDURAL HISTORY

On May 14, 2004, Complainant filed a written complaint with the U.S. Department of Labor, alleging that Respondent terminated her employment in violation of section 806 of the Sarbanes-Oxley Act. The Occupational Safety and Health Administration ("OSHA") conducted an investigation. On February 23, 2005, OSHA notified Respondent of its determination that Complainant had established that Respondent had retaliated against her in violation of the Act, and that Respondent's stated reasons for terminating her were pretextual.

On May 11, 2005, the Secretary of Labor issued her Findings and Preliminary Order, which concluded that there was reasonable cause to believe that Respondent had violated the Act, and ordered Respondent to pay Complainant back pay with interest, costs and attorney's fees, and the fair value, plus interest, of Complainant's stock options. The Secretary's Order also required Respondent to immediately reinstate Complainant.

By letter dated June 10, 2005 to the Chief Administrative Law Judge, Complainant filed an objection only to the portion of the Secretary's Order requiring reinstatement. Complainant argues that she should be awarded front pay in lieu of reinstatement because reinstatement is neither possible nor practical under the circumstances.

Respondent does not challenge any portion of the Secretary's Order of May 11, 2005, and has already paid Complainant $167,902 in compensatory damages, representing $69,402.00 in back pay damages with interest and $98,500 in attorney's fees and costs. Respondent has also requested information from Complainant about her stock options in order to comply with that portion of the award. Respondent informed the Secretary by way of a letter dated May 24, 2005 addressed to an OSHA Regional Investigator that it had offered to reinstate Complainant in compliance with the Secretary's Order.

The case was assigned to an administrative law judge in Cherry Hill, New Jersey. On June 17, 2005,the administrative law judge issued a notice scheduling the hearing for July 14, 2005 in New York, New York.

On June 29, 2005, Respondent filed motions to change venue and for a continuance to permit discovery. On July 8, 2005, Complainant filed a brief opposing the motion to change venue and seeking to limit discovery to the issue of whether Complainant is entitled to front pay in lieu of reinstatement. On July 11, 2005, the administrative law judge issued an order granting Respondent's motion for continuance and scheduling oral argument on the remaining motions. On July 14, 2005, at the time and place of the previously scheduled hearing, the administrative law judge heard oral argument on the pending motions to change venue and limit discovery. On July 20, 2005, the administrative law judge issued an order (ALJX 1), stating that the parties had agreed that the only issue to be decided was the appropriateness of the reinstatement remedy and that the parties would complete pretrial discovery and submit witness lists within 90 days, upon receipt of which the administrative law judge would rule on the motion to change venue.

On October 17, 2005, Complainant's counsel submitted a joint request of the parties for a six-week extension, until December 8, 2005, to complete discovery. On December 8, 2005, Complainant's counsel submitted a joint request of the parties for an additional sixty-day extension, until February 10, 2006, to complete discovery. On December 30, 2005, the administrative law judge issued an order denying the request for extension of time and requiring the parties to submit within ten days an estimated witness list and a short argument on the pending motion to change venue. On January 17, 2006, Complainant submitted a witness list (ALJX 2) and a brief statement regarding venue. Also on January 17, 2006, Respondent submitted a witness list (ALJX 4) and a supplemental statement regarding venue.

On January 18, 2006, Respondent filed a motion for summary decision.

On January 23, 2006, the administrative law judge issued an order (ALJX 3) granting Respondent's motion for change of venue, and transferred the case to the Office of Administrative Law Judges in San Francisco, California.

This case was assigned to me on January 24, 2006, and continues to be limited to the issue of whether Complainant is entitled to an award of front pay in lieu of reinstatement.

On January 26, 2006, Complainant submitted a letter seeking to prohibit review of Respondent's motion for summary judgment on procedural grounds, and in the alternative, requesting that Complainant be granted a three-week extension to respond to the motion. On January 27, 2006, Respondent submitted a letter opposing Complainant's request to prohibit review of its motion for summary decision.

On February 2, 2006, I issued an order (ALJX 5) denying Complainant's request to prohibit review of Respondent's motion for summary decision, and setting deadlines for responding to the motion for summary decision, exchanging exhibits, and filing witness and exhibit lists. I scheduled the hearing for March 14-16, 2006.

On February 3, 2006, the parties, having not yet received my February 2 order, each submitted additional letters on the issue of whether Respondent's motion for summary judgment should be reviewed or rejected on procedural grounds.

Also on February 3, 2006, Complainant's counsel submitted a letter advising that he would not be available for the hearing on March 14-16, 2006, and recommending that it be rescheduled to April 3-6, when both counsel and the witnesses would be available.

On February 15, 2006, Complainant submitted a request for a one-week extension of time, until February 21, 2006, to file her opposition to Respondent's motion for summary decision. On February 21, 2006, Complainant filed her opposition.

On February 24, 2006, Respondent submitted a letter (ALJX 6) informing me of alleged changed circumstances in this case, in that Respondent expected to close by the end of May the Chatsworth center at which Complainant had worked. Respondent argued that this would cut off any liability for front pay or damages because "Complainant's employment would have ended as of the time of this closing, which we understand will be completed by the end of May [2006]." ALJX 6 at 1 (Emphasis added). On March 13, 2006, Complainant submitted a letter (ALJX 7) arguing that it would be inappropriate to limit her damages based on Respondent's irrelevant decision to close its Chatsworth center.

On March 20, 2006, I issued an order denying Respondent's motion for summary decision (ALJX 8) and ordering that the hearing would commence on April 3, 2006 in Oxnard, California.

Thereafter, a hearing was held on April 3-5, 2006. Both parties were represented by counsel.

At the hearing, Complainant's exhibits ("CX") 1 through 69 were offered, and CX 3 through 69 were admitted into evidence. TR at 5-7, 156-57. Administrative notice was taken of CX 1 and 2, which are, respectively, the complaint and response in this matter. TR at 7-8. Respondent's exhibits ("RX") A through Q were offered, and RX A through N (excerpts only of RX N – see TR at 348-49), and P through Q, were admitted into evidence. TR at 10-16, 340, 347, 423. RX O was withdrawn. TR at 340. Administrative Law Judge exhibits ("ALJX") 1 through 8 were also identified and admitted into evidence.

At the hearing, I directed the parties to confer and attempt to reach a stipulation on the amount of deferred compensation and reimbursement for stock options to which Complainant is entitled. On April 19, 2006, Complainant's counsel wrote a letter to Respondent's counsel, which he copied to me, stating that their previous attempts to reach a stipulation had failed and he was awaiting further response. Also on April 19, 2006, Respondent's counsel responded, stating that he had received authorization to stipulate to an amount of reimbursement for stock options, which he would confirm upon receiving the computations of his economic expert.

On May 17, 2006, Complainant's counsel submitted a letter seeking clarification of the requirements and page limits for the closing briefs and statement of attorney's fees.

On June 8, 2006, Claimant submitted a joint letter on behalf of both parties stating that they had reached a stipulation as to the valuation of the stock options Complainant received as an employee that expired due to her termination. The letter stated, "The parties hereby stipulate that Complainant is entitled to $121,002 plus $4,513.35 in prejudgment interest (calculated through June 9, 2006), thereby totaling $125,515.35. The parties have also stipulated that interest will continue to accrue at a rate of $15.45 per day from June 9, 2006 until the date of the determination by the Court in this matter." This letter is hereby admitted as ALJX-9.

On June 13, 2006, Claimant's counsel submitted a letter requesting, on behalf of both parties, that the page limit for the closing briefs be increased from 20 to 25 pages. On June 15, 2006, I issued an order increasing the page limit from 20 to 22 pages, and stating that the parties could jointly agree to extend by one week the deadline for submitting their closing briefs.

On June 20, 2006, Respondent filed its closing brief, which is hereby admitted into evidence as ALJX 10. Also on June 20, 2006, Complainant filed its closing brief, which is hereby admitted into evidence as ALJX 11, and its attorney fee petition, which is hereby admitted into evidence as ALJX 12.

On June 29, 2006, Respondent submitted a letter requesting an extension of time to reply to Complainant's attorney fee petition. On June 30, 2006, Complainant submitted a letter stating his objection to the request for an extension of time. On July 10, 2006, I issued an order granting Respondent an extension until July 28, 2006 to respond to Complainant's attorney fee petition.

On July 28, 2006, Respondent filed its opposition to Complainant's attorney fee petition, which is hereby admitted as ALJX 13.

On August 8, 2006, Complainant filed a motion for leave to file a response to Respondent's opposition to the application for attorney's fees and costs, which is hereby admitted as ALJX 14.

On August 17, 2006, Respondent filed an opposition to Complainant's motion to file a reply, which is hereby admitted as ALJX 15.

On August 23, 2006, the record closed, and I issued an order in which I allowed Complainant's August 8 reply and Respondent's August 17 response to the reply and prohibited any further briefing on the issue of attorney's fees.

FINDINGS OF FACT

Complainant's Employment History

In 1985, Complainant was hired by ARCS Mortgage, Inc. ("ARCS") as an Executive Administrative Assistant for the Human Resources Manager. TR at 30. Complainant was quickly promoted to Assistant Vice President/Audit Quality Control Manager, and in 1990 became the Assistant Vice President of the Loan Origination Division. TR at 30-33; CX 64. During her ten years at ARCS, Complainant received regular raises, positive reviews, increased responsibility in the company, and increased visibility in the industry. TR at 35-37.

In 1985, Complainant became a member of the Mortgage Bankers Association of America ("MBA") and served as MBA's Vice Chairman of the Regulatory Compliance Committee from 1993 to 1995, and as Chairman of the Regulatory Compliance Committee from 1995 to 1996. CX 64. She also spoke on numerous topics related to the lending industry. TR at 47-53. Complainant was also a member of the National Rehabilitation Lenders Association, and the National Association of Residential Construction Lenders. CX 64; TR at 54-55. As a member of these organizations, Complainant attended seminars, gave speeches on various topics, coordinated meetings, and engaged in lobbying and interaction with regulatory agencies. TR at 47-55. Complainant is no longer on these committees. TR at 185.

In 1994, Complainant worked very briefly at GN Mortgage, and then was hired by Independent National Mortgage Co. ("Countrywide") as a Vice President of Funding and Product Development, with a salary of $85,000 per year and about 40 people reporting to her. TR at 38-41, 201; CX 64. After eight months at Countrywide, Complainant received a strong performance evaluation, was promoted to First Vice President, and received a salary increase from $85,000 to approximately $100,000 per year. TR at 40-41, 201.

In 1995, Complainant left Countrywide to accept a position at Innovative Mortgage Solutions ("Innovative"), as the First Vice President of Legal Affairs and Compliance with a salary of $125,000 and over 100 people reporting to her. TR at 41-42, 201; CX 64.

The following year, Complainant got married and resigned in order to relocate to Southern California and to start a family. TR at 42-43. Around this time, Complainant obtained a law degree from Ventura College of Law, but she never took a bar exam. TR at 229.

In 1997, Complainant returned to Countrywide as Vice President of Rehabilitation Lending, with a salary of $75,000 per year. TR at 43-44, 201-02. TR at 43-46, 201-02; CX 64. She was subsequently promoted to First Vice President for Mortgage Revenue Bonds, Construction and Rehabilitation Lending with 104 people reporting to her. TR at 44, 46-47, 201-02; CX 64. In 1999, Countrywide awarded Complainant the President's Council Award, an award given to the top 100 performers at the bank. TR at 46; CX 64. Complainant was consistently rated a top performer in her annual performance reviews. TR at 46; CX 64. She also received annual bonuses of about $15,000 based on her performance. TR at 46-47. In 2000, Countrywide laid off Complainant when it closed her division. TR at 202.

Complainant's Employment and Job Performance at Respondent

In early 2001, Respondent hired Complainant as a vice president and Manager of its new Custom Construction Loan Fulfillment Center ("LFC") in Chatsworth, California. TR at 55-56, 203; CX 64. The LFC had two divisions: Origination and Disbursement. TR at 55-56; 203. Complainant was the manager of the Disbursement LFC, and Mark Shandling ("Shandling") was the manager of the Origination LFC. TR at 56-57. Complainant and Shandling were originally supervised by Bruce Bingham. TR at 57, 204.

Complainant received positive feedback and reviews for her role in helping to staff and setup the LFC. TR at 56-60. In particular, she received feedback from some officers in Irvine, California who were part of the acquisition team responsible for acquiring the loans to be managed by the LFC, as well as from some people in the Legal Department in Seattle. TR at 60. Complainant's Disbursement LFC also received "a lot of accolades" and "hundreds of customer and builder letters of appreciation, sales partners, originators thanking [them]. [They] received literally hundreds of letters annually, every year." TR at 69. One "very significant business partner" expressed that he respected Complainant and found her "disbursement approach the gold standard in the business." TR at 71; CX 31.

Complainant also received positive reviews from her manager, Bingham. In her 2002 mid-year performance review, Bingham wrote that "[Complainant] has performed exceptionally as an LFC manager . . . ," ranked her performance as "Exceeds Expectations." She received a number of 5's on her evaluation, which are the highest scores possible. TR at 60-62; CX 28. Bingham rated Complainant with an overall rating of 4.2 on a 5-point scale. TR at 61; CX 28. Complainant testified, "[M]y manager told me that I'd be lucky if I saw a score that high again, because it's so rarely given." TR at 63. On Respondent's rating scale, "a three is considered a very good rating . . . a four is someone who is doing above meeting acceptable standards [of] work. . . . fives are . . . very rare, but it occurs [when] they're well-regarded by their manager." TR at 298.

Complainant was also nominated by Bingham for Respondent's prestigious Summit Club Award and became one of two individuals, out of approximately 1,500 potential employees at Respondent, to receive the award in 2002. TR at 63-64, 204; CX 29, 30. The Summit Club award is recognition for work done with the department. TR at 297.

Around February 2003, when Bingham announced he would be leaving Respondent, Mark Ulmer offered Complainant a promotion to the position of Operations Manager, which she declined after discussing it with her husband. TR at 229-30, 232, 234-35. She credibly testified, "I turned down the job because I had a child….he was 14 months old. I had a five year old, turning six, and I had a very very busy job. It was already a significant amount of hours. And when I say 'significant,' I mean like 70 hours was the standard. And I just wanted to keep my life in balance. I wanted to have a successful marriage and be successful at work." TR at 235. When asked by Ulmer to research what their competitors paid for comparable positions and what salary Complainant would need to accept the position, Complainant indicated that she did not want to take the position because she had two young boys at home. TR at 232, 235-36.

From about March until October 2003, Complainant served as the Acting Operations Manager for both LFCs. TR at 203-04, 230; CX 22.

Bingham left Respondent on or around March 31, 2003, and Complainant subsequently was supervised by a series of three managers (Mark Ulmer, Scott Anderson, and Dennis Forjay) for approximately one month each. TR at 66-67, 233-34. Then, Paul Campbell ("Campbell") became Complainant's manager in June or July 2003. TR at 67, 204. Campbell served as Complainant's supervisor for approximately seven months, until February 2, 2004 when Paul Needels took over. TR at 72-73, 205.

In November 2003, Campbell praised Complainant's outstanding performance characterizing her work to Respondent's leadership by stating, "You do have the 'Best in Class' disbursement center in the lending industry. [Complainant] and team have done an 'Outstanding' job...." TR at 67-69, 71, 204; CX 32. On December 17, 2003, Campbell rated Complainant's performance as "Exceeds Expectations." TR at 204; CX 52.

Complainant Reports Concerns about Short-Funded Loans

On December 23, 2003, Complainant noticed that two newly originated loans had been short funded and gone into immediate default. TR at 73-74. Complainant and others on her team were concerned because this was the second short-funded loan in three or four days, while there had only been two short-funded loans in the previous two and a half years. TR at 73-74. Complainant sent an informational memorandum regarding the loans to Jeff Conyer ("Conyer"), the Acting Wholesale Manager in the Origination LFC, and copied it to Eve Brooks ("Brooks"), the strategic Risk Partner; her manager, Paul Campbell; and Jane Pommerening ("Pommerening"), the Asset Manager. TR at 74-75; CX 6; CX 10A; CX 27. Complainant also spoke with Brooks and Pommerening in person, but was not able to speak with Conyer. TR at 76.

Over the next week or two, Complainant identified three additional loans that were short funded. TR at 77. Again, she sent a memorandum regarding each loan to Conyer, Brooks, Campbell, and Pommerening. TR at 77; CX 6.

Complainant then set up a meeting with Brooks, Pommerening and Shandling to discuss the issues she had identified with the loans and to attempt to identify the case of the short

funding. Complainant went to Brooks and Shandling with the loan issues because they had credit signing authority and were in a position to help resolve the problems. TR at 223-27. Conyer was advised of the meeting but did not participate. TR at 79-80. He was on vacation during much of this time period. TR at 224-25.

Over the next few weeks, Complainant learned seven or eight additional short-funded loans. TR at 77-81. As she learned of each new loan, Complainant provided written notice to Conyer, Campbell and Brooks. TR at 78-79; CX 6; CX 10A. Conyer did not respond in any way to Complainant's memos or emails regarding the short-funded loans. TR at 77-78, 81.

Complainant testified that, through the week of March 22, 2004, she documented 29-30 short-funded loans. TR at 147.

Conyer's Angry Confrontation with Complainant

On January 14, 2004, Complainant learned of a tenth short-funded loan, and went to Conyer's office to discuss the loan issues. TR at 81-82. When Complainant tried to talk to Conyer, he would not look at her and sat with his fists clenched on the desk. TR at 82-83. He responded, "It's not helping that you're cc'ing Campbell." TR at 82. When Complainant tried to explain that she only included Campbell on material issues, Conyer argued back. TR at 82-84. Then, "he stood up very rapidly, his chair went flying back, slammed into the back, and he came – he charged me. He just came literally charging toward me… his face was [very] close to me face." TR at 83. He yelled, "Campbell wouldn't recognize an issue if it hit him in the face, and even if he did, he wouldn't know what to do about it." TR at 83-84. When Complainant defended Campbell, Conyer's "veins stuck out in his neck, he was purple. He was just purple. And he barked at me that I and my team are not to talk to his people about anything." TR at 84.

Conyer testified at his deposition that he had objected to Complainant copying Campbell on all of her emails regarding the short-funded loans because it created more emails to which Conyer had to respond. RX N at 76-79. He conceded that he and Complainant had had disagreements, but he denied that they had ever had any confrontations or heated discussions. RX N at 77-78.

Complainant testified that she had previously seen Conyer get "pretty hot" and "he would turn beet red and his veins would stick out, but he never personally directed that anger at [her]." TR at 227. Complainant felt threatened by Conyer during this confrontation, because he is about one foot taller than she, and was standing four to five inches from her. TR at 84-85. She felt "powerless," "scared," and "threatened," both physically and professionally. TR at 86, 90.

For a while after the confrontation with Conyer, Complainant sat on the floor in a cubicle in order to avoid the possibility of Conyer's finding her alone again. TR at 86-87, 210. If she had to work after hours, Complainant also had a "large" team member stay with her in the building until Conyer had left the building. TR at 87-88.

Soon after the confrontation, Complainant also developed problems sleeping, was grinding her teeth, experienced numbness on her face and tingling down her arm, suffered severe

headaches, and experienced heart palpitations for the first time in her life. TR at 88-89. She consulted her general practitioner, who offered to prescribe sleep medication, but Complainant declined. TR at 217-18.

After the confrontation with Conyer, Complainant also felt she had to "sneak around" to meet with Shandling and Pommerening to discuss new issues with loans, because Conyer had forbade them from talking to each other. TR at 93. She also felt unable to write up new loan problems for a few days, until Conyer was not at the office. TR at 86, 93, 95. She began to take copies of memos home with her to be placed in a safe. TR at 88.

Complainant contacted Campbell about the "alarming" confrontation. TR at 89-90. She said that she felt this experience had made her job "hard" and "unbearable." TR at 89. Campbell told Complainant to "hang in there, that it would be better soon." TR at 89.

Complainant also contacted Susan Kassabian of Respondent's Employee Relations Department ("Human Resources"). TR at 89. Kassabian was the most senior Human Resources manager at the Chatsworth campus. TR at 246-47. Complainant had dealt with Kassabian previously on various issues concerning the employees Complainant supervised. TR at 251-53.

Complainant told Kassabian "in great detail everything that had happened" during the confrontation with Conyer. TR at 89. Complainant told Kassabian that she was scared of Conyer, that she was sitting on the floor in a cubicle in order to avoid him, and that she did not want "to ever have to meet with this man again privately" because she was concerned about him getting angry. TR at 90-92, 253, 295.

Kassabian could not recall many details of the conversation, and could not recall whether she had taken any notes. TR at 282, 295. Complainant asserted that Kassabian did take notes during their conversation and that she always "takes great notes." TR at 167.

Kassabian did recall Complainant telling her that Conyer had raised his voice, was angry, and his face was flushed. TR at 254, 281. She remembered that Complainant was upset but at trial, Kassabian's recollection was impeached with testimony from her deposition to recall that Complainant had told her that Complainant was also afraid of being alone with Conyer. TR at 254-55.

In response to Complainant's concerns, Kassabian suggested some things to say to Conyer in the future to help diffuse his hostility. TR at 92. Kassabian also testified, "I asked her if she wanted to go home. She declined going home. I asked her if she wanted me to talk to Mr. Conyer. She did not want me to talk to him at that time." TR at 254. Kassabian also offered to have a sit-down discussion with Complainant and Conyer, which Complainant declined. TR at 284-85. Kassabian testified that Complainant told her she was strong and could take care of herself. TR at 282. When Kassabian asked Complainant what she wanted her to do, Complainant requested a climate survey to assess the working environment in the LFC. TR at 91-92. Complainant claims that Kassabian said she could not do a climate survey at Complainant's request. TR at 91-92. However, Kassabian did not recall Complainant asking for a climate survey, but testified that Complainant could have requested a climate survey based on

her management level. TR at 282-84. 315-16.

Kassabian thought Complainant contacted her merely because "she was having communications concerns with [Conyer]." TR at 251. She interpreted Complainant's concerns as "venting about their communication with one another." TR at 254. She testified that Complainant said "[t]hey had disagreements on how a procedure [regarding how loans were to be disbursed to builders] in the department was to be handled." TR at 251. Complainant disagreed, stating that "The conflict with Jeff Conyer had nothing to do with the organization of the departments." TR at 166.

Kassabian further testified that she was not very concerned because she had observed that Complainant would embellish and use strong words to describe something but would later pull back. TR at 295-96. Kassabian gave examples, such as when Complainant said she felt threatened by Conyer but stated she did not need to go home. TR at 295. Kassabian also did not believe Complainant's description of the hours she worked. TR at 295-96. She felt that Complainant's description of her stature in the home loan community and the job offers she received did not seem plausible, even though Kassabian admitted she had no basis for judging. TR at 296.

Conyer Becomes Complainant's Immediate Supervisor and Problems Escalate

On February 3, 2004, Paul Needels, who had assumed Campbell's responsibilities for oversight of the Custom Construction Division, took Complainant to lunch and advised her that Conyer had been named the interim manager for the Origination and Disbursement LFCs, and she would therefore be reporting directly to Conyer. TR at 94. After hearing this news, Complainant could not "eat a single bite of food." TR at 94. She advised Needels that it would be imperative that Conyer treated her and her team with respect and professionalism, and emphasized that he had not done so in the past. TR at 94-95.

Conyer did not work out of the Chatsworth office every day, and his schedule was unpredictable such that Complainant did not know when he would be around. TR at 95, 209-10, 228, 238-29. Complainant testified that she was terrified of Conyer because she "never knew where [he] was." TR at 210-12. Complainant testified that "up until [Conyer] became my boss, I could avoid him. I could dodge, I could make sure that somebody was with me. I was committed to not being alone with him again. Once he became my boss, the situation changed. And when he would come and sit in my office, and with the door open, his conduct and his demands and his posture, the words he used were different." TR at 237. She emphasized that he was "very top-down" and "he made it very clear to me that I had no power and that he had the power and that he would decide when and if I needed staff. It was very unusual . . . . The conversations were just unlike anything I had actually experienced with a boss, let alone with Jeff Conyer, who I had worked with for three years." TR at 238.

In February 2004, Complainant discovered additional short-funded loans, and she continued to document these problems and report them to Conyer, Campbell, and Needels. TR at 95-96. On February 11, 2004, Needels "stunned" Complainant by stating that he did not need to be copied on emails regarding the loans. TR at 97.

February 11, 2004 Email from Conyer Requesting Data

At 10:19 p.m. on February 11, 2004, Conyer sent Complainant an email in which he asked that Complainant provide to him by the middle of the next day certain data that he needed in order to prepare a report for Needels justifying their need for additional staff. CX 5. Specifically, he requested nine pieces of information for every full-time employee in her area. CX 5. He wrote, "I know you have most of this data in reports, but I don't have access to get that myself. If you can provide that mid-day tomorrow, I'll complete a report for Paul to use for staffing justification in the center." TR at 208.

Complainant testified that this request was unusual because he was requesting "an extensive amount of information for the issue at hand," which included "information for 2003 for every single full-time employee that we had had in the prior year, in every capacity that they worked and how much work they had done." TR at 97. It was also unusual because he sent the request late at night with a very short deadline. TR at 97-98. Complainant testified that members of her staff were alarmed by the request and one threatened to quit. TR at 98. Complainant estimated that it would have taken "a couple of weeks, a week, if we worked around the clock" to compile all of the information. TR at 99. Complainant viewed this request as an unreasonable mandate. TR at 208. Complainant was also suspicious of the fact that this request came on the same day as Needels told her he did not want to be copied on emails about the short-funded loans. TR at 103-04.

Complainant and Conyer exchanged a series of emails about this request, and Needels was copied on every email in this exchange. CX 5. Complainant ultimately provided Conyer with the requested information shortly after noon on February 12, 2004. CX 8.

February 24, 2004 Email from Conyer Requesting Information

On February 24, 2004, Conyer sent an email to Complainant requesting historical data on every loan that had been in the loan workout pipeline. TR at 209. Conyer stated that he needed the data by the following day in order to meet his deadline to provide the information to Needels, and offered to dedicate someone to help compile the data. CX 7. Complainant considered this deadline to be unreasonable. TR at 209.

Complainant copied Needels, Thomas Saenz and Pommerening on her response to Conyer. CX 7. Needles believed the email exchange between Complainant and Conyer was a power play between the two. CX 37 at 5.

Complainant Talks to Kassabian about Conyer Again

On or around February 25, 2004, Complainant forwarded to Kassabian copies of her February 12 emails with Conyer, stating that she was sending them "for informational purposes only should this situation continue to escalate. I remain mostly concerned about credit safety and soundness and the new environment that has been evolving in the last few months which may be impacting credit concerns." CX 8. She also forwarded her February 24 emails with Conyer "for

documentation purposes should this situation continue to decline." CX 7.

Because she had received two requests from Conyer for "an extraordinary amount of information" with "very short" deadlines, Complainant was concerned that Conyer was giving her assignments that were "unmanageable" and that "nobody could do." TR at 100-01. She wanted to make Kassabian aware of the situation because she was concerned that Conyer would do the same thing to Jane Pommerening, her Asset Manager, while Complainant was on vacation the following week. TR at 100-01; CX 8.

Complainant set up a meeting with Kassabian in which she discussed these requests. She also discussed her concerns about Conyer's behavior related to the short-funded loans, expressed that she was considering going to the Credit Division about it, and talked about options for dealing with Conyer, given that others were also having problems with him. TR at 102.

Kassabian had limited recollection of these discussions. TR at 258-60, 286-86. Kassabian recalls Complainant being concerned about Conyer giving her deadlines that were too short and sending emails late at night. TR at 256. She told Complainant that "as a manager, that if a deadline is given to her, she has the responsibility to either meet the deadline or get back to the asking manager with a reason why the deadline cannot be met." TR at 258. She also recalled Complainant's concerns about being considered insubordinate and being retaliated against if she did not comply with Conyer's requests. TR at 256-57, 264-65. She believes she offered to talk to Conyer about the situation. TR at 260, 285. She testified that Complainant's concerns about retaliation did not set off any alarm bells for her beyond the concerns she already had about their communication problems. TR at 266-67. With regard to Complainant's credit safety concerns, Kassabian directed her to "bring them up with her senior management or her compliance department." TR at 261.

Kassabian testified that Complainant sent her many emails, to which she always responded by calling Complainant. TR at 265. She testified that Complainant sent her many emails because "[s]he wanted to have a record of her concern related to Mr. Conyer." TR at 266.

Kassabian did not discuss the situation with her supervisor, Jennifer Prescott, or research it further because Kassabian thought she was handling it adequately by speaking with Complainant. TR at 261, 286. Also, Kassabian believed the situation simply involved a miscommunication between Complainant and Conyer: Complainant felt Conyer was asking for an enormous amount of data, and Conyer felt his request to Complainant was relatively easy. TR at 286. Kassabian recalls Conyer complaining about the way in which Complainant responded to his requests. He stated that Complainant would not respond to requests, and would instead provide a lot of extraneous information. TR at 303.

Complainant Raises Concerns About Short-Funded Loans to Credit Risk Management Dept.

On February 24, 2004, Complainant notified Patsy Gammack, a long-time colleague who was the First Vice President in the Corporate Credit Risk Management Department, about the short-funded loans and her concerns about Respondent's credit soundness. TR at 104-106; CX 6; CX 9. The Corporate Credit Risk Management Department is the highest level of the credit

department at Respondent. TR at 104-05. Complainant was looking for guidance regarding how serious the problems with the short-funded loans were. CX 6 at 146. Complainant testified that Gammack took her concerns seriously. TR at 107. Gammack asked for examples of the loan issues, which Complainant provided. TR at 106-07. Complainant forwarded Gammack the memos she had prepared regarding four of the short-funded loans. TR at 106-107; CX 6.

Gammack expressed her opinion that since Complainant was identifying issues with loans under Conyer's responsibility, she believed Conyer would "be gunning for" Complainant because Complainant was "basically busting [Conyer]" by copying Needels and Brooks on the memos. TR at 111-13; CX 6. Complainant admits that, prior to Gammack's comment, she had been focusing on the short-funded loan issues and had not considered the possibility that Conyer could be upset with her for reporting these issues. TR at 112-13; CX 6.

On February 25, 2004, Complainant forwarded to Gammack information about another short-funded loan, and stated, "My gut tells me that we shouldn't be reporting to sales and my head is urging me to abandon ship." CX 9.

Complainant notified Kassabian that she had brought some of her concerns to people in the credit risk department. TR at 262. However, Kassabian noticed only that Complainant "sent [her] a lot of documentation" and she saw names of people she did not know included in the communications. TR at 263.

Investigation Led by Mark Hillis

On February 25, 2004, Gammack sent Complainant an email indicating that she had relayed Complainant's concerns about the short-funded loans to Mark Hillis, Respondent's Senior Vice President of Credit and Deputy Chief Credit Officer. TR at 107-08, 114; CX 12 at 1500. Gammack stated that Hillis was "VERY interested [in the short-funded loans] and assured me that he would keep it totally confidential, but he's wanting the detail." TR at 117-18; CX 10.

On February 26, 2004, while Complainant was on vacation, Gammack left Complainant a message reassuring Complainant that she could trust Hillis. TR at 114.

While Complainant was on vacation, she was weighing many concerns, including whether she "should just say nothing and try to leave [Respondent], just abandon ship" or "whether [she] could handle going to the Credit Risk Committee and . . . [she] was very afraid that if [she] said anything, it would get back to [Conyer] or [Needels]." TR at 119. She also considered whether she could start fresh after vacation as if nothing had happened. TR at 119. Complainant explained that she was considering leaving because she "was losing faith" in Respondent, because of the changes in management and who she was reporting to, and "the fact that [she] hadn't been able to effect positive change." TR at 120.

On March 12, 2004, after a "sleepless night" worrying about a particular short-funded loan, Complaint ultimately decided to hand the problem over to the Credit Risk Department because she was concerned about the borrowers and her employees. TR at 120, 129-130; CX 10A; CX 11. She thought that she could trust the Credit Risk Department because they were

"the other side of the organization" and "because they would have the authority, and certainly the technical knowledge, to bring this to closure, fix it." TR at 121.

On March 12, 2004, Complainant sent Gammack memos on the most recent short-funded loans, stating that "we may have come to the point that we need to have a confidential conversation with someone in a position to help properly address this matter. As for me, my gut tells me that the acting LFC manager (since October 03) bonus may be tied to wholesale originations and now I also report to [Conyer], which seriously compromises our position and ability to effect positive change." CX 11. Complainant also sent Gammack all 14 memos regarding the short-funded loans to be forwarded on to Hillis. TR at 129-30; CX 10A. Complainant emphasized that she and Pommerening "would like to stress the need for confidentiality on this matter, as neither of us feel that we'll be okay if it is discovered that we have escalated this matter." CX 10A.

On March 15, 2004, Credit Risk Management opened an investigation of the problem loans. TR at 130; CX 12. In addition to Hillis and Gammack, Ann Tierney, Melissa Martinez, Biff Green, Brian Parker, Eve Brooks and Nancy Gonseth of the Credit Risk Management department were involved in the investigation. TR at 131-134; CX 12; CX 18. Susan Kassabian was also brought into the investigation. TR at 133-34.

From March 15 through 19, 2004, "there were meetings, conference calls, and continual cautions to them that we needed to keep this confidential, that they could not know that this came from Jane or me" because of Conyer's "scary temper." TR at 130-34. On March 15, 2004, Hillis wrote to the investigation group, "If this wasn't a good example of a need for a Fraud team, then I can't find one. This poor individual is feeling like she is getting no support from her management on this one either, as we continue to do deals like this one. We need to be cautious of what we do to 'protect' her with the information she's providing." CX 12. On March 16, 2004, Gammack added, "[Complainant has] been escalating to me because I've known her for years and this issue is not being dealt with by her manager. This is still VERY confidential because as Mark states, she's concerned about retribution. And if her manager finds out that this has been escalated, the information may not be as forthcoming." CX 13. On March 17, 2004, Complainant wrote to Gonseth, "We are reiterating our request that our involvement be kept confidential, as retaliation is not speculative but rather assured. I had already been subjected to an alarming encounter with Jeff Conyer and am hoping to avoid any future episodes." CX 14.

Conyer Implements a New Procedure for Handling Short-Funded Loans

On March 18, 2004, Conyer announced a new policy in which short-funded loans would be returned to the Origination LFC -- which Conyer was overseeing and which had created the problems -- rather than being sent to a workout team for resolution, as had been done previously. TR at 134-35; CX 15.

Complainant was surprised at this policy and was reluctant to implement it because she was concerned that it was a significant departure from prior policy and it would effectively remove the system's checks and balances. TR at 136-37; CX 20. Complainant advised her staff that all issues discovered with loans should be forwarded to her or Pommerening first so they

could track the workout effort. CX 15. Conyer responded that he wanted the documentation and tracking to be handled on the origination side to avoid duplication of effort. CX 15.

Complainant expressed her concerns to Gonseth, who advised her not to follow the new procedure. TR at 136; CX 15; CX 20. Complainant also expressed her concerns to Gammack, who agreed the new procedure was "a little like having the fox watching the henhouse." TR at 138. Complainant expressed concern that if she did not implement Conyer's new protocol, he "was going to kill" her, and she "was extremely alarmed by his increasing tone and the fact that [she] was being crushed." TR at 141.

Complainant and Conyer continued to exchange a series of emails, in which Conyer demanded that she implement the policy immediately. TR at 137; CX 17. Complainant agreed to follow the new policy, but told Gonseth, Gammack, and Kassabian that she and Pommerening "would like to go on record stressing our concern that this was a form of 'hushing' us so that we would stop documenting the [short-funded loan] issues." CX 24.

Eve Brooks Forwarded Report to Conyer and Needels

On March 19, 2004, Eve Brooks forwarded to Conyer and Needels a copy of a report she prepared for Hillis regarding issues with the short-funded loans. CX 18. Complainant's name does not appear in Brooks' report to Hillis. CX 18.

However, Brooks' message suggests that Conyer and Needels already knew about the investigation. TR at 140. During the OSHA investigation, Needels stated that he learned of the investigation by Brooks from Conyer while they were discussing an organizational change within the LFC. CX 37 at 5. Needels advised OSHA that he and Conyer waited until after the investigation was completed to terminate Complainant. TR at 164-65; CX 37 at 5. However, Needels was not aware of the other confidential investigation being conducted by Gonseth and Hillis. CX 37 at 5.

Around this time, Complainant became concerned that Conyer knew about the investigation because his behavior had changed, and from "his body posture [and] the way he was carrying himself, it was very clear that he was very upset about something." TR at 134-35. In addition, "he was behind closed doors with Eve Brooks for two-and-a-half days." TR at 134. Complainant testified that "the 19th was a very pivotal day, because Jeff's [Conyer's] behavior had changed, his conduct had changed. We were very concerned, in fact convinced, that he knew." TR at 139.

Email Exchanges on March 19 and 20, 2004

In a March 19, 2004 email, Conyer argued that Complainant had not responded adequately to his requests and he again demanded that she implement his new procedure for handling the short-funded loans, inquired about the transfer of employee Shayne Tadlas, and complained that Complainant had not provided some KPI paperwork he needed. CX 19; CX 20. He ended by stating, "you are really leaving me no options here. I hope you can see that." CX 20 at 6. This terrified Complainant. TR at 137.

Complainant sent a response to this email to Conyer and Needels, and copied Kassabian. CX 19. She also forwarded her response to Gonseth and Gammack to make them aware that the situation had escalated and she was feeling threatened. TR at 141; CX 19; CX 20. Complainant also communicated to Gammack and Gonseth her suspicions and concerns that Conyer knew about the investigation. TR at 141-42; CX 20.

On March 19, 2004, after being copied on several emails between Complainant and Conyer, Needels responded by advising Complainant to stop being defensive and legalistic. He reminded Complainant that she works for Conyer and is accountable to him. Needels told Complainant to "please execute [Conyer's] instructions promptly." CX 22.

Also on March 19, 2004, in response to an email from Complainant reminding him that proper procedure was not followed on a loan, Conyer wrote to Complainant that elevating concerns to an executive vice president was not within standard procedures either. TR at 134, 139; CX 17. Complainant and Jane Pommerening were upset by this email and felt it was "absolutely appropriate" for them to tell an executive vice president about the short-funded loan problems. TR at 139. She continued, "Who are you supposed to tell? A therapist? I mean, we talked to our officers in our bank. That's what you do . . . it's part of our code of conduct. You're obligated to take issues up the chain." TR at 139.

Complainant Again Advises Kassabian of Issues With Conyer

On March 20, 2004, Complainant submitted a formal complaint to Kassabian, advising that she "was being subjected to retaliation for reporting credit loan issues, and…asking for [Kassabian] to intervene." TR at 142-143; CX 22. Complainant wrote, "It is clear to me that [Conyer] is attempting to build a case to establish that I am insubordinate and deceitful and, thus, force me out of my position." CX 22; TR at 268. In another email to Kassabian, Complainant stated, "I feel like a battered child in a violent home after reading Paul Needels' memo chastising me and giving [Conyer] license to torture me. For the first time in over 17 years, I was brought to tears at work." TR at 145-146; CX 23.

Complainant testified that she wrote these emails because she "felt powerless" and "didn't feel like the people who were there to protect [her] were protecting [her]." TR at 145. Also, at this point, the physical manifestations of the stress Complainant was suffering were "out of control." TR at 145. Complainant continued to experience trouble sleeping, hair loss, headaches, heart problems, and she lost a tooth because she was grinding her teeth. TR at 145.

Because Kassabian did not respond to Complainant's email, Complainant called her. TR at 143. However, Kassabian claims she called Complainant and they discussed each concern in the email. TR at 287. Complainant testified that Kassabian told her to relax and to try to see the situation from Conyer and Needels' perspective, and that she would look into it. TR at 144. Kassabian testified that she encouraged Complainant to try to see the issue from another point of view because "there are generally two sides to an issue, and…she should get clarification on what they were trying to accomplish . . . we needed to find out the background information of why some of the changes were being implemented . . . ." TR at 289.

Kassabian testified that she understood that the problem was that Conyer and Complainant had different ideas of how her employees should be directed and what procedures should be put in place to handle the loans. TR at 269-70. Kassabian explained to Complainant that when new management changes procedures it does not necessarily mean that the previous procedures were correct or that the new procedures were incorrect. TR at 287-88. Kassabian told Complainant to escalate her concerns about business procedures to people within her department. TR at 288. Kassabian also told her that she could use the anonymous "We Tip" line "if she had concerns about how something was handled within the department." TR at 288. She also sent Complainant a copy of the brochure and flyer for the tip line. TR at 288.

Kassabian testified that they talked about Complainant's retaliation concerns and she advised Complainant to raise her concerns to Conyer's boss. TR at 270. Kassabian also offered to intercede between Complainant and Conyer and sit down with the two of them to discuss their issues. Complainant rejected this suggestion. TR at 271. Kassabian also told Complainant how she defined insubordination. TR at 288.

Kassabian met with Conyer himself a few times to discuss various personnel issues, but she did not investigate Complainant's underlying concerns about him or about retaliation. TR at 271-72, 311. Kassabian did not investigate Complainant's allegations of retaliation or advise her supervisor, Jennifer Prescott, of Complainant's concerns. TR at 271-272. This was because Kassabian thought "it was being handled" and "it was being escalated to the proper department to investigate her concerns." TR at 288-89. Kassabian "felt [Complainant] was using the correct avenue in having the items reviewed by people in the department who understood the process." TR at 273. However, Kassabian conceded that the concerns that Complainant had escalated and the investigation that was underway both dealt with the short-funded loans and did not deal with Complainant's retaliation concerns. TR at 322.

Kassabian also admitted that she assumed Complainant was exaggerating or "embellishing." TR at 295. Complainant denied that her comments about Conyer were overstatements. TR at 211. However, Kassabian denied that her suspicions of exaggeration affected the way she viewed or handled Complainant's concerns. TR at 311.

Performance Review Prepared by Conyer.

On March 23, 2004, Conyer prepared an employee evaluation for Complainant in which he criticized Complainant's communication, adaptability, and willingness to cooperate. CX 33. Specifically, in the area of "communication," Conyer commented that Complainant "doesn't see me as a person she needs to communicate with [and she has not] transitioned well during the last two months of management, or presented any way to improve that." CX 2 at 1756. In the area of "adaptability," Conyer commented, "When the alignment of the department developed, we saw repeated reluctance to participate in the development. We had numerous requests for staffing, but no support in building a staffing model. When information was requested, she normally pretended she didn't understand what was needed." CX 2 at 1756-57. Similarly, in the area of "leadership," Conyer stated, "The management staff in place had previously worked at the same company together. They were very tight and committed to each other. This relationship was a

key factor preventing the new 'profit center' structure from being implemented. [Complainant] went as far as to say that her staff 'worked for her and not for me.' This attitude prevented anyone from providing or receiving information from anyone except [Complainant]. This was obviously not productive with all of the changes that had to be implemented." CX 2 at 1758. Lastly, in the area of "work ethic," Conyer commented that "[Complainant] viewed the Fulfillment piece as two individual departments or cost centers. That view became absolutely incorrect when the 'profit center' was created . . . . In the months following the profit center change, the departments within grew apart as opposed to getting a closer working relationship. This was mainly due to [Complainant's] resistance to the change being implemented." CX 2 at 1758.

Conyer gave Complainant an overall score of 160 with 40% of her ratings at ratings scale "1" and the remainder at "2" on the same 1-5 scale that Complainant had previously received ratings of "4" and "5." CX 2 at 1758; CX 33. Conyer also evaluated five other employees at the same time, who received overall scores of 280, 320, 290, 280, and 360. The other LFC Manager, Shandling, received a score of 190. CX 2 at 1750-72.

Complainant had received no negative reviews or comments about her performance at Respondent prior to being evaluated by Conyer. TR at 205-06, 215. Kassabian testified that it is not normal for an employee to receive a very high rating one period and a very low rating the next, but it can occur if there are different criteria, standards, or managers. TR at 300, 315.

Respondent ultimately used this performance evaluation as the basis to terminate Complainant's employment. TR at 306; CX 2. Kassabian testified that she had not seen this performance review before the hearing but that she understood, based on the date and format, that it was a performance review done for purposes of restructuring rather than termination for cause. TR at 305-06. She explained that lay-offs during restructuring are determined by the relative performance ratings of the employees in that department and other factors related to the personnel needs for the remaining jobs. TR at 306-07. Kassabian conceded, however, that before an employee is terminated for cause related to performance they are normally given an opportunity to improve their performance through a warning system. TR at 299. Complainant did not learn of or see this evaluation until Respondent included it in response to her OSHA complaint. TR at 158-59, 163.

Complainant Is Terminated by Respondent

On March 31, 2004, Conyer notified Complainant that her employment was terminated. CX 1; TR at 147. Although Complainant's position was not slated to be eliminated for 60 days, Conyer required Complainant to empty her desk and leave the premises immediately. TR at 147-148. Complainant testified that this was unusual because in other lay-off situations she had observed, the employees were given a notice period of 60 days and "[t]hey would work through the notice period, and then they would be given a severance package at the end of that period." TR at 148-49. However, Flores testified that 30 or 60 days is the standard notice period for lay-offs, and whether the notice is given on a working or non-working status is within the manager's discretion. TR at 337. The manager determines "whether or not that employee is needed to complete his or her task for that notification period . . . if there's no longer a need, then, again,

the manager could identify the notice is non-working." TR at 337.

On April 1, 2004, Kassabian was surprised to learn of Complainant's termination from an entry-level employee in Complainant's department. TR at 273-74, 293. Upon learning Complainant had left the company, Kassabian contacted her manager, Jennifer Prescott, and Jeff Kusulas, an employee relations consultant. TR at 275. Kusulas informed Kassabian that Complainant's position had been eliminated, she was provided with a severance package, and was placed on non-working notice. TR at 275. Kusulas had no knowledge of Complainant's concerns about retaliation. TR at 275. Prescott, who had no first-hand knowledge of Complainant's job elimination, told Kassabian she was concerned that there was a breakdown in communication between Kassabian and Kusulas. TR at 276. Kassabian told Prescott she was concerned about the appearance of retaliation, and Prescott agreed but did not ask Kassabian to follow up in any way. TR at 276, 293-94. Kassabian testified that there had been other occasions when an employee's job had been eliminated and she was not informed until later. TR at 277.

Reference to Complainant's Termination on Respondent's Email System

Complainant received calls at home from her co-workers after her termination. TR at 152. She learned later that a meeting was held after her termination at which Conyer "told people that he was as surprised as . . . anybody, but that it came from the top down that my position was to be eliminated." TR at 150. Complainant also learned that on Respondent's internal email system and employee directory, under the "Properties" section for Complainant's name, there was a notation reading "termed per notification of Jeff Conyer and HR." TR at 150, 154-55, 218-21; CX 69. Complainant testified that "termed" is short for "terminated." TR at 156. A former co-worker, Thomas Sines, gave Complainant a copy of the screen print showing this notation. CX 69; TR at 155.

Complainant was upset by this notation because it was not part of Respondent's usual process to make such notations. TR at 150. Kassabian similarly testified that she had never seen a Properties screen with notes on it. TR at 317. Complainant viewed this notation as "telling 74,000 employees . . . at [Respondent], or anybody who wants to screen print it and copy it in to an e-mail and send it around the country . . . that I was fired." TR at 155-56. Although she testified that there are a variety of ways to access this information, Complainant conceded that one would have to take "a couple of steps to be able to get to the properties box" with this information. TR at 221, 244-45. She conceded that it was an overstatement to suggest that 70,000 employees would see this information. TR at 221.

Complainant also objected to the reference to her having been terminated rather than laid off. TR at 150. Complainant testified that Respondent had a practice of not using the word "terminated" because of its negative connotations and liability risks, and instead used "separated" or "laid off." TR at 150-51, 156. However, Kassabian testified that the word "termination" is used at Respondent to describe any "separation between an employee and the company, whether it is voluntary or involuntary." TR at 291-92.

Final Investigation of the Short-Funded Loans

David Hiers prepared a summary report of the issues with the loans identified by Complainant, which he emailed to Gonseth and others on April 14, 2004. Hiers noted that most of the funding issues related to pre-paid costs that should have been paid out of pocket by the borrowers and not credited to the borrowers at closing. While Hiers indicated additional information about the loans would be needed to reach a "concrete conclusion," he attributed the issues to a failure to follow appropriate procedures. Hiers attributed these issues to an internal audit function, possibly the result of a lack of controls within the department revolving around training and staffing. CX 2 at 1747; CX 26.

Complainant learned about Hiers' investigation through Respondent's OSHA response. TR at 162. She felt vindicated by the fact that the investigation found "that all of the loans funded short. [Respondent] did not have enough money." TR at 162. However, Complainant opined that the "investigation was incomplete" and "given my 20-year history in the mortgage banking, audit process, regulatory compliance, I was shocked that this was the sum total of an investigation of the nature that we had raised. And Eve Brooks' e-mail . . . was basically a piece of propaganda . . . [with] no audit papers." TR at 163.

OSHA's Investigation and Issuance of the Secretary's Findings

On May 14, 2004, Complainant filed a Complaint against Respondent with the Secretary of Labor asserting a violation of SOX. CX 1, CX 3; RX I. On July 6, 2004, Respondent submitted its response. CX 2. Between August and November 2004, OSHA conducted interviews with Complainant, Conyer, Needels, Kassabian, and Hillis. CX 34, 35, 36, 37, 38, 39.

On February 23, 2005, the Secretary notified Respondent that Complainant had established a prima facie case of retaliation and that Respondent's purported reasons for terminating Complainant's employment were pretextual. CX 3 at 1795. The Secretary invited Respondent to submit additional evidence or make further arguments in opposition to the Secretary's findings. CX 3 at 1795. Respondent declined. CX 3 at 1795.

On May 12, 2005, the Secretary issued Findings and a Preliminary Order ("Order"). CX 3; RX A. The Secretary found there was "reasonable cause to believe that Respondent's purported reasons for terminating Complainant are pretextual for discriminatory retaliation in violation of the Sarbanes-Oxley Act." CX 3. The Preliminary Order required Respondent to immediately: (1) reinstate Complainant to her former position as Vice President within the Custom Construction Disbursement Loan Fulfillment Center; (2) pay Complainant a total of $167,902.00 for back pay with interest, attorney's fees and compensatory remedies; and (3) reimburse Complainant for the fair value of stock options, plus interest. CX 3.

Respondent Offers Reinstatement, Complainant Rejects Reinstatement

On May 24, 2005, Respondent advised OSHA that Respondent had offered to reinstate Complainant in compliance with the Preliminary Order. Although Complainant's former department had been downsized, a comparable position – Loan Fulfillment Center Manager II —

existed. Like Complainant's previous position, her title upon reinstatement would be Vice President and her pay level would remain unchanged. Respondent offered to reinstate Complainant to this position immediately. RX B.

On June 10, 2005, Complainant filed an objection to the Findings and Preliminary Order. In particular, Complainant objected to the provision of the Preliminary Order requiring reinstatement, stating that "reinstatement is not a viable option." Instead, Complainant requested front pay or an equivalent remedy in lieu of reinstatement, citing 29 C.F.R. § 1980.105; 69 Fed. Reg. 52108. CX 4; RX C.

Respondent complied or took steps to comply with the balance of the preliminary order by tendering $167,902.00 for back pay and attorney's fees, and by calculating the amount owed in stock options. RX D; RX F.

Complainant's Concerns Regarding Reinstatement

When Complainant was offered reinstatement in May of 2005, she considered going back to Respondent. She had "many, many, many conversations" with her husband about whether she should accept reinstatement, and balanced the competing concerns in her head almost every day. TR at 180. Although she realized that returning to Respondent would mean a much shorter commute, higher pay, increased responsibility, and increased opportunities for advancement, TR at 180, 212, Complainant decided to reject reinstatement for a number of reasons.

First, Complainant decided not to return because her health was better, she was sleeping better, and she "was living a better life." TR at 181. Most of Complainant's physical symptoms had subsided by April 2004, and almost all had subsided by May 2005. TR at 217-18. However, Complainant testified that she still experiences physical problems, including heart palpitations, inability to sleep, headaches, and numbness that are spurred on by events related to this case. TR at 244.

Second, Complainant also feels she could not return to Respondent because no one protected her from retaliation, and she believes nothing has been done to ensure better handling of credit issues and protection of whistleblowers in the future. Complainant testified that she could not accept reinstatement because "I was being brutalized, and they knew it. I was sharing the e-mails with everybody, pleading for protection. They said they were going to do it. We had borrowers that were being damaged and employees that were scared and crying. All of this was shared, and…there were actions that would be consistent with what another professional organization would do to protect a person in my position and resolve the issue….I don't even know how an organization of that stature and that size could be that incompetent, irresponsible, hurtful." TR at 187.

Complainant also testified, "I recognized with the background I had, with my audit background, with my compliance background, and just my years in the saddle working at the job, . . . [that] there should have been controls in place, there should have been policies and procedures . . . . The organization and senior leadership in that organization are irresponsible, and it would happen again, because they did not have the mechanisms in place. And I knew that

if I went back and I ever had a credit issue, or even if some of the people were still there, that I would be at risk for the rest of my career with that organization. I knew that I could not trust them." TR at 181-182. Complainant was also concerned that Respondent "never went to the root cause to figure out what was going on with our borrowers, and the material violations of federal and state law." TR at 168. She stated, "It was very evident to me that I wasted my career on a company that wasn't worthy." TR at 168.

Complainant believes that Respondent's "management, leadership, systems, processes and code of ethics are not reliable" and that she cannot trust her family's livelihood to them. TR at 243. Complainant stated that there are "senior level people in this organization who are still there today who did not tell the truth. Their integrity and their honor . . . without question failed in my situation." TR at 240-41. In particular, Complainant identifies Ann Tierney, Gonseth, Hillis, Gammack and Kassabian as the individuals at Respondent who did not act with integrity in handling her situation. TR at 241. Complainant was particularly upset when she learned through the OSHA report that Brooks forwarded a response she prepared for Hillis to Conyer and Needels, because the investigation with Hillis was supposed to remain confidential. TR at 160-61, 168. Similarly, Complainant was upset that, when asked during the OSHA investigation what he had done to protect Complainant, Hillis said that he did not know that anything had been done to protect her from retaliation. TR at 163-64; CX 39. The report from OSHA's interview stated, "When asked what he did to 'protect' [Complainant] from retaliation for her complaints, [Hillis] said that he did not know if anything was done to protect her. However, he told people involved to keep quiet about the complaints for this reason. [Hillis] stated that [Respondent] has a policy of protecting complainants like [Complainant] whereby they can make anonymous complaints through a 'tip line.'" CX 39 at 1675.

In addition to her concerns about not being protected from professional retaliation, Complainant was concerned that no one responded to her pleas regarding feeling physically threatened by Conyer's temper. TR at 168. She felt that her "pleas for protection and for help when Jeff Conyer's temper was rising were falling literally on deaf ears . . . ." TR at 168.

Third, Complainant is concerned that Respondent took the position that she was terminated for being a poor performer, and no one questioned that, even though there was no documentation of problems with her performance such as a counseling session with her manager or a write-up. TR at 163. She emphasized, "None of the policies and procedures that I had been trained on had been complied with, even by our own Employee Relations group." TR at 163.

For all of these reasons, Complainant doesn't believe she could work for anybody at Respondent. TR at 215. Complainant would not consider returning to Respondent even if she were not currently employed at Countrywide. TR at 234.

Respondent's Position on Complainant's Reinstatement

Kassabian has worked in Human Resources for about 20 years, including about 10 years for Respondent and its predecessor. TR at 248.

Kassabian continues to assert that there was a miscommunication between Complainant and Conyer, and there was no retaliation. TR at 310-11. Kassabian testified that, based on everything she knew at the time of the trial, Complainant was terminated in March 2004 because "the department did a restructure and her position was eliminated and she received a severance package." TR at 305.

Kassabian testified that the only thing she would do differently with regard to Complainant's allegations of wrongdoing is to keep more notes, memorialize phone conversations with a follow-up email, and better follow up with her employee relations colleagues Jennifer Prescott and Jeff Kusulas. TR at 292. Kassabian admitted that these changes are more protective of Respondent as far as creating a clearer record, rather than preventive of retaliation. TR at 314.

Kassabian emphasized that Complainant had many avenues for her concerns, including four other employee relations consultants on the Chatsworth campus and a regional employee relations team in Irvine, California that can be reached through an "866" telephone number. TR at 290. Kassabian also emphasized that Respondent's employees are encouraged to talk to an individual's supervisor if they have a concern they feel is not being addressed, and indicated that the name of Kassabian's supervisor and that supervisor's telephone number were easily accessible to Complainant if she felt Kassabian was not responding adequately. TR at 290. Complainant conceded that Kassabian was not her only avenue for help, and that she could have contacted others in Employee Relations, including Kassabian's supervisor, or she could have called the We-Tip number or the 866 number for employee relations. TR at 216-17. However, Kassabian agreed that, although other reporting avenues were available, Complainant's actions in reporting her concerns to Kassabian were sufficient for purposes of bringing her concerns to Respondent's attention. TR at 316.

Changes at Respondent since Complainant's Departure

While Respondent's custom construction LFC initially had one manager for Origination (Shandling) and another manager for Disbursement (Complainant), the structure was changed so that there was only one manager (Conyer) for the entire LFC. RX N at 41-44. Around July 2005, Conyer was no longer the manager of the custom construction LFC at Respondent. TR at 213; RX N at 37, 120-21. Conyer was replaced on an interim basis by Paul Needels, then Judy Cicanese, and then Rosemary Talavera. RX N at 38, 120-21; TR at 214.

At the time of his deposition, Conyer was the national construction manager for sales. RX N at 57. At that time, Conyer reported to Ralph Melbourne, who replaced Needels as the head of retail sales. RX N at 57; TR at 213. Rosemary Talavera also reported to Melbourne. RX N at 58. Conyer interacted with Talavera on an as-needed basis. RX N at 107. He provided support when she needed "sales-related things." RX N at 106. He also interacted with her regarding "problems or issues that come up on files and worked] with her to get those issues resolved." RX N at 107. He estimated that they communicate by email every other week and meet in person, as a part of group meetings, once every six months. RX N at 108-09.

Conyer testified that if Complainant returned to Respondent, "[i]f we worked in the same

division we would probably have to interact with each other . . . [but] I wouldn't have any supervisory responsibilities over her." RX N at 122. He stated, "I would be fine working with her. I was fine working with her before I managed her." RX N at 122. He explained that he had difficulty when he managed Complainant because "I don't think we communicated with each other the best, and that made it very challenging." RX N at 123.

Complainant knows Talavera, and has no reason to think Talavera has any ill will towards her. TR at 213-14. Complainant does not know Melbourne, and has no reason to believe that Melbourne would not regard her work highly. TR at 213-14

In the Employee Relations area, between Complainant's termination and the order of reinstatement, Prescott transferred to another department and Kassabian has a new manager. TR at 277. Prescott discussed the issues with the handling of Complainant's termination specifically with Kusulas and others. TR at 277-78.

The only change Kassabian could recall occurring after Complainant's SOX claims was that the importance of employee relations personnel informing their managers of events happening within their geographic area of responsibility was stressed. TR at 278. Kassabian said that, since Complainant's claim, Sarbanes-Oxley has been discussed at meetings but not to the level of 'training.' TR at 278-79. Respondent also has a new anonymous phone number for the receipt of Sarbanes Oxley complaints, operated by an outside vendor, which communicates with Respondent's loss protection department and forwards the information to the appropriate department for investigation. TR at 303; CX 2 at 1774; RX L.

Status of Respondent's Loan Fulfillment Center

Tony Flores, a Human Resources manager at Respondent, testified that on February 15, 2006, they had notified the fulfillment employees that their last day would be May 31, 2006. TR at 325; RX I. On March 29, 2006, they had notified the disbursement employees that they would not be released by Respondent. TR at 325. Respondent was in preliminary negotiations with Granite, an outside vendor, to possibly outsource the disbursement function, and Flores expected a decision by the end of April or early May 2006. TR at 325-27. He explained that closing the LFC would involve "bleeding out" the existing loans, and could take 12 to 24 months, during which the current employees might remain employed by Respondent. TR at 327, 333. He expected that the current disbursement employees would likely be extended jobs with the outside vendor. TR at 327. He also stated that Rosemary Talavera, the current manager of the LFC would be terminated as of June 30, 2006 and she would not be offered another position with Respondent. TR at 327-28. Flores acknowledged that the negotiations regarding outsourcing were still in their initial stages and might not lead to anything. TR at 333-34.

Respondent is providing the employees laid off in connection with the elimination of the custom construction operations with a severance plan. TR at 330; RX J, RX K. Based on the planned lay-offs, Flores opined that if Complainant had worked continuously for Respondent, she would be eligible to receive 16 weeks of severance pay. TR at 332; RX K.

Complainant's Employment after Respondent at Wells Fargo and Countrywide

A few days prior to being terminated from her employment at Respondent, Complainant received a call regarding a position at Wells Fargo. TR at 168. When Complainant and the recruiter were able to get in touch, Complainant had been laid off by Respondent. TR at 168-71.

On May 17, 2004, Wells Fargo hired Complainant a position as Division Operations Consultant for the Pacific Division with an annualized salary of $92,000 and a bonus target of $18,400. TR at 172-73, 177-78; CX 41. However, she was no longer a bank officer, had no direct reports, no managerial authority, no credit signing authority, and was no longer working as a national banker. TR at 173-175. Complainant testified that "the technical nature and scope of the job was far inferior." TR at 174. She explained that working as a regional banker versus a national banker is less taxing but also less prestigious, and she has lost out on the related "completely higher level of credibility and marketability in the industry." TR at 175. Also, because of her lower-level job, Complainant was no longer "permitted to go to any industry training sessions or to be [a] representative of the company in any capacity." TR at 177.

The Wells Fargo office was 60 miles from Complainant's home and involved a three-and-a-half to four hour round-trip commute (as opposed to the 19-mile, 45-minute round-trip commute to Respondent's office), so Complainant was not able to spend as much time with her family. TR at 175-76. In addition, the Wells Fargo office was located in East L.A., a high crime area, which Complainant found "scary." Complainant testified that the location of the office caused her and her family a great deal of stress. TR at 179.

Complainant left Wells Fargo to take a position with Countrywide on December 5, 2005, as a First Vice President of Fulfillment Resource Operations. TR at 182, 206; CX 42. She earns $115,000 per year with a bonus capability of 15 percent. TR at 182; CX 42. Complainant is not a bank officer, has limited managerial duties, and has no credit signing authority. TR at 182-185.

However, Countrywide has plans to grow Complainant's division by 30 percent by 2010, to add 150 to 200 new home loan centers by the end of 2006, and to increase the number of loan officers by 5,000 by the end of 2006. TR at 206-07.

Impact of Termination by Respondent on Complainant's Career

Complainant believes, based on her experience over the past two years, that she will never be able to attain the level of employment or earnings she would have had at Respondent. TR at 183. She testified that she had been "on a very fast track," she "was a very high performer," and she "had extraordinary people and met people under [her] and had built teams of people." TR at 183. She testified, "I was on an upward trajectory. There was momentum, I was getting . . . 10 percent, 11-percent raises a year, which doesn't always continue, but . . . the promotion availability to me [was] assured . . . . I was a national banker in a very specialized position" TR at 185. Complainant claims her career path "was very deliberate . . . was on a national scale, and [was] progressive, and quite rapid with national exposure." TR at 184. She testified that she is no longer on the committees she was previously a part of and consequently, no longer has the same national exposure. TR at 185.

Complainant testified, "I was very visibly terminated . . . [and now] none of the recruiters are calling me . . . ." TR at 185. Complainant believes she is "damaged goods" due to the publicity surrounding her termination from Respondent. TR at 186. This is because high finance lending is "a limited universe of professionals, and all of them, which is not that many, are aware that…I was fired by [Respondent]…I was told by people that at a national conference where I was a board member that it was discussed." TR at 186.

Complainant believes that, but for her termination, she would be "either First Vice President or, certainly, I would have left it for a Senior Vice President position some place else, if . . . the instability at [Respondent] has resolved, so that I could actually get the promotion and, you know, work with somebody long enough to earn, you know, that recognition." TR at 231.

Dr. Jonathan Cunitz was Complainant's expert in accounting and financial analysis. TR at 356; CX 40 at 2041-42. Dr. Cunitz explained the difficulty for Complainant in resuming her career at the same high-level and trajectory as before March 31, 2004:

> I've…worked on a number of cases of employment actions where I see that individuals that have had a dramatic break in the earnings path or their career find it very difficult to recover the momentum of where they were going and how they were going.
> In situations of employment actions, regardless of the outcome of any litigation, there is a stigma attached to the past. There is a break in a CV or a resume for an individual. There is a termination that has to be disclosed to future employers. There is, again regardless of the outcome, a cloud over what happened. Because when a prospective employer will be speaking with Ms. Complainant, they will receive one side of the story and not know the other side. And not know, necessarily, the truth.
> Employers are reluctant within the law to get involved in situations where there might be problems in the future, for one reason or another. And that makes them hesitant to make employment decisions. And it's that type of environment that hinders the future career of an individual such as Ms. Complainant. And I've seen that in many situations." TR at 356, 373-374.

Dr. Cunitz opined that Complainant would have to explain the circumstances of her termination for future prospective employers, who would be hesitant to hire her. TR at 389-91, 401. He testified that employers "would see an individual who has resorted to litigation against her prior employer" and would be concerned that she might bring a lawsuit against them "if something doesn't work out." TR at 401.

Mr. Flores testified that Respondent responds to employer requests for separation information on former employees through an outside vendor who provides only hire date, last day worked and last job title. Respondent will also release salary information with the employee's permission. TR at 319-20.

Evidence Regarding Damages

Complainant testified that her raises at Respondent were consistently at the high end of the range of 5 to 10 percent a year. TR at 232-33. She acknowledges that this was more than the average of 5 percent at Respondent because she "was one of the higher performers and they were really trying to keep [her] at a point of leadership development . . . ." TR at 233.

When she was offered the Operations Manager position, which had a salary of about $200,000, Complainant researched the pay for comparable positions at competing banks. TR at 232, 235-36. The base salaries ranged between 160,000 and 185,000, plus bonuses. TR at 236.

At the time of her termination from Respondent, Complainant was earning $127,000 annually, plus bonuses and incentives of approximately $50,000. TR at 172-73. Her total expected earnings at Respondent for 2004 were $189,544. TR at 362; CX 40 at 2028, CX 52.

Dr. Cunitz based his opinions on review of relevant financial documents, including her earnings records since 2000, and approximately five conversations with Complainant. TR at 356-361, 392; CX 40 at 2040. Dr. Cunitz wrote a report on March 9, 2006, in which he calculated Complainant's total damages based on two alternative calculations of her loss of earnings. TR at 368; CX 40 at 2039.

In his first calculation, Dr. Cunitz assumed that for purposes of calculating damages, Complainant's loss of expected earnings commenced on May 1, 2005, CX 3; CX 40 at 2023; TR at 368, 393-93, and runs until her age of retirement in October 2027. TR at 372; CX 40 at 2023. He began with Complainant's expected earnings of $189,544 at Respondent for 2004. TR at 362; CX 40 at 2028, CX 52. Based on his calculation that Complainant had received average annual increases of 11.3 percent while at Respondent, Dr. Cunitz projected that her earnings at Respondent would continue to increase by 10 percent in 2005. TR at 368-369; CX 40 at 2029. He projected that Complainant's earnings at Respondent would increase for the subsequent four years at the following rates: nine percent for 2006, eight percent for 2007, seven percent for 2008 and six percent for 2009. TR at 369; CX 40. He projected that Complainant's earnings would increase in subsequent years by five percent per year. TR at 369; CX 40. He contrasted those earnings with Complainant's expected earnings at Countrywide, which are $132,250 for 2006, based on a base salary of $115,000 and an expected 15 percent bonus. TR at 370; CX 40; CX 42. As with Complainant's projected earnings at Respondent, Dr. Cunitz projected that Complainant's earnings with Countrywide would increase by nine percent for 2006, eight percent for 2007, seven percent for 2008 and six percent for 2009. TR at 370-371; CX 40. Complainant's projected earnings increases in subsequent years are five percent per year. TR at 37-71; CX 40. The present value calculation of Complainant's lost future earnings and benefits through 2027 is $2,879,152. TR at 372; CX 40 at 2032.

In his second, or alternative, calculation of Complainant's lost earnings, Dr. Cunitz was less aggressive and assumed that Complainant would recover her loss of career track and earnings within approximately ten years, rather than assuming the loss would continue until retirement. Thus, he used the same methodology as the first calculation, except that he applied annual increases in Complainant's projected earnings with Countrywide so that her projected earnings with Respondent and with Countrywide were equal by the year 2015. TR at 373-375; CX 40. He also applied annual decreases in the loss of benefits so that Complainant's loss of

benefits was reduced to zero by the year 2015. TR at 373-375; CX 40. The present value of Complainant's loss of earnings and loss of benefits would be $642,941. TR at 372-75; CX 40 at 2033.

Included in both totals is Dr. Cunitz's calculation of the loss of retirement and insurance benefits that Complainant would suffer. CX 40 at 2030. He calculated that, in the year 2006, Complainant would receive $7,761.32 in total fringe benefits at Countrywide, while she would receive $39,282.82 at Respondent. TR at 367, 383-84; CX 40 at 2030-31. The difference in the fringe benefits is $31,522. TR at 371, 384; CX 40 at 2023. Dr. Cunitz then reduced that amount by inflation to bring it back to the same starting point of 2005 as the front pay, and then he increased that amount by three percent inflation per year afterward. TR at 371. The amount for loss of benefits was added to the amount of loss of earnings for the total present value loss calculations. TR at 371-72.

Dr. Cunitz conceded that there was one error in his report, although it did not affect his total calculations. TR at 384. He emphasized, however, that Respondent's expert in forensic accounting, Michael Miskei, had examined and accepted his calculations. TR at 384-85. Dr. Cunitz also conceded that his report did not take into account possibilities such as Complainant becoming unable to work, Countrywide's plans to expand its business, or Respondent's possible plans to close the Chatsworth LFC. TR at 385-87. He conceded that he was not aware of Countrywide or Respondent's business plans, but emphasized that "both of those events may or may not have affected [Complainant]." TR at 388. He also explained that Countrywide's expansion plans were too speculative to consider in his calculations because it was unknown where their expansion would be geographically, whether they would hire and promote from within, and whether the expansion would be successful. TR at 397. Similarly, Dr. Cunitz did not believe that the possible closing of the Chatsworth LFC should be taken into account because it is unknown whether it will actually occur and whether Complainant would have been retained by Respondent in another capacity. TR at 402-03.

Michael Miskei testified for Respondent as an expert in forensic accounting and calculations of earnings and other damages. TR at 411. Mr. Miskei based his opinions and calculations on review of Dr. Cunitz's reports and financial documents related to Complainant's employment and earnings. TR at 411-15. Mr. Miskei submitted two reports. RX P and RX Q. Mr. Miskei calculated that the present value of Complainant's lost future earnings and benefits would be $473,130. TR at 424, 441; RX. P; RX Q.

Mr. Miskei agreed with Dr. Cunitz's assumption that, for a brief period of time, Complainant would have continued to receive salary increases at Respondent near or at the level she had received between 2003 and 2004. TR at 417. However, he disagreed with Dr. Cunitz's assumption that Complainant would have continued to receive increases of at least 5 percent indefinitely. TR at 418. Mr. Miskei testified that such an assumption of constant salary increases "tends to ignore certain other economic realities which we all understand exist in the employment world and which, in fact, have existed in [Complainant's] employment career." TR at 418. He explained that "the economy doesn't always roar ahead at four or five percent per year" and the mortgage banking business is especially subject to fluctuations. TR at 418. Mr. Miskei also opined, "I think that the time frames involved, because they're so long, require some

additional risk assessment associated with increasing salaries and what that would mean, and whether or not there was an assumption that she would change jobs, because the salary would have increased beyond the current pay levels for a Level 7 employee." TR at 420.

Instead, for Complainant's projected earnings at Respondent, Mr. Miskei assumed that her base salary would continue to increase by 10.59 percent, as it had between 2003 and 2004, and she would continue to receive 25 percent bonuses. TR at 431-32, 444-45. Mr. Miskei explained that even though it was "relatively generous" to assume that Complainant would continue to receive 25 percent bonuses, it was better than making subjective judgments about bonuses. TR at 433.

Mr. Miskei opined that Dr. Cunitz's "assumption that [Complainant] was permanently damaged or that the damage lasted 10 years was not justified . . . ." TR at 416. Mr. Miskei opined that Complainant could recover her earnings more rapidly than 10 years, since she had received a 25 percent salary increase by moving from Wells Fargo to Countrywide. TR at 416-17. Consequently, in his aggressive calculation of Complainant's projected actual earnings, Mr. Miskei assumed that she will continue to receive annual salary increases at the higher rate of 25 percent, such that Complainant would catch up to her prior earnings by 2010. TR at 429, 433-434, 450, 452; RX P; RX Q. Mr. Miskei assumed that Complainant's bonuses would stay at 15 percent, as she has received at Countrywide. TR at 435.

Mr. Miskei explained that he based the assumption that Complainant would receive increases of 25 percent on the increase she received upon moving from Wells Fargo to Countrywide. TR at 434. He stated that this "does assume that it is a combination of raises and perhaps job changes. It assumes that [Complainant's] experience and reputation and abilities will command a salary commensurate with those abilities and that she will be able to recover those in some reasonable period of time." TR at 434, 446. Respondent's expert admitted that his assumption of 25 percent increases is "aggressive." TR at 450. He also conceded that Complainant had never received an increase of that size from Respondent. TR at 447. He conceded that Complainant's "need to be employed, her work ethic, caused her to take [the Wells Fargo] job which was, I believe, beneath her experience and ability level." TR at 450. He added that the Countrywide position is still "somewhat less than the position she held at [Respondent]." TR at 450.

However, he attempted to justify his assumption by emphasizing that the 25 percent subsumes other reasonable increases in bonuses, benefits, equity compensation, which he had assumed would not increase in his calculations. TR at 434, 446, 450-51. Mr. Miskei also testified that mid- and upper-level executive compensation "tends to exceed seven or eight percent per year and can be as high as 20 to 25 percent, depending on the position, the nature of the industry." TR at 451. He added that "[o]ne of the things that I think isn't factored in here today in all of the projections is that the nature of this industry is heavily dependent on the refinancing environment, the home building environment. When [these sectors] are at a peak, as they have been recently, compensation seems to move pretty quickly." TR at 452.

Mr. Miskei agreed with Dr. Cunitz's calculations of Complainant's lost benefits. TR at 429-30. However, Mr. Miskei opined that Complainant, based on her experience, knowledge,

responsibility and past performance, would likely recover her equity compensation and fringe benefits. TR at 417-19. He stated, "She clearly enjoyed a substantial amount of success in her prior careers and increases. I think that it is reasonable to assume that, notwithstanding her experience at [Respondent], that she would be able to in the future recover much of that. And there's no support, in my view, for the assumption that she wouldn't." TR at 419.

Mr. Miskei testified that if he had used a less aggressive assumption about Complainant's projected salary increases and a ten-year recovery period, his present value calculation of Complainant's lost earnings and benefits would be one-third higher than or twice as high as his original calculation. TR at 449-452. Thus, using a ten-year recovery period under Mr. Miskei's revised assumptions, the present value of Complainant's lost future earnings and benefits could range from $629,262 (i.e. $473,130 x 1.33) to $946,260 (i.e. $473,130 x 2). TR at 452; RX P at 1.

CONCLUSIONS OF LAW

Credibility

The following conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I must determine the credibility of witnesses, weigh the evidence, and draw my own inferences from it.

Complainant

Overall, I found Complainant to be a credible witness. Although I found that she had some tendency to exaggerate amounts and time periods, I noted that she exhibited genuine, strong emotions when she was testifying about feeling threatened by Conyer and the stressful times at Respondent beginning in July 2003 through March 31, 2004. See TR at 67-167. She also came across as truthful, competent, and motivated as confirmed by her quick actions to find new work with Wells Fargo, and later Countrywide, after being wrongly terminated. TR at 168-246. Complainant was also much more believable than Susan Kassabian as to Respondent's customary terminology for terminating or firing an employee versus separating them from employment due to a layoff which made Complainant the more credible witness. *See* TR at 155-156, 291; CX 69. Even without any supporting medical evidence, I find Complainant was sincere in her testimony about her physical manifestations in response to Respondent's conduct in early 2004. See TR at 145, 217-18. I also found more believable, and gave more weight to, Complainant's testimony about the likelihood of returning to work at Respondent and finding irreparable damage to the employment relationship due to enmity between them creating a dysfunctional work environment. TR at 239-246.

Susan Kassabian

I did not find Susan Kassabian to be a credible witness. Kassabian generally testified that she was unaware that Complainant had been fired due to Conyer's retaliation against her for

reporting the shot-loan losses yet the evidence shows that Kassabian was very active in all of Complainant's interactions with Conyer, fully aware of Conyer's attempts to cover-up the short-loan problems and his harassment of Complainant, and Kassabian was also aware of Complainant's interactions with Respondent's upper management. I find that Kassabian was Complainant's lone contact with Respondent's Human Resources department throughout all relevant times and that her testimony at trial that she believed Complainant was merely laid-off due to poor performance rather than fired due to Conyer's retaliation for Complainant's whistle blowing activities is quite shocking and unbelievable.

First, I note that her credibility was impeached when she testified that she did not remember Complainant saying she was afraid of being alone with Conyer, but in her deposition she had testified that she did remember Complainant saying that. *See* TR at 254-55.

Second, I also note that she gave very short answers without very much information on direct examination by Complainant's counsel. Some of her answers were vague or evasive, even after I admonished her to answer questions with "yes," "no," or "I don't know." See TR at 247-280. Then, on cross-examination/direct by Respondent's counsel, her testimony went very quickly and seemed well-rehearsed. TR at 281-307. I note that Complainant's counsel even inquired about the reason for the difference. TR at 308.

Third, I find that Kassabian demonstrated selective awareness and memory of the facts and circumstances surrounding this case. For example, Kassabian could not remember whether Complainant had asked for a climate survey. TR at 282-84, 315-16.This is not credible given that conducting climate surveys is a major part of Kassabian's job function. TR at 283-84. Similarly, she could not remember whether she had taken notes in a given meeting. TR at 282. This is not credible given Complainant's credible testimony that Kassabian did take notes during their conversations and that she always "takes great notes." TR at 167. I further note that most people have a consistent practice of always or never taking notes and in my experience handling whistleblower cases I take administrative notice that most Human Resources professionals understand the importance of taking and keeping notes to avoid liability.

Overall, Kassabian was not credible in her insistence that Complainant was not retaliated against. TR at 310. She admitted that Complainant felt threatened by Conyer and feared retaliation, but she continued to characterize the problem between them as a "miscommunication." TR at 253-310. Similarly, Kassabian admitted that after learning about Complainant's termination she was concerned that retaliation was at play, but she continued to assert that Complainant was terminated as a low-performer and because of restructuring. TR at 254-74, 294-310. She testified that Complainant's concerns about retaliation did not set off any alarm bells for her beyond the concerns she already had about their communication problems. TR at 266-67.

Additionally, I did not find it credible when Kassabian insisted that, within Respondent, "termination/terminated" means any kind of separation from employment. TR at 291. I find that "termination" at Respondent means "fired" with or without cause and is a specific type of "separation from employment" with "separation due to layoff" as being different from "termination." *See also* TR at 150-51, 156. I also did not find it credible that that Kassabian was

not aware that Complainant was to be laid off and had to find out from a random employee, when she was very involved with Complainant's problems up until her termination and she knew a good deal about the offer to reinstate Complainant. TR at 310-22.

Finally, I find it inconsistent and not credible that Respondent argues that Kassabian emphasized that Complainant had many avenues for her concerns, including four other employee relations consultants on the Chatsworth campus and a regional employee relations team in Irvine, California that can be reached through an "866" telephone number (TR at 290) yet Kassabian testified that she did not discuss the situation with her supervisor, Jennifer Prescott, or research it further because Kassabian thought she was handling it adequately by speaking with Complainant and would look into all of her allegations of retaliation. TR at 144, 261, 286. Kassabian further testified that she did not investigate Complainant's allegations of retaliation or advise her supervisor, Jennifer Prescott, of Complainant's concerns. TR at 271-272, 322. Kassabian also testified that she told Prescott she was concerned about the appearance of retaliation, and Prescott agreed but did not ask Kassabian to follow up in any way. TR at 276, 293-94.

For these apparent reasons, Kassabian's testimony was contradictory and not believable.

Tony Flores

I generally found Mr. Flores to be a credible witness. However, I did not find it credible how certain he seemed at times about Respondent's restructuring/downsizing plans when many aspects of the plan were still up in the air at the time of trial. Mr. Flores testified that Respondent *may not* actually close its disbursement LFC, a department which Complainant helped support in the past and which remained a viable position for her if reinstatement was appropriate. TR at 65, 325-26, and 333-35. Furthermore, Flores testified that on March 29, 2006, Respondent had notified the disbursement employees that they would not be released by Respondent. TR at 325. Therefore, I find it highly speculative and unreliable that Complainant's former position at Respondent was actually eliminated at any time so as to cut-off her entitlement to lost future earnings as front pay. I further find that Mr. Flores' demeanor fluctuated and his testimony was inconsistent as to Respondent's speculative future plans to shut down its disbursement LFC.

Overall, I find that there were no believable statements that Respondent's disbursement LFC would fully close by some specific future date thereby precluding Complainant from receiving front pay, as requested by Respondent in its closing argument.

Jeffrey Conyer

Although Mr. Conyer did not testify at the hearing, excerpts of his deposition were submitted as an exhibit. RX N. Mr. Conyer's testimony seemed credible with regard to the organization of departments and procedures at Respondent. However, his testimony was not at all credible when he minimized the problems he had with Complainant by saying they never had any confrontations or heated discussions. RX N at 77-79. This was not credible given that numerous emails between Complainant and Conyer, as well as Complainant's testimony, establish that they did have at least one heated confrontation in person and numerous

confrontational email exchanges. See CX 6, CX 8, CX 12, CX 13, CX 14, CX 16, CX 19, CX 20, CX 21, CX 22, and CX 68 (duplicate of CX 14).

Dr. Cunitz and Mr. Miskei

I found both of these economic experts to be credible witnesses. However, as will be discussed below with regard to the calculation of front pay, I did not find them credible with regard to some of the assumptions they made about Complainant's ability or inability to recover her career track and earning power. Specifically, each expert's first opinions were aggressive and unreasonable in rational – Dr. Cunitz because he assumed Complainant would never recover her career track and would receive front pay until she retired and Mr. Miskei because he assumed that Complainant would be reinstated at Respondent as of May 1, 2005.

Analysis

1. Complainant's entitlement to front pay in lieu of reinstatement

Although reinstatement is the preferred and presumptive remedy to make whole employees who have been discharged in violation of the Act, front pay may be awarded instead where reinstatement would be inappropriate. 18 U.S.C. § 1514A(c)(1); *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-15 (ARB June 9, 2006). Front pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) an employee's medical condition that is causally related to her employer's retaliatory action (*see Michaud v. BSP Transport, Inc.*, ARB Case No. 97-113 (Oct. 9, 1997); (2) manifest hostility between the parties (*see Welch*, 2003-SOX-00015; *see also Creekmore v. Abb Power Sys. Energy Servs., Inc.*, 93-ERA-24 (Sec'y Feb. 14, 1996)); (3) the fact that claimant's former position no longer exists (*see Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987)); or (4) the fact that employer is no longer in business at the time of the decision (*see Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-00056 (July 18, 2005)). Thus, while front pay exists as a potential remedy in a SOX case, it must be determined whether it is an appropriate remedy to which Complainant is entitled.

In this case, the Secretary issued a Preliminary Order on May 12, 2005, requiring Respondent to reinstate Complainant immediately. On May 24, 2005, Respondent notified OSHA that it had offered to reinstate Complainant to a comparable position, Loan Fulfillment Center Manager II, at the same managerial and pay level as she had been at before. On June 10, 2005, Complainant notified OSHA that she rejected reinstatement as it was "not a viable option."

A complainant's rejection of a respondent's unconditional offer of reinstatement to a substantially equivalent position ordinarily tolls the respondent's liability for back pay, front pay, and reinstatement. *Ford Motor Co. v. EEOC*, 458 U.S. 219, (1983)(back pay); *Caudle v. Bristow Optical Co.*, 224 F.3d 1014 (9th Cir. 2000)(back pay and front pay); *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991)(reinstatement). This is because refusal of an offer of reinstatement constitutes a breach of the obligation to mitigate damages. *Williams v. TIW Fabrication & Machining, Inc*., 88-SWD-3 (Sec'y June 24, 1992). The respondent bears the

burden of proving that the complainant did not properly mitigate damages. *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56, at 55 (July 18, 2005). The ARB held that a complainant's refusal to accept an offer of reinstatement is measured by an objective, reasonable person standard. *Michaud*, 95-STA-29 (Jan. 6, 1997) (citing *Morris v. American Nat'l Can Corp.*, 952 F.2d 200, 203 (8th Cir. 1991); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982)). More specifically, an employee's failure to seek or accept reinstatement does not preclude an award of front pay if it is determined that there was excessive hostility between the parties. *Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014 (9th Cir. 2000). Thus, the inquiry here is whether excessive hostility between the parties made Complainant's rejection of Respondent's offer of reinstatement objectively reasonable thereby providing a basis for an award of front pay.

a. Excessive Hostility Between the Parties

Courts have held that front pay is available where reinstatement is inappropriate or not possible due to a hostile employment relationship. In cases under the Energy Reorganization Act ("ERA") and the Surface and Transportation Act ("STA"), the Administrative Review Board ("ARB") has ordered that front pay be considered as a substitute for reinstatement when the complainant contends that reinstatement is not possible because enmity between the parties would create a dysfunctional work environment. *Michaud v. BSP Transport, Inc.,* ARB Case No. 97-113 (Oct. 9, 1997), citing and quoting *Nolan v. AC Express*, ARB Case No. 1992-STA-00037 (Jan. 17, 1995), and citing *Doyle v. Hydro Nuclear Services*, ARB Case No. 1989-ERA-00022 (Sept. 6, 1996). Similarly, in cases under the Age Discrimination in Employment Act ("ADEA"), the Ninth Circuit "has recognized that reinstatement may be inappropriate where discord and antagonism between the parties [make] it preferable to fashion relief from other available remedies." *Rabkin v. Or. Health Scis. Univ.,* 350 F.3d 967, 977 (9th Cir. 2003) (ADEA retaliatory discharge case); *see also Cassino v. Reichhold Chem.,* 817 F.2d 1338, 1346-1347 (9th Cir. 1987) (ADEA retaliatory discharge case).

In a case under SOX, *Welch v. Cardinal Bankshares Corp.*, the administrative law judge recognized that "[i]f there is such hostility between the parties that reinstatement would not be wise because of irreparable damage to the employment relationship, the ALJ may decide not to order it." 2003-SOX-00015, quoting *Dutile v. Tighe Trucking, Inc.*, 1993-STA-00031 (Sec'y Oct. 31, 1994). This is because judicially-ordered reinstatement "is discretionary, and should not be used where the result would be undue friction and controversy." *Welch,* 2003-SOX-00015, quoting *McKnight v. General Motors Corp.*, 973 F.3d 1366 (7th Cir. 1992) (Title VII racial discrimination case). In other words, reinstatement may be inappropriate when the employment relationship is "pervaded by hostility." *Welch,* 2003-SOX-00015, citing and quoting *McNeil v. Economics Laboratory Inc.*, 800 F.2d 111, 118 (7th Cir. 1986), *cert denied* 481 U.S. 1041 (1987) (ADEA case). The judge further explained, "Manifest hostility between a complainant and company managers could cause a dysfunctional work environment which might render reinstatement infeasible." *Id.*, citing *Nolan v. AC Express,* 1992-STA-00037 (Jan. 17, 1995).

For the reasons discussed below, I find that Complainant's rejection of Respondent's offer of reinstatement was objectively reasonable based on the hostility exhibited toward

Complainant by Respondent's managers and the likelihood of a dysfunctional work environment upon reinstatement. For the same reasons, I further find that reinstatement would be inappropriate and that Complainant is entitled to front pay instead. No person's career should be subject to the same degree of risk as I find Complainant would experience under the special circumstances of this case, which circumstances include Respondent's admitted discrimination toward Complainant and its refusal to accept the consequences of its actions to prevent any further sabotage of Complainant's career.

First, Complainant was objectively reasonable in rejecting reinstatement, because at the time it was offered in or around May 2005, Conyer was still working for Respondent and Complainant would have had to interact with him as part of her job. RX N at 37. Even after June 2005, Conyer remained in a position which interacted with the manager of the Disbursement LFC, a position similar to that which Complainant could expect to receive on reinstatement. TR at 213; RX N at 57, 101-09.

I find that Conyer had intentionally threatened Complainant physically and professionally, made regular work communications fraught with tension, and was responsible for her retaliatory termination. TR at 237-46; CX 3; CX 28 and CX 33. Moreover, he denied that he and Complainant had any serious problems, which is a clear indication that his retaliatory behavior and treatment toward her would not improve. RX N at 76-79. I further find that this caused Complainant to suffer harassment related to his conduct which was sufficiently severe so as to alter the conditions of her employment and created an abusive working environment. See TR at 81-88. I further find that it was objectively reasonable for Complainant to have been detrimentally affected by Conyer's conduct and for her to refuse reinstatement to a position that would require her to have regular contact with Conyer. Furthermore, Respondent acted unreasonably by not acting consistent with OSHA's accepted findings and replacing Conyer to avoid any interaction with Complainant.

Second, Respondent's managers, including Kassabian, Flores, Conyer and others, have continued to assert throughout the OSHA investigation and more importantly, *after* accepting OSHA's findings and through the trial, that Complainant was terminated due to poor performance and restructuring. TR at 254-74, 294-310. Although it is understandable that Respondent took this position during the OSHA investigation, to persist adamantly in this position *after* it had accepted OSHA's finding of retaliation is a demonstration of hostility toward Complainant as Respondent has not learned from its retaliation mistake nor has Respondent changed its position to incorporate its admitted retaliation into new guidelines or policies to prevent future retaliatory conduct. To call a high-performing, committed employee like Complainant a poor performer is insulting and hostile, especially when the evidence overwhelmingly fails to support Respondent's claim of poor performance over a customary year-long period of time. Moreover, many of these people who continue to believe that Complainant was terminated for poor performance remain in positions of authority at Respondent (i.e. Kassabian, Flores, Kusulas, and Talavera) would likely limit or interfere with Complainant's proper career growth.

Third, in this case, Complainant sought help from a number of people in positions of authority at Respondent when confronted with the harassing manner of Conyer. Not only did

these people not provide aid or relief to Complainant in response to her complaints but, instead, they moved the harasser to a position of immediate supervision over Complainant. In addition, despite repeated, explicit pleas from Complainant for protection from retaliation as a result of the information she shared regarding the short-funded loans, no one acted to prevent her termination. The managers involved also violated their promises of confidentiality regarding the information about the short-funded loans. As a result of this treatment, Complainant reasonably lacks trust in Respondent and its managers, which would guarantee a dysfunctional, unproductive working relationship.

In addition, Complainant testified that she continues to have well-founded concerns of retaliation, which also would guarantee a dysfunctional working relationship. On one hand, it does not appear that there have been any material changes in Respondent's processes for preventing or handling retaliation, credit problems, or fraud concerns. Kassabian did testify that Respondent does have a new anonymous phone number for the receipt of Sarbanes Oxley complaints, operated by an outside vendor, which communicates with Respondent's loss protection department and forwards the information to the appropriate department for investigation. TR at 303; CX 2 at 1774; RX L. Therefore, it seems possible, or even likely, that Complainant would encounter another problem like the short-funded loans about which she would feel compelled to initiate an investigation or blow the whistle. If she did, it is likely that the investigation would return to some of the same people as before like Kassabian in Human Resources.

On the other hand, there has been little change in the structure or training at Respondent for better handling of SOX complaints in the future and protecting whistleblowers from retaliation. It also does not appear that there have been any significant changes in Human Resources/employee relations generally, even after the serious breakdown in communication and procedures at Respondent that allowed for Complainant to be terminated by Conyer without the advance knowledge of Kassabian or anyone else in Human Resources. Most notably, Kassabian testified at trial she would not have done much differently in Complainant's situation. On the whole, no evidence was presented showing that any of Respondent's managers understand the past errors in their conduct toward Complainant. These problems combine to create a situation in which Complainant would be likely to encounter credit problems and fraud concerns yet she credibly testified that she would be scared to report or investigate them out of fear of retaliation.

In light of the foregoing, I hold that the standard for recovery for finding excessive hostility between parties warranting front pay in place of reinstatement is relaxed under the special circumstances of this case, where a respondent's retaliation and pre-textual termination against a complainant is admitted, when compared to the evidentiary burden required to prove a prima facie claim of a hostile work environment. I find there is a noted distinction between this case and one in which a plaintiff is arguing the presence of a hostile work environment as an element of her prima facie case, where the burden of proof remains firmly on the party alleging a hostile work environment. That situation warrants stricter scrutiny and a higher burden of proof on a complainant than here, where Respondent has admitted that an adverse act hostile to Complainant has occurred yet its management refuses to acknowledge this admission and remains in a position of influence over the prevailing Complainant's work performance. Under the circumstances of this case, I hold that Respondent should be required to show by clear and

convincing evidence why reinstatement is warranted. I find that Respondent has failed to show that Complainant's reinstatement to her former position is appropriate in this case.

Alternatively, at the April 4, 2006 trial on the sole issue of remedial relief, despite Respondent already having accepted OSHA's findings of retaliation against Complainant and that Respondent's stated reasons for terminating Respondent were pre-textual, Respondent's Human Resources specialist, Ms. Kassabian, still maintained that Complainant had properly been terminated for cause. Ms. Kassabian testified at trial that her view had not changed and that she still "did not feel there was retaliation going on" by Conyer's biased and hostile performance evaluation of Complainant back on March 23, 2004. *See* TR at 298-300, 305-07, and 310; CX 33. In addition to the separate acts referenced above that I find collectively constitute one unlawful employment practice, I further find that this continued stubborn refusal to recognize Respondent's prior acknowledged discriminatory conduct toward Complainant is adequate to prove that excessive hostility remains pervasive throughout Respondent's upper management and would unreasonably interfere with Complainant's work performance if she were required to return to work at Respondent. Stated differently, I find that a productive and amicable working relationship would be impossible between Respondent and Complainant due to Respondent's refusal to accept the admitted facts at trial where the only remaining issue involved Complainant's remedy for Respondent's retaliation and pre-textual termination. *See* TR at 17; RX A (OSHA's findings of Respondent's retaliation and pre-textual termination); and ALJX 1 (July 20, 2005 order referencing parties' agreement that only issue for litigation concerns the appropriateness of the reinstatement remedy).

For all of these reasons, I find that Complainant has demonstrated her entitlement to some other form of remedial relief to be "made whole" in lieu of reinstatement based on Respondent's continued hostility and the impossibility of a functional, productive working relationship.

b. Unavailability of comparable position/Employer no longer in business

Under whistleblower case law, it may be appropriate to award front pay in lieu of reinstatement where the employer has closed or restructured its business such that it cannot offer Complainant a comparable position. *Kalkunte v DVI Financial Services, Inc.*, 2004-SOX-56 (July 18, 2005); *Diaz-Robainas v. Florida Power & Light Co.,* No. 92-ERA-10 (Sec'y Jan. 19, 1996); *Sprague v. American Nuclear Resources, Inc.*, No. 92-ERA-37 (Sec'y Dec. 1, 1994). However, because reinstatement is generally the favored remedy, the ARB and the courts have generally required employers to find a comparable position. *See Hobby v. Georgia Power*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995); *Dutkiewicx v. Clean Harbors Environmental Services, Inc.*, 95-STA-34 (ARB Jun 11, 1997).

In this case, Respondent's LFC had undergone some restructuring after Complainant was terminated but was continuing to operate. RX N. Respondent was able to offer Complainant a comparable position as LFC Manager II. RX B. Thus, the unavailability of a comparable position is not relevant to the issue of the reasonableness of Complainant's decision to reject of reinstatement.

Respondent argues, however, that the closing of its fulfillment LFC means that Complainant would have been laid off by May 31, 2006, so its front pay liability should end on that date. ALJX 6. Complainant responds that this is irrelevant to the issue of whether she was entitled to front pay in lieu of reinstatement as of June 10, 2005. ALJX 7. Complainant also argues that if reinstatement were found to be the appropriate remedy, Respondent would still be required to reinstate Complainant to a position of the same seniority status, regardless of whether the fulfillment LFC had closed. ALJX 7. In effect, the parties agree that the closure of the fulfillment LFC is not relevant to whether reinstatement or front pay is the appropriate remedy. In addition, Respondent's Human Resources manager, Tony Flores, testified that Respondent may not similarly close its disbursement LFC, a department which Complainant helped support in the past and which remained a viable position for her if reinstatement was found to be appropriate. TR at 65, 325-26, and 333-35.

2. Calculation of Remedies

a. Front Pay/Loss of Earnings/Benefits

Section 806 of SOX provides that where a SOX violation has occurred, the employee "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1)(2002); 29 C.F.R. § 1980.105. It is my conclusion that in order to make Complainant "whole" in this case, I have discretion in fashioning relief to order economic reinstatement, front pay, and/or money for future lost earnings as a result of discrimination under SOX. *See Welch v. Cardinal Bankshares Corp.,* ARB Case No. 06-062 (ARB June 9, 2006) (front pay-money for future lost compensation can be awarded under SOX).

While some speculation is necessary to determine front pay, expert testimony concerning an employee's earning potential and evidence about what positions are available comparable to the discharged position is helpful. *Peyton v. DiMario, The Public Printer of the U.S.*, 287 F.3d 1121, 1129 (D.C. Cir. 2002). In *Ass't Sec'y & Bryant v Mendenhall Acquisition Corp.*, the ARB stated that "a litigant who seeks an award of front pay must provide the court 'with the essential data necessary to calculate a reasonably certain front pay award.' Such information includes the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate." ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005)(quoting *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992) (*McKnight III*). The Ninth Circuit has held that a plaintiff's work history, work expectancy, and life expectancy are pertinent factors in calculating the amount of front pay. *Gotthardt v. National R.R. Passenger Corp.*, 191 F.3d 1148, 1157 (9th Cir. 1999).

Most cases seem to award front pay for a set amount of time. *Gotthardt v. National RR Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999) (11 years); *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56, at 61-62 (July 18, 2005) (4 years); *Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB Sept. 6, 1996) (5 years); *Michaud v. BSP Transport, Inc.*, 95-STA-29 (ARB Oct. 9, 1997) (2 years). "Similarly, in *Davis v. Combustion Engineering, Inc*., 742 F.2d 916, 923 (6th Cir. 1984), the Sixth Circuit upheld an award of front pay to a 59 year-old plaintiff [through

retirement age] but noted that front pay for a 41 year-old plaintiff until retirement age might be unwarranted. Indeed, '[o]ther courts seem to agree that plaintiffs in their forties are too young for *lifetime* front pay awards' (citations omitted)." *Peyton v. DiMario, The Public Printer of the U.S.*, 287 F.3d *supra*. at 1130 (emphasis added).

At the time of trial, Complainant was in her mid-forties and I follow the line of cases referenced in *Peyton* to reject Dr. Cunitz's expert testimony that Complainant is entitled to a *lifetime* front pay award, here until her retirement in 2027. *See* CX 40 at 2032; *see also Peyton v. DiMario, The Public Printer of the U.S.*, 287 F.3d *supra*. at 1129 (award of 26 years of front pay for a 34 year-old plaintiff was found to be unduly speculative and therefore an abuse of discretion). Here, as in *Peyton*, I find that extending the assumptions made in Dr. Cunitz's primary calculation over the rest of Complainant's career makes them untenable. It is too speculative and optimistic to assume that Complainant would remain employed and receive steady raises and promotions at Countrywide for 22 more years. As argued by Mr. Miskei, this calculation does not account for risk and fluctuations in the economy, especially in the mortgage banking business. TR at 418, 420. As a result, I further find that Dr. Cunitz's first calculation based on the assumption that Complainant would never recover her career track and earnings potential in her lifetime is not credible.

A remedial gap can open up when reinstatement is found to be inappropriate. *McKnight v. General Motors Corp*., 908 F.2d 104, 116 (7th Cir. 1990)(*McKnight II*). In *McKnight II,* Circuit Judge Posner found that there was a presumption that an employee's employment opportunities had been damaged where reinstatement was not ordered and substantial back pay ($55,000) had also been awarded. *Id*. Judge Posner reasoned that "there is a presumption that the plaintiff does not have equally good employment opportunities, for if he did he would have been earning about the same in whatever job he took, upon being discharged, in order to mitigate his damages." *Id*.

Similarly here, I am not ordering reinstatement and Complainant was awarded substantial back pay of $69,402 by OSHA through May 1, 2005. *See* CX 3 at 1795. Respondent did not challenge this back pay award and paid it. RX D. In addition, both financial experts agreed that Complainant earns less money her positions at Wells Fargo and Countrywide than she expected to earn at Respondent in 2004. Consequently, I find there is a presumption here that Complainant did not have equally good employment opportunities after she was discharged, for if she did she would have been earning about the same in the Wells Fargo and Countrywide positions she took upon being discharged, in order to fully mitigate her damages. As a result, I further find that back pay alone will not make Complainant "whole" from May 1, 2005 forward.

As discussed below, the evidence relied on and the assumptions and opinions of the financial experts prove that Complainant will not be made "whole" until after the year 2014 when her disrupted career is back on track. See CX 40 at 2024 and 2033. I agree with Dr. Cunitz that the stigma of the events that occurred at Respondent have reduced Complainant's future employment opportunities, especially in this case where Complainant diligently mitigated her damages by taking positions with Wells Fargo on April 28, 2004 and later with Countrywide, yet an earnings gap remains. *See* CX 40 at 2024; CX 41. I find that while Complainant's current position at Countrywide lags behind what she did at Respondent in terms of national exposure,

wages, benefits, and responsibilities, it is probably one of the best positions she could have landed to reduce the amount of time it will take for her employment to be comparable or superior to what she expected from Respondent in 2004.

Respondent has not put forth evidence to sufficiently rebut the presumption that Complainant did not have equally good employment opportunities after being discharged. I further find that Dr. Cunitz's alternative calculation based on the assumption that Complainant will recover her career track and earnings potential within 10 years is reasonable and persuasive. It is based on Dr. Cunitz's expert review of all the pertinent documents related to Complainant's past work, wage, benefits, job offers, and financial histories. CX 40 at 2040; CX 40-69. Thus, Dr. Cunitz's calculation addresses the effects of the reputation loss and step back in her career path that Complainant suffered as a result of her termination, while also accounting for the fact that she is a high-performing, motivated employee who will be able to regain her career path.

In light of the foregoing, I find that Complainant is entitled to a front pay/loss of earnings award totaling $642,941, the amount of Dr. Cunitz's alternative calculation discounted to present value, based on the assumption that Complainant would recover her career track within 10 years[1], the present value of Complainant's loss of earnings and loss of benefits to compensate Complainant and make her whole for the diminution in expected earnings in all of her future jobs for as long as the reputational injury is expected to affect her prospects. *See* CX 40 at 2024.

Dr. Cunitz was credible when he stated that employers would be hesitant to hire Complainant after she is forced to disclose the circumstances of her termination to the prospective employer. TR at 389-91, 401. I find that Complainant will likely have to honestly explain the disruption in her career with Respondent stemming from the circumstances of her termination, despite Respondent's policy of not providing such details to prospective employers. I also note that while Wells Fargo and Countrywide were not deterred from hiring Complainant, she continues to suffer harm from lower wages and I find that she will continue to be harmed for a period of ten years as put forth by Dr. Cunitz and Mr. Miskei - once Mr. Miskei's calculations are re-adjusted for a more realistic annual percentage wage increase in Complainant's wages from 25% to 10% and later 5% as used in Dr. Cunitz' calculations. *See* TR at 447-52; CX 40; RX P.

Dr. Cunitz's 10-year front pay projection also takes into account the fact that many of the circumstances which caused Complainant to change jobs in the past are no longer relevant, as Complainant's age (mid-40's) and regained good health make it likely that she will remain employed in the banking industry as shown in Dr. Cunitz's report. CX 40. I find it reasonable to believe that she will stay in the same position at Countrywide with steady salary increases rather than regain much of her career track and earnings more quickly through promotion to a new

[1] The front pay awarded here is for approximately 8 years as it extends from this December 2006 Recommended Decision and Order through 2014. CX 40 at 2033. Both experts agreed to calculate front pay commencing from May 1, 2005. However, the period of May 1, 2005 through the date of this Recommended Decision is more accurately described as further back pay since the actual gap between Complainant's wages from her 2004 position with Respondent and her mitigated positions thereafter are known with certainty, and the gap from the date of this Recommended Decision through 2014 is based on expert testimony that is less certain by its nature but is close in amounts after Respondent's expert admitted his aggressive methodology and re-adjusted his figures to match Dr. Cunitz. *See* TR at 449-52; CX 40; and RX P.

position or moving to another company. I also find that Dr. Cunitz's other assumptions that Complainant is no longer in the more lucrative commercial banking industry, that her present job responsibilities and experience with Countrywide are limited to a regional rather than a national level, and that she had less managerial and credit-risk duties than before, explain why it will likely take 10 years for Complainant to recover her career track. CX 40 at 2024.

Mr. Miskei assumed that Complainant will continue to receive annual salary increases at a rate of 25 percent, such that Complainant would catch up to her prior earnings by 2010. I find that this assumption is not credible as it is improperly based on the percentage increase in wages Complainant received from Countrywide (a position more comparable to her past position with Respondent) after leaving Wells Fargo (a position she was forced to accept immediately after she was first terminated). Although I agree that Complainant could receive at least a 25 percent salary increase through a promotion or a move to another company, I am not persuaded that she could do so repeatedly for a period of four or five years. I note that Mr. Miskei himself acknowledged weaknesses in his assumptions. He conceded that if he had made more reasonable assumptions, Complainant's lost earnings would be one-third higher than or twice as high as his original calculation, TR at 449-452, which would bring his estimate in line with Dr. Cunitz's alternative 10-year calculation.

I reject Respondent's argument that Complainant is entitled to only one year's base salary as front pay because her former position with Respondent was set to end effective May 31, 2006. ALJX 6; ALJX 15 at 16. I find that argument specious as the evidence shows that Respondent's Human Resources manager, Tony Flores, testified that Respondent *may not* actually close its disbursement LFC. TR at 65, 325-26, and 333-35. Therefore, I find it highly speculative and unreliable that Complainant's old job was actually eliminated at any time so as to cut-off her entitlement to her lost future earnings as front pay.

Accordingly, I accept Dr. Cunitz's alternative calculation, based on the assumption that Complainant would recover her career track within 10 years, that the present value of Complainant's loss of earnings and loss of benefits is $642,941. TR at 372-75; CX 40 at 2033.

b. Stock Options, Expired Equity, and Restricted Shares

The parties stipulated that Complainant is entitled to $121,002 plus $4,513.35 in prejudgment interest (calculated through June 9, 2006), thereby totaling $125,515.35. The parties have also stipulated that interest will continue to accrue at a rate of $15.45 per day from June 9, 2006 until the date of the determination by the Court in this matter.

3. Attorney's Fees

Under SOX, a prevailing complainant shall be entitled to recover "litigation costs, expert witness fees, and reasonable attorney's fees." 18 U.S.C. § 1514A(c). A complainant may be considered to have prevailed if he or she succeeded on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit. *Hensley v. Eckerhart*, 461

U.S. 424, 433 (1983). Because she has succeeded in obtaining an award of front pay in lieu of reinstatement, I find that Complainant is a prevailing party within the meaning of the Act.

Complainant's counsel, Marc Susswein, submitted an affidavit of legal services in support of Complainant's application for a total award of $500,601.56, consisting of $443,368 in attorney's fees and $57,233.56 in costs, incurred in connection with Complainant's claim for front pay in lieu of reinstatement after the Secretary of Labor issued its Preliminary Order on May 11, 2005. ALJX 12 at 1-2. Respondent previously paid Complainant's counsel $98,500.00 in attorneys' fees and costs incurred through May 2005. ALJX 12 at 2.

Respondent filed objections on July 28, 2006, in which it objected to the hourly rates sought, billing practices used, and specific fee and cost entries. Complainant's counsel filed a reply on August 8, 2006, in which it responded to most of the objections raised by Respondent.

Respondent filed its own reply on August 17, 2006, in which it argued that Complainant's reply brief should be disallowed because it is not authorized by the regulations or the briefing schedule and it unfairly allowed Complainant a second chance to meet her burden of demonstrating the reasonableness of the requested fees and costs after learning of Respondent's objections. ALJX 15. Although Respondent's objection was well-taken, and I am mindful that Complainant's counsel bears the burden of justifying the fees and costs sought, I issued an order on August 23, 2006 allowing both Complainant's reply and Respondent's reply in order to have more complete information upon which to base an award.

a. Fees

After having determined that Complainant is a prevailing party, I must determine whether the fees sought are reasonable and properly supported. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Hours not "reasonably expended" or which are excessive, redundant or otherwise unnecessary should be excluded, according the principle that "[h]ours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority." *Id.* at 434 (emphasis in original). A petition for attorney's fees must specify the date on which the attorney's time was expended, the amount of hours expended, and a specific description of the tasks undertaken by the attorney during that time. *Pillow v. Bechtel Construction, Inc*., 87-ERA-35 (ARB Sept. 11, 1997); *Clay v. Castle Coal & Oil Co., Inc.*, 90-STA-37 (Sec'y June 3, 1994).

The attorneys' fees and costs being sought here in excess of $500,000.00 were incurred primarily over less than a year's time and relate almost exclusively to the single litigated issue concerning Complainant's refusal to accept OSHA's May 2005 finding that Complainant should return to Respondent to resume her banking career. I find this total amount unreasonable for the reasons that follow.

Hourly Rates

The hourly rates sought by Complainant's counsel are $450 to $475 for Mr. Susswein; $300 to $325 for his associate, Jeffrey Zimmerman; $75 for his paralegal, Guy Sparks; $500 for Ethan Brecher; and $650.00 for Jeffrey Liddle. ALJX 12 at 5-6.

Complainant's counsel argues that his rate and that of Mr. Zimmerman are in accordance with or lower than rates charged by comparable law firms in New York. ALJX 12 at 5-6 (citing the *New York Law Journal* December 12, 2005 attorney fee survey as its Exhibit B). Complainant's counsel also argues that the rates are appropriate for the experience and ability of the attorneys. ALJX 12 at 6-7. Complainant's counsel next points out that it "is charging Complainant a contingent fee to pursue her claims. Thus, it is particularly appropriate for the Court to make an award of attorneys' fees so that Complainant receives as much of any award made on her claims as possible and that her award is not consumed by paying L&R its fee." ALJX 12 at 7. Complainant's counsel also submits that the representation "involved complex and novel issues of law requiring a substantial expenditure of time and effort by counsel" given that this was a case of first impression concerning the degree to which SOX provides for front pay. ALJX 12 at 8.

Respondent objects that the *New York Law Journal* survey submitted by Complainant's counsel does not support the reasonableness of the hourly rates sought because it is based on much larger firms, does not list rates by level of experience, field of practice, or geographic area in which the attorneys practice. ALJX 13 at 6-7. I take administrative notice that Complainant's counsel's firm is small, comprised of approximately eleven lawyers.

To supplement the *New York Law Journal* attorney fee survey that was previously submitted, Complainant's counsel also submitted the 2006 Altman Weil Survey. ALJX 14 at 2. Based on the Altman Weil Survey, Complainant's counsel stated that the hourly rates for attorneys in New York with the same number of years of experience as Mr. Susswein ranged from $333 to $495, while the hourly rates for attorneys in New York with the same number of years of experience as Mr. Zimmerman ranged from $267 to $350. ALJX 14 at 3. The Altman Weil Survey does not contain any reference to California attorneys and does not distinguish firm size. While stating the usual rates that Mr. Susswein and Mr. Zimmerman billed to firm clients, they do not profess any experience handling whistleblower cases or SOX cases in particular.

Respondent argues that the Altman Weil Survey still does not provide any specific information about hourly rates for employment attorneys with similar experience. ALJX 15 at 5. Respondent also argues that the Altman Weil Survey states that attorneys with 11 to 15 years of experience charge rates between $333 and $495, while attorneys with 4 to 5 years of experience charge rates between $267 and $350 per hour. ALJX 15 at 5. Respondent points out that Mr. Susswein and Mr. Zimmerman are at the low end of the range for experience, with 11 and 4 years respectively, while they are at the high end of the range for their hourly rates sought. ALJX 15 at 5.

The burden is on the fee applicant "to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). No affidavit or declaration provides

an evidentiary basis for the high end hourly rates Complainant's counsel requests. *See Davis v. City of San Francisco*, 976 F.2d 1536, 1547 (9th Cir. 1992).

At the outset, I note that the relevant geographic market or legal community for purposes of determining the appropriate hourly rate for attorney's fees is normally the locality of the hearing. *Hoch v. Clark County Health District*, 1998-CAA-12 (ALJ Mar. 15, 2000); *see also Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991). The specialized nature of the case and the unavailability of local counsel may be grounds for exception to that rule. *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001) (awarding fees based on Complainant's counsel's rates in Seattle, rather than rates for the Colorado area where the hearing was held); *see also Guam Society of OB/GYNs v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996) (same). However, I do not find special circumstances exist in this case to warrant changing the relevant legal market from the Los Angeles area, the proper location of the hearing and witnesses, to New York, the location of only Complainant's counsel. Without contradictory evidence from the parties, I find that the prevailing hourly rates are lower for the Los Angeles area than for New York, which provides further support for the reductions in the hourly rates of Complainant's counsel. Moreover, I find that the quality of the representation provided by Complainant's counsel was substantially equivalent to that of the attorneys who regularly practice before me in California, and does not justify the higher rates sought given the awards I have issued in similar cases.

In *Polk v. New York State Dept. of Corr. Services*, 722 F.2d 23, 24-25 (2d Cir. 1983), the Court of Appeals held that a district judge was not required to confine his consideration of rates to those of the forum district, but rather, could consider rates of the filing district under the special circumstances in that case where there was a parallel class action pending in the filing district on behalf of a class to which the plaintiff appeared to belong. Here, however, there were no special circumstances similar to the *Polk* case with no pending action involving Complainant in New York. Moreover, Respondent was successful in changing venue back to California where OSHA's initial findings had been issued in 2005 and the majority of witnesses, including Complainant, reside. The only connection this case has with New York is that it is the location of Complainant's lawyers, as Respondent's lawyers are in California.

My knowledge of and experience with the California Bar leaves me no doubt that Complainant could have found adequate counsel closer to her Southern California home. Thus, I do not find any evidence that there is a shortage of qualified lawyers in Southern California where the trial took place nor has there been any evidence presented that Complainant's lawyers are "specialists" in presenting SOX cases so much so that there are no competent counsel in California. *See Avalon Cinema Corp. v. Thompson*, 689 F.2d 137,140-42 (8th Cir. 1982) (Plaintiff's requested attorney fees reduced because Court of Appeals held that plaintiff could have found adequate counsel closer to situs of case for substantially less than amount charged by out-of-state counsel). By the same token, given Complainant's counsel's lone connection with high-rate New York, I further find that it was filed there with little prospect of litigation there but in the hope of securing a higher fee. *See Polk*, 722 F.2d *supra* at 25.

I do find, however, as Complainant's counsel argued, that this case involved novel and complex issues under the Sarbanes-Oxley Act. I also find that Complainant's counsel provided

competent yet undistinguished representation. Specifically, I note that Complainant's two primary counsel were not exceptionally skilled or experienced in litigating this whistleblower case or in administrative practice as evidenced by their need to purchase the federal regulations which govern this proceeding. *See* ALJX 14 at 9; ALJX 15 at 5-6. I also concur with Respondent's argument that Mr. Susswein and Mr. Zimmerman's hourly rates should be in the bottom of their respective ranges in the Altman Weil Survey, given that they are at the bottom of their respective ranges based on their years of experience.

Judge Posner's economic analysis in *Fogle v. William Chevrolet/Geo, Inc.,* 275 F.3d 613 (7th Cir. 2001) makes the point that "there is no single, market-wide fee for a given case, and this requires the judge to consider the quality of the particular lawyer as well as the amount of time that he devoted to the case." *Fogle*, 275 F.3d at 615. That decision affirmed the reduction to $11,000 of a $44,000 fee request plaintiff's lawyer made after settling allegations of consumer fraud, odometer tampering and Truth in Lending Act violations by obtaining rescission of the contract to purchase one car and the refund of a substantial part of the purchase price on another. Lawyers are not guaranteed payment for every hour devoted to files that offer a chance of recovery under a fee-shifting statute. "A lawyer worth only $185 an hour may still put in more hours in expectation of a court-awarded fee than he would if his client were breathing down his neck." *Id*. at 616.

A successful claimant's attorney must exercise "billing judgment," deciding which hours are "properly billed to one's adversary pursuant to statutory authority." *Hensley,* 461 U.S. at 434 (1983). This consists of winnowing the hours actually expended down to the hours "reasonably expended." *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1250 (10th Cir. 1998). Lawyers for a prevailing plaintiff should "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley,* 461 U.S. at 434. Hours not billable to clients are not billable to opponents under fee-shifting statutes.

Finally, with regard to Complainant's counsel's comments regarding their contingency fee arrangement, I note that whistleblower statutes, like SOX, provide for fee shifting in lieu of paying contingent fees out of a complainant's award. *See Van Der Meer v. Western Kentucky University*, 95-ERA-38 (ARB Apr. 20, 1998). I also note that enhancement of fee awards based on an underlying contingency fee arrangement is not appropriate under whistleblower statutes. *Lederhaus v. Pashen & Midwest Inspection Service*, Ltd., 91-ERA-13 (Sec'y Jan. 13, 1993) (discussing *City of Burlington v. Dague*, 505 U.S. 557 (1992)); *Charvat v. Eastern Ohio Regional Wastwater Authority*, 1996-ERA-37 (ALJ Mar. 3, 1999).

No lawyer appearing before me has ever received more than $300 an hour in a litigated non-settlement context and I find that there is no shortage of competent attorneys who could have litigated this case as competently as Complainant's counsel for an hourly rate of $300 or less. Weighing all relevant factors, most importantly my knowledge of customary hourly rates for Southern California lawyers practicing before me in whistleblower cases with the quality of the representation by Mr. Susswein and Mr. Zimmerman and the complex issue presented in this case, I find that appropriate customary hourly rates in Southern California are as follows: $350 for Mr. Susswein, $275 for Mr. Zimmerman, and $75 for Mr. Sparks.

Fee Entries for Jeffrey Liddle and Ethan Brecher

Respondent objects to the fees billed by Jeffrey Liddle (1 hour at $650 per hour for reviewing a memo and correspondence and having a telephone conference with Mr. Susswein regarding hearings) and Ethan Brecher (1 hour at $500 per hour for office conferences and reviewing a decision with Mr. Susswein). ALJX 13 at 4-5. Respondent argues that these charges, along with Mr. Susswein's charges for these same meetings, should be denied because there is no evidence that they contributed to the prosecution of Complainant's claim and they were likely for the purpose of updating the firm on the progress of the hearing. ALJX 13 at 5.

Complainant's counsel responds that the fees charged by Mr. Liddle and Mr. Brecher are for consultations related to the prosecution of this matter.

Respondent's counsel again argued that these fees are inappropriate because there was no "further explanation, such as the nature of the consultation, the reason the consultation was necessary, or how the consultation contributed to the case." ALJX 15 at 7.

In *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000), the ARB did not reduce the fees sought because of the vagueness of items listing consultation with co-counsel, finding that it could not dispute the reasonableness of consultation with another attorney in a preparation for a rather extensive hearing in a difficult administrative case. Similarly, I find that it was not unreasonable for Complainant's counsel to consult with two other members of the firm given the novel and complex nature of this case and therefore, I decline to reduce this fee entry except as referenced below.

I find that attorneys with the titles of managing partner and senior partner, like Mr. Liddle and Mr. Brecher, tend to have more experience and charge higher hourly rates than other members of their firms. However, I find that Complainant's counsel has failed to provide any evidence, aside from their titles, to support the extraordinarily high hourly rates sought for Mr. Liddle and Mr. Brecher. Accordingly, I find that the appropriate hourly rates for Mr. Liddle and Mr. Brecher are $450 and $425, respectively.

Fee Entries for Unrelated Matters

First, Respondent argues that the fees should be reduced based on entries for matters not associated with this action, including communications with Dr. Beverly Torres, who did not testify or otherwise contribute to this action. Second, Respondent argues that the fees should be reduced based on an entry for communications with the American Arbitration Association, which is handling a parallel action. ALJX 13 at 10-11.

Complainant's counsel responds that the fees for communications with Dr. Beverly Torres are reasonable, as she was a prospective witness in this litigation. ALJX 14 at 6. However, Complainant's counsel withdraws as unrelated to this action the fee entry for 5 hours on June 16, 2005 for communications with AAA. ALJX 14 at 4.

Respondent argues that the fee entries for communications with Dr. Torres were not reasonably incurred because Complainant did not introduce any evidence from Dr. Torres or call her as a witness, nor did she contribute to any result obtained by Complainant. ALJX 15 at 8. Also, Respondent does not object to the withdrawal of the fee entry for 5 hours on 6/16/06 for work performed by Mr. Zimmerman on another matter, but it emphasizes that "the inclusion of this time in the initial application underscores the severity of the deficiencies noted by [Respondent]." ALJX 15 at 8.

A judge may reduce or disallow time for time spent on irrelevant or unnecessary matters. *Varnadore v. Martin Marietta Energy Systems, Inc.*, 94-CAA-2 and 3 (ALJ June 23, 1995); *Smith v. Esicorp, Inc.*,1993-ERA-16 (ARB Aug. 27, 1998). Although Complainant did not prevail on the issue of entitlement to damages for physical and psychological harm, I find that Complainant's counsel did not spend an unreasonable amount of time in pursuing this relevant issue. Accordingly, I decline to reduce the hours based on the time spent related to Dr. Torres.

Complainant's counsel's fee shall be reduced for the 5 hours incurred by Mr. Zimmerman on June 16, 2005 for communications related to Complainant's parallel action. This reduces Mr. Zimmerman's total hours from 623.75 to 618.75.

Block Billing, and Vague or Duplicative Time Entries

Respondent next argues that Complainant's fees should be reduced due to "excessive block billing of time entries, vague descriptions for time entries and duplicate entries," and cites examples of objectionable entries. ALJX 13 at 8-10. Respondent also argues that the fees should be reduced based on significant conference between attorneys at the firm. ALJX 13 at 9.

Complainant's counsel denied that their time entries included excessive block billing, vague entries, or duplicate entries. ALJX 14 at 4-6.

Respondent responded that Complainant's counsel made no attempt to respond to or correct any of the billing issues raised by Respondent in its objections. ALJX 15 at 7.

Entries such as "review documents," "depositions," "trial preparation," or "legal research" are too vague to provide a meaningful opportunity for review of whether the hours were reasonably expended. *Varnadore v. Oak Ridge National Laboratory*, 92- CAA-2 and 5 and 93-CAA-1 (ALJ Sept. 22, 1994) (citing *H. J., Inc. v. Flygt Corporation*, 925 F.2d 257, 260 (8th Cir. 1991) and *Ecos, Inc. v. Brinegan*, 671 F.Supp. 381, 396 (M.D.N.C.)). Where the billing descriptions do not afford a meaningful opportunity to determine the reasonableness of the time expenditures, an ALJ need not engage in an item by item reduction of the hours, but rather, may make reductions based upon a percentage basis. *Id.; Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27, at 12 (July 13, 2004); *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001).

First, I note that Complainant's counsel's fee petition includes numerous vague fee entries, such as "review documents" for 2 hours on 9/12/05; "review and prepare file" for 4.75 hours on 1/26/06; "prepare for hearings" for 5.25 hours on 1/27/06; "review and finalize

documents" for 8.5 hours on 2/23/206; "prepare for depositions" for 5 hours on 10/19/05. I find that these and many other time entries are too vague to allow meaningful review of their reasonableness. Second, I note that Complainant's counsel engaged in repeated block billing, in which up to seven tasks are included in one fee entry. For example, 5/18/05 (4 tasks); 9/13/05 (4 tasks); 10/20/05 (5 tasks); 11/21/05 (4 tasks); 1/9/05 (4 tasks); 1/25/06 (5 tasks); 2/2/05 (4 tasks); 3/22/05 (7 tasks); 3/31/05 (7 tasks); 5/31/05 (5 tasks). Such block billing also prevents meaningful review of the reasonableness of the time spent on individual tasks. Lastly, I concur with Respondent's comment that the erroneous inclusion of the fee entry for 5 hours on 6/16/06 for work performed by Mr. Zimmerman on another matter "underscores the severity of the deficiencies" of the fee petition. ALJX 15 at 8. I find that Complainant's counsel's fee records are not detailed enough to conclude that they have not, intentionally or unintentionally, included work done on Complainant's parallel case.

Overall, many of the fee entries appear to reflect an excessive amount of time given the lack of complexity or importance of the task. Without further detail and breakdown of the tasks completed, I must conclude that the hours recorded were not reasonably or efficiently expended, especially when viewed in light of the high hourly rates applicable to this case, the fact that two lawyers were tasked to litigate the limited remedial issues, and the lawyers' years of experience as litigators. I infer that lawyers able to command rates at the higher end of the market as professed by Complainant's counsel work efficiently and, as a reciprocal for receiving high end rates, I would expect relatively few hours to be claimed for a case involving relatively few issues. Accordingly, I will reduce the total hours charged by 25 percent.

Quarter-Hour Incremental Billing

Respondent also argues that Complainant's fees should be reduced because they are billed in quarter-hour increments, rather than tenth-hour increments. ALJX 13 at 7, citing *Lopez v. San Francisco Unified School District*, 385 F. Supp. 3d 981, 993 (N.D. Cal. 2005) (citing *Zucker v. Occidental Petroleum Corp.*, 968 F. Supp. 1396, 1403 (C.D. Cal. 1997)).

Complainant's counsel responded that quarter-hour billing is their firm's standard practice, and the practice is not prohibited by SOX and has been upheld by some federal courts. ALJX 14 at 4, citing *Winterstein v. Stryker Corp. Group Life Ins. Plan*¸ 2006 WL 1071884 at *2 (N.D. Cal.); *Herrojon v. Appetizers And, Inc.*, 1999 WL 116598 at *3 (N.D. Ill. 1999); and *Morimanno v. Taco Bell*, 979 F. Supp. 791, 799 (N.D. Ind. 1997).

Respondent argues that Complainant's counsel's citation to decisions from courts in Indiana and Illinois fails to justify the practice of quarter-hour billing when it has been rejected by federal courts in California. ALJX 15 at 6.

Use of quarter-hour incremental billing may be reasonable based on the tasks completed. *See, e.g., White v. The Osage Tribal Council,* 1995-SDW-1 (ALJ Aug. 10, 2000). However, as discussed above with regard to the vague fee entries and use of block billing, I find that the fee entries are not detailed enough to determine whether a quarter hour is a reasonable amount of time to have spent on a given task. Accordingly, this provides further justification for the 25 percent across-the-board hours reduction discussed above.

Calculation of Total Fees to be Awarded

The total fees to be awarded, after a 25 percent reduction in the hours requested and a reduction in the hourly rates, are as follows:

Mr. Susswein:	383 hours	x	$350/hour	=	$134,050.00
Mr. Zimmerman:	464 hours	x	$275/hour	=	$127,600.00
Mr. Sparks:	19 hours	x	$75/hour	=	$1,425.00
Mr. Liddle:	.75 hours	x	$450/hour	=	$337.50
Mr. Brecher:	.75 hours	x	$425/hour	=	$318.75
TOTAL FEES TO BE AWARDED:					*$263,731.25*

b. Costs

The total costs sought by Complainant's counsel are $57,233.56. ALJX 12 at 10.

Cost Entries for Photocopying, Mailing, Faxing, and Research

Respondent argues that the charges for photocopying, postage, facsimile charges, Federal Express, Express Mail, Kinko's, and Westlaw are customarily considered part of overhead costs that are covered by an attorney's hourly rate, and cannot be charged separately without proof of why the costs incurred were extraordinary. ALJX 13 at 11-15, citing *Platone, supra,* at 8 and *Lopez*, 385 F. Supp. at 1001. Respondent also objects to the charges for "miscellaneous – US Gov't Printing" as unsupported by any explanation or detail. ALJX 13 at 15.

Complainant's counsel responds that the costs claimed are reasonable and appropriate. They argue that the charges for photocopying and Kinko's were for photocopying related to this case, and that the ARB has determined that photocopying costs are recoverable under whistleblower statutes. ALJX 14 at 7, citing *Michaud*, 95 STA 29 (ARB Oct. 9, 1997). Similarly, Complainant's counsel argues that postage and facsimile costs are not overhead and should be reimbursed. ALJX 14 at 8. Also, Complainant's counsel states that the vast majority of the Federal Express costs were for shipping exhibits to and from the hearing, and the vast majority of the Express Mail costs were for filings and urgent correspondence in this case. ALJX 14 at 8. They argue that the charges for Westlaw were for research in this case, and such charges have been found to be reasonable. ALJX 14 at 9, citing *Wehr v. Burroughs Corp.*, 619 F.2d 276, 285 (3rd Cir. 1980). Complainant's counsel explains that the charges for "miscellaneous – US Gov't Printing" was incurred for the purchase of a copy of Section 29 of the Code of Federal Regulations, which was essential to litigating this matter. ALJX 14 at 9.

Respondent again argues that Complainant has not provided an adequate explanation for why these costs should not be excluded as overhead. ALJX 15 at 9, citing *Platone* at 8. Respondent emphasizes that "[c]onclusory statements regarding such costs are not sufficient for the court to determine their reasonableness." ALJX 15 at 9,10, citing *Lopez*, 385 F. Supp. at

1001. With regard to the Westlaw charges, Respondent argues, "Computerized research costs, like any other form of research, is a component of attorney fees and is not properly awarded as a separate cost." ALJX 15 at 11, citing *Goff v. Washington County*, 2006 LEXIS 27134, at 18 (N.D. Idaho 2006). With regard to the costs incurred for purchasing a copy of the regulations, Respondent argues that "Complainant has cited to no authority allowing an award of costs associated with purchasing legal texts for a complainant's attorney's library." ALJX 15 at 11.

I find that the charges for photocopying, postage, facsimile charges, Federal Express, Express Mail, Kinko's, Westlaw research, and purchasing a copy of the regulations are part of overhead, and Complainant has not shown that these costs were extraordinary and should be reimbursed, nor have any receipts been provided. Accordingly, I disallow all of these costs.

Cost Entries for Travel, Taxis and Working Meals

Respondent argues that the travel and taxi expenses sought should be denied because the vast majority have no corresponding time for travel or meetings billed to the case on that day by any attorney. ALJX 13 at 13. Respondent objects to the charges for "working meals" because only one entry has a corresponding time entry for a meeting with Complainant on the same day. ALJX 13 at 13. Respondent argues that caselaw only supports reimbursement for modest meals while preparing for trial with a client. ALJX 13 at 13, citing *Platone* at 8.

Complainant's counsel responds that it is the firm's "standard practice" to "expense meals when attorneys are working on a case after 8:00 p.m. or during trial preparation," and "[s]uch costs were reasonably incurred in connection with this matter." ALJX 14 at 8, citing *Platone*, at 8.

Respondent argues that Complainant's counsel has not shown that these meals were for trial preparation meetings with Complainant, which would allow them to be reimbursed under *Platone*. ALJX 15 at 10. Respondent also notes that Complainant's counsel offers no explanation why Mr. Zimmerman is seeking reimbursement for a working meal on 2/20/06 when he has no corresponding time entry on that date. ALJX 15 at 10.

I find that Complainant's counsel has failed to demonstrate that the costs for travel, taxis, and working meals were related to and reasonably necessary to the prosecution of this case. Furthermore, the travel, like the Federal Express and express mailing charges referenced above are more appropriately deemed overhead, particularly for a New York law firm practicing in California where there is no evidence that Complainant could not have retained comparable legal counsel in Southern California where she resides. Accordingly, these costs are disallowed.

Cost Entries for Overtime

Respondent objects to the overtime charges of $54.53 for Marcus Nadal and $7.85 for Guy Sparks because there is no explanation given as to the necessity of the overtime or the work performed. ALJX 13 at 12.

Complainant did not respond to this objection. ALJX 15 at 11.

I find that Complainant's counsel has failed provide any information about who Marcus Nadal is, what work he was doing, and why it was reasonably necessary to this case. Similarly, I find the Complainant's counsel has filed to provide information about what work Mr. Sparks was doing that required overtime. Accordingly, these overtime costs are disallowed.

Cost Entries for Court Reporters

Respondent also objects to the charges for Esquire Deposition Services, Jackson & Associates court reporters and Veritext/New York Reporting Co., because there is no explanation of these costs. ALJX 13 at 14-15.

Complainant's counsel argues that the costs for Esquire Deposition Services and Veritext/New York Reporting Co. were for the depositions of Jeffrey Conyer, Paul Needels, Susan Kassabian, and Tony Flores. ALJX 14 at 9.

Complainant did not respond to the objection regarding the cost of obtaining a copy of the hearing transcript from Jackson & Associates.

I find that these costs for deposition and hearing transcripts were all reasonably incurred.

Calculation of Total Costs to be Awarded

Total Costs Sought:	$57,233.56
Minus Disallowed Costs for:	
- photocopying, Kinko's, postage, express mail, Federal Express, facsimiles, working meals, overtime charges, travel and taxi charges, and purchase of the regulations.	- $12,162.61
- Westlaw	- $3,053.49
TOTAL COSTS TO BE AWARDED:	*$42,017.46*

Based on the discussion and calculations above, reasonable attorneys' fees totaling $263,731.25 and costs of $42,017.46 shall be awarded to Complainant's counsel.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record, I hereby **ORDER** that:

1. Respondent shall pay Complainant front pay in the amount of $642,941.00.

2. Respondent shall pay Complainant $125,515.35 for the value of her stock options, expired equity, and restricted shares, plus interest at a rate of $15.45 per day from June 9, 2006 until the date of this Recommended Decision and Order, as stipulated by the parties.

3. Respondent shall pay Complainant's counsel, the law firm of Liddle & Robinson, L.L.P., fees and costs totaling $305,748.71, which is comprised of $263,731.25 as reasonable attorneys' fees and $42,017.46 as reasonable costs incurred.

4. Respondent shall immediately expunge from its personnel records all derogatory or negative information, including the 2004 performance evaluation, relating to Complainant and her termination on March 31, 2005, and shall provide neutral employment references when another firm, entity, organization, or an individual inquires about Complainant.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-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).