U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 March 2007

CASE NO.: 2005-SOX-00112

In the Matter of:

CATHY REINES,
Complainant,
v.

VENTURE BANK AND VENTURE FINANCIAL GROUP,
Respondents.

Appearances:

Philip Sloan, Esq.
For Complainant

Karen O'Connor, Esq.
For Respondents

Before:

Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a retaliation complaint filed by Cathy Reines ("Complainant") against her former employer, Venture Bank, a wholly-owned subsidiary of Venture Financial Group, Inc. (collectively, "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 12, 2005, Complainant filed a complaint with the U.S. Department of Labor alleging that she was constructively discharged by Respondent in violation of section 806 of Sarbanes-Oxley. The Department of Labor's Occupational Safety and Health Administration ("OSHA") conducted an investigation. On August 26, 2005, the Secretary of Labor issued her Findings and Preliminary Order, finding that there was no reasonable cause to believe that Respondent had violated the Act and dismissing the complaint. Specifically, the Secretary concluded that Complainant failed to demonstrate that she suffered an adverse employment action because she voluntarily resigned from her position. ALJX 1.

By letter dated September 27, 2005 to the Chief Administrative Law Judge, Complainant objected to the Secretary's finding/conclusion that she did not suffer adverse employment action and requested a hearing before an Administrative Law Judge pursuant to 29 C.F.R. § 1980.106. Complainant argues that even if Respondent's conduct did not constitute constructive discharge, it was nonetheless adverse employment action affecting the terms and conditions of her employment for purposes of Sarbanes-Oxley's employee protection provisions. ALJX 1.

The case was assigned to me on September 30, 2005. On October 5, 2005, I issued a notice scheduling the hearing for January 9, 2006, in Seattle, Washington, and referencing various procedural deadlines. ALJX 2.

On October 19, 2005, Complainant's counsel filed a joint request of the parties to continue the hearing date until April 10, 2006. ALJX 3. On October 24, 2005, I issued an order granting the joint request for a continuance, re-setting the hearing for April 10, 2006, and amending the earlier pre-trial order with respect to procedural deadlines. ALJX 4. In the order granting Complainant's request for a continuance, I noted that Complainant had waived her right pursuant to 29 Code of Federal Regulations section 1980.114 to bring an action at law or equity for *de novo* review in an appropriate U.S. District Court.

Complainant submitted a Pre-hearing Statement on March 10, 2006 (ALJX 5), and a Supplement to Complainant's Pre-hearing Statement on March 14, 2006 (ALJX 6). Respondent submitted a Pre-hearing Statement on March 17, 2006, and a Revised Pre-hearing Statement on March 24, 2006. ALJX 7.

A hearing was held on April 10-12, 2006, in Seattle, Washington. Both parties were represented by counsel. On July 17, 2006, Respondent submitted Respondent's Closing Brief, which is hereby admitted into evidence as ALJX 8. Complainant also submitted Complainant's Closing Brief on July 17, 2006, but Complainant's counsel indicated that he had not completed a final accounting of fees for the work he performed in this matter. He requested leave to submit his attorney's fee petition on July 18, 2006. On July 18, 2006, Complainant submitted Complainant's Attorneys' Fees Request, which is hereby admitted into evidence as ALJX 9.

On July 19, 2006, Complainant submitted her Revised Complainant's Closing Brief and requested leave to insert "two very important and salient paragraphs" into the earlier filed brief.

Also on July 19, 2006, Respondent submitted a letter stating its objection to Complainant's submission of a revised brief after the agreed date for simultaneous submission of closing briefs, and requesting that I review only the pleadings which were timely submitted. Alternatively, if Complainant is allowed to submit a revised brief, Respondent requests that I review certain portions of the transcript. On July 21, 2006, Complainant replied to Respondent's letter, arguing that Respondent will not be prejudiced by the allowance of Complainant's late-submitted revised brief. Respondent's July 19, 2006 letter and Complainant's July 21, 2006 reply letter are hereby admitted into evidence as ALJX 10. In addition, Complainant's Revised Closing Brief is hereby admitted into evidence as ALJX 11.

On August 24, 2006, Respondent submitted Respondents' Objections to Complainant's Requested Costs and Attorney's Fees, which is hereby admitted into evidence as ALJX 12 and the record closed.

STIPULATIONS

The parties stipulate, and I find that there is sufficient evidence in the record to support, that Respondents Venture Bank and Venture Financial Group are companies subject to, and Complainant is an employee covered under, the whistleblower protection provisions of SOX. *See* TR at 13, 298-300.

SUMMARY OF EVIDENCE

A. Documentary Evidence

At the hearing on this matter, Complainant's exhibits ("CX") 1 through 38 were offered and were admitted into evidence. TR at 6, 191. Respondent's exhibits ("RX") 1 through 21 and 23-24 were offered and were admitted into evidence, it having been noted for the record that there is no RX 22.[1] TR 6-7, 212-13. Administrative Law Judge exhibits ("ALJX") 1 through 7 were also identified and were admitted into evidence. TR at 7-8. In addition, ALJX 8 through 12 were admitted into evidence at various times after the hearing, as outlined above.

B. Testimonial Evidence

1. Complainant Cathy Reines

Complainant was raised in Portland, Oregon, and currently resides in Snohomish, Washington. TR at 53-4. After a year of college at Oregon State University, she got married and moved to Houston, Texas. TR at 55-6. She returned to college after the birth of her second child, attending classes at night to obtain an Associate degree in business. TR at 56. Thereafter, she earned a Bachelor of Science degree in business and accounting, and passed the CPA examination at the end of her senior year of college. TR at 56-7.

After college, Complainant worked as a staff accountant at Ernst & Winney, now Ernst & Young. TR at 57. For two years, she split her year between auditing financial statements for financial services companies and performing information technology ("IT") audits. TR at 57-8.

Upon leaving Ernst & Winney in 1991, Complainant went to work in the IT department at Puget Sound Bank, performing IT audits year round. TR at 59. After Puget Sound Bank was acquired by Key Bank, she worked in Key Bank's corporate audit department. TR at 60-1.

After leaving Key Bank, Complainant worked for a short time at US Bank before switching to public accounting firm Knight, Vale and Gregory. TR at 61. She performed financial statement and IT audits, spending 75 to 80 percent of her year dealing with community

[1] Subsequently, CX 29 and CX 30 were withdrawn by Complainant as duplicative and replaced by RX 8 and 9. TR at 85-6. RX 21 was withdrawn by Respondent and replaced by CX 24 for the same reason. TR at 202-03.

banks. TR at 62. After a year and a half, Complainant started the firm's internal audit and regulatory compliance department, which oversaw out-sourced internal auditing and regulatory compliance for financial institutions in the Northwest. TR at 62. She also performed IT audits at First Community Bank, which eventually became Respondent Venture Bank. TR at 63-4. She testified that she was involved in the investigation of a fraud relating to one of First Community Bank's accounts which she had brought to the bank's attention. TR at 64, 209-10.

After four years with Knight, Vale and Gregory, Complainant was promoted to partner and was responsible for overseeing internal auditing and regulatory compliance at First Community Bank. TR at 62. She testified that during this time she had a "good relationship" with the bank's chief executive officer ("CEO"), Ken Parsons, although she aware that he had a reputation for being an "explosive" manager. TR at 63, 67.

Complainant was divorced in May 1993. TR at 65. She remarried in April 1994 to her present husband, and had two more children in 1996 and 1998. TR at 65. She worked at Knight, Vale and Gregory from September 1994 through May 2003. TR at 61.

In May 2003, Complainant accepted the position of chief financial officer ("CFO") with Respondent. TR at 70. By that time, Mr. Parsons was directing Respondent's operations as its CEO. TR at 80-81, 233-34. She took the job despite Mr. Parsons' reputation because she had enjoyed a good work relationship with him for several years and believed other people "just couldn't get along with him." TR at 68. Complainant believes that Mr. Parsons knew when he hired her that she strictly interpreted and applied accounting rules and standards based on her earlier involvement in a fraud investigation at the bank. TR at 210.

Complainant testified that she took the job with Respondent after her eldest child left for college because she "needed a different lifestyle." TR at 68-71. Her starting salary was $120,000, which was $40,000 less than she had earned at Knight, Vale and Gregory. TR at 70-1.

Complainant testified that she expected to stay with Respondent until she retired or the bank was sold. TR at 71. She understood that Mr. Parsons was planning to retire "in the near future," and that Respondent bank's president, Jon Jones, would succeed Mr. Parsons as CEO. TR at 80-1, 233-34. She did not know of any firm date for Mr. Parsons' retirement. TR at 81.

When she was hired, Complainant understood that she would assume responsibility for Respondent's IT audit department. TR at 71. She initially shared the responsibilities of managing that department with the Information Services ("IS") Manager, who had two employees reporting to her. TR at 75-6. Complainant testified that she spent about 20 percent of her time working with the IS Manager on IT functions. TR at 76. The IS manager was terminated in 2004, and Complainant estimated that she was devoting 30 to 50 percent of her time to IT functions as of December 2004, including time spent managing the employees who had previously reported to the IS Manager. TR at 75-6.

Complainant testified that on February 12, 2004, she became aware that Mr. Parsons had authorized on behalf of the company the repurchase of 12,500 shares of stock owned by Patrick Martin, a member of Respondent's Board of Directors, at a price of $22.92 per share. Mr.

Parsons also authorized the repurchase of 22,000 of his own shares at $22.95 per share. TR at 82, 89, 91. Complainant, who was familiar with the stock's trading history, testified that she was concerned at the implication of insider trading because the company would be "paying [insider] directors at a price that had been established by the CEO and Chairman of the Board [Mr. Parsons] more than we had paid any of the other shareholders." TR at 82-3.

Complainant explained that the price set by Mr. Parsons was high in light of the fact that the stock had never traded at or above $22.95 prior to February 12, 2004. TR at 88. She also said that in a non-publicly traded company, large volumes of stock should be discounted. TR at 88. The price set for Mr. Parsons' trade had not been discounted in light of the volume of the transaction, and it was the highest price received to date. TR at 88. It was also three cents per share higher than the price Mr. Parsons authorized for Director Martin at the same time. TR at 88.

Complainant testified that as CFO, she was required to consider the interests of Respondent's 1400 shareholders. She felt the transaction authorized by Mr. Parsons was not in the shareholders' best interests because he had authorized the repurchase of his stock and that of Director Martin at prices higher than those at which the stock had previously traded. TR at 82-3. Complainant testified that it was "absolutely out of the ordinary," "unethical," and "potentially illegal" for the CEO to set the price for the sale of his own stock. TR at 83-4.

Complainant informed Mr. Jones about Mr. Parsons' trade, and they contacted Respondent's outside securities counsel, Ken Roberts, Esq. TR at 84. According to Complainant, Mr. Roberts recommended "unwinding" or cancelling Mr. Parsons' transaction and establishing a formal process for setting stock prices in sales by company insiders in the future. TR at 97. Complainant and Mr. Jones spoke to Mr. Parsons, and Mr. Parsons cancelled his trade. TR at 84.

At a meeting of Respondent's Board of Directors on February 18, 2004, Mr. Parsons shared that he would be selling approximately 45,000 shares of stock at some point in the future. TR at 100; RX 8. After some discussion, it was recommended that Complainant obtain a legal opinion from Mr. Roberts on stock repurchase issues, which she did on February 18 or 19, 2004. TR at 100, 101-02; RX 8.

On February 19, 2004, the Board held a telephonic conference to follow-up the previous day's discussion about stock acquisitions from insiders, and they agreed to authorize the purchase of 22,000 shares of Mr. Parsons' stock at $22.75 per share, rather than the $22.95 per share he had originally allowed himself. TR at 84; RX 9. The Board also discussed Mr. Roberts' recommendation that a committee be formed to set stock purchase guidelines. TR at 97-8, 104; RX 9. Neither Mr. Parsons nor anyone else objected to the formation of such a committee. TR at 211.

At meetings of the Board of Directors held on March 31, 2004 (RX 10) and April 21, 2004 (RX 11), the Board unanimously voted to approve the formation and ratify the appointment of the "Stock Repurchase Committee," also referred to in the record as the "Stock Oversight Committee." TR at 110, 211, 279; RX 10, 11. The Committee was comprised of Board

members Paul DeTray, Patrick Martin and Rick Panowicz, and Complainant was appointed Chair as a non-voting member. TR at 110, 212; RX 10, 11. On April 21, 2004, the Board approved a "Stock Repurchase Policy," which established a framework for discounting share price based on the volume of the transaction. TR at 110, 115; RX 11.

Complainant testified that her relationship with Mr. Parsons did not change as a result of her raising questions about his February 2004 stock transaction. TR at 93-4, 117. She did not feel that he retaliated against her in any way. TR at 117. She felt that it was her responsibility to the shareholders to monitor the propriety of similar transactions in the future. TR at 97.

On June 21, 2004, Complainant received a "very favorable" performance review by Mr. Parsons. TR at 214; RX 12. Among other things, Mr. Parsons wrote: "My perception is that [Complainant has] a better handle on [her] area of responsibility than anyone in our organization; therefore, I don't have any constructive criticism or suggestions to offer." RX 12; TR at 214. Complainant received a pay raise as a result of the performance review. TR at 214-15; RX 12.

In early October 2004, Mr. Jones informed Mr. Parsons that he and Complainant were involved in a romantic relationship despite being married to other people at the time. TR at 118. Complainant has no knowledge of the content of their discussion, but afterwards she had her own brief discussion with Mr. Parsons wherein she agreed to inform Mr. Parsons of any change in her relationship with her husband.[2] TR at 118, 122. According to Complainant, Mr. Parsons did not express any "personal disapproval" of the relationship, although he "had some concerns about [the] relationship . . . if [Mr. Jones] were to be the CEO and [Complainant] were to be the CFO." TR at 119. Complainant testified that she later told Mr. Parsons that she would leave Respondent "if the existing relationship with Mr. Jones ever became an issue." TR at 119-20. She volunteered to leave because Mr. Jones had been with the bank for fourteen years and was its President. TR at 120. Complainant later had a third conversation with Mr. Parsons wherein he asked "if anything had changed," to which she replied that nothing had. TR at 122.

Other than the occasions noted above, Complainant testified that she had "very few" conversations with Mr. Parsons about her romantic relationship with Mr. Jones or her future at the bank if the relationship were to continue unabated. TR at 122. Complainant said that she continued to have a "fine" rapport with Mr. Parsons following disclosure of the relationship, and did not perceive any hostility or retaliation on his part. TR at 125.

Complainant did recall, however, that in early October 2004 Mr. Parsons asked Complainant and Mr. Jones, two of Respondent's highest ranking officers married to other people, to discuss their romantic relationship at a meeting with the Executive Management Team, an event which Complainant refers to as "a public flogging." TR at 125. Present were Complainant, Mr. Jones and other bank officials - Bruce Marley, Cathy Moseby (by telephone), Patty Graves, Leigh Baxter, Joseph Beaulieu, and Mr. Parsons. The stated intent of the meeting, which Complainant admits was a "legitimate" intent (TR at 216), was "to get input from the management team as to whether or not this [romantic] relationship would impact the ability of the management team to work together." TR at 126.

[2] Complainant testified that she had told her husband about her relationship with Mr. Jones in July 2004, and he was aware that Mr. Parsons and others at the bank were informed of it in October 2004. TR at 121.

Complainant recalled that Ms. Baxter, Mr. Parsons' administrative assistant, commented that Complainant and Mr. Jones had a responsibility to be "Christ-like" as executives and leaders in the company. TR at 139, 141. Complainant responded that "[her] personal life was [her] personal life." TR at 139, 140. Complainant said that Ms. Baxter later apologized for her comment. TR at 140. Although the meeting minutes reflect another comment by Ms. Moseby via teleconference, Complainant does not recall any such comment. TR at 140. Complainant testified that no team member expressed concerns about the romantic relationship to her, nor did anyone ever say that the personal relationship between Complainant and Mr. Jones was impacting her job performance. TR at 141.

Prior to a meeting of the Executive Management Team, Complainant and Mr. Jones separately informed most of the individual team members about their relationship. TR at 128-29. According to Complainant, "there wasn't one person who informed me of any concerns they had about my relationship with Mr. Jones." TR at 129. Complainant also spoke to Lisa Furman and Kelly Van Valley, Respondent's heads of internal audit and regulatory compliance, respectively, and "verified that they didn't have any concerns about the relationship." TR at 129. Complainant testified that she did not receive any input from any member of the Board of Directors indicating concern about her relationship with Mr. Jones. TR at 142.

When asked about alleged "hanky-panky going on behind closed doors during business hours," Complainant testified that "closed-door meetings were not unusual" either before or after the inception of her romantic relationship with Mr. Jones. TR at 129-31. She explained that there were numerous things that she, as CFO, and Mr. Jones, as President, were both involved in on a day-to-day basis in running the bank. TR at 131. She would not say whether her closed-door meetings with Mr. Jones increased, decreased or remained the same after they became romantically involved, but she believed people noticed them more after the romantic relationship was disclosed. TR at 133-134. On further questioning, she testified that there had been no change in the frequency of such meetings. TR at 136-37. Complainant denied engaging in any "hanky-panky" or romantic interludes during business hours when she was behind closed doors with Mr. Jones. TR at 132-33.

In December 2004, Respondent's stock, which had been trading at around $16 per share, went up to $23 per share.[3] TR at 148. Complainant testified that such a "jump" in price is "highly unusual," so she informed Mr. Parsons and Directors DeTray and Martin about the sales.[4] TR at 149. According to Complainant, Mr. Parsons responded that $23 per share is "too high," and Directors DeTray and Martin made similar comments. TR at 149.

[3] Complainant explained that $23 per share was the approximate price of shares on the market before a three-for-two stock split which took place "in May 2005" and dropped the price down to roughly $15 per share. TR at 148-50. However, because Complainant's testimony that the stock split took place in the year 2005 appears to be error, I find that she intended to refer to a stock split which took place in or around May 2004. *See* RX 11 (On April 21, 2004, the Board unanimously voted to approve three for two stock split).

[4] When asked about the reason for the increase in share price, Complainant explained that a "highly abnormal" amount of trading in December 2004 "ate up all of our shares available" for sale at the $16 to $16.50 per share price range. TR at 150-51.

At the end of December 2004, Mr. Parsons informed Complainant that he wanted to sell some stock at $23 per share, discounted by two percent. TR at 149. Complainant testified that she explained to him that $23 per share was not the fair market value of the stock and that it would therefore not be in the shareholders' best interest for Respondent to acquire Mr. Parsons' stock at that price. TR at 149-50, 154.

According to Complainant, that the $23 per share is "too high" a price is rooted in the fact that $23 per share reflects a price earnings ratio of between 20 and 21 (TR at 149), whereas Respondent's stock had historically traded in the range of 14 to 15 times earnings. TR at 153. Complainant testified that since she had been affiliated with Respondent, its stock had never traded at above 15 times earnings. TR at 153-54. Consequently, while she acknowledged that shares traded at prices ranging from $22 to $22.90 per share in January 2005 (TR at 229-30), and from $21.15 to $22.75 per share in February 2005 (TR at 230), Complainant believes these prices were "inflated." TR at 149, 229-30. She explained that those sales did not involve a sufficiently large number of shares so as to provide a statistically significant basis to set a price for the 40,000 shares offered by Mr. Parsons. TR at 241. She also emphasized that those were external trades, not shares being repurchased by Respondent. She felt that it is "not ethical for the holding company to buy back shares" at an inflated price. TR at 241.

In light of Complainant's concerns, the Stock Oversight Committee met on January 5, 2005. TR at 150, 154; CX 38. Complainant testified that, prior to that meeting, she and Mr. Parsons discussed that each of them would present the Committee with their positions as to the proper price for Mr. Parsons' shares. TR at 155. She further testified that Mr. Parsons advised her not to be disappointed if or when the issue was decided in his favor, which Complainant took to mean that he felt certain the Committee would authorize the price he requested. TR at 155-56.

At the January 5, 2005 meeting of the Stock Oversight Committee, Complainant testified that Mr. Parsons presented data from various banks showing as part of the justification for his asking price for his shares. TR at 158. She later acknowledged that the meeting minutes do not refer to any remarks made by Mr. Parsons. TR at 217-18; CX 38.

For her part, Complainant urged that Respondent's stock had never traded at above a 15 price earnings ratio; that while a few hundred shares had traded at $23 per share, the average price for December 2004 was around $16 per share; and that $23 per share was therefore an inflated price. TR at 160. She also asserted that buying stock is not the best use of Respondent's capital. TR at 160. She did not recall whether Mr. Parsons responded to her comments. TR at 160. Mr. Parsons was then excused from the meeting and after some discussion, the Committee determined that they needed additional information before making a decision. TR at 160-61, 218; CX 38. It was also determined that a methodology should be established for setting the share price in the future. TR at 161. Complainant was asked to "do a capital analysis and to do some research from some third-party analysts as to what the going [price earnings] ratio was," and the Committee agreed to meet again at a later date. TR at 161, 218-19.

Mr. Parsons was brought back into the meeting and told that the Committee did not feel it had sufficient information to set a price for his shares. TR at 161. According to Complainant, Mr. Parsons' face "turned beet red," and he was "clearly angry." TR at 161. She acknowledged

that Mr. Parsons was not required to accept a price set by the Stock Oversight Committee, but rather he had the option to list his stock for sale for another buyer to purchase. TR at 230-31.

Thereafter, on January 19, 2005, the Stock Oversight Committee set a buy-back price of up to $21.50 per share using a 16.9 price earnings ratio, which price was later presented to the full Board. TR at 219; RX 14. Complainant does not recall Mr. Parsons suggesting that the Board accept the price recommended by the Committee instead of going higher. TR at 220.

Complainant testified that Mr. Parsons' behavior toward her changed after the January 5, 2005 meeting of the Stock Oversight Committee, and she cited several examples. TR at 161. First, she said that in weekly management meetings, Mr. Parsons belittled her, and questioned her decisions and authority. TR at 161-62. On a second occasion, Complainant had obtained information from outside consultants about the valuation of certain deferred compensation plans, which she shared with Mr. Parsons. The next day, Complainant was blind-copied on an e-mail from the consultants to Mr. Parsons, which lead Complainant to believe that Mr. Parsons "had obviously contacted them and questioned the information that I had shared with [him]." TR at 162. Similarly, on another occasion, Mr. Parsons asked and Complainant confirmed that she had questioned certain language in an engagement letter from an outside consulting firm. Complainant testified that Mr. Parsons "turned around and called the partner and asked if I had, indeed, questioned the language in the engagement letter—and I had." TR at 162-63.

Complainant explained that "these are individuals who I had had longstanding relationships with. And it was humiliating and aggravating and irritating that all of the sudden now, behind my back [Mr. Parsons] was questioning me, questioning my information that I provided him, questioning my integrity, questioning my ability to do my job." TR at 162-63.

Complainant testified that the most prevalent example of Mr. Parsons' change in behavior toward her took place at an Audit Committee meeting on February 9, 2005. TR at 163, 235. Present were Directors Panowicz, Manspeaker, and DeTray; the Executive Management Team, including Ms. Graves, Mr. Marley, and Mr. Jones; Ms. Furman and Ms. Van Valley; representatives from Respondent's external auditors, Moss Adams; and Mr. Parsons and Leann Zembas, who took the meeting minutes. TR at 163-64. Complainant testified that, "It was basically a meeting whereby everything that came out of my mouth was questioned. It was questioned for accuracy, it was questioned from an integrity standpoint. It really was two hours of him sitting there in front of the people that were my peers, in front of our external auditors who, prior to that meeting, I know had respect for me. It was two hours of retaliation and verbal abuse." TR at 164. Complainant said she became defensive and angry, and though she did not communicate her feelings during the meeting, "anybody who knew me could tell." TR at 165. She also testified the auditors "basically confirmed that we were doing exactly what we should have been doing on some of the matters that [Mr. Parsons] was questioning." TR at 164-65.

Complainant testified that one of the topics discussed at the Audit Committee meeting was Respondent's Disclosure Committee. TR at 235. Earlier, she had advised Mr. Parsons that he did not "need" to serve on the Disclosure Committee. TR at 235. Subsequently, Complainant recalled that at the Audit Committee meeting, Mr. Parsons posed questions to the external auditors about the purpose and function of the Disclosure Committee. She did not recall "not

allowing the external auditors to answer the questions." TR at 235-36. She agreed that the auditors advised that as CEO, Mr. Parsons should serve on the Disclosure Committee. TR at 236. She explained that she previously told Mr. Parsons "there was no need for him to serve on the committee" because it "had representation from all of the areas that it needed to have," but she admitted that this was "not the information provided by the external auditors at the meeting." TR at 236-37. Complainant denied that Ms. Furman told her that her conduct at the meeting was inappropriate, but admitted that Ms. Graves told her to "chill out." TR at 237.

According to Complainant, Mr. Panowicz came to her office after the meeting and said he was sorry about Mr. Parsons' "abusive behavior." TR at 167. She said Mr. Panowicz had also called her after the January 19, 2005 meeting of the Stock Oversight Committee, and had said it was "apparent . . . that [Mr. Parsons] is being abusive of [her]." TR at 167-68, 169. Complainant said she told Mr. Panowicz that she would quit her job if Mr. Parsons continued "to retaliate" against her. TR at 167, 169.

Complainant testified that Ms. Van Valley and Ms. Furman apologized to her after the Audit Committee meeting and were supportive of her. TR at 170. She also testified that Mr. Marley hugged her and told her to "hang in there," and Ms. Zembas hugged her and said she was sorry that Mr. Parsons treated Complainant "that way" during the meeting. TR at 171.

Complainant testified that on or about February 12, 2005, there was an annual Stakeholders' Meeting "just to celebrate our results for the year." TR at 173. She said Ms. Furman told Director Panowicz at the event that if Mr. Parsons ever caused Complainant to leave the company, Ms. Furman would leave too. TR at 173. Complainant testified that Mr. Panowicz later "checked to see how I was doing," and she told him "right then and there, if I ever have another day like I've had in the last week, I'm leaving." TR at173.

On the morning of February 14, 2005, Mr. Jones told Complainant that he had been fired and left the office. TR at 174. Thereafter, Mr. Parsons notified the Executive Management Team that Mr. Jones had been terminated. Director Schorno explained to the group that the Board had "lost confidence" in Mr. Jones, and that the decision to terminate him had been unanimous. TR at 174. Complainant commented that "90 percent of [others in the office will] assume [Mr. Jones] was terminated because of his [romantic] relationship with me," to which Mr. Parsons replied that indeed, he was terminated because of the relationship. TR at 174-75. Mr. Parsons also announced that he would be serving as CEO and President of the bank. TR at 175.

After the Executive Management meeting ended, Complainant met with Mr. Parsons, Ms. Moseby and Director Schorno. Complainant testified that Mr. Parsons told her that she "had some decisions to make." TR at 175. According to Complainant, Mr. Parsons also informed her that "the IT department would not be reporting" to her. TR at 176. Complainant took this to mean that Mr. Parsons did not want individuals in the IT department with unlimited access to the bank's security systems to be directly reporting to Complainant for fear that she might "be able to manipulate them into getting access to the system either for [herself] or [possibly] Mr. Jones." TR at 178, 238. Complainant assumed her IT responsibility was being removed indefinitely, but "had no idea." TR at 176-77. She testified that she considered this the "ultimate humiliation,"

because IT was her area of expertise. TR at 177. When asked whether Mr. Parsons had reduced her pay, Complainant explained that money was not the "driving factor," but rather, "[i]t's about pride, it's about ethics, it's about integrity." TR at 179. She felt that "Mr. Parsons was going to stop at nothing to continue humiliating me and retaliating against me. And now that . . . he was going to be the CEO and President of the bank, it wouldn't stop." TR at 177.

After her conversation with Mr. Parsons, Complainant went home to talk to her husband, and was later joined there by Ms. Furman and Ms. Van Valley. TR at 180. Complainant said they brought Chinese food, and "we laughed, we cried. We just talked. They tried to support me." TR at 181. After her co-workers left, Complainant returned to the office and informed Ms. Moseby that she was resigning. TR at 182. She submitted a letter of resignation the next day. RX 16. When asked if she had resigned voluntarily, Complainant testified, "No, I didn't have a choice. Emotionally, I didn't have a choice." TR at 182. She acknowledged that her resignation letter did not mention intolerable working conditions. TR at 223; RX 16.

After her resignation, Complainant testified that she provided Director Panowicz with a handwritten list of "issues that [she] had seen through the past 12 months," in order to "make sure he understood what was going on, so that he could continue to protect the shareholders in my absence." TR at 183; CX 23. She also gave the list to Director DeTray. TR at 225.

Complainant testified that she participated in an initial interview as part of an investigation performed by John Guadnola, Esq. of the law firm Gordon, Thomas & Honeywell. TR at 234. When asked if she had declined to be interviewed "on the record," Complainant responded that she "wasn't prepared." TR at 234. She admitted that she declined to testify under oath. TR at 234. She did not recall whether she had been informed in advance that she would be expected to conduct the interview on the record and under oath. TR at 234-35.

After leaving her job with Respondent, Complainant started her own company doing consulting work for banks. TR at 198. It took about three months to form the corporation and get the business running. TR at 198. As damages for her alleged constructive discharge from Respondent, Complainant seeks three months salary, as well as prorated portions of Respondent's contributions to her 401(k) profit sharing plan and the annual bonus she believes she would have received had she stayed with Respondent. TR at 200-01. She also seeks the realizable value of stock options she was awarded in 2003 and 2004, the unvested portion of which she lost when she left Respondent. TR at 201. Finally, Complainant seeks attorney's fees and costs incurred in presenting her case. TR at 202.

2. Ken Parsons

Ken F. Parsons, Sr. is CEO of Respondents Venture Bank and Venture Financial Group, and Chairman of the Boards of Directors of both organizations. TR at 248. Mr. Parsons helped establish Lacy Bank (now Venture Bank) in 1978. TR at 250, 370-71.

As CEO of Venture Financial Group, the bank's holding company, Mr. Parsons stated that his goal is to cause the price of the company's stock to increase. TR at 251. As CEO of the bank, his role is to ensure that the bank meets its regulatory obligations and has the infrastructure

it needs to create earnings. TR at 251. Mr. Parsons testified that it is his duty to track the price of the company's stock, and it is also important for him to do so as a shareholder. TR at 329. Although he did not recall how many shares he held in 2004, he testified that he owns approximately seven percent of the bank. TR at 331. He acknowledged that as the share price fluctuates, he is impacted along with every other shareholder. He noted that several members of the Board of Directors own more than a million dollars worth of company stock. TR at 331.

Mr. Parsons testified that as CEO, he focuses on strategic planning while the bank President oversees daily bank operations including retail banking and lending. TR at 251-52. He testified that the primary responsibilities of the CFO include financial record-keeping and management, accounting, and helping the CEO increase the value to shareholders. These requirements are currently the same as they were during Complainant's employment. TR at 252.

Beginning in 2000, in anticipation of semi-retirement, Mr. Parsons began training Mr. Jones to become President of the bank and Jim Arneson to become President of the holding company. When Mr. Arneson left the company, Mr. Jones was promoted to bank President and was slated to become CEO and President upon the change in Mr. Parson's status as a full-time employee. TR at 253. Mr. Parsons testified that he negotiated an agreement with the Board of Directors whereby he would step down effective January 1, 2006. TR at 253. Beginning in 2003, he started selling stock in preparation for his retirement. TR at 281.

Mr. Parsons' practice when he wants to sell stock is to write a letter, usually to the CFO, indicating the number of shares for sale and his asking price. TR at 273-74, 281. The CFO then decides whether to approve the proposed transaction, and if approved, the shares are listed with the shareholder relations desk for sale on the open market or considered for buy-back by the company. TR at 273-74, 374-75. Mr. Parsons testified that it is the CFO's responsibility to determine whether the company should buy back its stock. TR at 271-72.

Mr. Parsons recalled that in February 2004, Complainant raised concerns about his sale of stock after she approved the transaction and it had gone to shareholder relations. TR at 274. He testified that when Complainant shared her concerns about the share price, he went to shareholder relations and "stopped that sale." TR at 274-75. He said the sale was "not consummated and I pulled those certificates back," and "suggested that we contact our legal counsel to try to determine what they recommend we do." TR at 275-76. Mr. Parsons testified that Complainant had "raised a good issue in terms of how do we set price for insiders." TR at 276-77.

The Board of Directors ultimately approved the sale of 22,000 shares of Mr. Parsons' stock at a price of $22.75 per share on February 19, 2004. RX 9. Mr. Parsons did not recall Complainant stating any objection to the price set by the Board. TR at 278. In addition, recommendations obtained from outside counsel Mr. Roberts, namely the formation of a Stock Oversight Committee and a Stock Repurchase Policy, were presented to the Board and adopted by April 21, 2004. TR at 279; RX 8-11. Mr. Parsons testified that he did not resist or have concerns about the formation of the Stock Oversight Committee or the Stock Repurchase Policy. TR at 278-80. He testified that he nominated Complainant to be the non-voting Chair of the new Committee. TR at 277. He also nominated the voting members. TR at 373-74. He nominated

Director Panowicz because he is Chair of the Audit Committee; Director DeTray because "he tends to be finicky about pricing of stock;" and Director Martin because he was a long-term member of the board. TR at 374.

Mr. Parsons testified that he wrote a performance review for Complainant in June 2004, and was pleased with her performance. TR at 279-80. He believes Complainant was "knowledgeable in . . . the managing of our finances" and "independent." TR at 280. He further explained that she "was still feeling her way along [the] differences between being a consultant and being responsible for running an organization. But I thought she was doing a good job for us, and I thought she fit in well." TR at 280. He testified that he appreciated that Complainant occasionally challenged him and other members of the Executive Management Team, because "it causes us to take a new look, a fresh look at things." TR at 280. He elaborated that "each of us challenged each other and we did it behind closed doors at our cabinet meeting every week. And I think that built a healthy, hard-charging organization." TR at 280-81.

On or about October 10, 2004, Mr. Jones informed Mr. Parsons that he was involved in a romantic relationship with Complainant, and they had "strong feeling" for one another. TR at 254. Mr. Parsons testified that he indicated to Mr. Jones that it "wouldn't work on an executive management team having two key employees having a relationship," and "one of them would have to leave." TR at 254. Mr. Parson said he expressed "in strong terms that it was up to [Mr. Jones] to make it happen. He was the President. He needed to take the leadership." TR at 254. After Mr. Jones left Mr. Parsons' office, Complainant approached Mr. Parsons and said that if one of them had to leave, she wanted it to be her. TR at 255.

Mr. Parsons testified that he immediately informed the Board's Compensation Committee about the relationship because they were "going to be doing Mr. Jones' performance review. And . . . they were also beginning to negotiate an agreement with him, and he was targeted to become CEO." TR at 256. According to Mr. Parsons, certain committee members were upset and "concerned about [Mr. Jones'] judgment." TR at 257. The full Board was informed of the romantic relationship between Complainant and Mr. Jones within a couple of weeks at a retreat. Mr. Parsons testified that "some members of the Board felt more strongly than others that it just couldn't be tolerated," and the consensus was that "it had to be resolved." TR at 258. Mr. Parsons testified that the Board felt the relationship could cause disruption among the executive team and "they were just not willing to accept two executive level individuals having a relationship." TR at 258. Mr. Parsons said he asked them to give Mr. Jones "some time to work through it." TR at 258.

Mr. Parsons met with Mr. Jones again to discuss how Mr. Jones would inform the other members of the Executive Management Team about his relationship with Complainant, whereupon Mr. Jones asked to meet with each member individually. TR at 256. Thereafter, a meeting was held to discuss the issue. Mr. Parsons testified that Ms. Graves, Executive Vice President of Retail Banking, and Ms. Moseby, Senior Vice President, Human Resources Director, both expressed "serious concerns." TR at 259. Mr. Parsons recalled it was felt that Mr. Jones and Complainant were not available to their direct reports or other members of the Executive Management Team because they "were constantly behind . . . closed doors." TR at 259. Ms. Graves and Ms. Moseby also indicated that the relationship was not a secret, but "was

out in the general community and population of the bank." TR at 259.

Mr. Parsons testified that at one point, Ms. Graves told him that she was "going to resign, that she was not going to tolerate or accept that environment." TR at 260. Ms. Graves told Mr. Parsons that "there was no cohesive unit anymore," in that Mr. Jones and Complainant "were making decisions that used to be made after a conference or presented at the weekly cabinet meetings, and give everyone a chance to provide input, Mr. Jones and [Complainant] were making decisions without getting or allowing others to provide the input." TR at 261. Mr. Parsons asked her to "hold off, give us a chance to work through it, that Mr. Jones is working through it." TR at 260. Consistent with Respondent's general practice for personnel issues, Ms. Graves allegedly wrote a report documenting her observations and frustrations. TR at 264. No such report was offered into evidence by Respondent, however.

Mr. Parsons testified that he had follow-up conversations about the relationship with Mr. Jones every week or two. TR at 260. He further testified that the Board raised the issue and Mr. Parsons provided status reports at every Board meeting, indicating to them that Complainant and Mr. Jones "would make a decision of what was going to happen." TR at 262, 373. Mr. Parsons testified that he never specifically told Complainant that he objected to the relationship (TR at 339), nor did he ever indicate to her that it would be acceptable. TR at 378. He believed that his own relationship with Complainant remained amicable, professional and friendly after the disclosure of the romance in October 2004. TR at 349.

Mr. Parsons testified that he decided to sell more stock in December 2004, and he formulated a letter to that effect to Complainant. TR at 281. He next testified that Complainant "appropriately" called for a meeting of the Stock Oversight Committee to discuss the terms of his proposed sale of 45,000 to 47,000 shares. TR at 282; CX 38. He denied telling Complainant that he would ultimately prevail before the Committee on the issue of share price. TR at 332.

Mr. Parsons testified that he sat through part of the meeting of the Stock Oversight Committee on January 5, 2005, to express his desire to sell some stock and his asking price. TR at 282, 332. He did not recall telling the Committee why the price he sought was fair, or providing any documentation summarizing stock prices at comparable banks within the community. TR at 328, 332. The Committee then met without him and after some discussion, agreed they wanted Complainant to obtain additional information before they would decide on a share price. TR at 283, 333; CX 38. A follow-up meeting was set for January 19, 2005 to review the requested information and make a decision. TR at 283; CX 38. Mr. Parsons testified that he was not angry, upset or offended by the Committee's decision not to authorize the purchase of his shares at the price he requested. TR at 283, 333.

Mr. Parsons testified that he was present for twenty minutes or so at the beginning of the subsequent meeting of the Stock Oversight Committee on January 19, 2005. TR at 283. Thereafter, Mr. Parsons testified that the Committee presented to the full Board its recommendation that the buy-back price for company stock be set at up to $21.50 per share less applicable discounts, which represents a price lower than that which he had initially requested. TR at 284, 329; RX 14. Mr. Parsons explained that there was discussion at the Board meeting that the price set by the Committee may not be high enough, but he did not recall who raised the

issue. TR at 285, 341-42. Mr. Parsons responded that the Board should not increase the price recommended by the Committee, explaining that the Committee had two meetings, requested additional information from the CFO, and had "been diligent in doing some homework," therefore "we ought not try to second-guess them." TR at 285. He testified that had he been dissatisfied with the Committee's price, he could have listed his shares for sale on the open market. TR at 285, 374-76.

Mr. Parsons denied treating Complainant any differently after the January 5, 2005 Stock Oversight Committee meeting, humiliating her at weekly management meetings, or questioning her capabilities. TR at 288, 327. He did not feel that their relationship changed after the Committee researched the issue of stock pricing in January 2005. TR at 378-79. He testified that no one brought to his attention any concerns about his conduct toward Complainant during that time period (TR at 288, 335-36), nor had any Director ever cautioned him that his personal management style could be more diplomatic. TR at 335. He "absolutely" denied that Director Panowicz expressed that Mr. Parsons was being unduly harsh on Complainant. TR at 336. Mr. Parsons did not feel Complainant acted inappropriately by raising concerns over the pricing of stock he sold in 2004 or 2005. TR at 296-97, 321. He believed that in January 2005, she was "doing her job as the CFO just exactly like she did in February of 2004 when she questioned stock [*sic*]. And she did that on an ongoing basis, that was her job to manage the price of the stock. If insiders were improperly pricing or trading, she should bring that up." TR at 351.

Mr. Parsons recalled having a discussion with Complainant about the Disclosure Committee. He said the issue had come up amongst his banking "colleagues across the country" in connection with the requirement for certification of financial statements, and it had been expressed that "the disclosure committee is [an] opportunity to have some middle-management in your organization look at procedures . . . and certify that things are according to Hoyle, or working appropriately." TR at 286-87. For this reason, Mr. Parsons asked Complainant if he should be a member of Respondent's Disclosure Committee, and she responded that he did not need to be involved. TR at 287. According to Mr. Parsons, "it just didn't sound right," so he asked the same question to an outside auditor from Moss Adams at the Audit Committee meeting on February 9, 2005. TR at 286-87. Mr. Parsons testified that the auditor advised that as CEO, Mr. Parsons should be a member of the Disclosure Committee. TR at 287-88.

Mr. Parsons further testified that Complainant's behavior at the February 9, 2005 Audit Committee meeting was "unprofessional." TR at 288. He believed she was "agitated because I think she sensed that she was caught in a situation with this Disclosure Committee—what she said to me versus what the auditor was going to say were contradictory. I think she was embarrassed and she reacted unprofessionally and kept interrupting the auditor." TR at 288. Mr. Parsons said he asked Complainant to allow the auditor to finish speaking. TR at 288.

Mr. Parsons testified that after the Stakeholders' Meeting on Thursday, February 10, 2005, the Chair of the Compensation Committee asked to meet with him. At about 9:30 or 10:00 that evening, Mr. Parsons met with Compensation Committee members Mr. Schorno and Ms. Buckner, and discussed a meeting that Mr. Schorno had had that day with Mr. Jones, wherein Mr. Jones indicated that "he and [Complainant] were in love and that they were not going to leave the bank. Instead, they both intended to stay and run the bank." TR at 262-63. Mr.

Schorno asked Mr. Parsons to call a "work session" of the Board for that weekend. TR at 263.

At a Board meeting held on Sunday, February 13, 2005, Mr. Schorno relayed that his interpretation of his conversation with Mr. Jones was that neither Mr. Jones nor Complainant had any intention of leaving the bank. TR at 263. Mr. Schorno explained that he told Mr. Jones that the Board would find this "unacceptable." TR at 263. Mr. Parsons testified that present at the meeting by conference call were "our corporate counsel, our principal in the auditing firm that did our financial audit, Moss Adams, a legal attorney representing Washington employees who advised us on human resources issues, our Human Resource Senior Vice President [Ms. Moseby] . . . and the Board members." TR at 263.

Mr. Parsons further testified that the Board was "tired of waiting for the issue to be fixed by Mr. Jones," that "it was clear to them that it wasn't going to be fixed," and that "they essentially indicated that they had lost judgment in [Mr. Jones'] ability [*sic*] to lead the institution." TR at 263-64. He further testified that Ms. Graves' written report of her concerns about the relationship was read to the Board during the latter part of the meeting. TR at 264. The Board directed Mr. Parsons to terminate Mr. Jones, and directed Mr. Schorno to participate in the termination as Chair of the Compensation Committee. TR at 265. Mr. Parsons testified that he was not an active participant in the Board's discussion, and he did not advocate for Mr. Jones' termination. TR at 265-66.

The next day, Monday, February 14, 2005, Mr. Parsons and Mr. Schorno notified Mr. Jones that the Board "had lost confidence in his judgment" and had decided to terminate his employment. TR at 266. Mr. Parsons testified that the Board decided to fire Mr. Jones rather than Complainant because they "asked [Mr. Jones] to resolve [the issue of the relationship], and he didn't resolve it. [T]hey felt that as a leader he should do those things and make those judgments." TR at 372. As a result, the Board had "lost comfort" in Mr. Jones' judgment. TR at 371-72. Thereafter, the news of the termination was shared with the Executive Management Team at a brief meeting. TR at 266-67.

Following that meeting, Mr. Parsons, Mr. Schorno and Ms. Moseby met with Complainant. Mr. Parsons described Complainant as being "obviously distraught, very, very upset, agitated." TR at 267. Mr. Parsons told Complainant that "she would have to make some decisions," but also "indicated that we wanted her to stay and the Board had no intention of asking for her termination from this meeting that they held." TR at 267. According to Mr. Parsons, the only discussion pertaining to Complainant was "that she would not have sole authority over network access." TR at 268. He explained that this change was necessary because "from a security standpoint, we would be criticized." TR at 268. He further explained that Complainant had been a "good employee" with "high integrity," but "just as a check and balance, you wouldn't have someone that's distraught and in charge of some critical piece of your organization. And that was a critical component, particularly since Mr. Jones needed to be locked out from access to a number of those things and she had a relationship with Mr. Jones." TR at 268. He said that his security concerns and the action he took were not due to anything Complainant had done at any point in her employment, but were "just a precaution that the [Federal Deposit Insurance Corporation] would expect [him] to take." TR at 288-89.

Mr. Parsons testified that Complainant's pay had not been reduced, and it had not been determined whether the IT responsibility would be removed from Complainant permanently. TR at 269. He opined that the suspension of a portion of Complainant's IT functions represented a "significantly immaterial" reduction in her responsibilities. TR at 269. He testified that the IT employees would continue to report to Complainant. TR at 269. Thereafter, he testified that Complainant would have one person, the Vice President of Information Services, who would run the IT department and report to her.[5] TR at 270. He felt that her primary responsibility as CFO had been and would remain "financial control of the company." TR at 269.

Mr. Parsons testified that after meeting with him, Mr. Schorno and Ms. Moseby, Complainant left the office and went home. TR at 270. He further testified that Complainant contacted her direct reports and some other employees, including some who were on vacation, "and clearly was trying to create some chaos," despite the fact that Mr. Parsons had asked the executive managers, including Complainant, not to tell lower-ranked employees about Mr. Jones' termination until senior management had been fully apprised of the situation. TR at 270. Complainant returned to the office later that day and resigned her position. TR at 270.

With regard to Complainant's job performance, Mr. Parsons denied that she had done anything in the course of performing her duties that would warrant any criticism from him, with the exception of her conduct at the February 9, 2005 Audit Committee meeting. TR at 290-91. *See also*, TR at 287-88. On cross-examination, Mr. Parsons expressed that Complainant adequately supervised the IT audit function, but he felt she should have hired a replacement for the IS manager who was terminated in 2004. He was not aware whether funding had been denied for a replacement, and said he personally did not deny funding. TR at 292-94, 369. When questioned further about whether there was any deficiency in Complainant's supervision of IT functions, Mr. Parsons testified that, "what happens is she doesn't have time to do her primary focus . . . [which is] [m]anaging the earnings." TR at 370. He explained his concern that Complainant "didn't spend the time or have the time to spend on her primary focus, which is driving the financial value and the increased value of the organization." TR at 370.

Mr. Parsons testified that he approved a severance package for Complainant which was put together by Ms. Moseby and Director Schorno and presented to Complainant after her resignation, but he is not familiar with the details of the package. TR at 362-63, 365. Mr. Parsons recalled that Complainant's employment contract with Respondent entitled her to one year of severance pay if she were to terminate her employment for good cause. TR at 363.

Mr. Parsons testified that he provided sworn testimony to Mr. Guadnola which was recorded as part of an investigation conducted after Complainant resigned. He said he knew in advance of his interview that his testimony would be under oath and transcribed for the record. TR at 289, 345. He was not provided with a copy of Mr. Guadnola's notes of the interview. TR at 345. Mr. Parsons testified that some of the other witnesses were interviewed in the conference rooms at the bank while Mr. Parsons was in his office in the same general area. TR at 365-66.

Mr. Parsons testified that Mr. Guadnola did not tell him that some of his stock trades

[5] Mr. Parsons testified that Complainant had terminated the Vice President of Information Services in 2004, and had not replaced that position. TR at 269-70.

raised the appearance of violating laws relating to trading within a six-month period, or that some transactions arranged for him and his wife appeared unduly favorable to them. TR at 344-45. He said that Mr. Guadnola did not tell him anything but only asked him questions. TR at 345. On further questioning, Mr. Parsons testified that he was aware of Mr. Guadnola's report, which stated that certain of Mr. Parsons' transactions "raised an appearance of impropriety," such that Mr. Guadnola recommended that "the company institute procedures to eliminate even the appearance of favorable treatment of insiders in the future." TR at 346; RX 18. Mr. Parsons believed this to be an appropriate recommendation. TR at 346-47.

3. Patty Graves

Patty Graves has been Respondent's Executive Vice President of Retail Banking for three years. She previously held a similar position with Respondent for 12 years, and has worked in the operational areas of banking for 25 years. TR at 439-40. She is currently responsible for bank operations, including branches, the call center, and operational support areas. TR at 440. About half of Respondent's employees report to her either directly or indirectly. TR at 440-41.

In her capacity as Executive Vice President of Retail Banking and member of the Executive Management Team, Ms. Graves interacted with Complainant on a daily basis. TR at 441-42. Ms. Graves also knew Complainant before she came to work for Respondent, when she was a consultant in charge of Respondent's internal audit team. TR at 442.

Ms. Graves testified that she had "open discussions" with Complainant, and that Complainant shared her opinion freely during management meetings. TR at 452. Ms. Graves said that those attending Executive Management meetings are "all very open with one another," and that it was not uncommon for Mr. Parsons' ideas to be challenged in that "very open forum." TR at 453. She has never seen Mr. Parsons retaliate against anyone for disagreeing with him. TR at 503. Ms. Graves has "vehemently" disagreed with Mr. Parsons on several occasions, and does not believe Mr. Parsons has ever retaliated against her. TR at 454. She added that she has been "very offensive" in some of her conversations with Mr. Parsons. TR at 454.

Ms. Graves testified that in or around October 2004, she became aware of a romantic relationship between Complainant and Mr. Jones. TR at 443-44. She said that one of her direct reports, a regional manager, expressed concern about rumors that Complainant and Mr. Jones were romantically involved. TR at 442-43, 471-72. Ms. Graves testified that she confronted Mr. Jones and told him that the persistence of such rumors would be "detrimental to the organization," because of "how the staff would feel about it and how the general public would feel about it." TR at 443. At that time, Mr. Jones neither confirmed nor denied the rumors but, by the end of the workday, he told Ms. Graves that he and Complainant "do have feelings for one another" and that Mr. Parsons was aware of the relationship. TR at 443-44.

Ms. Graves testified that she had concerns about the relationship which she relayed to Mr. Jones. She felt the relationship was not "in the best interest of the bank," and would "undermine the Executive Management Team being able to work together effectively." TR at 444. She also felt that the bank's employees would "question the decisions that were being made," and that "the general public would not be in favor of it, either." TR at 444.

Ms. Graves further testified that the relationship caused issues in the workplace. TR at 444-45. She explained that Complainant and Mr. Jones began "doing a lot of behind closed door meetings not involving the rest of the Executive Management Team." TR at 445. Specifically, Ms. Graves said that decisions were made with respect to the sale of seven bank branches without consulting her, even though there were aspects of that transaction which Ms. Graves felt she "needed to be involved in." TR at 446, 448-49. She said those types of decisions previously would have come up in weekly management meetings, which provided a "very corroborative atmosphere where every Monday morning we would meet and we would talk about things that were going on within the organization." TR at 449.

Ms. Graves also felt that the relationship, specifically the closed-door meetings, impacted her ability to do her job because she "did not have the access to [Mr. Jones]" that she needed to perform her duties. TR at 447. She felt Mr. Jones was not accessible when she wanted to consult with him on decisions she was making because he and Complainant were "in his office with the door closed." TR at 447. She was frustrated by the lack of access to Mr. Jones, and she informed him that she felt the closed-door meetings were not necessarily work-related. TR at 447, 473. She was also frustrated that Complainant and Mr. Jones were making decisions without involving the appropriate parties. TR at 475.

Ms. Graves testified that closed-door meetings were generally conducted when "needed to maintain confidentiality," such that "if the door was closed, it was closed for a reason." TR at 448. She would not feel comfortable interrupting such a meeting. TR at 448. On at least one occasion, she knocked on a closed door and was not denied entry. TR at 475. On another occasion, she knocked and entered without waiting for permission, and "there was a very awkward moment" where she felt as if she had interrupted "touches." TR at 475-76.

Ms. Graves never witnessed any romantic gestures or sign of sexual activity by Complainant and Mr. Jones during business hours. TR at 474. However, there was other behavior which Ms. Graves considered problematic. As an example, Ms. Graves cited a meeting wherein Complainant sneezed, and Mr. Jones "stopped the meeting to say, 'Isn't she cute when she does that?'" TR at 450. Ms. Graves also recalled a meeting wherein Complainant and Mr. Jones disagreed over whether to raise interest rates on deposit accounts, and Complainant stopped the meeting for "probably a good 10 minutes before we could move on." TR at 450. According to Ms. Graves, Complainant had a "very difficult time any time [Mr. Jones] disagreed with her." TR at 450.

In addition, Ms. Graves recalled that at a meeting held at a restaurant near the bank she saw Mr. Jones "feed [Complainant] olives from his drink." TR at 451. This happened again after an annual employee meeting, when "we were out with . . . 15 to 20 employees, some of which weren't even in management, certainly most of which were not members of the Executive Management Team, nor were they privy to [Complainant's and Mr. Jones'] feelings for one another." TR at 451. Ms. Graves testified that she later had employees tell her that they witnessed some hand-holding and a kiss in the parking lot that night. TR at 451.

On more than one occasion, Ms. Graves shared her concerns about the relationship and

its impact on the workplace with Mr. Parsons. TR at 454. Shortly after Mr. Jones disclosed the relationship, Ms. Graves told Mr. Parsons that she "could not see this being beneficial to the bank . . . and if they both stayed, it would be a work environment that I would no longer continue to work in." TR at 454. After Ms. Graves raised the issue with Mr. Parsons a couple of times and told him that "things had heated up recently, that the two of them would be much more openly affectionate," Mr. Parsons asked Ms. Graves to document her concerns on or about February 11, 2005. TR at 454-55, 498-99.

Ms. Graves was present at the Audit Committee meeting on February 9, 2005. She recalled that Mr. Parsons asked the outside consultants about his role, as CEO, on the Disclosure Committee, but Complainant interrupted each question and tried to give Mr. Parsons her answer. TR at 456. She testified that Complainant became "very agitated," and was "showing antagonism towards [Mr. Parsons]" and being "extremely disrespectful in front of Board members and consultants." TR at 456. Ms. Graves further testified that she looked at Complainant and mouthed the word "stop," because she was "appalled and embarrassed." TR at 456. She said Mr. Parsons asked Complainant to allow the consultants to answer his questions, and she felt "he did it very respectfully and that he showed remarkable restraint in the way he handled the situation." TR at 456-57. According to Ms. Graves, the consultant responded that Mr. Parsons had the responsibility to be "aware of" what was going on with the Disclosure Committee. TR at 458, 494, 497. She also recalled the consultant saying that "it was the norm or not unusual for [Mr. Parsons'] position" to be on the Disclosure Committee. TR at 496.

When Complainant stopped by Ms. Graves' office after the Audit Committee meeting, Ms. Graves told her "she needed to chill." TR at 457. Ms. Graves did not believe that Mr. Parsons harassed, belittled or humiliated Complainant during the meeting. TR at 457. She said Mr. Parsons' questions were addressed to the consultants, and he never addressed Complainant except to ask her to refrain from speaking so the consultants could provide their answers. TR at 457. Ms. Graves did not observe Mr. Parsons exhibit any antagonism or negative attitude toward Complainant in January or February 2005. TR at 503.

Ms. Graves testified that Complainant frequently complained about Mr. Parsons' "micro-managing." TR at 455, 462, 466-67. She thought the complaints became more frequent during the last 90 days of Complainant's employment. TR at 468-69. Ms. Graves said she made similar complaints about Mr. Parsons' management style to Complainant on twelve or so occasions during Complainant's tenure. TR at 467-68, 469, 470, 499.

Ms. Graves recalled that in or about December 2004, Complainant expressed concern about Mr. Parsons' approach in selling his stock. TR at 463. Ms. Graves did not ask for details, nor did she fully understand the transaction at issue. TR at 463-64. On another occasion, Complainant mentioned to Ms. Graves that she "took a stand" against Mr. Parsons with the Stock Oversight Committee, and was concerned "about what the repercussions of that would be." TR at 463, 479. Ms. Graves said she pointed out to Complainant, and Complainant agreed, that Mr. Parsons had been the one to call the meeting of the Stock Oversight Committee. TR at 463-64, 479. As a result, Ms. Graves did not feel Complainant's concerns about "repercussions" were "reasonable." TR at 504.

Ms. Graves testified that she once resigned or threatened to resign after a heated discussion with Mr. Parsons over his son's application for the position of Construction Manager with the bank. TR at 458-59. Ms. Graves testified that she was involved in conducting the interviews, and that Mr. Jones had made it "very clear" to her that he did not want Mr. Parsons' son working for the organization. TR at 459. Ultimately, Mr. Parsons' son was not hired, and Ms. Graves and Ms. Moseby met with Mr. Parsons to discuss their hiring decision. TR at 460. Ms. Graves said Mr. Parsons asked questions about the candidate who was to be hired, and with each question, Ms. Graves became "more defensive about feeling as if he were questioning whether or not I was being fair." TR at 460. She "stormed out of the office," went to Mr. Jones' office, threw the applicant's resume on Mr. Jones' desk and said, "I quit." TR at 460, 470, 476. Complainant was sitting in Mr. Jones' office at that time. TR at 460. Ms. Graves did not recall whether Mr. Jones' door was closed when she entered. TR at 476.

Complainant followed Ms. Graves to her office and told her to calm down, while Mr. Jones spoke to Mr. Parsons. TR at 460. Ms. Graves perceived that Complainant did not want her to quit. TR at 478. Ms. Graves testified that when Mr. Jones returned and asked what she wanted to do, it "became very clear" that Mr. Jones and Mr. Parsons wanted her to quit. TR at 460-61. After a discussion with Mr. Parsons, however, Ms. Graves decided not to quit "because of how fairly [Mr. Parsons] treated me that morning, and not because anybody else tried to talk me out of it." TR at 461. Ms. Graves testified that Mr. Parsons did not attempt to influence her with regard to his son's job application (TR at 461-62), and although his questions triggered her anger, she felt that, "based on the environment that [Complainant] and [Mr. Jones] had created, I had very little control over my emotions the last 90 days they were there." TR at 471.

Ms. Graves testified that Doych Dragt held a position in Respondent's IT department when Complainant joined the organization, but could not recall Ms. Dragt's job title. TR at 484-85. For about a year after Complainant's arrival, Ms. Graves complained about, and sent at least two of her direct reports to Complainant to complain about, Ms. Dragt's performance. TR at 485-86. Complainant eventually expressed that Ms. Graves "was leaving her no choice" but to terminate Ms. Dragt. TR at 486-87. Ms. Graves testified that Complainant's decision was "long overdue, but the right decision to make." TR at 487. She said that it was Complainant's decision not to replace Ms. Dragt. TR at 488. Ms. Graves recalled Mr. Parsons expressing that the organization needed an "IT Director," which has "always been his stand." TR at 488. She did not recall whether funds were available for a replacement. TR at 489.

Ms. Graves testified that she was not concerned about how her future with Respondent would be impacted by Mr. Parsons' retirement. However, she further testified that during the last 90 days of Mr. Jones' employment, she had "serious concerns that he was trying to push me out or replace me." TR at 500. Ms. Graves explained that one of her direct reports, Kathy Bryant, began going straight to Complainant with issues related to the sale of several bank branches, and Ms. Graves "was being just kind of kept out of the loop." TR at 500-01. She told Mr. Jones that she felt he and Complainant were aiming to have Ms. Bryant report directly to Complainant rather than Ms. Graves, and that she was "not okay with it." TR at 501.

Ms. Graves further testified that Mr. Jones began developing a "close relationship" with Mary Holbrook, another one of her direct reports, "in an effort to ensure that she stayed [with

Respondent]" in the event that Ms. Graves were to leave. TR at 501-02. Ms. Graves said she has "since found out that [Mr. Jones] did share with [Ms. Holbrook] that he knew that potentially I would be leaving the bank, because I was not in favor of his relationship with [Complainant]. And that he had already anticipating [*sic*] that and planned on replacing me." TR at 501-02.

4. Jeff Green

Jeff Green is a partner in the public accounting firm Moss Adams, which specializes in auditing, tax and consulting services. He has been in public accounting for about eighteen years, and in charge of performing auditing services for Respondent since 2003. TR at 506-07.

As part of the audit process, Mr. Green testified that senior executives and others in the institution being audited are asked if they have been involved with or are aware of any fraud being committed within the organization. Mr. Green testified that he made those specific inquiries of Complainant, but she had not disclosed any concerns. TR at 508-09.

Mr. Green testified that he attended a meeting of Respondent's Audit Committee on February 9, 2005. TR at 509. He recalled that Mr. Parsons asked him whether Respondent's CEO should be a member of its Disclosure Committee. TR at 510. He testified that he responded that "the CEO or CFO definitely should be on the committee, as well as the President of the organization." TR at 510. On further questioning, Mr. Green clarified that he said, "we typically see the President or CEO on the Disclosure Committee." TR at 511. He considers it "a given" that the CEO should be aware of the Disclosure Committee's work. TR at 512.

Mr. Green further testified that while he was explaining his response to Mr. Parsons' question, Complainant "was kind of saying what her thoughts were, as well. And then I think [Mr. Parsons] finally just kind of said, 'Could you let us know what your thoughts are?' Referring to myself." TR at 510. He did not recall what Complainant had said. TR at 513.

Mr. Green did not feel that Mr. Parsons was disrespectful to Complainant, nor did he think Mr. Parsons was humiliating or belittling her. TR at 511. He said the exchange took about two minutes, and was not "a major issue." TR at 513-15. He did not perceive that Complainant and Mr. Parsons disagreed with respect to the composition of the Disclosure Committee. TR at 516. Mr. Green thought Complainant seemed "pretty composed," and did not note anything out of the ordinary with respect to her demeanor at the meeting. TR at 516.

5. Jewell Manspeaker

Jewell Manspeaker has been a member of Respondent's Board of Directors for ten years. TR at 518. He serves on the Audit Committee, the Asset Liability Committee, and the Nominating Committee. TR at 518-19. Mr. Manspeaker does not have any social relationship with Mr. Parsons outside of the Board meetings. TR at 543-44.

In his capacity as a Board member, Mr. Manspeaker has interacted with Complainant. TR at 519. Mr. Manspeaker testified that there is frequently disagreement among the Board members. TR at 520. In addition, he has never sensed that the senior managers who attend

Board meetings are afraid to challenge Mr. Parsons, but rather has seen them do it "often." TR at 522. He has never observed any retaliatory conduct from Mr. Parsons as a result. TR at 522.

Mr. Manspeaker recalled that Mr. Parsons presented to the Board his intent to sell some stock at around $21 per share. TR at 538. Mr. Manspeaker did not believe that the proposed price was the highest price at which the stock had ever sold. TR at 539. He did not recall Complainant opposing or taking any position on the transaction. TR at 540. He did not recall whether Complainant was involved in assembling information from outside sources with respect to stock pricing. TR at 540. Soon thereafter, the Stock Oversight Committee was formalized. TR at 540. Mr. Manspeaker testified that Mr. Parsons did not object to the formation of the Committee, but rather was "very supportive of that." TR at 528, 541.

Mr. Manspeaker became aware of the relationship between Complainant and Mr. Jones during a retreat attended by the Board members in October 2004. TR at 520. Mr. Parsons told the Board to "give both [Mr. Jones and Complainant] time to work through it." TR at 521.

Mr. Manspeaker was concerned for the families of Complainant and Mr. Jones, and was concerned that "two very key members of our staff would face challenges within the work place if they pursued a relationship." TR at 521. He testified that there was "serious concern" among the Board members about what would happen with regard to job performance. TR at 522.

Mr. Manspeaker was present at the Audit Committee meeting on February 9, 2005. TR at 524. He recalled that Mr. Parsons asked Mr. Green whether the CEO should be a member of the Disclosure Committee. TR at 522-23. Mr. Manspeaker testified that "it appeared that [Complainant] wanted to answer that question, rather than have Mr. Green answer it. [And] Mr. Parsons asserted himself and clearly stated that he wanted Mr. Green to answer the question." TR at 523. Mr. Manspeaker further testified that Mr. Green opined that it was appropriate for the CEO to be a member of the Disclosure Committee, and that Mr. Green "even suggested that if he were a CEO, he would be on that committee." TR at 523.

This was the only exchange Mr. Manspeaker recalled involving Complainant and Mr. Parsons. TR at 523. He did not feel that Mr. Parsons belittled, humiliated, or questioned Complainant's capabilities during that meeting. TR at 524. With respect to Complainant's behavior, he testified that "there appeared to be some tension and [Complainant] was more interested in answering the question and explaining . . . the current practice, which was one in which Mr. Parsons did not serve on the Disclosure Committee." TR at 524.

Mr. Manspeaker was also present at the weekend meeting wherein the Board decided to terminate Mr. Jones' employment. TR at 524-25. He said it was a "lengthy" meeting because each Board member spent a "substantial amount of time expressing concerns, asking questions, and hearing from other Board members." TR at 526. He did not remember Mr. Parsons being a "major contributor" during the meeting. TR at 526.

Mr. Manspeaker recalled that a letter from Patty Graves was read during the meeting, in which she expressed that she was having difficulty seeing Mr. Jones because he was "otherwise involved in meeting with [Complainant]," and that "positions and priorities that [Ms. Graves]

had were sometimes not being addressed by [Mr. Jones] because they may not have been the position that [Complainant] would have taken on the issue." TR at 532. Ms. Graves' letter did not imply that "hanky-panky" was going on behind closed doors. TR at 532. Mr. Manspeaker did not believe that Ms. Graves would engage in a "turf war." TR at 542, 545. He believes Ms. Graves is a "highly valued" and "outstanding" member of the Executive Management Team. TR at 544. He said he took Ms. Graves' concerns about Mr. Jones "very seriously," and he could not recall another time when Ms. Graves expressed concerns about a supervisor, including Mr. Jones. TR at 545. Mr. Manspeaker considered Ms. Graves' input significant because it suggested that Mr. Jones' performance as bank President was being affected by the time he was spending with Complainant. TR at 534.

According to Mr. Manspeaker, the Board also considered Director Schorno's concern that Mr. Jones was "trying to gain his support in becoming the CEO of the bank." TR at 545, 547. Mr. Manspeaker testified that the Board had started negotiations with Mr. Parsons to move him into a "half-time role," but that change would not happen until 2006. TR at 547.

Mr. Manspeaker testified that the Board discussed the possibility of firing Complainant, but ultimately there "was a concurrence that the real issue that we had to face was that of our President and his performance. And that we, as a Board, needed to . . . make a decision with regard to the President of the company." TR at 526. The Board determined that Complainant's employment should continue. TR at 526-27. Mr. Manspeaker supported that decision, and did not have any specific concerns about Complainant's job performance. TR at 537. He believed issues were raised about Complainant's performance, but could not recall what they were except to say that "she was not as much involved with other members of her staff . . . as she might once have been." TR at 536-37. Mr. Manspeaker testified that the Board did not direct Mr. Parsons to discipline Complainant or to restrict or modify her behavior in her job. TR at 543.

6. Rick Panowicz

Rick Panowicz has been a member of Respondent's Board of Directors since 1995. TR at 550. He is the Chair of the Audit Committee, and a member of the Stock Oversight Committee, the KSOP Committee, and the Marketing Committee.[6] TR at 552. He has been a member of the Stock Oversight Committee since its inception. TR at 552.

Mr. Panowicz testified that the Board has "intense" monthly meetings wherein the Board members do not always agree, often resulting in a split vote or a compromise. TR at 550-51. He said that members of bank management frequently attend Board meetings and appear to express their opinions openly. TR at 551. Complainant was an active participant at Board meetings who voiced her opinion when she did not agree with others. TR at 551-52.

After reviewing the minutes of the Board meeting on February 18, 2004 (RX 8), Mr. Panowicz recalled that Mr. Parsons was interested in selling 45,000 shares of stock. He also noted that Mr. Roberts recommended the formation of a stock repurchase committee. TR at 552-53; RX 8. Mr. Panowicz testified that Mr. Parsons did not object to the formation of such a committee, which was established shortly thereafter. TR at 554-55. He did not recall what price

[6] Complainant testified that the KSOP is an employee-owned stock ownership plan. TR at 38, 82.

Mr. Parsons initially requested. TR at 573. He did not believe that Complainant "challenged" the price requested by Mr. Parsons but he believed she felt, as did Mr. Panowicz, that there needed to be research performed before a price was established. TR at 574. He agreed that Mr. Parsons did not get the price he asked for at the February 18, 2004 Board meeting. TR at 577.

Mr. Panowicz did not recall any time before February 2004 when the Board set the price for a stock transaction, and he believed that the price for prior sales was set by "the market." TR at 574-75. He testified that when stock is presented for repurchase by the company, the KSOP Committee determines whether the purchase is a good value. He did not know if the KSOP had ever rejected the price posed by a perspective seller of stock, nor did he know whether anyone had ever challenged Mr. Parsons on any of his sales or purchases of stock. TR at 575-76.

Mr. Panowicz learned of the romantic relationship between Complainant and Mr. Jones during a Board retreat in October 2004. TR at 562, 588. He said the Board was "concerned" and "disappointed." TR at 563. He testified that he was "particularly disappointed" because he thought "we had two great people being groomed to step into leadership of the bank." TR at 563. He felt the relationship was not appropriate. TR at 563. He understood that Mr. Parsons gave Mr. Jones the opportunity to "correct the problem." TR at 565, 607.

Mr. Panowicz testified that he spoke to Mr. Jones in November 2004, and expressed his hope that Mr. Jones would reconcile with his wife for the sake of his family. TR at 563. He said that Mr. Jones commented that he was in love with Complainant, that he felt his marriage was "history," and that he and Complainant could probably do a better job running the bank than Mr. Parsons could. TR at 564.

In December 2004 or January 2005, Mr. Jones asked Mr. Panowicz if Mr. Parsons had changed his mind about retiring. Mr. Jones referred to a life insurance policy on Mr. Parsons, and expressed concern that Mr. Parsons would not to retire as planned. TR at 564, 607.

Mr. Panowicz recalled attending a meeting of the Stock Oversight Committee on January 5, 2005, wherein Mr. Parsons expressed interest in selling a block of stock and stated the price at which he was willing to sell. TR at 556, 600. He does not remember any disagreement between Complainant and Mr. Parsons over the price of Mr. Parsons' stock. TR at 605. Mr. Panowicz testified that there was discussion about the structure for determining the value of the stock, but no decision was made during that meeting with respect to Mr. Parsons' offering, and the matter was referred to Complainant for further review. TR at 556. Mr. Panowicz did not sense that Mr. Parsons was angry when told that the sale would not proceed at that time. TR at 557.

After the Stock Oversight Committee meeting, Mr. Panowicz went to Complainant's office. TR at 557. He testified that he told Complainant that the proposed transaction "was setting a precedent for the bank, not only for Ken Parsons, but also for any other large block of stock, any other director, and we also have some retired directors that have large blocks of stock." TR at 557. He felt it was "very important that she and the Committee do their homework to come up with a policy that's fair to the shareholders, fair to [Mr. Parsons], and that was appropriate for the type of transaction we were talking about." TR at 557. Mr. Panowicz testified that his concern did not stem from any action by Mr. Parsons, but rather from what he

perceives to be "a strong fiduciary responsibility to monitor how the stock is traded" given the close-knit nature of the corporation. TR at 557-58.

Mr. Panowicz next testified that the Stock Oversight Committee reconvened on January 19, 2005, and heard a presentation by Complainant about the price earnings ratios and trading ranges at peer banks. TR at 558, 598; RX 15. He did not recall if Mr. Parsons was present for that discussion, but believes he was not. TR at 558, 598-99. As a result, he also did not recall whether Mr. Parsons suggested what price earnings ratio would be appropriate or offered documentary support for the price he requested for his stock. TR at 598-99.

Mr. Panowicz also did not recall Complainant expressing any concerns about the price ultimately arrived at by the Committee during the January 19 meeting. He said he specifically asked Complainant if she was "comfortable" with the price, to which she replied that she was. TR at 558, 597. He did not recall any disagreement then pending between Mr. Parsons and Complainant over the value of the stock (TR at 597-98), or any significant dispute between Mr. Parsons and Complainant over the price of stock at any other time. TR at 606.

Later on January 19, the Stock Oversight Committee presented its recommended price to the full Board. TR at 559; RX 14. Mr. Panowicz recalled that the Committee explained how the price was determined, and that a motion was carried unanimously to accept the recommended purchase price of $21.50 per share. TR at 559, 600; RX 14. Mr. Panowicz also recalled a discussion about whether the price was "high enough to be fair," as the stock had been trading at a higher price. Mr. Panowicz believes Mr. Parsons responded that he was comfortable with the Committee's price. He did not feel that Mr. Parsons was angry about that price. TR at 559-60. Mr. Panowicz agreed that if the company's stock price were "lowered," it could affect the value of his holdings of 140,000 shares worth about $1.8 million. TR at 571, 572.

Mr. Panowicz denied that he called Complainant after the Stock Oversight Committee and/or Board meetings on January 19, 2005. TR at 567, 570. He further "absolutely denies" telling Complainant that he would support her if Mr. Parsons "attacked" her for challenging the sale price of his stock. TR at 570. He testified that between the January 5, 2005 meeting of the Stock Oversight Committee and Complainant's resignation on February 14, 2005, he did not witness any retaliatory or antagonistic conduct by Mr. Parsons toward Complainant. TR at 560.

Mr. Panowicz attended the Audit Committee meeting on February 9, 2005. TR at 560-61. According to Mr. Panowicz, Mr. Parsons asked if he should be on that committee, and Complainant responded that his membership was not necessary. TR at 561. Mr. Panowicz testified that, "at one point I know Ken [Parsons] asked or told [Complainant], 'I'm asking Jeff [Green] the question.'" TR at 561. He further testified that Mr. Green replied, "'If I were signing those statements, I certainly would want to be on that committee.'" TR at 561. Mr. Panowicz felt Mr. Parsons' conduct was "firm and professional," and was not "humiliating" toward Complainant. TR at 561. He did not recall any other "acrimony" between Complainant and Mr. Parsons during the meeting, and while the exchange was "a little uncomfortable because of the directness of it," he did not consider it "a big issue." TR at 601-02.

As for Complainant's conduct at the Audit Committee meeting, Mr. Panowicz sensed she

was "angry and upset that [Mr. Parsons] was going to the accounting firm versus asking her for her opinion." TR at 561. He was not sure if she acted inappropriately, noting that she is "spirited" and "aggressive," but he said that Mr. Parsons is "Chairman of the bank and when he asked a particular question of the auditors, that's appropriate that they respond and not [Complainant]." TR at 602.

After the Audit Committee meeting, Mr. Panowicz testified that Complainant requested five minutes to meet with him, and he went into her office. TR at 561, 603. Mr. Panowicz testified that Complainant apologized for her behavior during the meeting, to which he replied that she did not have to apologize to him. TR at 516-62, 603. He said to her that in the course of business, "you have debates with other employees and [Mr. Parsons is] a strong debater. And just pick your battles." TR at 562, 603-04. Mr. Panowicz denied telling Complainant that he would "help" or "protect" her. TR at 603. He does not recall Complainant saying that she would leave the bank if she ever had another day like that one with Mr. Parsons, and he believes he would have remembered that conversation had it occurred. TR at 609.

Mr. Panowicz denied that Complainant expressed any concerns to him that Mr. Parsons was retaliating against her or about how he was acting toward her, either during that conversation or at any other time. TR at 562, 586-87.

Mr. Panowicz attended the Board's work session on a Sunday afternoon at Mr. Parsons' home, during which the decision was made to terminate Mr. Jones. TR at 564-65. Mr. Panowicz noted that at the time of the meeting, six months had elapsed since the romantic relationship was revealed and "nothing had changed." TR at 565. In determining its course of action, the Board consulted an attorney specializing in employment law, had an "open discussion" about the relationship, and unanimously voted that Mr. Jones should be terminated. TR at 565. Mr. Panowicz recalled that Mr. Parsons was "pretty quiet" during the meeting, which was "unusual" for him. TR at 566. He believed Mr. Parsons "turned it over to the Board to hash out the issue and he did . . . recommend that we talk to the attorney and get her input." TR at 566.

There was also discussion among the Board about whether Complainant should be terminated but, according to Mr. Panowicz, the Board determined that Mr. Jones was the President of the bank, and as the senior executive, "it was his responsibility to resolve the issue and he hadn't done it." TR at 565-66, 595. It was felt that the Board "had put up with it for long enough." TR at 595. Mr. Panowicz testified that he did not advocate for Complainant's termination, and he wanted her to stay on as CFO. TR at 595-96. He further testified that Complainant never told him that she was considering leaving the bank because of how Mr. Parsons was treating her or for any other reason. TR at 596. She never talked to him about any problem she was having with Mr. Parsons or anyone else at the bank. TR at 596. At no time did Mr. Panowicz tell Complainant that he did not want her to leave the bank. TR at 595-96.

Mr. Panowicz testified that he was pleased with Complainant's job performance to the extent he was aware of it. TR at 590-91. He mentioned that after Complainant's resignation, it was discovered that the amount which had been budgeted for a certain insurance plan for executives was not appropriate to cover the expense. TR at 591-92. Other than that, he had no other concerns about Complainant's performance as CFO, or about how she got along other with

other senior executives. TR at 592. He had not heard anyone complain about Complainant's performance (TR at 592), or that she was not doing her job because she was spending time behind closed doors with Mr. Jones. TR at 593-94.

After Complainant's resignation, Mr. Panowicz received a phone call from her indicating that she wanted to file a whistleblower complaint. TR at 566. Mr. Panowicz contacted Mr. Green of Moss Adams, who recommended that Mr. Panowicz and another member of the Audit Committee meet with Complainant to ask about her complaint. After a meeting had been held, Mr. Green recommended that Mr. Panowicz, as Chair of the Audit Committee, hire an outside firm to investigate Complainant's allegations. TR at 566.

Mr. Panowicz denied that Complainant ever expressed concern to him about the conduct or actions of Mr. Parsons prior to her informing him that she was planning to file a whistleblower complaint. TR at 567. He further denies that Complainant used the word "abusive" during any conversation with him. TR at 609.

7. Lisa Furman

Lisa Furman currently serves as Respondent's Vice President, Risk Management Officer. TR at 622. During the period of Complainant's employment with Respondent, Ms. Furman held the title Vice President, Compliance Officer. TR at 624. In her role as Compliance Officer, Ms. Furman was responsible for ensuring the bank's compliance with federal and state laws and regulations. TR at 624, 658. Ms. Furman testified that she assisted Complainant in setting up the bank's whistleblower policy shortly after Complainant came to work for Respondent. TR at 624-25. Ms. Furman is the designated contact person for whistleblower complaints, and is responsible for training employees on whistleblower complaint procedures. TR at 625-26

Ms. Furman has worked for Respondent since 2001 and has known Complainant since 1996. TR at 623, 628. Complainant was Ms. Furman's boss at Respondent, and was also her supervisor for five years at Knight, Vale and Gregory, where she was previously employed. TR at 623, 646. Ms. Furman testified that she and Complainant are "close friends" (TR at 623-24, 646), and that Complainant is or was her "mentor." TR at 672.

Ms. Furman became aware of the romantic relationship between Complainant and Mr. Jones in late January 2005. TR at 626, 687-88. Ms. Furman testified that she, Complainant, Mr. Jones, and another employee were entertaining a vendor in a private room at a restaurant. Complainant and Mr. Jones were seated on the same side of table, but not directly next to each other, when Ms. Furman saw Complainant feed Mr. Jones dessert from her spoon. TR at 627. Later, outside the restaurant, Ms. Furman saw Complainant and Mr. Jones engage in "a hand-holding game, where they were holding hands with each other and has their arms around each other and kind of laughing and giggling." TR at 627. The next day, Complainant called Ms. Furman into a meeting and told her about the relationship. TR at 626-27. Ms. Furman was surprised by the revelation of the relationship. TR at 627-28.

Ms. Furman attended the Audit Committee meeting on February 9, 2005, and recalled a discussion about the Disclosure Committee. TR at 628, 675. She testified that Mr. Parsons

asked about the composition of the Disclosure Committee and was trying to get answers to his questions from the outside consultants present at the meeting. According to Ms. Furman, Complainant kept interrupting, and Mr. Parsons "was getting frustrated and at one point told her to please be quiet, he wanted to hear from Moss Adams who should be on the Disclosure Committee." TR at 629, 676-78. She recalled that Mr. Green responded that it is appropriate for the CEO to be on the committee, and that most of his clients had their "CEO, Chairman, President" on that committee. TR at 677. Ms. Furman did not recall any other significant interaction between Complainant and Mr. Parsons during the meeting. TR at 630.

Ms. Furman testified that throughout the meeting, Complainant was rolling her eyes when Mr. Parsons was talking, which Ms. Furman felt was "embarrassing." TR at 629-30. She further testified that after the meeting, she and Kelly Van Valley went to Complainant's office. TR at 630. She did not recall getting coffee before going to Complainant's office, nor did she recall why she went other than to say that they often got together before or after meetings. TR at 679. Ms. Furman testified that she told Complainant that Mr. Parsons should not have gotten "mad" at her, but that Complainant had acted "completely unprofessional," that everyone could see her rolling her eyes, and that she needed to "tone it down." TR at 630, 679-80. She did not recall with certainty whether Complainant mentioned quitting her job. TR at 680.

Ms. Furman testified that this was the first and only time she ever observed a "hostile" interaction between Complainant and Mr. Parsons. TR at 676, 679, 691. She testified that she felt "uncomfortable" and "didn't enjoy watching the interaction." TR at 630, 678. Ms. Furman felt that Mr. Parsons did get angry (TR at 678) or frustrated (TR at 676), but she did not feel that he belittled or humiliated Complainant during the meeting. TR at 630. She did not view the exchange as a change in the relationship between Complainant and Mr. Parsons. TR at 691.

Ms. Furman testified that there was a Stakeholders' Meeting shortly before February 14, 2005, during which she sat next to Director Panowicz. TR at 683, 688. She believes she commented to Mr. Panowicz that she was concerned that the events at the Audit Committee meeting might lead Complainant to quit her job. TR at 684, 689, 690-91. She could not recall his response, but believed he said "something positive" about Complainant. TR at 684. She did not recall if he intended to speak to Complainant. TR at 684. Ms. Furman denied telling Mr. Panowicz that she would leave the bank if Mr. Parsons caused Complainant to leave. TR at 689.

When Mr. Jones was terminated on February 14, 2005, Ms. Furman was officed at a bank branch located four or five miles from the home office. TR at 644. Ms. Furman believes that Complainant told her of Mr. Jones' firing, although it may have been another bank employee, Mike Myer. TR at 645. Ms. Furman testified that she was "very upset" upon learning of Mr. Jones' termination because Complainant was upset. TR at 631-32, 682. Ms. Furman was "very angry" at Mr. Parsons because Complainant told her that Mr. Parsons called "a secret Board meeting to get [Mr. Jones] fired." TR at 632. Ms. Furman was also angry at Ms. Graves because she thought Ms. Graves participated in the "secret" meeting and was partly to blame for Mr. Jones' termination. TR at 691. At the time of Mr. Jones' termination, Ms. Furman testified that her loyalty lay with Complainant, her friend and boss. TR at 692.

That same day, Ms. Furman went to Complainant's house along with Ms. Van Valley.

They talked about their concern for Mr. Jones and Complainant's future with the bank. TR at 632. According to Ms. Furman, Complainant said she was going to quit her job because "she could no longer work at a place where she didn't respect the decisions of the Board, that she didn't respect the decision they made because in her mind, it wasn't in the best interest of the shareholders." TR at 632. Ms. Furman testified that Complainant did not mention that any of her job responsibilities had been taken away from her, or that her job had changed in any way. TR at 633-34. Ms. Furman said they also talked about how Mr. Parsons was a micro-manager, and how Complainant was planning to talk to Directors Panowicz and DeTray. TR at 632. Ms. Furman testified that Complainant complained that Mr. Parsons' style of management was "too controlling," but she denied that Complainant ever said that Mr. Parsons' treatment of her was "abusive." TR at 634. Ms. Furman believes that Complainant resigned that evening. TR at 636. *But see* RX 16 (Feb. 15 resignation letter from Complainant telefaxed to Mr. Schorno on Feb. 16, 2005).

The day after Mr. Jones was terminated and Complainant resigned, Complainant called Ms. Furman and informed her that she was going to meet with Directors Panowicz and DeTray to discuss her whistleblower complaint. TR at 636. Ms. Furman testified that Complainant called her again after her meeting with them and said to Ms. Furman, "if you or more people would file complaints with the Audit Committee, that maybe all of this would be reversed and her [sic] and [Mr. Jones] could come back to work at the bank." TR at 637. Ms. Furman responded that she did not have any complaints to make. TR at 637. Ms. Furman testified that at that time, Complainant did not say that Mr. Parsons had been retaliating against her, and Ms. Furman did not know what Complainant's whistleblower complaint was about. TR at 637.

Ms. Furman testified that starting six to nine months after Complainant came to work for Respondent and throughout Complainant's employment, they had several conversations wherein Complainant complained that Mr. Parsons was "too involved in things" and that he was a micro-manager. TR at 633, 638. Ms. Furman testified that Complainant also said she was tired of Mr. Parsons asking about her marriage. TR at 633. She further testified that on one occasion, Complainant said that Mr. Parsons was "unethical." TR at 633. When Ms. Furman asked why, Complainant responded, "Because he wants to sell some stock and I won't let him." TR at 633.

Ms. Furman testified that she was not aware in February 2004 of any issues between Complainant and Mr. Parsons pertaining to the price for Mr. Parsons' stock, nor was she aware of any gossip about this issue. TR at 654, 655. She acknowledged that February 2004 might be the approximate time when Complainant began complaining that Mr. Parsons was "too controlling." TR at 654-55. *See also*, TR at 633, 638. Ms. Furman testified that she was not aware at any time prior to Complainant's resignation of any issues regarding the pricing for Mr. Parsons' stock. TR at 655. She knows that the Stock Oversight Committee exists, but she is not involved with it and has no knowledge about it. TR at 656-57. Ms. Furman twice reiterated that the only time she heard anything relating to a stock transaction was when Complainant commented about Mr. Parsons' desire to sell some stock, as noted above. TR at 654, 658.

Ms. Furman testified that prior to Complainant's resignation she never heard any complaint from senior management about Complainant's job performance. TR at 669-70. She was not aware of Mr. Parsons' opinion of Complainant's performance, but she never heard he

was dissatisfied with her. TR at 669-70. Ms. Furman also never heard any criticism of Complainant's supervision of the IT department. TR at 670. She testified that she had worked at another bank location since April 2004, and typically met weekly with Complainant, her direct supervisor. TR at 695. She said that the meetings were sometimes cancelled if Complainant was "doing other things" or "busy working on something else," but Ms. Furman did not feel that Complainant was "difficult to reach." TR at 696.

Ms. Furman testified that she never saw Mr. Parsons "being retaliatory" toward Complainant, and that Complainant never indicated that Mr. Parsons was retaliating against her for anything. TR at 635, 637. She further testified that Complainant had never expressed or suggested that any conduct of Mr. Parsons was in violation of any law, other than her comment that Mr. Parsons was "unethical." TR at 693. *See also*, TR at 633.

To Ms. Furman's knowledge, Complainant did not formally or informally utilize Respondent's whistleblower complaint procedure to bring any complaint to her attention. TR at 639, 692. She opined that Complainant was aware of the complaint process and how to use it, "considering that she wrote it." TR at 639. She acknowledged that a complaining party is not precluded from reporting misconduct directly to the Audit Committee. TR at 661. Ms. Furman does not know whether Complainant brought complaints of improper activity to the Audit Committee or anyone else before she resigned (TR at 663-64), but she testified that the Audit Committee never asked her to follow-up on or investigate any concerns raised by Complainant which might be classified as a whistleblower complaint. TR at 692.

8. <u>Catherine Moseby</u>

Catherine Moseby has been Respondent's Senior Vice President of Human Resources for three years, and is a member of the Executive Management Team. TR at 697-98. She has been in banking for more than twenty years. TR at 698.

Ms. Moseby testified that she attends weekly meetings of the Executive Management Team, wherein senior managers engage in lively discussions and "feel free to take Mr. Parsons on." TR at 711-12. She feels comfortable in challenging Mr. Parsons. TR at 712. She has seen Complainant express her opinion freely during management meetings, and has never seen her suffer any adverse consequences as a result. TR at 713-14. She has never seen Mr. Parsons retaliate against anyone for taking a position contrary to his. TR at 712.

Ms. Moseby testified that she began speculating about a romantic relationship between Complainant and Mr. Jones in late 2003 or early 2004. TR at 699. Her suspicions were based on their spending "numerous" hours together behind closed doors, and one occasion where she entered Mr. Jones' office and saw Complainant sitting in his guest chair with "her legs on the desk." TR at 699-700. She did not believe they were engaged in a sexual act, but felt Complainant's posture was "too relaxed" and "inappropriate." TR at 714-15. She had also heard rumors. TR at 700. Ms. Moseby testified that one of her direct reports told her that she had left a restaurant because Complainant and Mr. Jones were "nestled in a corner and she felt that she needed to get out of there." TR at 700.

Ms. Moseby testified that she officially became aware of the relationship in October 2004, when Mr. Jones was asked by Mr. Parsons to disclose the relationship to members of the Executive Management Team. TR at 700-01, 702. Shortly thereafter, Ms. Moseby, who was recovering from shoulder surgery, telephonically participated in a meeting of the management team to discuss the relationship. TR at 701. She questioned Complainant and Mr. Jones about "what was going to change, because constantly they were behind closed doors and there were people asking me who was in there with [Mr. Jones]." TR at 701-02. According to Ms. Moseby, "they both said that nothing needed to change." TR at 702. Ms. Moseby further testified that no one at the meeting said or implied that the relationship was acceptable, and that it was clear that the management team did not approve of it. TR at 702-03.

Ms. Moseby testified that Complainant complained to her about Mr. Parsons "on a couple of occasions." TR at 703. She next testified that Complainant complained "numerous times" about Mr. Parsons' micro-management throughout her time with the bank. TR at 703-04.

When asked whether Complainant ever complained about retaliation, Ms. Moseby testified that Complainant had mentioned a couple of times that she thought Mr. Parsons was "mad at her" and was "going to fire her." TR at 704. On one occasion, Complainant asked Ms. Moseby to "close" the office because she did not want to be left alone with Mr. Parsons. TR at 704. Ms. Moseby testified that in late 2004 or early 2005, Complainant stated that Mr. Parsons might fire her and that she was being treated unfairly. TR at 704-05. She believes Complainant's comments dealt with a meeting regarding stock transaction, wherein Complainant felt Mr. Parsons was "being very defensive with her." TR at 705. When Ms. Moseby questioned Complainant the following week, Complainant said that she and Mr. Parsons were "back to normal, but that they would probably have another blow-up." TR at 706. According to Ms. Moseby, Complainant denied that Mr. Parsons was treating her unfairly, saying that he treats her "just like he does everyone else." TR at 706.

Ms. Moseby was present at the meeting on February 13, 2005, when the Board decided to terminate Mr. Jones' employment. TR at 706. She testified that the Board discussed how Mr. Jones "openly disclosed to Larry [Schorno] that he was in love with [Complainant] and that [Complainant] and he could run the bank." TR at 707. The Board also discussed how the relationship was impacting the organization. Ms. Moseby did not recall offering her perception of the relationship's impact, and said she mostly listened to the discussion of the Directors. TR at 707.

Ms. Moseby was not present when Mr. Jones was terminated on February 14, 2005. That morning, she attended the Executive Management meeting wherein the senior managers were informed of the termination. TR at 707-08.

After the Executive Management meeting, Ms. Moseby met briefly with Complainant, Mr. Parsons and Director Schorno. TR at 709, 729. According to Ms. Moseby, Mr. Parsons informed Complainant that she would remain CFO, and "the only thing that would change was the security access." TR at 709. Ms. Moseby denied that Mr. Parsons took away the IT department. TR at 709. She said Mr. Parsons told Complainant that "she would not be authorized to make the security decisions." TR at 710. She said that Complainant did not object

to what Mr. Parsons told her, and did not ask any questions. TR at 710.

Ms. Moseby did not recall whether Mr. Parsons used the term "IT" during the meeting. She thought he said "security," which to her meant "adding people, deleting people . . . from our security system." TR at 728-29. Ms. Moseby testified that Mr. Parsons did not restrict Complainant's computer or security access, rather "[h]e was restricting her authorization for other employees' access or changes or deletions." TR at 731. She further testified that Mr. Parsons told Complainant that her role would remain as it was. TR at 731-32. She did not recall whether the changes directed by Mr. Parsons were permanent or temporary. TR at 730-31.

Ms. Moseby testified that on the morning of Mr. Jones' termination, she gave authority to David Leaf, Respondent's "IT Manager," to delete Mr. Jones from the security system.[7] TR at 728-29, 734. She did not instruct Mr. Leaf to make any changes with regard to Complainant's computer or security access. TR at 734. Ms. Moseby testified that there was no change with respect to Complainant's access to the bank's computer system after Mr. Jones was terminated, and it was her understanding that the only alteration of Complainant's responsibilities was the removal of her ability to authorize security access changes, deletions, or terminations. TR at 734-35. As an example, she explained that there is an authorization process for new hires to ensure that a new employee has access to different systems depending on their position within the organization. She further explained that prior to Mr. Jones' termination, Complainant had the ultimate authority to determine what access was appropriate. TR at 735. Ms. Moseby said that Complainant "didn't do a whole lot" with respect to the authorization process before February 14, 2005. TR at 735. Ms. Moseby did not give much thought to the restriction imposed on Complainant's prior authority. TR at 737-38.

At about 4:00 p.m. on February 14, 2005, Complainant informed Ms. Moseby that she had resigned. TR at 711. Ms. Moseby testified that Complainant did not, either formally or informally, express any concern or complaint about Mr. Parsons' treatment of her, or that Mr. Parsons had acted in violation of any law. TR at 711. After her resignation, Ms. Moseby directed that Complainant be deleted from Respondent's computer systems. TR at 735-36.

Ms. Moseby did not conduct an exit interview with Complainant after she resigned. TR at 728. She identified RX 17 as an undated document used to verify that bank property was returned upon Complainant's departure from the company. TR at 728-29; RX 17.

9. James Arneson

James Arneson currently serves as President and CEO of Respondent bank and President of Respondent's holding company. TR at 739. Prior to coming to work for Respondent in September 2005, he was President and CEO of Redmond National Bank and its holding company, Washington Commercial Bank Corporation. TR at 740. From March 1993 through December 31, 2002, he held the position of Executive Vice President and CFO of First

[7] Ms. Moseby testified that on February 14, 2005, David Leaf held the position of "IT Manager." TR at 732-33. She explained that he "basically" took over the position formerly held by Doych Dragt, although her position was never actually replaced. TR at 733. Ms. Moseby testified that Ms. Dragt had been a Vice President, whereas Mr. Leaf did not hold that title. TR at 733-34.

Community Bank, which is now Respondent Venture Bank. TR at 740.

Mr. Arneson testified that he contacted Mr. Parsons on February 15, 2005 after hearing rumors that Respondent's President and CFO had left the company. TR at 751. Mr. Parsons confirmed the rumors and asked Mr. Arneson if he would be interested "leading the company." TR at 751-52. Apparently, Mr. Arneson and Mr. Parsons also discussed the acquisition of Redmond Bank by Venture Bank, which was subsequently announced in a jointly issued press release in April 2005. TR at 746-47. Mr. Arneson denied engaging in any discussion with respect to a merger of the banks prior to February 15, 2005. TR at 478-49.

Mr. Arneson testified that he was familiar with the responsibilities of Respondent's CFO at the time he held that position, and is familiar with the CFO role in general based on his experience in the banking industry. TR at 740-41. He is also familiar with the role the CFO currently plays at Respondent. TR at 741, 744. The CFO position was vacant when Mr. Arneson returned to work with Respondent in September 2005, and he hired Complainant's replacement, Sandra Sager. TR at 741, 744, 750.

Mr. Arneson described the CFO's primary responsibility as overall financial management of the company, including financial and SEC reporting, Board reports, regulatory reports, and management reporting. The CFO also manages the bank's ability to earn profits. TR at 741.

Mr. Arneson testified that Respondent's CFO is currently responsible for overseeing the IT department. TR at 742. He believes that he did not have IT responsibility when he accepted the CFO position in 1993, but gained it shortly thereafter. TR at 742. From that point on, Mr. Arneson testified that the IT department has reported through Respondent's CFO. TR at 742.

As CFO, Mr. Arneson spent "probably less than five percent" of his time on IT-related supervision or functions. TR at 742. He testified that his IT duties were a "peripheral" function, which he believes remains true today. TR at 742-43. He further testified, based on his ten years as Respondent's CFO and his current oversight of the CFO role, a change in IT responsibilities would not represent "a big change," a "material reduction," or a "demotion" with respect to the CFO's duties. TR at 745.

Mr. Arneson testified that when he left Respondent at the end of 2002, Doych Dragt held the position of Vice President of Information Technology.[8] TR at 752. He believes she fulfilled a "meaningful role" which assisted him as then-CFO by reducing the amount of time he had to spend being personally involved in IT functions. TR at 752.

According to Mr. Arneson, Respondent currently has a Vice President of Information Technology, Tom DeCoy, who reports to the CFO. TR at 750. That position was vacant when Mr. Arneson arrived in September 2005, and he filled it shortly thereafter. TR at 750. He agreed that he hired Mr. DeCoy to ensure that the CFO does not have to devote time to functions that Mr. DeCoy's job accomplishes. TR at 753.

[8] Mr. Arneson testified that this title is interchangeable with the title "Information Systems Manager." TR at 750.

10. Lawrence Schorno

Lawrence Schorno has been a member of Respondent's Board of Directors for almost nine years. He is a member of the Stock Oversight Committee, the Compensation Committee, and the Loan Committee. TR at 756-57. The Compensation Committee reviews salary ranges for bank employees and senior management, carries out salary and performance reviews for the Chairman, and negotiates the contracts of Respondent's senior executives. TR at 757-58.

In his capacity as a Board member, Mr. Schorno has interacted with both Complainant and Mr. Parsons. TR at 757. He described Respondent's Board as an "individualistic group of people," who do not always agree with each other. TR at 758. He feels there are "healthy discussions" at Board meetings, and that attendees feel free to, and often do, disagree with Mr. Parsons. TR at 773. He feels that Complainant was not shy about voicing her opinion during Board meetings. TR at 759.

Mr. Schorno testified that the trading of Respondent's stock, including insider trades, was discussed at every Board meeting. TR at 759. Mr. Schorno recalled that at a Board meeting on February 18, 2004, Mr. Parsons offered stock for sale and there was discussion about how to set a price for the transaction. TR at 760-61; RX 8. It was decided that advice should be obtained from legal counsel, and Mr. Schorno did not believe anyone dissented on that issue. TR at 761.

Mr. Schorno recalled attending a subsequent meeting wherein the Board approved the purchase of 22,000 shares from Mr. Parsons at a purchase price of $22.75 per share. TR at 761-62; RX 9. He did not recall if Complainant or anyone else expressed concern about that price, nor did he believe Mr. Parsons asserted undue influence upon the Board with respect to its determination. TR at 762.

Mr. Schorno also recalled a Board meeting wherein the Stock Oversight Committee presented its recommendations regarding another acquisition of stock from Mr. Parsons. He recalled that the Committee had agreed on a method to discount large blocks of stock. TR at 763. Mr. Schorno testified that some Board members questioned whether the recommended price was high enough, and he believed Mr. Parsons expressed that it was better to sell for slightly lower than the recommended price to avoid any appearance of impropriety. TR at 763. He further testified that neither Mr. Parsons nor Complainant objected to the price recommended by the Stock Oversight Committee. TR at 763.

In October 2004, the Compensation Committee, of which Mr. Schorno is a member, was notified by Mr. Parsons of the romantic relationship between Complainant and Mr. Jones. TR at 764. Mr. Schorno testified that he was concerned about the relationship. TR at 764. Once it was disclosed to the full Board, Mr. Schorno recalled that "the Board was concerned about the relationship, as was the Compensation Committee, and [they] let Mr. Parsons know that he would have to inform them that this is something that could not be tolerated." TR at 765.

Following a lunch meeting on Friday, February 10, 2005, Mr. Schorno had a conversation with Mr. Jones about the relationship. Mr. Schorno testified that Mr. Jones asked

for a meeting with the Compensation Committee without Mr. Parsons being present. TR at 765. Mr. Jones stated that since his performance review would come before the Compensation Committee in March 2005, he wanted to discuss his role in operating the bank and his concern that Mr. Parsons' contract might be extended. TR at 765-66. Mr. Schorno testified that he was "a bit taken aback," and told Mr. Jones at that time that he and the other Board members were concerned about his romantic relationship with Complainant. TR at 766. According to Mr. Schorno, Mr. Jones responded that there was no need for concern, as "he was in love with [Complainant] and [he] and [Complainant] could run the bank." TR at 766. Mr. Schorno testified that he told Mr. Jones "that was absolutely not a tolerable situation at all." TR at 766.

That evening at the Stakeholders' Meeting, Mr. Schorno recounted his conversation with Mr. Jones to Linda Bucker, another member of the Compensation Committee.[9] Mr. Schorno and Ms. Bucker agreed they should share the conversation with Mr. Parsons and the Board as soon as possible, and they relayed this to Mr. Parsons at about 9:30 p.m. TR at 766-67.

The meeting requested by Mr. Schorno was held on Sunday evening, February 13, 2005. TR at 767-68. The Board discussed the situation, including Mr. Schorno's conversation with Mr. Jones. Ms. Moseby informed the Board that Ms. Graves had submitted a letter regarding the adverse affects of the relationship on bank operations. TR at 768. Mr. Schorno testified that there was discussion about whether both Complainant and Mr. Jones should be terminated, which was supported by Ms. Bucker. TR at 768. He further testified that ultimately, it was the consensus that Mr. Jones should be terminated since he was the President, "and was in a position of affecting the other members of . . . senior management." TR at 768. Mr. Schorno explained: "[O]ur President is responsible for operating the bank. He's our leader, and we felt that it was his responsibility, since he had been given ample time and instruction to change the relationship [and] this is what we had hoped would have taken place. Obviously, it had not, and it was the Board's feeling that our President is the person most responsible for leading the company. And therefore the committee had lost confidence in his ability to lead." TR at 768-69.

Mr. Schorno testified that toward the end of the Board meeting, someone asked for Mr. Parsons' opinion "because he had not given a great deal of input." TR at 769. Mr. Parsons responded that he understood the situation and was "somewhat of the same opinion." TR at 769. The Board voted unanimously that Mr. Jones should be terminated. TR at 769. There was no vote taken with respect to Complainant's employment. TR at 769.

The following Monday morning, Mr. Schorno was present when Mr. Jones was terminated. TR at 769-70. Mr. Schorno also attended the Executive Management meeting wherein the group was notified of the termination. Afterwards, he met with Complainant, Mr. Parsons and Ms. Moseby. TR at 771.

Mr. Schorno testified that Complainant "was visibly upset over the termination of Jon Jones," and asked if she would be fired next. TR at 771, 775. He testified that Mr. Parsons responded that as long as Complainant "continued to do her job in a professional manner," she would not be terminated. TR at 771, 776-77. He did not recall whether Mr. Parsons told Complainant that she "had some decisions to make." TR at 774-75.

[9] Mr. Schorno testified that the committee's third member, Director Martin, was out of town. TR at 767.

Mr. Schorno testified that Mr. Parsons did not take away any of Complainant's job duties, but he did say that she "would not have exclusive duties with the IT information network for checks and balances reasons." TR at 771. Mr. Schorno took this to mean that "there would have to be more than one person aware of what decisions were made regarding the technology information" (TR at 771-72), and that control of the IT information would be shared by Mr. Parsons and Complainant. TR at 777. Mr. Schorno admitted that he does not recall the "the specific words" Mr. Parsons spoke to Complainant (TR at 776), but he recalled discussion about "access to the computer system – or access to the IT system." TR at 777. Mr. Schorno did not recall Complainant asking any question other than whether she would be fired. TR at 772.

The following day, Mr. Schorno received a faxed resignation letter from Complainant. TR at 772. He did not recall having any conversation with her about the letter. TR at 772.

Mr. Schorno testified that he has never observed Mr. Parsons treat Complainant poorly. TR at 773. He further testified that prior to her resigning, Complainant never brought to him any complaints about unethical or illegal conduct. TR at 773-74.

11. <u>John Guadnola</u>

John Guadnola is a partner in the law firm of Gordon, Thomas & Honeywell in Tacoma, Washington, and has been an attorney since 1971. TR at 383. As part of his regular practice, he has conducted investigations of various clients, including adverse investigations and anti-trust audits. TR at 384.

Mr. Guadnola was charged by Director Panowicz, Chair of Respondent's Audit Committee, to investigate questions about Mr. Parsons' conduct which were raised by Complainant after her resignation. TR at 387. He did not know Mr. Panowicz or Mr. Parsons prior to being retained (TR at 417), and his work with respect to Respondent or any of its present or former employees has been limited to this investigation. TR at 416.

After a brief discussion with Mr. Panowicz, Mr. Guadnola interviewed Complainant and then interviewed other employees who were identified by Complainant as possessing relevant information. TR at 388. He did not prepare any summary or analysis of the witness' testimony. TR at 389. He testified that all statements were given with the expectation of confidentiality in order to encourage candid and honest responses from the witnesses, given the "potential for people to feel that their jobs were in jeopardy if they didn't say the right thing." TR at 389, 402. Most of the interviews were conducted at the bank, while Complainant's and Mr. Jones' interviews took place in Mr. Guadnola's office. TR at 402-03. Mr. Guadnola believes that Respondent's employees were honest and truthful in their interviews. TR at 420.

Mr. Guadnola testified that he concluded based on several factors that Complainant's allegations had "very little, if any, credibility." TR at 390. He noted that Complainant appeared for her interview with a lawyer, and refused to testify under oath or to allow her testimony to be transcribed, even though she had been informed that she would be requested to do so. TR at 390-91. Mr. Guadnola did not mean to imply that Complainant was not entitled to the advice of

a lawyer, or that bringing a lawyer to her interview indicated that she was "dishonest." TR at 395. Rather, he explained that he found it "odd" that Complainant refused to testify under oath and on the record after she had previously agreed to those conditions. TR at 396. He further explained that his conclusions with regard to Complainant's credibility were based principally on what he discovered later, as described below. TR at 396.

Mr. Guadnola testified that at the start of her interview, Complainant denied any romantic relationship between her and Mr. Jones. TR at 391. He further testified that Complainant described a number of events and provided names of employees who she said would corroborate her descriptions, but those employees "either failed to corroborate them or actually told a contrary story." TR at 391. As an example, Mr. Guadnola said Complainant told him about "a transaction with Mr. Parsons . . . where she thought that he had somehow bamboozled the Stock Repurchase Committee into paying an exorbitantly high price . . . [and] that she was outraged by the result. And yet when I talked to the people that she told me would corroborate that, they all told me that she came out of that meeting and said that she was very pleased with herself, because she had persuaded the Committee to take a lower price than Mr. Parsons had originally asked for." TR at 398. In addition, Mr. Guadnola testified that Complainant told him that her co-workers would confirm that she had complained to them about Mr. Parsons' behaving unethically and improperly, but he found that "literally, nothing that she told me about her observations of Mr. Parsons was corroborated by any other people that I talked to . . . other than [Mr. Parsons'] tendency to micro-manage." TR at 398, 417.

In the course of his investigation, Mr. Guadnola reviewed stock transactions going back to 1999 or 2000. TR at 394. His examination focused primarily on what he understood to be Complainant's primary complaints, that Mr. Parsons had purchased stock for his wife's IRA at favorable prices and, towards the end of Complainant's time at the bank, he sold stock back to Respondent, again at favorable prices. TR at 394. Mr. Guadnola explained that on some occasions, Mr. Parsons purchased shares for his or his wife's IRA which had been offered for sale by other shareholders at prices lower than other shares which were available. Mr. Guadnola was concerned that Respondent might have been interested in purchasing shares at those prices, giving rise to the appearance that Mr. Parsons was taking for himself an opportunity that should have gone to the corporation. TR at 405, 419.

While Mr. Guadnola felt there were approximately $3,000 worth of stock purchases by Mr. Parsons "which could conceivably be misinterpreted," he ultimately concluded that nothing improper had happened. TR at 394. He reached this conclusion because there was no indication of any pattern to the transactions, and the amounts involved were "de minimis." TR at 406. Mr. Guadnola further concluded that Mr. Parsons did not act with the intent to divert any corporate opportunity for himself or to do anything otherwise improper. TR at 394-95, 406, 407.

Mr. Guadnola prepared a two-page report summarizing the results of his investigation and his conclusions, as well as a brief memorandum containing his recommendations for certain changes. TR at 388-89; RX 18. Mr. Guadnola's report provides: "Nonetheless, the transactions raise an appearance of impropriety and we recommend that the company institute procedures to eliminate even the appearance of favorable treatment of insiders in the future." TR at 409-10; RX 18. Mr. Guadnola's first recommendation was that Respondent be contacted before an

insider is allowed to purchase stock. TR at 417-18. The second recommendation dealt with Ms. Baxter's sharing of information related to the investigation with Mr. Parsons. TR at 418.

12. Ken E. Roberts

Ken Roberts has been a partner with the law firm of Foster Pepper for eighteen years, and has been an attorney for 36 years. TR at 422. His areas of expertise include corporate finance securities, representing public and private companies and predominately financial institutions. TR at 423. In 2003, Foster Pepper began representing Respondent in corporate finance matters, including SEC reporting. TR at 423. Mr. Roberts provides Respondent with securities law counsel on an 'as needed' basis. TR at 423.

Mr. Roberts testified that in February 2004, Complainant approached him with concerns about the prices paid by Respondent to repurchase stock from insiders. TR at 425. Mr. Roberts explained that Respondent's Board of Directors had authorized management to purchase a certain number of shares of stock over a period of time, but there was no requirement that any number of shares be purchased and no specific price had been set. TR at 425-26. Mr. Roberts does not believe Respondent had a policy regarding the pricing of stock purchases from insiders when Complainant contacted him in February 2004. TR at 425. He recommended to Complainant that the Board formulate and adopt such a policy, including a methodology for determining the price of shares being repurchased by Respondent. TR at 425.

Mr. Roberts' recommendations to Complainant were twofold. He first advised that when an insider offers stock for resale to the company, analysis should be put into whether buying the stock is the best use of capital. TR at 426. Mr. Roberts opined that an insider who is selling stock should not be making the decision as to whether the company should purchase it. TR at 428. Secondly, once it is determined that the shares should be purchased, Mr. Roberts recommended that the Board form a committee and develop a protocol for determining what price Respondent should pay for the shares. TR at 427-28.

With regard to pricing, Mr. Roberts did not believe Respondent had ever "talked about what the right price was" for its stock. TR at 427. He explained there is no "market maker" for Respondent's stock, and all trades are "private transactions." TR at 427. Respondent does not set a share price, but would provide the most recent trading prices to parties interested in buying or selling shares. TR at 427. A price is then determined by the buyer and seller. TR at 427.

Complainant raised the question of what price Respondent would pay if it were the buyer in a proposed sale by a shareholder. Mr. Roberts testified that in such cases, Respondent had generally been inclined to pay "market price." TR at 427-28. The question remained, however, whether "market price" is the last price at which the stock traded, or some other price. TR at 428. Mr. Roberts also discussed with Complainant whether it was appropriate, in a situation where Respondent wanted to buy a large block of stock from a shareholder, for the price to be set "at the higher end, because it's hard to buy a larger block, or . . . at the lower price, because it's harder to sell a larger block." TR at 428. In either event, Mr. Roberts advised Complainant that Respondent should develop a protocol for dealing with these issues. TR at 428.

Mr. Roberts recalled that Complainant's questions about acquisitions of shares held by company insiders were raised in connection with the proposed acquisitions of Mr. Parsons' stock and that of another Director. TR at 428-29. He did not recall telling Complainant that any transactions were improper, or that any transaction needed to be "unwound." TR at 429. Mr. Roberts also did not recall whether Complainant raised concerns about insider trading, black-out periods,[10] or short-swing profits[11] between February 2004 and February 2005. TR at 430-32.

DISCUSSION

Actions brought under Sarbanes-Oxley are governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. 18 U.S.C. § 1514A(b)(2)(C). To prevail on a complaint of retaliation under the Sarbanes-Oxley whistleblower provisions, a complainant must show by a preponderance of evidence that: (1) she engaged in a protected activity; (2) the employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1980.104(b), 1980.109(a); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, 2003-SOX-8 (ARB July 29, 2005). If the complainant succeeds in establishing that protected activity was a contributing factor, the employer may escape liability if it can establish by clear and convincing evidence that it would have taken the same adverse action in absence of the complainant's protected activity. 18 U.S.C § 1514A(b)(2)(C); 29 C.F.R. § 1980.109.

A. Credibility Analysis

Complainant

Generally, I find Complainant's testimony to be credible as to her overall chronology of events and the fact that prior to the Audit Committee meeting on February 9, 2005, Mr. Parsons was always respectful of Complainant's opinions and integrity. TR at 163-64.

Observing Complainant's demeanor at hearing, I saw her counsel continuously ask her leading questions which Complainant refused to answer directly, but instead, responded evasively adding information that Complainant deemed relevant but which was not asked for. *See e.g.* TR at 19, 68, 96-97, 104-10, 121-26, 133-37, 158-59, and 169.

Complainant's testimony is inconsistent, misleading, and contradicted, however, by an overwhelming amount of other evidence in the record which completely undermines her credibility with respect to proving the elements of her whistleblower complaint. For example, I find Complainant's credibility impeached as follows:

[10] Mr. Roberts testified that prior to February 2004, he and Complainant discussed that Respondent did not have an "insider trading policy," but he did not recall any specific conversation between February 2004 and February 2005 addressing whether a particular trade occurred within a "black-out period," which he defined as a "period in time in which insiders, by policy, are agreed not to effect trades in stock transactions." TR at 431-32.

[11] *See* 17 C.F.R. § 240.16b-3. *See also*, TR at 432-33.

1. The circumstances surrounding the February 9, 2005 Audit Committee meeting with outside auditor Jeff Green concerning the propriety of Mr. Parsons participating on Respondent's disclosure committee as testified to by Complainant were not confirmed by any other witness despite the consistent listing of meeting attendees including Mr. Parsons, Mr. Panowicz, Mr. Manspeaker, Mr. DeTray, Mr. Jones, Ms. Graves, Mr. Marley, internal auditor Ms. Van Valley, and Ms. Furman. Other than Complainant, the witnesses who testified contradicted Complainant's version of the facts about what was said at the meeting between Complainant and Mr. Parsons, the tone of the conversation, and the propriety of Mr. Parsons' belief that he should be a member of the disclosure committee as confirmed by external auditor Jeff Green. The overwhelming weight of the evidence supports Respondent's version of what transpired at the meeting on February 9, 2005 and not the facts as stated by Complainant. The witnesses credibly testified that it was appropriate for Mr. Parsons to be a member of the Disclosure Committee and that Complainant, and not Mr. Parsons, acted unprofessionally at the February 9, 2005 meeting. TR at 163-72 versus TR at 286-88, 455-58, 496-98, 509-16, 522-524, 560-62, 570, 601-04, 628- 31, and 773.

2. Complainant's testimony included events that involved Mr. Jones, Mr. Marley and Ms. Van Valley, Respondent's former internal auditor, who was hired away from Respondent by Complainant to assist her at her employer at the time of trial. *See* TR at 129, 164, 170, 286, 376, 416, 754-55, and 779. I find it highly relevant and undermining to Complainant's veracity that she chose not to call any of these three people as potentially corroborating witnesses, particularly as no evidence was submitted that any of these witnesses were unavailable.

In conclusion, I witnessed Complainant's demeanor at trial and find that her temperament, evasiveness, and reaction to criticism were consistent with much of the testimony from the other witnesses that rather than any abusive conduct by Mr. Parsons in response to Complainant's questioning of insider stock transactions, it was her romantic relationship with Mr. Jones while both were still married and occupying high-ranking officer positions at Respondent that resulted in the relinquishment of Complainant's IT responsibilities and her corresponding resignation. Complainant was clear to testify that Mr. Parsons was not hostile or abusive toward her at any time before the February 9, 2005 Audit Committee meeting. As stated above, the overwhelming weight of evidence shows that Complainant acted unprofessionally by interrupting Mr. Parsons' questions at the February 9, 2005 meeting. The evidence also shows that the Board had instructed Complainant and Mr. Jones to resolve their romantic relationship beginning in October 2004 and both ignored these instructions and even flaunted their romance for close to four months without achieving the requested resolution.

Based on the foregoing inconsistencies and contradictions in Complainant's testimony and behavior, I conclude that she was not a credible witness and accord little weight to her testimony concerning the events which took place from October 2004 through February 16, 2005.

Rick Panowicz, Lawrence Schorno, and Jewell Manspeaker

I find the group of directors/Respondent committee members listed above to be the most credible of all the witnesses at trial as their testimony was consistent and effortless. Each director had a wealth of successful experience both related to Respondent and outside Respondent. Each director described Complainant's abilities as CFO in flattering terms. Ultimately, their testimony made it clear and convincing to me that the termination of Mr. Jones as Respondent's president and the related repercussions involving removal of Complainant's IT responsibilities were driven exclusively by their romantic relationship which had not been resolved as of February 13, 2005. Complainant's attempt to tie Respondent's action in restricting her network access to any protected activities in 2004 or 2005 fails, as none of the three directors corroborated Complainant's testimony. Instead, their testimony supported Respondent's prudent decision to terminate Mr. Jones from his leadership position and properly safeguard Respondent's IT system by restricting Complainant's access to Respondent's computer system until the effects of Mr. Jones' termination blew over.

Ken Parsons

Mr. Parsons was a credible witness with respect to the events taking place at the February 9, 2005 Audit Committee meeting as they were consistent with every other witness except Complainant. While I hesitate to believe that Mr. Parsons took a passive role at the Board meeting on Sunday, February 13, 2005 at his home, other witnesses credibly testified that this was the case. *See* TR at 526, 566, and 769. Ultimately, however, Mr. Parsons held but one vote as a director and the testimony from the other directors shows that they were aligned and unanimous in their decision to remove Mr. Jones as president of Respondent given their cumulative loss of confidence in his judgment due his failure to resolve the romance with Complainant while they occupied highly visible offices of power as Respondent's president being groomed to succeed Mr. Parsons as CEO, and as CFO.

James Arneson

As CFO, Mr. Arneson stated that he spent "probably less than five percent" of his time on IT-related supervision or functions. TR at 742. He testified that his IT duties were a "peripheral" function, which he believes remains true today. TR at 742-43. He further testified, based on his ten years as Respondent's CFO and his current oversight of the CFO role, a change in IT responsibilities would not represent "a big change," a "material reduction," or a "demotion" with respect to the CFO's duties. TR at 745. I give less weight to Mr. Arneson's testimony regarding his former position as Respondent's CFO because he did not show me that he was as qualified as Complainant to conduct IT audits or as experienced with Respondent's computer system as Complainant. He did not have personal knowledge as to how Respondent's CFO position during Complainant's time compared with his tenure regarding specific responsibilities and duties. As a result, I find his testimony about Respondent's IT responsibilities irrelevant and speculative as applied to Complainant.

John Guadnola

Mr. Guadnola alleged that he conducted his own "independent" whistleblower investigation into allegations against Mr. Parsons by Complainant after her resignation. I disregard his investigation since there was no evidence presented to support his conclusory findings of March 18, 2005 other than what he testified about. I do give weight, however, to his finding that stock transactions involving Mr. Parsons and his wife as Respondent insiders "raise the appearance of impropriety and we recommend that the company institute procedures to eliminate even the appearance of favorable treatment of insiders in the future." RX 18 at 1 and 2.

The Remaining Witnesses

The remaining witnesses were credible in their testimony which was consistent with Respondent's theme of its case, particularly describing: (1) the events of the February 9, 2005 Audit Committee meeting; (2) the uncomfortable work relationship between Respondent employees on one hand and Complainant and Mr. Jones on the other hand involving the couple's perceived work-related romantic exchanges, especially after October 2004; and (3) the events immediately leading up to Complainant's resignation on February 16, 2005. Ms. Moseby predictably testified about the various personnel actions concerning Complainant and her role in support of Respondent. Other than with respect to credible testimony regarding Respondent's personnel policies and procedures, I give less weight to the testimony from Respondent's Human Resources witness because such individuals are generally less objective and more trained in the area of employment litigation than Respondent's other employees.

B. Protected Activity

Employees of publicly traded companies engage in protected activity under SOX when they "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to . . . a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514(A). "While the employee is not required to show that the reported conduct actually caused a violation of the law, [s]he must show that [s]he reasonably believed the employer violated one of the laws or regulations enumerated in the Act." *Tuttle v. Johnson Controls*, 2004-SOX-76, at 3 (ALJ Jan. 3, 2005) (quoting *Ames Department Stores, Inc., Stock Litigation*, 991 F.2d 953, 967 (2nd Cir. 1993)).

Complainant contends that she engaged in protected activity in January 2005, when she notified Mr. Parsons of her belief that the price he sought for 45,000 shares of stock he offered for repurchase by Respondent was "excessive as an inside trade." ALJX 11 at 7. Respondent denies that Complainant engaged in protected activity, arguing that Complainant could not have reasonably believed that Mr. Parsons' listing his shares for sale at a price at which other shares had recently sold is a violation of any law or regulation enumerated in the Act. *Id.* at 7-8.

Respondent also points out that the price to which Complainant objected was not the price Respondent ultimately offered and paid for Mr. Parsons' stock. *Id*. at 9.

Complainant is not asserting that she was retaliated against for raising similar concerns about the price sought by Mr. Parsons for a block of his stock in February 2004. *See* TR at 93-4, 117; ALJX 11 at 7. Nevertheless, as discussed below, the events of February 2004 have some bearing on the question of whether Complainant's actions relating to Mr. Parsons' proposed sale of stock in January 2005 constituted protected activities under SOX.

Complainant testified that on February 12, 2004, she became aware that Mr. Parsons had authorized on behalf of the company the repurchase of 12,500 shares of stock owned by Director Martin at $22.92 per share, and 22,000 of his own shares at $22.95 per share. TR at 82, 89, 91. Complainant believed the transaction was not in the shareholders' best interests because Mr. Parsons had authorized Respondent to purchase the stock at prices higher than those at which the stock had previously traded. TR at 82-3, 88. She also believed that in a non-publicly traded company, large volumes of stock should be discounted. TR at 88.

Complainant informed Mr. Jones about Mr. Parsons' stock trade and contacted outside counsel, Ken Roberts. TR at 84. She then spoke to Mr. Parsons about her concerns, at which point Mr. Parsons reversed his trade. TR at 84, 274-75. Thereafter, at a meeting of the Board of Directors on February 18, 2004, Mr. Parsons shared that he planned to sell approximately 45,000 shares of stock at some point in the future. It was recommended that Complainant obtain a legal opinion from Mr. Roberts on stock repurchase issues, which she did on February 18 or 19, 2004. TR at 100, 101-02; RX 8.

On February 19, 2004, the Board had a telephonic conference to follow-up their discussion regarding stock acquisitions from insiders. The minutes of the meeting reflect that "insider trading," and specifically Rule 10b-5, had been discussed with Mr. Roberts.[12] RX 9. The minutes note that Rule 10b-5 "discourages buying and selling stock from insiders at a higher price than from other shareholders," and "suggests refraining from buying or selling stock from insiders during 'black out' periods or during 'significant events,' and to be cognizant to not manipulate stock prices." RX 9. It was further noted that Mr. Roberts recommended forming a committee to set stock purchase guidelines, in order to "remove the decision-making from management and move it to a more neutral position." RX 9. Thereafter, the Board agreed to authorize purchase of 22,000 shares of Mr. Parsons' stock at $22.75 per share, rather than his requested price of $22.95 per share. TR at 84; RX 9.

It is not clear from the record whether Mr. Parsons' transaction was fully consummated and had to be "unwound," or whether he stopped the transaction before it was consummated. Similarly, it is not clear whether Mr. Roberts recommended "unwinding" the transaction. *See* TR at 274-75 (Mr. Parsons testified that the sale was not consummated); TR at 97 (Complainant testified that Mr. Roberts recommended unwinding the transaction); TR at 429 (Mr. Roberts does not recall recommending an unwinding). In addition, Mr. Roberts does not recall advising Complainant that this or any other transaction was "improper." TR at 429.

[12] *See* 17 C.F.R. § 240.10b-5.

It is apparent, however, that once Complainant communicated her concerns about the February 2004 transaction, Mr. Roberts recommended that Respondent establish a formal process for setting the stock prices in sales by company insiders in the future. TR at 97, 425-28; RX 9. Mr. Roberts testified that Respondent did not have a policy pertaining to the pricing of stock repurchases from insiders at the time Complainant contacted him in February 2004. TR at 427. Thereafter, at meetings of the Board of Directors held on March 31, 2004 (RX 10) and April 21, 2004 (RX 11), the board unanimously voted to approve the formation and ratify the appointment of the Stock Oversight Committee. TR at 110, 211, 279; RX 10, 11. On April 21, 2004, the Board approved a "Stock Repurchase Policy," which established a framework for discounting the share price based on the volume of the transaction. TR at 110, 115; RX 11.

I am persuaded that the reasonableness of Complainant's concerns about the February 2004 transaction is borne out by the subsequent prompt formation of the Stock Oversight Committee and the Stock Repurchase Policy in early 2004. Both measures were put into place at the recommendation of outside securities counsel, and I find that their aim was to ensure that Respondent would not run afoul of Rule 10b-5 or other securities laws in setting stock prices for sales by company insiders.

In the course of the discussion initiated by Complainant in February 2004, Mr. Parsons announced his intent to sell 45,000 shares at some point in the future. *See* RX 8. Complainant was asked to, and did, seek advice from Mr. Roberts with regard to the planned sale, and I find that the aforementioned Stock Oversight Committee and Stock Repurchase Policy were established in part in anticipation of that and other future stock repurchases from insiders. *See* TR at 100, 101-02; RX 8.

The transaction alluded to by Mr. Parsons in February 2004 was not carried out until December 2004, at which time Mr. Parsons informed Complainant that he wanted to sell 45,000 to 47,000 shares at $23 per share, discounted by two percent. TR at 149. *See also*, TR at 282; CX 38. Complainant testified that she told Mr. Parsons that $23 per share was not the fair market value of the stock and it would therefore not be in the shareholders' best interest for Respondent to acquire his stock at that price. TR at 149-50, 154.

At trial, Complainant explained that a price of $23 per share reflects a price earnings ratio of between 20 and 21, whereas Respondent's stock had historically traded in the range of 14 to 15 times earnings (TR at 149, 153), and had never traded at above 15 times earnings while she was affiliated with Respondent. TR at 153-54. While she acknowledged that the stock traded at prices ranging from $22 to $22.90 per share in January 2005 (TR at 229-30), and from $21.15 to $22.75 per share in February 2005 (TR at 230), Complainant opined that those prices were "inflated."[13] TR at 149, 229-30. She felt those sales do not provide a statistically significant basis to set a price for the 45,000 shares offered by Mr. Parsons. TR at 241. Complainant emphasized that those were external trades, "people who are trading amongst each other," not

[13] The minutes of the meeting of the Board of Directors held on January 19, 2005 reflect that Mr. Parsons shared that there were currently 13,500 shares of stock available for sale, including (approximately): 2,500 shares for sale between $22 and just under $22.90 per share; 4,000 shares at $22.90 per share,; and approximately 7,000 shares at $23-$30 per share. RX 14. It is noteworthy that these were offerings of shares for sale, not consummated sales.

repurchases of stock by Respondent. TR at 241. Complainant opined that, where the holding company is paying for the shares, "that's where our legal responsibility as the CFO, as the CEO, as the stockholders' repurchase committee . . . comes in." TR at 241. She testified that it is "not ethical for the holding company to buy back shares" at an "inflated" price. TR at 241.

The Stock Oversight Committee met on January 5, 2005, and according to the meeting minutes, "the question was asked again if the stock was over-inflated, and if so, by how much?" CX 38. The Committee agreed "that a fair and acceptable trade price needed to be established," but they wanted more information before making a decision. CX 38. At the subsequent Committee meeting on January 19, 2005, Complainant discussed the analysis and peer information which had been gathered from outside consultants. RX 15. The Committee established that meetings may need to be held quarterly, and that "share repurchases will follow the industry very carefully with regard to industry consistency and the [price earnings] ratios." RX 15. The Committee set a buy-back price of up to $21.50 per share, which was later presented to and accepted by the full Board. TR at 219; RX 14, 15. Thus, the price set by the Committee was lower than the $23 per share Mr. Parsons had originally requested.

Complainant believes that in presenting her arguments to Mr. Parsons and then to the Stock Oversight Committee about the impropriety of the share price requested by Mr. Parsons, she was engaging in an activity protected under Sarbanes-Oxley. TR at 157. She further alleges that "the very fact that the process of the Stock Oversight Committee was initiated authenticates the fact that" she provided proper notification of her concerns. ALJX 11 at 7-8.

Respondent argues that Complainant's objecting to the price at which Mr. Parsons listed his shares does not demonstrate that "she was 'providing a report' that Respondents were engaging in an actual or suspected legal violation, or about to commit fraud." ALJX 8 at 11. Respondent therefore asserts that Complainant has failed to demonstrate by a preponderance of the evidence that she "provided information" of an actual or suspected violation to someone with authority to investigate that matter. *Id.* at 12.

Respondent's argument is without merit. It is undisputed that when Mr. Parsons informed Complainant in December 2004 that he wanted to sell some stock, Complainant, as CFO, had authority to approve the sale but she declined to do so. *See* TR at 149-50 (testimony of Complainant); TR at 273-74, 281 (testimony of Mr. Parsons). Mr. Parsons and Complainant also agree that Complainant called for the meeting of the Stock Oversight Committee in January 2005 to review the proposed transaction. *See* TR at 282 (Mr. Parsons' testimony that Complainant called for meeting of the Stock Oversight Committee); TR at 111 (Complainant's testimony that she called the Committee meeting in January 2005). *But see* TR at 463-64, 479 (Ms. Graves' testimony that Mr. Parsons called the meeting of the Stock Oversight Committee). I find that Complainant "provided information" and/or "caused information to be provided" to Mr. Parsons, who is "a person with supervisory authority" over her, by refusing to approve his proposed transaction and alerting him of her belief that the price he requested was not the fair market value of the stock. *See* TR at 149-50, 154. Thereafter, I find that Complainant "provided information" and/or "caused information to be provided" about her concerns to the Stock Oversight Committee and the full Board of Directors, which are entities "with authority to investigate, discover, or terminate misconduct" within the meaning of Sarbanes-Oxley. 18

U.S.C. 1514(A); 29 C.F.R. § 1980.102(a). That Complainant did not utilize Respondent's formal whistleblower policy does not alter this conclusion, as she brought her concerns to the attention of appropriate authorities.

The question that remains is whether Complainant provided information about conduct which she reasonably believed violated or had potential to violate any law covered by Sarbanes-Oxley. I find that in both February 2004 and January 2005, employing her familiarity with the stock's trading history, Complainant voiced concerns about implications of insider trading which were raised by CEO Parsons' offerings of relatively large blocks of stock for repurchase by Respondent, at prices she could reasonably have considered to be "inflated." I find that Complainant's stated reasons for concluding that the prices sought by Mr. Parsons in both transactions were unfavorable to Respondent's shareholders were well-explained and credible. *See* TR at 82-8 (involving February 2004 transaction) and TR at 149-54, 229-41 (involving January 2005 transaction). Moreover, I find that in February 2004, Complainant raised concerns about possible violations of one or more of the laws enumerated in Sarbanes-Oxley. This is demonstrated by the ensuing discussion at the February 19, 2004 Board meeting of Rule 10b-5 and its restrictions on insider trading, and by the subsequent remedial actions taken by the Board in forming the Stock Oversight Committee and Stock Repurchase Policy. *See* RX 9.

Although Complainant testified that Mr. Parsons did not retaliate against her for questioning his February 2004 stock transaction, she further testified that she felt it was her responsibility to Respondent's shareholders to continue to monitor the propriety of similar transactions in the future. TR at 93-4, 97, 117. While the formation of the Stock Oversight Committee was approved by the Board shortly after the February 2004 transaction, and the Committee intended to hold quarterly meetings (RX 10), there is no evidence in the record showing that it did in fact meet regularly thereafter. *See, e.g.*, TR at 150. Consequently, in January 2005, it remained to be seen whether the measures which had been taken, namely the formation of a committee to review stock transactions by insiders and a formal Stock Repurchase Policy, would be fully effective in accomplishing their purpose. In light of this situation, I find that Complainant acted reasonably in again raising concerns about the transaction proposed by Mr. Parsons in January 2005.

It is also noteworthy that the Stock Oversight Committee treated Complainant's concerns seriously enough to call for additional research and analysis before setting a price for Mr. Parsons' 45,000 shares. After Complainant shared the results of that research, the Committee settled on a price lower than the one to which Complainant originally objected. Corporate action taken based on the information provided by a so-called whistleblower is strong indicia that it could support a reasonable belief the conduct reported implicates a violation of the enumerated provisions. *See* Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, 148 Cong. Rec. S7418, 7420 (daily ed. July 26, 2002). *See also, Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365 (N.D. Ga. 2004). In addition, Respondent's remedial actions in response to Complainant's earlier expressed concerns about the February 2004 transaction, and Complainant's knowledge of and involvement with those actions, further support the reasonableness of her concerns with respect to the later transaction in January 2005. Even Mr. Guadnola's investigation concluded that Respondent's stock transactions involving Mr. Parsons and his wife as Respondent insiders "raise the appearance of impropriety and we recommend that

the company institute procedures to eliminate even the appearance of favorable treatment of insiders in the future." RX 18 at 1 and 2.

Viewing these circumstances as a whole, I find that Complainant actually and reasonably believed that the transaction Mr. Parsons proposed in January 2005 had potential to violate of one of the laws or regulations enumerated in Sarbanes-Oxley. *See Tuttle*, *supra*, at 3. Accordingly, it is my conclusion that Complainant was engaged in protected activity when she communicated her concerns to Mr. Parsons and the Stock Oversight Committee. There is no real dispute that Respondent was aware of Complainant's activity.

C. Adverse Action

Sarbanes-Oxley prohibits covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because of the employee's protected activity. *See* 18 U.S.C. § 1514A(a).

Several administrative decisions have held that a complainant must show that her employer's allegedly adverse action had some "tangible job consequence." *See Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23, at 12 (ALJ Dec. 9, 2004) (citations omitted). *See also, Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-33, at 24 (ALJ Oct. 5, 2005) ("An employment action must produce some tangible job consequence to be considered an 'adverse action' within the context of [SOX]."). A "tangible job consequence" has been defined by the United States Supreme Court as one which "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries v. Ellerth*, 524 U.S. 742, 761 (1998).

In contrast to the aforementioned standard, other whistleblower decisions define adverse action more liberally. *See Hendrix, supra*, at 12 (citing *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993)) (other citations omitted). The Ninth Circuit takes an expansive view of adverse action, defining such action as one which is "reasonably likely to deter employees from engaging in protected activity." *See Id*. at 13-14 (citing *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000)). I find that it is reasonable in this case, which arises in the Ninth Circuit, to adopt the Ninth Circuit's standard for adverse action.[14]

At Complainant's urging, I note that her retaliation claim against Respondent is not limited to "being constructively discharged on February 14, 2005." *See* ALJX 11 at 2, 4-5. While she continues to assert that her "whistle blowing" pertaining to Mr. Parsons' stock trading activities lead to her constructive discharge, she also contends that Mr. Parsons' sudden change

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

in behavior in early January 2005, including his treatment of her in meetings with other employees and directors, and culminating in his revoking her supervisory authority over the IT employees, "constituted a demotion, threats, harassment and other matter of discrimination against her because of her protected activities."[15] ALJX 11 at 5.

To fully address Complainant's claims, the evidence relating to each alleged act or series of acts of retaliation is examined below in order to determine whether any of these acts, viewed independently, constitute adverse employment actions. Thereafter, the alleged conduct is viewed in its totality in order to determine whether Complainant was constructively discharged or suffered a hostile work environment because of it.

1. Questioning Complainant's Authority

Complainant asserts that Mr. Parsons' behavior toward her changed after the January 5, 2005 meeting of the Stock Oversight Committee, and in her testimony she provided several examples which are grouped together here for purposes of determining whether the actions alleged constitute adverse employment actions.

Complainant first asserts that in weekly management meetings, Mr. Parsons belittled her, and questioned her decisions and authority. TR at 161-62. She next asserts that she obtained information from outside consultants about the valuation of deferred compensation plans, which she shared with Mr. Parsons. The next day, she discovered Mr. Parsons "had obviously contacted them and questioned the information that I had shared with [him]." TR at 162. Similarly, Complainant asserts that on a third occasion, Mr. Parsons asked and Complainant confirmed that she had questioned certain language in an engagement letter from an outside consulting firm, yet Mr. Parsons "turned around and called the partner and asked if I had, indeed, questioned the language in the engagement letter—and I had." TR at 162-63. Complainant explained, "it was humiliating and aggravating and irritating that all of the sudden now, behind my back [Mr. Parsons] was questioning me, questioning my information that I provided him, questioning my integrity, questioning my ability to do my job." TR at 162-63.

As stated above, I find that neither Complainant's assertions that Mr. Parsons belittled, humiliated, and/or questioned her in weekly management meetings, nor the examples she provided of Mr. Parsons' questioning of her authority, are corroborated by any witness to the alleged conduct or substantiated by any other evidence in the record.

Ms. Graves, a member of the Executive Management team and regular attendee of the weekly management meetings, did not observe Mr. Parsons exhibit any negative attitude toward

[15] Although she does not raise the argument in her Revised Complainant's Closing Brief (ALJX 11), Complainant appeared to allege during the hearing that Respondent engaged in a "continuing course of retaliatory conduct" after she resigned on February 14, 2005. *See, e.g.*, TR at 185-87 (post-resignation press releases) and 206-08 (terms of severance agreement). There is no indication that any allegations of retaliatory post-resignation conduct were included in Complainant's complaint before OSHA or that OSHA considered such allegations. *See* RX 19; ALJX 1. To the extent that Complainant asserts that Respondent engaged in retaliatory conduct after her resignation, I find that the allegations constitute separate alleged violations of Sarbanes-Oxley. Accordingly, she is required to file a timely complaint before OSHA addressing each allegation. No such allegations are considered herein. Complainant may have other recourse for her post-resignation allegations under other employment law statutes in other forums.

Complainant in January or February 2005. TR at 503. Similarly, Director Panowicz denied witnessing any antagonistic conduct by Mr. Parsons toward Complainant at any time after the January 5, 2005 Stock Oversight Committee meeting. TR at 560. He also denied that Complainant expressed any concern to him that Mr. Parsons was retaliating against her or about his conduct toward her. TR at 562, 586-87. Director Schorno also testified that he never saw Mr. Parsons treat Complainant poorly. TR at 773.

Ms. Furman, a close friend of Complainant's, never saw Mr. Parsons "being retaliatory" toward Complainant, and testified that Complainant never made any statements to the effect that Mr. Parsons was retaliating against her for anything. TR at 635, 637. Ms. VanValley, Mr. Marley and, most surprisingly, Mr. Jones, did not testify in support of Complainant's case.

Ms. Graves recalled that in or about December 2004, Complainant expressed concern about Mr. Parsons' approach in selling his stock but Ms. Graves did not ask for details and did not fully understand the transaction at issue. TR at 463-64. Complainant also once mentioned to Ms. Graves that she "took a stand" against Mr. Parsons with the Stock Oversight Committee, and was concerned "about what the repercussions of that would be." TR at 463, 479. Ms. Graves said she pointed out to Complainant, and Complainant agreed, that Mr. Parsons had been the one to call the meeting of the Stock Oversight Committee. TR at 463-64, 479. Ms. Graves did not feel that Complainant's concerns about "repercussions" were "reasonable." TR at 504.

Ms. Moseby testified that in late 2004 or early 2005, Complainant said that Mr. Parsons "may fire her" and that she was being treated unfairly. TR at 704-05. Ms. Moseby believed Complainant's comments dealt with a meeting about a stock transaction, wherein Complainant felt Mr. Parsons was "being very defensive with her." TR at 705. Ms. Moseby said she followed up with Complainant the next week, and Complainant said she and Mr. Parsons were "back to normal, but that they would probably have another blow-up." TR at 706. Ms. Moseby said that Complainant denied feeling that Mr. Parsons was treating her unfairly. TR at 706.

I find that Ms. Graves' testimony supports that Complainant expressed worry about the possibility of "repercussions" for her raising questions about a stock transaction involving Mr. Parsons, but it does not establish that Complainant actually experienced any repercussion or act of retaliation. I note that Ms. Graves had little, if any, understanding of the transaction to which Complainant referred, and I find that Ms. Graves' testimony that it was Mr. Parsons who called the Stock Oversight Committee meeting is contradicted by other evidence and is likely inaccurate. *See* TR at 282 (Mr. Parsons' testimony); TR at 111 (Complainant's testimony). For these reasons, I do not give Ms. Graves' testimony much weight as it pertains to this issue.

Similarly, I find that Ms. Moseby's testimony, while providing some support for Complainant's assertion that she was having difficulties with Mr. Parsons in late 2004 or early 2005, is somewhat vague as to her recollections and therefore is not particularly reliable. Moreover, her testimony appears to be that whatever problems Complainant was having with Mr. Parsons during this time period had pretty much resolved. *See* TR at 706.

In sum, the testimonial evidence described above does not support a finding that Complainant was harassed, belittled, humiliated or otherwise mistreated by Mr. Parsons after

raising concerns about his proposed stock trade in January 2005.

Moreover, the record reflects that Complainant had complained about Mr. Parsons' management style, most notably his tendency to micro-manage her, well before January 5, 2005. Ms. Graves testified that she and Complainant had exchanged complaints about Mr. Parsons' micro-management, and she felt that Complainant's complaints had increased during the last 90 days of her employment, i.e. around November 2004. TR at 455, 462, 466-70, 499. Similarly, Ms. Furman testified that Complainant complained that Mr. Parsons was "too involved in things," and that he was a micro-manager. TR at 633, 638. She estimated that these complaints started about six to nine months after Complainant came to work for Respondent in May 2003, and continued throughout her employment. TR at 633, 638. Ms. Moseby testified that Complainant complained "numerous times" about Mr. Parsons' micro-management, and that such complaints occurred throughout her employment. TR at 703-04. In addition, Mr. Guadnola, who was retained to conduct an independent investigation of Complainant's whistleblower allegations after her resignation, also testified that the employees he interviewed confirmed that Complainant had complained about Mr. Parsons' tendency to micro-manage. TR at 398, 417. The testimony of several witnesses thus suggests that the alleged adverse actions, even if established, were not necessarily distinguishable from Mr. Parsons' usual manner of "micro-management," which had engendered complaints by Complainant to other employees on numerous occasions throughout her employment with Respondent.

In light of the foregoing, I find that Complainant's testimony about how she was treated by Mr. Parsons after the January 5, 2005 meeting of the Stock Oversight Committee was not corroborated by any witness, and is largely without other support in the record. I further find that these aspects of Complainant's testimony are somewhat exaggerated, skewed by self-interest and not particularly reliable, and I do not give them much weight.

Accordingly, I find that Complainant has failed to establish by a preponderance of the evidence that Mr. Parsons' alleged conduct during meetings or in questioning Complainant's authority constitute adverse action under Sarbanes-Oxley.

2. The Audit Committee Meeting of February 9, 2005

Complainant testified that the most prevalent example of Mr. Parsons' change in behavior toward her took place at the Audit Committee meeting on February 9, 2005. TR at 163, 235. According to Complainant, "It was basically a meeting whereby everything that came out of my mouth was questioned. It was questioned for accuracy, it was questioned from an integrity standpoint. It really was two hours of him sitting there in front of the people that were my peers, in front of our external auditors who, prior to that meeting, I know had respect for me. It was two hours of retaliation and verbal abuse." TR at 164.

I find that Complainant's assertion that Mr. Parsons' conduct at the Audit Committee meeting represents adverse action is unsupported, as her version of events is contradicted by several witnesses who were present at the meeting, as described below.

All of the witnesses who were present at the Audit Committee meeting, including

Complainant, agree that Mr. Parsons posed questions to external auditors about the purpose and function of the Disclosure Committee. However, Complainant testified that she does not recall "not allowing the external auditors to answer the questions." TR at 235-36. In contrast, several other witnesses who were present testified consistently and credibly that Complainant attempted to respond to the questions Mr. Parsons posed to the auditor, and that Mr. Parsons asked Complainant to allow the auditor to answer the questions. *See* TR at 561 (testimony of Director Panowicz); TR at 523 (testimony of Director Manspeaker); TR at 510 (testimony of Mr. Roberts); TR at 456 (testimony of Ms. Graves); TR at 629, 676-78 (testimony of Ms. Furman).

Complainant characterized the meeting as "two hours of retaliation and verbal abuse." TR at 164. However, this characterization was refuted by the meeting's other attendees. Mr. Green, the auditor to whom Mr. Parsons' questions were directed, did not feel that Mr. Parsons was disrespectful toward Complainant at the meeting. He testified that the entire exchange lasted about two minutes, and was not a "major issue." TR at 511, 513-15. Ms. Furman felt that Mr. Parsons did get angry (TR at 678) or frustrated (TR at 676) with Complainant, but did not feel that Mr. Parsons belittled or humiliated Complainant during the meeting. TR at 630. Director Panowicz felt that Mr. Parsons' conduct towards Complainant was "firm and professional," and not "humiliating." TR at 561. He did not recall any other "acrimony" between Complainant and Mr. Parsons during the meeting, and while he felt the exchange was "a little uncomfortable because of the directness of it," he did not consider it "a big issue." TR at 601-02. Similarly, Director Manspeaker did not feel that Mr. Parsons belittled, humiliated, or questioned Complainant during the meeting, and he recalled that this was the only exchange involving Complainant and Mr. Parsons. TR at 523. Ms. Graves said that Mr. Parsons asked Complainant to allow the consultants to answer the questions, and she felt "he did it very respectfully and that he showed remarkable restraint in the way he handled the situation." TR at 456-457. Like the others, she did not believe that Mr. Parsons harassed, belittled or humiliated Complainant during the meeting. TR at 457.

Complainant denied that Ms. Furman told her that her conduct at the meeting was inappropriate, but admitted that Ms. Graves told her to "chill out." TR at 237. *See also*, TR at 457 (testimony of Patty Graves). Complainant testified that Kelly Van Valley and Ms. Furman approached her after the meeting, apologized and were supportive of her. TR at 170. However, Ms. Furman testified that throughout the meeting, Complainant was rolling her eyes when Mr. Parsons was talking, which Ms. Furman felt was "embarrassing." TR at 629-30. She further testified that after the meeting, she told Complainant that Mr. Parsons should not have gotten "mad" at her, but that Complainant had acted "completely unprofessional," everyone could see her rolling her eyes, and she needed to "tone it down." TR at 630, 679-80. Ms. Van Valley did not testify in these proceedings.

According to Complainant, Mr. Panowicz came to her office after the meeting and apologized for the "abusive behavior" by Mr. Parsons. TR at 167. However, Mr. Panowicz testified that Complainant asked for five minutes to meet with him after the meeting and when he went into her office, she apologized for her behavior during the meeting. He said he replied that she did not have to apologize to him. TR at 561-62, 603. Mr. Panowicz denied that Complainant used the word "abusive" during any conversation with him. TR at 609.

Even Complainant's own testimony contained some inconsistencies. For example, Complainant admitted that she became defensive and angry when Mr. Parsons questioned the auditor (TR at 165), but she testified that the auditors "basically confirmed that we were doing exactly what we should have been doing on some of the matters that [Mr. Parsons] was questioning." TR at 164-65. She later explained that she had told Mr. Parsons "there was no need for him to serve on the committee" because "the committee had representation from all of the areas that it needed to have," but she admitted this was "not the information provided by the external auditors at the meeting." TR at 236-37. She then agreed that the auditors advised that as CEO, Mr. Parsons should serve on the Disclosure Committee. TR at 236.

The number and significance of the inconsistencies between Complainant's account of the February 9, 2005 Audit Committee meeting and the accounts of the several other witnesses who were also present leads me to find that Complainant's testimony is somewhat exaggerated and not entirely credible. Moreover, I find that Complainant's version of how Mr. Parsons treated her during the Audit Committee meeting is without other support in the record. Accordingly, I find that Complainant has failed to establish by a preponderance of the evidence that Mr. Parsons' alleged conduct during the Audit Committee meeting constitutes adverse action under Sarbanes-Oxley.

3. Removal of IT Responsibilities

Complainant alleges that she suffered an adverse employment action when Mr. Parsons removed her authority over IT functions. TR at 175-78; ALJX at 8. According to Complainant, Mr. Parsons informed her on the morning of Mr. Jones' termination that the IT department would no longer be reporting to her. TR at 176. She considered this to be the "ultimate humiliation," because IT was her area of expertise, and her IT experience had differentiated her from other CFO candidates during Respondent's hiring process. TR at 177.

There is some dispute about whether Mr. Parsons intended and directed that the individuals in the IT department would no longer report to Complainant, as Complainant alleges. Mr. Parsons testified that he informed Complainant "that she would not have sole authority over network access." TR at 268. He further testified, somewhat unclearly, that the IT people would continue to report to Complainant, and she would have one person, the Vice President of Information Services, who would run the IT department and report to her. TR at 269. He opined that the suspension of Complainant's network access authority represented a "significantly immaterial" reduction in her responsibilities, and he felt that her primary responsibility as CFO had been and would remain "financial control of the company." TR at 269. Mr. Parsons testified that it had not been determined whether the restrictions he was imposing were permanent or temporary, and he said that Complainant's pay had not been reduced. TR at 269. Complainant assumed that her reduced IT responsibilities were taken away from her "indefinitely." TR at 176-77.

Ms. Moseby, who was also present during the conversation, denied that Mr. Parsons "took away the IT department." TR at 709. She said Mr. Parsons told Complainant that "she would not be authorized to make the security decisions." TR at 710. She testified that Mr. Parsons did not restrict Complainant's computer or security access, but rather "was restricting

her authorization for other employees' access or changes or deletions." TR at 731. She further testified that Mr. Parsons told Complainant her role would not otherwise change. TR at 731-32.

Present at the time that Mr. Parsons communicated his intent with respect to Complainant's IT responsibilities were Complainant, Mr. Parsons, Ms. Moseby, and Director Schorno. Although none of their testimony on this point was as clear as it could be, Mr. Parsons, Ms. Moseby and Director Schorno testified consistently with each other that Mr. Parsons informed Complainant that she would no longer have sole authority over network access, changes, and deletions. *See* TR at 268 (testimony of Mr. Parsons); TR at 710, 728-29, 731 (testimony of Ms. Moseby); TR at 771-72, 777 (testimony of Mr. Schorno). I find that the testimony of these three individuals was credible as to their recollections of this point. Only Complainant testified that the IT department would no longer be reporting to her. Accordingly, I find that the weight of the evidence establishes that on February 14, 2005, Mr. Parsons removed Complainant's sole authority to oversee decisions relating to Respondent's network access, changes, and deletions.

Respondent asserts that even if some degree of IT authority was removed from Complainant, such removal does not constitute adverse employment action because Complainant's IT-related duties represented a "peripheral" job responsibility. In support of this argument, Respondent presented the testimony of James Arneson, who is currently President and CEO of Respondent (TR at 739), and who served as Respondent's CFO from March 1993 through December 31, 2002. TR at 740. Mr. Arneson testified that he oversaw Respondent's IT department during most of his reign as CFO, and spent "probably less than five percent" of his time on IT-related supervision or functions. TR at 742. He testified that his IT duties were a "peripheral" function, which he believes remains true today. TR at 742-43. He opined that a change in IT responsibilities would not represent "a big change," a "material reduction," or a "demotion" with regard to the CFO's overall responsibilities. TR at 745.

Once again, while I have no reason to question Mr. Arneson's general credibility, I find that his testimony about his former role as CFO and how he handled his IT responsibilities is, at best, only marginally relevant to this case and is speculative as it relates to Complainant's work. Mr. Arneson cannot speak to Complainant's specific duties or the manner in which she performed her job as CFO from May 2003 through February 2005. Accordingly, I do not give Mr. Arneson's testimony much weight.

Moreover, I find it immaterial whether Complainant's IT duties were "peripheral" or central to her role as CFO. The record shows that prior to Mr. Jones' termination, Complainant reported only to Mr. Parsons, and all IT department employees reported to Complainant. Complainant was pivotal in developing Respondent's IT accounting and had more experience than anyone else in auditing Respondent's IT system. According to Ms. Moseby, Complainant had ultimate authority to determine the appropriate degree of network access for any given employee, and therefore had the ability to overrule a contrary opinion of David Leaf, Respondent's IT Manager.[16] TR at 735. In contrast, after Mr. Jones was terminated, it appears that Complainant would no longer have had that same degree of authority. It is not clear from

[16] There is no indication in the record as to whether Mr. Parsons had or exercised any authority over Complainant's network access decisions.

the record whether Mr. Leaf or Mr. Parsons or someone else would have ended up holding the ultimate authority with respect to network access decisions. *See, e.g.,* TR at 777 (Mr. Schorno's testimony that Mr. Parsons and Complainant would share control of network access).

Ms. Moseby testified that Complainant "didn't do a whole lot" with respect to the network access authorization process before February 14, 2005. TR at 735. However, given that Complainant previously oversaw the entire IT department including Mr. Leaf, I find that the removal of Complainant's sole authority over network access had potential to impact her ability to effectively manage and oversee Mr. Leaf and the other IT department employees. Moreover, logic dictates that the modification of her authority would have hampered Complainant's ability to perform the full range of tasks she previously performed and to exercise the degree of control over IT issues which she previously enjoyed as a high-level executive and head of the IT department. For these reasons, I am persuaded that the restriction imposed by Mr. Parsons, which represents a diminution in Complainant's authority and responsibility, is the type of action which is "reasonably likely to deter employees from engaging in protected activity." *See Hendrix, supra*, at 12 (citing *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000)); *Burlington Northern*, *supra* No. 05-259, at *10 (the test is whether a reasonable employee would be dissuaded from whistleblowing based on the alleged adverse action). *See also*, *Yartzoff v. Thomas*, 809 F.2d 1371, 1373, 1376 (9th Cir. 1987) (finding adverse actions where the employer permanently transferred significant job duties away from the plaintiff and gave below-average performance reviews).

In light of the foregoing, I find and conclude that Respondent took adverse employment action against Complainant when Mr. Parsons removed her sole authority to oversee decisions relating to Respondent's network access.

4. <u>Constructive Discharge/Hostile Work Environment</u>

Complainant asserts that as a result of her whistleblowing pertaining to Mr. Parsons' stock trading activities, Mr. Parsons engaged in retaliatory conduct which ultimately forced her to resign. To demonstrate that she was constructively discharged, Complainant must show that her employer created "working conditions so intolerable that a reasonable employee would feel compelled to resign." *See Pennsylvania State Police v. Suders***,** 124 S.Ct. 2342, 2347 (2004)("To establish 'constructive discharge' the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."); *Hughart Raymond James & Associates, Inc.*, 2004-SOX-9 (ALJ Dec. 17, 2004) (citations omitted). In other words, the working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary. *See id*. (citing *Johnson v. Old Dominion Security*, 1985-CAA-3 to 5 (Sec'y May 29, 1991)). Such an environment may be established by evidence of a pattern of abuse, threats of imminent discharge, and marked lack of response by supervisors to the complainant's concerns. *Id*. (citing *Taylor v. Hamilton Recreation and Hamilton Manpower Services*, 1987-STA-13 (Sec'y Dec. 7, 1988)).

Respondent correctly points out that Complainant's allegations with regard to Mr. Parsons' conduct might also be construed as a claim of hostile work environment. ALJX 8 at 12.

A hostile work environment claim involves repeated conduct or conditions that occur over a period of time. To recover, the employee must establish that the conduct complained of was serious and pervasive. Circumstances germane to gauging a hostile work environment include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Allen v. Stewart Enterprises Inc.*, ARB No. 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006) (citing *Erickson v. United States Envtl Prot. Agency*, ARB Nos. 03-002, -003, -004, -064, 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18, at 18-19 (ARB May 31, 2006)).

I have previously concluded that, with the exception of Mr. Parsons' removal of her authority over network access, the various acts of retaliation alleged by Complainant do not constitute adverse employment action for purposes of Sarbanes-Oxley when viewed independently. As explained above, I have serious doubts about the credibility and accuracy of Complainant's complaints that Mr. Parsons belittled or humiliated her at various times after January 5, 2005, and in particular at the Audit Committee meeting of February 9, 2005. Although I have concluded that Complainant suffered an adverse employment action when Mr. Parsons removed her authority over network access, I note that Complainant did not remain with Respondent long enough to clarify the nature of the restriction imposed by Mr. Parsons or to determine what effects it would have on her ability to perform her job. She apparently did not object to or ask any questions about the changes being made to her role. *See* TR at 710 (testimony of Ms. Moseby); TR at 772 (testimony of Director Schorno). She assumed the IT department responsibility was being removed from her indefinitely, but did not know for certain. TR at 176-77. Under the circumstances, I find that Complainant could have reasonably resolved this issue through means short of resignation.

Viewing the alleged retaliatory conduct as a whole, I find that Complainant has not established that Mr. Parsons engaged in a pattern of abuse or that, by reason of Mr. Parsons' alleged conduct, her "working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary." *See Hughart, supra*. For the same reason, I find that Complainant has not shown that the conduct complained of was "serious and pervasive," such that she suffered a hostile work environment. *See Allen, supra,* at 18-19.

D. Causation

To prevail under Sarbanes-Oxley, the whistleblower must prove by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable personnel action. *Allen v. Stewart Enterprises Inc.*, ARB No. 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii)). A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Id.* (citing *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). *See also, Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365, 1379 (N.D. Ga. Sept. 2, 2004). If the complainant succeeds in establishing that protected activity was a contributing factor, the employer may escape liability if it can establish by clear and convincing evidence that it would have taken the same adverse action in absence of the complainant's protected activity. 18 U.S.C

§ 1514A(b)(2)(C); 29 C.F.R. § 1980.109.

Complainant argues that Mr. Parsons removed her authority over access to Respondent's network because he "wanted to eliminate her as a threat to challenge his stock trades in the future and to retaliate against her for having done so in the past." ALJX 11 at 12. She points out that the termination of Mr. Jones eliminated the alleged disruption and morale issues caused by their romantic relationship, yet Mr. Parsons nonetheless altered her IT responsibilities because he "knew she would quit." *Id.* Respondent counters that there is no evidence in the record which would indicate that Mr. Parsons' action was related to any activity of Complainant, protected or otherwise. ALJX 8 at 18-19. It further asserts that this step was a legitimate business action to protect the security of Respondent's information, and was inevitable without regard to any action by Complainant. *Id*. at 19.

Complainant has not offered any direct evidence showing that her protected activity was a contributing factor in Mr. Parsons' removal of her authority over network access. Direct evidence is "smoking gun" evidence that the respondent acted with retaliatory motivation. *See Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56, at 38 (ALJ July 18, 2005) (citing *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852-53 (3rd Cir. 1987)). For example, comments made by a manager or those closely involved in employment decisions may constitute direct evidence of discrimination. *Id.* (citing *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989)) (other citations omitted). *See also, Blake v. Hatfield Electric Co.*, 87-ERA-4 (Sec'y Jan. 22, 1992) (holding supervisor's disapproval of employee's complaints to government agency indicated discriminatory intent).

Instead, Complainant asserts that Mr. Parsons' retaliatory motive can and should be inferred from the circumstances surrounding his actions. Complainant reasons that Mr. Parsons should have fired her if he sincerely held "security concerns," as it is "a well known banking management rule that if a bank has any reasonable basis to suspect that any employee, and especially a senior officer, is likely to act dishonestly or unethically, the employee must be terminated immediately." ALJX 11 at 15. She further contends that Mr. Parsons was aware that firing Complainant would place the bank at risk of having to provide her with one year's severance pay under her employment contract. *Id.* at 15. Complainant therefore argues that by taking IT responsibilities away from her, Mr. Parsons managed to avoid application of the severance pay provision even while "constructively forcing her out the door because he knew she would quit." *Id.* at 15-16. She thus contends that Mr. Parsons' stated reasons for restricting her network access authority based on security concerns were "pretextual."

Initially, I find that Complainant's assertion that Mr. Parsons should have fired her if he believed she posed a security threat is unsupported. She cites no authority for her recitation of an allegedly "well known banking management rule" that a bank must terminate an employee when it has any reasonable basis to suspect that the employee is likely to act dishonestly or unethically. I note that Respondent's "Code of Business Conduct Policy" does not reflect such a rule, but rather provides that Respondent "may take disciplinary action for violations of [the] Code, which can include written or oral reprimands, suspension or termination of employment or potential civil lawsuit against violations." CX 28. From the record before me, there is simply no basis for concluding that Mr. Parsons acted incorrectly or with retaliatory motive when he took action

short of terminating Complainant in order to address his security concerns for Respondent after terminating Mr. Jones, Respondent's president and romantic confidant to Complainant.

Complainant also fails to point to any evidence in the record that Mr. Parsons knew that firing her risked a year's severance pay pursuant to her employment contract. However, the record does reflect that Mr. Parsons was aware that Complainant's employment contract provided for one year of severance pay if *she* were to terminate her employment for good cause. TR at 363; CX 24. In my view, this appears to establish that Mr. Parsons and Respondent would have faced essentially the same financial risk by giving Complainant cause to resign as they would by firing her. Accordingly, I find no basis for an inference that Mr. Parsons was operating with retaliatory intent nor is this the forum to enforce any rights under the employment contract.

Finally, I find that there is no support for Complainant's assertion that Mr. Parsons "knew she would quit" when he altered her IT responsibilities. Complainant argues that Mr. Parsons "knew her hot buttons," that he "knew how prideful, conscientious and competent she is" and that she is "strong-willed and tenacious," such that when he told her that she "had some decisions to make," he knew what her decision would be. ALJX 11 at 14. Even assuming that Mr. Parsons "knew" that Complainant possesses the traits she describes, I decline to make the substantial inferential leap which would be required in order to conclude that he "knew she would quit" as a result of his actions. There is no evidence in the record which indicates that Mr. Parsons or anyone else wanted Complainant to resign. Rather, Mr. Parsons specifically told her that the Board of Directors had no intention of terminating her employment and that her role would remain unchanged but for the modification of her sole authority over network access. TR at 267-68 (testimony of Mr. Parsons). *See also*, TR at 771, 776-77 (testimony of Mr. Schorno).

Having carefully considered Complainant's arguments in light of the evidence in the record, I find that Complainant has not shown by a preponderance of the evidence that there was any connection between her protected activity and Mr. Parsons' removal of her authority over network access on February 14, 2005. Complainant did not remember Parsons' exact words, but she admitted in her testimony that the restriction he imposed dealt with security concerns. Specifically, she testified:

> What I took away from [the conversation with Mr. Parsons] was that the IT department does have complete access to the bank. There were individuals in that department who had unlimited access to security systems. And so basically [Mr. Parsons] implied if they report to you, you somehow are going to be able to manipulate them into getting access to the system either for yourself or – I don't know, Mr. Jones? I don't know. That they wouldn't normally grant.

TR at 178.

Complainant's account of the conversation is actually similar to and supported by the account offered by Mr. Parsons. Mr. Parsons testified that Complainant was "obviously distraught, very, very upset, agitated." TR at 268. That Complainant was upset by Respondent's decision to fire Mr. Jones is also supported by the testimony of Mr. Schorno, who was present at the meeting and testified that Complainant was "visibly upset over the termination of Jon Jones."

TR at 771, 775. According to Mr. Parsons, he told Complainant "that she would not have sole authority over network access." TR at 268. Mr. Parsons explained that the change was necessary because "from a security standpoint, we would be criticized." TR at 268. He said that Complainant was a "good employee," and that she had "high integrity." TR at 268. He went on to explain:

> But just as a check and balance, you wouldn't have someone that's distraught and in charge of some critical piece of your organization. And that was a critical component, particularly since Mr. Jones needed to be locked out from access to a number of those things and she had a [romantic] relationship with Mr. Jones. It would make sense that you have that check and balance. And, frankly, if she did something, then the [Federal Deposit Insurance Corporation] would criticize us severely.

TR at 268. Mr. Parsons credibly elaborated that he acted on his security concerns, not due to anything Complainant had done at any point in her employment, but as "a precaution that I would expect the [Federal Deposit Insurance Corporation] would expect me to take." TR at 289-90.

I find that Mr. Parsons' restriction of Complainant's authority over network access was a patently reasonable security measure taken in the wake of Mr. Jones' termination and departure. I further find that Complainant has not offered any credible evidence showing that Mr. Parsons' action was anything other than what Complainant herself explained it to be, a precaution intended to protect the integrity of Respondent's information and security systems.

Although Complainant does not raise the argument, I note that Mr. Parsons' action came about a month and a half after Complainant engaged in protected activity by raising concerns about his proposed sale of stock in late December 2004 or early January 2005. Generally, this degree of this temporal proximity may allow an inference that the adverse action was caused by Complainant's protected activity. An unfavorable personnel action taken shortly after a protected disclosure may lead the fact-finder to infer that the disclosure contributed to the employer's action. 29 C.F.R. § 1980.104(b)(2). Judges have drawn inferences of causation when the adverse action happened as few as two days later, *Lederhaus v. Donald Paschen & Midwest Inspection Serv., Ltd.*, 1991-ERA-13 (Sec'y Oct. 26, 1992), to as much as about one year later. *Thomas v. Ariz. Pub. Serv. Co.,* 1989-ERA-19 (Sec'y Sept. 17, 1993). However, the causal connection may be severed by some legitimate intervening event. *Tracanna v. Arctic Slope Inspection Serv*., 1997-WPC-1, at 7-8 (ARB July 31, 2001).

In this case, I find that any inference of causal connection which arises by reason of the timing of the events in issue is severed by the termination of Mr. Jones on February 14, 2005, a significant event which immediately preceded Mr. Parsons' removal of Complainant's network access authority. In my view, the reasonableness of Mr. Parsons' action under the circumstances presented by Mr. Jones' sudden termination, Complainant's romantic attachment to Mr. Jones and her distress at his being fired, negates any inference of discrimination raised by the temporal proximity between Complainant's protected activity and the unfavorable employment action.

In light of the foregoing, I find that Complainant has not met her burden of establishing

by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable personnel action. In sum, Complainant has not established her case in chief: she has not shown that she was subjected to retaliation when Mr. Parsons removed her sole authority over decisions relating to Respondent's network access.

Assuming *arguendo* that Complainant had satisfied her burden, I find that Respondent is able to carry its burden of rebuttal. An employer may escape liability if it can establish by clear and convincing evidence that it would have taken the same adverse action in absence of the complainant's protected activity. 18 U.S.C § 1514A(b)(2)(C); 29 C.F.R. § 1980.109.

Clearly, Complainant's romantic involvement with Mr. Jones preceded her January 2005 protected activity. Respondent demonstrated that by about October 2004, most of Respondent's senior managers and all members of its Board of Directors were aware of the relationship. In addition, ample evidence demonstrates that the relationship caused Mr. Parsons and the Board a good deal of unease. Mr. Parsons testified that, upon being notified of the relationship, he informed Mr. Jones that it "wouldn't work on an executive management team having two key employees having a relationship," and that "one of them would have to leave." TR at 254.

Mr. Parsons testified that he immediately informed the Compensation Committee of the relationship, and certain committee members were upset and "concerned about [Mr. Jones'] judgment." TR at 257. Within a couple of weeks, the full Board was informed, and Mr. Parsons testified that "some members of the board felt more strongly than others that it just couldn't be tolerated," and the consensus was that "it had to be resolved." TR at 258. According to Mr. Parsons, the Board members "were just not willing to accept two executive level individuals having a [romantic] relationship." TR at 258. Mr. Parsons' account of the Board's reaction to news of the relationship is well supported by the testimony of several Board members. *See* TR at 521-22 (testimony of Mr. Manspeaker); TR at 563 (testimony of Mr. Panowicz); TR at 765 (testimony of Mr. Schorno). Mr. Parsons testified that he had follow-up conversations about the relationship with Mr. Jones "every week or two" (TR at 260), and the Board raised the issue at every meeting. TR at 262, 373. It is thus apparent that the relationship engendered apprehension and consternation among Respondent's leaders which resulted in ongoing efforts to monitor the situation as it developed.

Respondent also demonstrated that the relationship caused problems with workplace interactions. Ms. Graves relayed her concerns about closed door meetings and that decisions were being made without her to both Mr. Jones and to Mr. Parsons, and she told Mr. Parsons she would quit her job if the issue of the relationship were not resolved. TR at 444-49, 454-55. She felt that the relationship impacted her ability to do her job because she "did not have the access to [Mr. Jones]" that she needed to perform her duties. TR at 447. She documented her concerns at Mr. Parsons' request. TR at 454-55, 498-99. Similarly, Ms. Moseby testified that shortly after the relationship was disclosed, she questioned Complainant and Mr. Jones about "what was going to change, because constantly they were behind closed doors and there were people asking me who was in there with [Mr. Jones]." TR at 701-02. The evidence thus establishes that Respondent had legitimate reasons to treat the romantic relationship as a serious concern.

It is undisputed that Mr. Jones was terminated on February 14, 2005. Furthermore,

there can be no real dispute that Mr. Jones' access to Respondent's computer network and security systems had to be restricted upon his departure. *See* TR at 268 (testimony of Mr. Parsons); TR at 728-29, 734 (testimony of Ms. Moseby). Nor is there is any dispute that Complainant, as head of the IT department, had the authority to effect changes to network access, including additions and deletions of employees. In view of this situation, I find that Respondent could not have been expected to ignore the fact that Complainant had a romantic attachment to Mr. Jones, particularly as there is no evidence in the record indicating that the relationship had ended by the time Mr. Jones was terminated. Accordingly, as explained more fully above, I find that Mr. Parsons took reasonable and prudent measures to protect the integrity of Respondent's computer network and security systems.

In light of the foregoing, I find that Respondent has established by clear and convincing evidence that it had sufficient non-discriminatory reasons to restrict Complainant's authority over Respondent's network access. Stated differently, I find that Respondent has presented clear and convincing evidence that it would have taken the same action in absence of Complainant's protected activity. As explained above, Respondent's restriction of Complainant's IT authority was a reasonable and prudent measure taken to safeguard its IT system upon the termination of Mr. Jones, to whom she had an open romantic attachment.

CONCLUSION

Complainant established that she engaged in protected activity. She also established that Respondent acted adversely toward her by restricting her IT responsibilities. However, Complainant failed to establish by a preponderance of the evidence that there was any connection between her protected activity and Respondent's restriction of her IT responsibilities. Moreover, Respondent showed by clear and convincing evidence that it would have taken the same adverse action in absence of Complainant's protected activity.

RECOMMENDED ORDER

In light of the foregoing, it is hereby recommended that the relief sought by Complainant Cathy Reines, including her request for attorney's fees, be **DENIED** and that her complaint be **DISMISSED**.

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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).