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Issue Date: 18 July 2005

In the Matter of:
SHEILA J. KALKUNTE
Complainant

v. **2004-SOX-00056**

DVI FINANCIAL SERVICES, INC.

and

AP SERVICES, LLC
Respondents

RECOMMENDED DECISION AND ORDER
AWARDING DAMAGES

Complainant Sheila J. Kalkunte filed a claim under the Corporate and Criminal Fraud Accountability Act, Section 806 of the Sarbanes-Oxley Act ("SOX" or "the Act"), 18 U.S.C. § 1514A, implementing regulations found at 29 CFR Part 1980, and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 CFR Part 18A. This statutory provision prohibits any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, or required to file reports under section 15(d) of the same Act, or any officer, employee or agent of such company, from discharging, harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. § 1341 (mail fraud and swindle), § 1343 (fraud by wire, radio, or television), § 1344 (bank fraud), or § 1348 (security fraud), or any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of Federal law relating to fraud against shareholders.

In this case, the Complainant alleges that Respondents DVI Financial Services, Inc. ("DVI") and its contractor AP Services, LLC ("AP") retaliated against her after she reported financial improprieties at DVI to its Board of Directors, and after she made affirmative efforts to verify that an investigation into the allegations was progressing. After the record was closed, the Complainant made the additional assertion that Mark Toney, Chief Executive Officer of DVI and a "Principal" of AP, should be an added Respondent.

The Complainant is represented by R. Scott Oswald, Esquire, Nicholas Woodfield, Esquire, and Courtney R. Abbott, Esquire, The Employment Law Group, Washington, D.C. DVI is represented by James K. Webber, Esquire, Drinker, Biddle and Reath, Florham Park, New Jersey. AP is represented by L.A. Hynds, Esquire and Jeanne M. Scherlinck, Esquire, Honigman, Miller, Schwartz and Cohn, Detroit, Michigan, and Sheldon Toll, Esquire, Southfield, Michigan.

A hearing was held in Washington, D.C., from December 13 through 15, 2004. The

Complainant submitted exhibits marked "CX" 1 through CX 51, which were admitted into evidence. Transcript ("Tr.") at 110-111, 231, 456. DVI submitted exhibits marked "EX" 1 through EX 75, and admitted into evidence. Tr. at 233, 511. AP submitted exhibits marked "RX" 1 through RX 6, and admitted into evidence. Tr. at 232. All parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument, and file post-hearing briefs.

APPLICABLE STANDARDS

The Sarbanes-Oxley Act states in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - -

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by - -
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> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
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> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A (a)(1); *see also* 29 C.F.R. § 1980.102(a), (b)(1).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act is governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21 Act"). Because of its recent enactment, the Sarbanes-Oxley Act lacks a developed body of case law. Procedures for the process are found at 29 CFR Part 1980, (69 Fed. Reg. 52103, Aug. 24, 2004).

As the whistleblower provisions of Sarbanes-Oxley are similar to the whistleblower provisions found in many federal statutes, it is appropriate to refer to case authority interpreting these whistleblower statutes.[1]

[1] The Sarbanes-Oxley Regulations specifically indicate that consideration was given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century ("AIR 21 Act"), 29 C.F.R. § 1979; the Surface Transportation Assistance Act ("STAA"), 29 C.F.R. § 1978; and the Energy Reorganization Act ("ERA"), 29 C.F.R. 24. *See* 29 C.F.R. § 1980 at 2. Moreover, the legal burdens of proof in Sarbanes-Oxley are taken from AIR 21, 49 U.S.C. § 42121. *See also* 42 U.S.C. § 5851(b)(3)(legal burdens of proof for whistleblowing under ERA).

THRESHOLD ISSUES

1. Whether the Complainant qualifies as an "employee" of the Respondents under the terms of the Sarbanes-Oxley Act.
2. Whether Respondent AP is an appropriate party for subject matter jurisdiction where AP is not a publicly traded company.
3. Whether Mark Toney should be added as a Respondent in this case.

DISCUSSION

Complainant is Covered under the Sarbanes-Oxley Act; AP as Respondent

AP is a firm that provides crisis management and restructuring services to companies in financial distress. DVI's Board of Directors contracted with AP in August, 2003, to provide leased employees to manage DVI through bankruptcy and dissolution. CX 19.

AP argues that it has never been a publicly traded company and never employed Complainant. AP filed a Motion for Dismissal on the ground that the Department of Labor lacks subject matter jurisdiction over AP. Prior to hearing, AP filed a Brief in Support of its Motion, asserting that subject matter jurisdiction is to be applied narrowly, and that there is no individual liability under the Act. It asserts that the "plain language" of the Act shows that Congress extended jurisdiction only to companies that either: (1) have a class of securities registered under section 12 of the Securities and Exchange Act of 1934 ("SEA"), or (2) are required to file reports under section 15(d) of the SEA. 18 U.S.C. 1514A(a).[2] I denied the Motion.

AP alleges that by the summer of 2003, DVI was experiencing severe financial difficulties, the causes of which are apparently the subject of an impending federal investigation. There is no dispute that DVI is an appropriate party. Because of its financial distress, DVI entered into a contract ("the Agreement")(CX 19) with AP in August, 2003, to provide DVI with employees who could manage DVI through bankruptcy and dissolution. For reasons set forth below, based on the affidavits and the attachments of proposed exhibits, and CX 19, I find that AP is both a subcontractor and agent of DVI and/or DVI's trustee in bankruptcy.

The evidence shows that Mark Toney has been employed as a Principal of AP since 1999. Tr. at 239. Mr. Toney became DVI's President and CEO effective August 25, 2003, by appointment of DVI's Board of Directors. Tr. at 517-518, 520; CX 19. AP notes: "In his temporary employment as President and CEO of DVI, Mr. Toney has at all times reported directly to an independent committee of the Board, consisting of Board Members Nathan Shapiro and William S. Goldberg ("Special Committee")." AP argues that the only relationship between the Complainant and AP was the appointment of Toney as DVI's CEO by virtue of the contract between AP and DVI. *See* AP's Brief in Support of Motion for Summary Decision. At hearing, Mr. Toney testified that both DVI and AP had appointed him as a corporate representative in this matter. Tr. 240.

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d), which provides:

> The administrative law judge may enter summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

[2] I note that AP did *not* object on the basis that it was not considered a party at the time that OSHA conducted its investigation, and did not have an opportunity to participate at that time. *See AP Objections* filed June 8, 2004. This document was not moved into evidence at hearing.

29 CFR § 18.40(d). ***Stauffer v. Wal Mart Stores, Inc***., ARB No. 99-107, ALJ No. 1999-STA-21 (ARB Nov. 30, 1999)(under the Act and pursuant to 29 CFR § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); ***Webb v. Carolina Power & Light Co***., Case No. 1993-ERA-42, at 4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits me to grant summary decision for either party where "there is no genuine issue as to any material fact." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in a light most favorable to the non-moving party (*i.e*., Prosecuting Party), and Respondent must be entitled to prevail as a matter of law. ***Gillilan v. Tennessee Valley Authority***, Case Nos. 1991-ERA-31 and 1991-ERA-34, at 3 (Sec'y August 28, 1995); ***Stauffer***, *supra*.

I decided prior to hearing to hold the issue of summary judgment in abeyance pending further development of the record at hearing. *See* Transcript of December 10, 2004 Telephonic Hearing.

AP is a firm that provides crisis management and restructuring services to companies in financial distress. DVI's Board of Directors contracted with AP in August, 2003, to provide leased employees to manage DVI through bankruptcy and dissolution. AP argues that it has never been a publicly traded company, and therefore, the statute does not apply to it. Mr. Toney testified that during the week of August 25, 2003, which was the week prior to DVI's bankruptcy filing, AP was retained as restructuring consultants and advisors. Tr. at 243.

In support of its Motion, AP submitted affidavits and attachments of proposed exhibits. Attachment D is an Engagement Letter between Respondent DVI and AP, dated August 25, 2003. At hearing, this document was admitted into evidence as CX 19. It shows that DVI contracted with AP to provide experienced management during the course of bankruptcy. Included in that document at Section 7 of the general terms and conditions is an indemnification clause. CX 19:14.

Attachment F contains Minutes of a Special Meeting of DVI's Board of Directors held on August 23, 2003, which states in part:

> Mr. Toney then described the AP Services Letter Agreement ("Letter Agreement") to the members of the Board, and highlighted its differences between this Letter Agreement and the Interim AP Services Letter Agreement approved by the Board by resolution dated August 21, 2003. In particular, Mr. Toney noted that he would become Chief Executive Officer upon the Company filing for protection under Chapter 11 of the U.S. Bankruptcy Code, and the addition of resources described in the Letter Agreement.
>
> Pursuant to a motion duly made and seconded by members of the Board, the following resolution was unanimously adopted by the Board:
>
> > RESOLVED, that the appropriate officers of the Company are authorized and directed to take such actions necessary to engage AP Services pursuant to the Letter Agreement; and it is further
> >
> > RESOLVED, that Mark Toney is hereby appointed President and Chief Executive Officer of the Company effective upon the Company filing for protection under Chapter 11 of the U.S. Bankruptcy Code.

Mr. Toney, an officer appointed by DVI through the contract with AP, is clearly the protagonist alleged by the complaint. *See* Affidavit.

I accept that AP is not a publicly traded company, but according to the documents provided as attachments and the affidavit of Mr. Toney, it is clear that he is an "officer" identified by the statute. He also remains a "Principal" of AP. I am advised that AP is a Michigan Limited Liability Company, validly formed and validly in existence to date. I am also asked to find that from August 25, 2003, through Complainant's termination on September 18, 2003 and beyond, Toney worked full-time in his position as DVI's President and CEO and performed no other work for AP. *See* Proposed Findings. However, I reject that finding, and instead conclude that Mr. Toney remained a "Principal" of AP and continued to simultaneously perform work for AP, through his assignment under a contract between AP and DVI.

Mr. Toney testified that when AP assigned him to the DVI project it was AP who paid his salary. Tr. at 240. In addition, AP paid the salaries of all of the AP team members working at DVI.[3] *Id*. at 240-241. During the period that he was assigned to the DVI project, beginning on August 25, 2003 until the date of hearing, Mr. Toney's health insurance was part of a plan provided by AP. *Id*. Also during that period when Mr. Toney would incur expenses on behalf of DVI, he would turn in those expenses to AP. *Id*. at 241. Specifically, once the expenses were turned in to AP, a bill would be provided to Mr. Toney and he would, in turn, give the bill to DVI for reimbursement. *Id*. Also during his time at DVI, he would communicate via email using the AP network server. *Id*.

Ms. Kalkunte testified that to her knowledge Mr. Toney was an employee of "AlixPartners or AP Services who was taking over the role of CEO of DVI, Inc." Tr. at 285-286. Christine Clay was also a Principal at AP Services and was brought in by Mr. Toney to work on HR issues. *Id*. at 286.

Mr. Toney testified that during the first nine to twelve months of his engagement with DVI, he worked "pretty much exclusively" on DVI. Tr. at 241. However, during the prior summer, he had worked on two other engagements. *Id*. He specified that these were not management engagements but consulting assignments. *Id*. He clarified that between August 25, 2003 and the present, other than DVI, he had worked on "a couple of assignments part-time" over the "last couple of months." *Id*. at 242. Thus, while during the first part of the DVI assignment, he was full-time on DVI, during the months of June 2004 through August 2004, he worked on two other assignments. *Id*. I assume that these part time assignments were for AP and not for DVI.

Mr. Toney testified that once AP assigned him to the DVI matter, the authority given to him by the Board of Directors was that of CEO of the company for DVI. Tr. at 242. This meant that as a CEO of DVI, he had the authority to hire and fire employees of DVI. *Id*.

I find that these facts show that Mr. Toney remained a "Principal" engaged on behalf of AP while assigned under contract to DVI.

Moreover, the contract in Attachment D/CX 19 independently shows that AP is also a subcontractor, contractor and/or agent of Respondent DVI. 18 USC § 1514A. Therefore, AP is subject to the statute.

In ***Morefield v. Exelon Serevices, Inc. and Exelon Corporation***, 2004-SOX-00002 (ALJ Order Jan 28, 2004), the Administrative Law Judge ("ALJ") framed the issue to be whether the

[3] Mr. Toney testified that Christine Spadafor-Clay ("Ms. Clay") had also been assigned to the DVI project on August 25, 2003, by AP, and was also a Principal in the firm. Tr. at 242-243. To the best of his knowledge, Ms. Clay's salary was paid by AP. *Id*. at 243. Mr. Toney testified that he had asked fellow principal, Ms. Clay, to perform human resources and administrative functions at DVI, under his direction. *Id*.

whistleblower provisions of the Act are available to a complainant who was not an employee of a publicly traded company, but rather worked for a subsidiary of a public traded company. The ALJ determined that Congress must have intended the employees of non-publicly traded subsidiaries to be protected by the Act's whistleblower provisions.

In ***Klopenstein v. PCC Flow Technologies Holdings, Inc. and Allen Parrott***, 2004-SOX-11 (ALJ July 6, 2004), the ALJ dismissed the complaint for reason that Complainant's employer, a non-publicly traded subsidiary of a publicly traded company, was not a publicly traded company. The ALJ agreed with the reasoning in ***Morefield***, that employees of non-public subsidiaries of publicly traded companies can be covered by the whistleblower provisions of the Act, but held that in the case before him the complainant had not filed his complaint against the parent company. The ALJ articulated: "I find the commonality of management and purpose between the two companies sufficient to most likely bestow whistleblower protection upon Complainant had he sued the parent company. He did not however." ***Klopenstein***, *supra*, at 8.

A Decision and Order of another ALJ is not precedent but may be used to aid me or persuade me. I find that ***Morefield*** is persuasive.

AP also argues (probably alternatively) that Congress included the terms "officer, employee, contractor, subcontractor, or agent" to establish *respondeat superior* liability, *i.e.* that publicly traded companies are vicariously liable if their officers, employees, contractors, subcontractors or agents violate the Act. It argues that establishing *respondeat superior* liability of publicly traded companies, rather than extending the Act's jurisdiction to non-publicly traded companies and individuals, is "consistent with well-established law interpreting other federal employment discrimination statutes." It asserts that to extend liability to AP "would not further the stated goal of Congress in enacting the entire Sarbanes-Oxley statutory scheme, which was to protect innocent shareholders of publicly traded companies." It alleges that DVI, not AP, has vicarious liability.

I reject that interpretation, as the clear intent of the statute is, in this context, to protect whistleblowers. 29 CFR § 1080.100 states, in pertinent part, that the statute:

> … provides for *employee protection* from discrimination by companies and representatives of companies because the employee has engaged in protected activity pertaining to a violation or alleged violation of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, *or* any provision of Federal law relating to fraud against shareholders.

(emphasis added). 29 CFR Part 1980, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52103 (Aug. 24, 2004). Moreover, the contract between AP and DVI identifies AP as the subcontractor who supplies Mr. Toney and relates reciprocal, mutual indemnification, in case of liability. Attachment D: ¶ 7; CX 19:14.

After reviewing the contract language and evaluation of the actual relationships involved factually, I find, alternatively,[4] that under the contract, AP assumed *respondeat superior* liability to the Complainant.

The Restatement of Agency defines an agency relationship as "the fiduciary relation

[4] Even if the statute requires AP to have been the Complainant's "employer," I note that contrary to AP's position, the statute does not require that a respondent be an "employer" to be liable for a violation. *See* discussion *infra*.

which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." ***Restatement (Second) of Agency*** S 1(1) (1958). In ***Petition of United States***, the Third Circuit defined an "agent" as one who is "employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf." 367 F.2d at 509 (citing Restatement (Second) of Agency S 14 N).

The Board has defined a "joint employer" as "a company that is unrelated to the employer-in-fact but which exercises sufficient day-to-day control over a [complainant's] work to be treated as a co-employer of the [complainant]." ***Williams v. Lockheed Martin Energy Sys., Inc***., No. 98-059 (ARB January 31, 2001). By nature of its responsibilities to DVI, AP significantly affected Ms. Kalkunte's access to employment opportunities. AP consultants controlled the flow of work to DVI employees, (CX 26:116), made the decisions as to which DVI employees would be included in the reduction in force, and made decisions about how to pay the remaining DVI employees. CX 19:2-3.

When Mr. Toney and Ms. Clay made these decisions in their capacity as DVI officers, they were paid by AP to act in this capacity. Tr. at 240-41; CX 26:87, 107, 112; CX 28:272-75. Likewise, Mr. Toney and Ms. Clay submitted to AP their expenses for reimbursement, received medical benefits through AP's corporate plan, and were protected under an insurance policy secured by AP. Tr. 241. I find this conduct a manifestation of consent to act Mr. Toney and Ms. Clay on AP's behalf and subject to its control, and consent by to act accordingly. Moreover, I note that Mr. Toney was the official designated representative of both DVI and AP. I find that this, standing alone, is a clear expression of agency.

For these reasons, AP is an "agent" under the statute.

Here, Complainant alleges that she suffered retaliation for engaging in activity protected by the Act, and that the retaliatory conduct was the responsibility of her employer, a publicly traded subsidiary, as well as AP, a non-publicly traded company, which furnished the actor accused of discriminatory activity. The non-publicly traded entity is a subcontractor and/or contractor and agent of the publicly traded company. Complainant has set forth a cause of action under the Act sufficient to withstand a motion for summary decision. Consequently, summary decision on this ground must be denied.

AP argues that the Department of Labor has analyzed this language on several occasions. ***Powers v. Pinnacle Airlines, Inc.***, 2003-AIR-00012 (March 5, 2003) (dismissing the complaint because the complainant's employer, while an indirect subsidiary of a publicly traded company, did not itself meet the definition required by the Act). *See also* ***Flake v New World Pasta Co.***, 2003 SOX 00018 (July 7, 2003) (holding there is no jurisdiction under the Act when the respondent does not satisfy either of the alternate definitions of a company). Clearly, individuals do not fit either prong of the statutory definition. It further asserts that most individuals are "not themselves the complainant's employer"… as required by the Act." ***Powers***, at 4. *See* Brief.[5]

[5] In ***Stephenson v. NASA***, No. 98-025 (ARB July 18, 2000), the Administrative Review Board ("ARB" or "Board") considered whether an employer may be held liable for actions it has taken against a person who is not its common law employee. The Board concluded that:

> [i]n a hierarchical employment context, an employer that acts in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee … The issue of employment relationship necessarily depends on "the specific facts and circumstances" of the particular case, however.

AP also argues that the language "or any officer, employee, contractor, subcontractor, or agent of such company" does not extend subject matter jurisdiction to officers, employees, contractors, subcontractors, or agents of publicly-traded companies. 18 U.S.C. 1514A (emphasis added). "Toney was, in fact, an employee of DVI, a publicly-traded company, when he decided to terminate Complainant's employment with DVI. Tr. 242 at 16-22. However, the quoted statutory language does not mean that Toney may himself be sued for damages under the Act by virtue of that employment relationship. Congress included this language, not to establish individual liability, but to establish respondeat superior liability, *i.e.* that publicly traded companies are vicariously liable if their officers, employees, contractors, subcontractors or agents violate the Act." *See* Brief.

I find that this argument is inconsistent with the "plain text" of SOX, the legislative intent behind the statute, the regulations, and case law. ***Powers***, *supra*, did not concern itself with a contractor, subcontractor, or agent. ***Flake*** is not precedent and is merely instructive and does not address this fact pattern where the same person, Mr. Toney, is an admitted principal/agent of AP and DVI as well. Tr. at 43, 49 (Both DVI and AP acknowledge him as their representative).[6]

Again, SOX reads:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), ***or*** any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee.

18 U.S.C. § 1514A(a) (emphasis added).

The Complainant argues that contrary to AP's contention, the clear and unambiguous text

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Id. at 8.

[6] Neither ***Powers*** nor ***Flake*** are applicable to this fact pattern. DVI is a publicly traded company that contracted with AP for the use of Mr. Toney. AP does not deny this fact. It described the relationship as an "independent contractor relationship." *See* AP's Brief at 4. The Complainant is an employee of a publicly traded company. Even if AP were an independent contractor, the statute includes "contractors."

AP also cites ***Orell v. UMass Memorial Medical Center, Inc***., 203 F.Supp.2d 52, 64 (D. Mass. 2002). In ***Orell***, the plaintiff alleged age discrimination, disability discrimination and retaliation in violation of the False Claims Act, 31 U.S.C. § 3730(h).

It argues that AP is "merely" a management firm that contracted with DVI to lease temporary employees to DVI:

> As in ***Orell***, the only relationship between Complainant and APS was the appointment of Toney as DVI's CEO by virtue of the contract between APS and DVI. Ex. D, Engagement Letter dated 8/25/03; Christiansen Affidavit. Just as UMMC granted Corbett the authority to fire Orell, Toney had the authority to fire Complainant as DVI's President and CEO. APS did not supervise Complainant's day to day activities, hire or fire any DVI employees, control work assignments, issue operating instructions or conduct any other activity that employers commonly perform.

AP's Brief.

The False Claims Act does not define the term "employer." In the absence of explicit statutory language to the contrary, Congress intended "employer" in § 3730(h) to have its ordinary, common law meaning. ***United States v. Texas***, 507 U.S. 529, 534 (1993); ***Nationwide Mut. Ins. Co. v. Darden***, 503 U.S. 318, 322-23 (1992); ***United States ex rel. Siewick v. Jamieson Science & Engineering, Inc***., 214 F.3d 1372 (D.C. Cir. 2000).

Unlike the statutes in ***Orell***, the SOX whistleblower statute protects employees of publicly traded companies from conduct not only by employers but also from conduct by any officer, employee, contractor, subcontractor, or agent of the employer.

of the statute clearly prescribes that SOX[7] obligations extend beyond just those companies with registered securities. I agree.

Regulations Do Not Require AP to be an "Employer" to be Liable

I also note that contrary to AP's position, the statute does not require that a respondent be an "employer" to be liable for a violation.

In promulgating the regulations under SOX, the Department of Labor defined an employee as "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1801.101 (2004) (emphasis added). Under those same definitions, a "company representative" is defined under SOX as "any officer, employee, contractor, subcontractor, or agent of a company." *Id*. (emphasis added). The regulations further state that "[n]o company or company representative may discharge … or in any other manner discriminate against any employee…" *Id*. at § 1801.102.

AP argues that the definition of "named person" in the Regulations is impermissibly broad. It argues that agencies may not draft regulations that "contravene the will of Congress" as expressed in any statute.[8] It reminds that "the purpose of these regulations is to provide procedural rules for the handling of whistleblower complaints and not to interpret the statute." 69 Fed. Reg. 52106 (August 24, 2004). It asserts that the "clear language" of the Act establishes that Congress did not intend individuals (nor officers, employees, contractors, subcontractors or other agents) of publicly traded companies to be liable under the Act, but instead intended for the publicly traded companies to be held accountable for discriminatory actions taken by such agents.

However, AP falls under the statutory definition of a company representative, described in the statute as any officer, employee, contractor, subcontractor, or agent of such company, and therefore, the Complainant falls under the both the statutory and regulatory definitions of employee. Contrary to the position espoused by AP, the regulations do not require that AP actually employ the Complainant to be responsible.

DVI contracted to AP the power to determine how best to manage the corporation and its assets in light of the pending bankruptcy. CX 19. Included in those powers was the power to evaluate DVI's employees' value to the company and to terminate those who were no longer needed. CX 19:2-3. Mr. Toney, as CEO, had the authority to terminate anyone at DVI, and Ms. Clay testified that she performed the duties of Chief Administrative Officer as part of her duties at DVI. Thus AP, through Mr. Toney and Ms. Clay, had the power to affect Ms. Kalkunte's employment. Tr. 286; CX 28:103-04.

Moreover, Complainant can also be viewed as a third party beneficiary to the agreement between the Respondents in the event that liability is assessed. A "creditor beneficiary" has been accorded full rights to sue under the original contract. *See* 4 Arthur Linton Corbin, ***Corbin on Contracts*** § 787 (1951); 3 E. Allan Farnsworth, ***Farnsworth on Contracts*** § 10.2 (1990); 2 Samuel Williston, ***A Treatise on the Law of Contracts*** §§ 361-64, 381 (Walter H.E. Jaeger ed., 3d ed.1959); ***Restatement of Contracts*** § 133(1)(b) (1932); *See* ***also Restatement (Second) of***

[7] Citing to ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); ***Douglas v. E.G. Baldwin & Assoc., Inc.***, 150 F.3d 604, 606 (6th Cir. 1998).

[8] Citing to ***Ragsdale v. Wolverine World Wide, Inc.***, 535 U.S. 81, 92 (2002).

Contracts § 302 (1981) (extending third party beneficiary status to the broader category of "intended" beneficiaries). Consistent with this analysis, court decisions involving joint payment agreements have characterized them as making the joint payee a third party beneficiary of the contract with the right to sue the promisor for breach. *See, e.g.*, ***United States ex rel. Youngstown Welding & Eng'g Co. v. Travelers Indem. Co.***, 802 F.2d 1164, 1167-68 (9th Cir.1986); ***Merco Mfg., Inc. v. J.P. McMichael Constr. Co.***, 372 F.Supp. 967, 971-72 (W.D.La.1974); cf. ***Maccaferri Gabions, Inc. v. Dynateria Inc***., 91 F.3d 1431, 1441 (11th Cir.1996) (assuming *arguendo* that joint payment provision in contract created a third party beneficiary arrangement under Florida law).

Mark Toney as Named Party

On December 15, 2003, the Complainant filed a complaint with the Secretary of Labor-OSHA alleging that Respondent discriminated against her. The charges were investigated by OSHA, and on or about April 7, 2004, the Regional Administrator of OSHA sent its Preliminary Order to the Respondents. On April 29, 2004, Richard Seguin, Regional Supervisory Investigator, filed his report. The investigation determination has no force or effect, and is not legally prejudicial. ***Hobby v. Georgia Power Co.***, 90-ERA-30 (Sec'y Aug. 4, 1995).

However, the Preliminary Order included that:

1. [Complainant] Waive[d] the reinstatement requirement of the Act since Complainant has moved to another state, searching for comparable employment, and is not interested in returning to work for Respondent based on their impending closure and bankruptcy.
2. Respondent shall pay Complainant back wages, retention bonus, medical benefits and compensatory damages in the amount of $100,000.00, plus interest, which reflects the amount the Complainant would have earned from September 18, 2003, until the bankruptcy concludes, less any interim earnings. Respondent shall pay Complainant interest in accordance with 26 U.S.C. 6621, which sets forth the interest rate for underpayment of federal taxes.
3. Respondent shall expunge any adverse references from Complainant's personnel records relating to the discharge and not make any negative references relating to the discharge in any future requests for employment references.

The parties in this document are noted as DVI and AP. Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer, and notification was made to DVI. 18 USC § 1514B2(B). Mr. Toney was not named.

On or about June 2, 2004, this Office docketed the case; objections were filed by DVI, on June 8, 2004, AP filed objections, and on June 9, 2004, after the case was assigned to me, I set the case for hearing on July 17, 2004. However, after Jack Meyerson, Esquire, entered his appearance for the Complainant, I was asked to reset the case to a later date. After hearing a series of motions, I reset the case for August 13, 2004. After hearing another series of motions and counter motions, I reset the case for November 16, 2004. After Mr. Meyerson moved to withdraw as Complainant's counsel, I entered an order relieving him on September 10, 2004. Mr. Oswald entered his appearance as Complainant's counsel on October 5, 2004. Again, I was asked to continue the case, and I reset it for December 13, 2004.

Whistleblower claims are heard *de novo*. *De novo* means a trial which starts over, which wipes the slate clean and begins all over again, as if any previous proceeding has not occurred. I am bound by the record before me and only that record.

The applicable regulations provide that "[w]hen there is a hearing, the record shall be closed at the conclusion of the hearing unless the administrative law judge directs otherwise." 29 C.F.R. § 18.54(a). The regulation further provides:

> Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record. However, the administrative law judge shall make part of the record, any motions for attorney fees authorized by statutes, and any supporting documentation, any determinations thereon, and any approved corrections to the transcript.

29 C.F.R. § 18.54(c).

I closed the record at the conclusion of the hearing in this matter at 6:50 p.m. on December 15, 2004. Tr. 762. I directed that the record would remain open in two respects:

> First, matters pertaining to documents listed on a privilege log.
>
> Second, the parties were directed to submit simultaneous post-hearing briefs thirty days after receipt of the transcripts and I left the record open fifteen additional days for responses to each other's briefs.

Tr. 755-757.

The issue of individual liability of Mr. Toney was never raised at any point from the time I was assigned the case through the close of the hearing, even after I offered the parties an opportunity to raise any remaining concerns. ("Anything anybody wants to bring up? This is your last chance." Tr. 757.)

Nothing is to be made part of the record once the record has been closed except:

> (1) issues about which the ALJ has directed the record remain open;
>
> (2) "new and material evidence [that] has become available which was not readily available prior to the closing of the record" (29 C.F.R. 18.54(c));
>
> (3) motions for attorney fees and supporting documentation and determinations on such motions; and
>
> (4) any approved corrections to the transcript.

Id.

The Complainant's brief was filed on February 25, 2005. Prior to that the Complainant had requested a correction to the record, but that request did not include a request to amend the named parties.

On or about March 2, 2005, I received a letter from Complainant's counsel advising me that after an inquiry concerning insurance coverage, Mr. Toney should be listed as a named party in this case.

On March 14, 2005, I held a telephone hearing. Mr. Toney appeared and was advised that he had a right to be represented in this matter.

On March 16, 2005, the Complainant filed a Motion to Supplement the Evidentiary Record and to Recognize Mark E. Toney as a Respondent in this Matter. Attached are proposed exhibits, marked as CX 56 (Complainant's OSHA Complaint filed on December 15, 2003) and CX 57 (the April 7, 2004 Findings and Preliminary Order). The attached documents show that the Complainant initially requested that in addition to AP and DVI, she had asked OSHA to name Bettina Whyte, Mark Toney, Christine Clay, Richard Miller, DVI Financial Services, Inc.,

William Goldberg and Nathan Shapiro.

I am advised that under 29 C.F.R. § 1980.101 (2004), "named person" means the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act. I am advised by counsel that the Department of Labor provided Respondents AP and DVI with all details of the OSHA Complaint prior to discovery and the hearing on the record in this matter. 29 C.F.R. § 1980.104(a) (2004) requires the Assistant Secretary to inform the named persons of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint.

I am further advised by Complainant's counsel that counsel for AP and DVI received copies of the materials contained in CX 56 (Complainant's OSHA Complaint filed on December 15, 2003) and CX 57 (the April 7, 2004, Findings and Preliminary Order) well before discovery and the hearing on the record in this matter.

The Complainant argues that because "of these very documents" the hearing on the record took place. "Therefore, Respondents cannot claim unfair prejudice or surprise as the result of the introduction of these exhibits into evidence. Moreover, these exhibits are relevant to the matter before the Court, as they demonstrate that Mark Toney's circumstances as a Named Person in this litigation are indistinguishable from those of Respondent AP Services, LLC. Therefore, these documents serve as the foundation for the Court's recognition of Named Person Mark Toney as a Respondent in this matter." *See* Brief.

AP filed a response asserting that there is "absolutely" no legal basis on which to do so because finding individual liability against Mr. Toney in this matter would violate his Constitutional right to due process. "Complainant apparently has concluded (possibly erroneously) that DVI purchased Directors and Officers insurance pursuant to contract that would cover a judgment against Toney as an individual because he was an officer of DVI. However, it would be clear error for this agency to make a finding of liability against Toney as an individual under the circumstances of this case."

I am also reminded that the Complainant failed to cross-appeal OSHA's finding that, of all the many individuals and companies she listed as "Named Persons" in her complaint, only DVI and AP were liable. "If Complainant had cross-appealed, objecting to OSHA's finding that Toney and the other named individuals were not liable, Toney would have had an opportunity to obtain counsel and defend himself, as APS did when OSHA (albeit erroneously) found it liable." *See* Memorandum dated March 23, 2005.

Mr. Toney did not file a response.

DVI filed a brief response, which can be viewed ambiguously.

AP asserts that before OSHA, DVI submitted a position statement in response to the Complaint. At that time, DVI argued that all parties except DVI had been improperly named and should be dismissed. After OSHA conducted its investigation in this matter, the Secretary issued a finding that DVI and AP were liable to Complainant in the amount of $100,000. I am advised that in response to OSHA's finding that it was a party in this matter, AP retained its own counsel.

AP reminds me that the Complainant addressed numerous discovery requests to DVI and AP, but none were addressed to Mr. Toney. On all discovery briefs and pre-hearing submissions, all three parties listed on their captions only the Complainant, DVI, and APS. On December 2, 2004, counsel for the Complainant sent an e-mail to counsel for DVI asking if counsel would accept service of a subpoena for Mark Toney. "Complainant was well aware that Toney was unrepresented." *See* Memorandum dated March 23, 2005.

When Complainant's counsel asked Mr. Toney in his deposition, "How many of the

gentlemen sitting to your right represent you in your personal capacity?", Toney responded, "None." (Ex. H, p 8, line 20, p. 9, line 3.) At hearing, when counsel for AP stated his appearance for the record, he stated that Honigman Miller (and Sheldon Toll, of counsel) represented AP and that Mr. Toney was present as a corporate representative. Tr. 7, lines 14-15.

In his opening statement at that hearing, counsel for Complainant stated that he would ask for relief against DVI and AP after the evidence was presented and did not then or ever mention relief as to Mr. Toney. Tr. at 33. Counsel for Complainant requested that Mr. Toney should be sequestered as a witness. I did not sequester Mr. Toney because, as both DVI and AP posited, he was present as a corporate representative for both Respondents. *Id*. at 34-35. As part of her case in chief, the Complainant called Mr. Toney as if on cross examination. *Id*. at 238-260. He testified that both DVI and AP had appointed him as corporate representative. *Id*. at 240.

At all pertinent times, Mr. Toney was not included on the caption of the case, on documents that I prepared, or on documents prepared by the parties and filed in this record.

After a review of the evidence on this matter, I find that the Complainant has not established that issues about which I directed the record remain open are involved in naming Mr. Toney as a party. I further find that I have not received any "new and material evidence [that] has become available which was not readily available prior to the closing of the record" (29 C.F.R. 18.54(c)). Therefore, Mr. Tony will not be an added Respondent in this case.

I recognize that current counsel for the Complainant was not representing the Complainant at the OSHA stage, nor at the point in time when the initial round of motions was filed. However, the record shows that the Complainant is a licensed attorney and that she knew or should have known that she needed to address the issue to protect it. There is no allegation that either Mr. Meyerson or current counsel failed to protect the record.

I do not have plenary powers, but on occasion can consider such matters as equitable tolling and amendment of the pleadings to conform to the evidence. However, if I am to administer equity, I would do it on the record unless the interests of justice require otherwise. I find that the record has closed and there is no basis to reopen it.

Although I note that there may be an insurance interest in this matter, whether there is indemnification at this point through Mr. Toney is not relevant to my determination that the Complainant failed to timely move to join him when the record in this matter remained open. Although Mr. Toney did not respond to the Motion to add him as a party, I accept AP's argument that he was considered by all parties to be a witness rather than a party, and that his right to participate as a party must be considered. I rely on AP's assertion that it is a limited corporation rather than a partnership. There is no evidence in the record to controvert the assertion.

I also find that, standing alone, it would be impracticable to add Mr. Toney as an additional respondent in this case, and that his due process rights could be adversely affected if I were to do so.

PRELIMINARY CONCLUSIONS OF LAW

1. The Complainant qualifies as an "employee" of the Respondents under the terms of the Sarbanes-Oxley Act.
2. AP is an appropriate party for subject matter jurisdiction.
3. Mark Toney is not an added Respondent in this case.

ISSUES

1. Whether the Complainant engaged in activities that are protected by the Sarbanes-Oxley Act.
2. Whether the Respondents, actually or constructively, knew of, or suspected, such activity.
3. Whether the Complainant suffered an adverse personnel action.
4. Whether the Complainant's activity was a contributing factor in the adverse personnel action taken against her.
5. If so, whether the Respondents proffered a legitimate, non-discriminatory reason for taking adverse action against the Complainant.
6. If so, whether the Complainant has shown that Respondents' proffered reason is pretextual.
7. If not, whether the Respondents demonstrated that they would have taken the same adverse personnel action regardless of whether the Complainant had engaged in protected activity.

STIPULATIONS

1. Complainant engaged in protected activity in August, 2003, when she reported allegations of fraud and accounting improprieties to the Board of Directors of named party DVI. *See* DVI Proposed Findings I(1); Tr. at 49-50, 208-209, 738-739.
2. The decision-maker at issue, Mark Toney, knew of that protected activity. *See* DVI Proposed Findings I(1); Tr. at 49-50, 208-209, 738-739.
3. The Complainant suffered an adverse employment action when she was terminated on September 18, 2003. *See* DVI Proposed Findings I(1); AP Brief.

CREDIBILITY DETERMINATIONS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *See, e.g.*, ***Frady v.Tennessee Valley Authority***, 92-ERA-19 at 4 (Sec'y Oct. 23,1995)(citing ***Dobrowolsky v. Califano***, 606 F.2d 403, 409-10 (3d Cir. 1979)); ***Indiana Metal Products v. National Labor Relations Board***, 442 F.2d 46, 52 (7th Cir. 1971). I am not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See* ***Altemose Constr. Co. v. National Labor Relations Board***, 514 F.2d 8, 15 n. 5 (3rd Cir. 1975).

I have based my credibility findings on a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The transcript of the hearing contains the testimony of three fact witnesses. I find the testimony of the Complainant, Shelia Kalkunte, to be credible. Although she appeared to be distraught about her case, I found her testimony at hearing to be genuine. She held strong convictions concerning the circumstances surrounding her termination and expressed her opinions cogently. Differences of opinion may exist as to the interpretation of events, but for the most part, I did not find that Ms. Kalkunte embellished the facts as they

pertained to the events leading up to and surrounding her termination. I find the testimony of Mark Toney, the ultimate decision-maker regarding the Complainant's termination, to be less credible than that of Ms. Kalkunte. At times throughout the hearing, he provided non-responsive answers to the questions at hand. He also provided testimony by way of deposition, and in at least one instance, as will be discussed below, his deposition testimony conflicted with his hearing testimony. I find that the testimony of Christine Clay, who aided Mr. Toney in his decision to terminate Ms. Kalkunte, also lacked credibility. On multiple occasions, her version of the facts conflicted with the testimony of Ms. Kalkunte as well as other witnesses who testified by way of deposition.

As noted above, an ALJ is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Accordingly, I will not entirely discredit the testimony of Mr. Toney and Ms. Clay, notwithstanding my finding that they both lacked credibility to some degree. However, as will be discussed below, facts where the testimony of these witnesses directly conflicts with the testimony of Ms. Kalkunte will be found in favor of the Complainant as I find her to be a more credible witness.

Eleven individuals provided testimony by way of deposition: Nancy Cascioli, William Goldberg, Nathan Shapiro, Richard Meller, David Heller, Zachary Judd, Josef Athanas, Rebecca Kolbe, and Jeffrey Bromme; Mr. Toney and Ms. Clay provided deposition testimony in addition to their testimony at hearing. Although I did not have the opportunity to observe the demeanor of the witnesses who testified by way of deposition only, it seems that each deponent was cooperative in deposition, was truthful and thoughtful in his/her responses, and provided internally consistent remarks. Therefore, I find that the testimony of each deponent will be afforded equal weight.

CHRONOLOGY IN BRIEF

June, 2001:	DVI hired Ms. Kalkunte on a contract basis to serve as an attorney in its legal department.
October, 2002:	DVI offered Ms. Kalkunte a full-time, in-house position, and Ms. Kalkunte accepted the position.
December, 2002:	Ms. Kalkunte began her tenure as a full-time DVI employee. Her new title was Associate General Counsel.
May, 2003:	Ms. Kalkunte's title changed to Assistant General Counsel; however, her salary remained unchanged.
June, 2003:	Deloitte & Touche resigned as DVI's independent auditors.
Summer, 2003:	Ms. Kalkunte learned of instances of financial impropriety at DVI from co-workers at the company.
August 11 or 12, 2003:	Ms. Kalkunte sought independent legal advice regarding her ethical obligations as an attorney under the Sarbanes-Oxley Act. Legal counsel advised that she had an obligation to report the improprieties to the company.
August 18, 2003:	Ms. Kalkunte drafted and transmitted a memorandum to DVI's Board of Directors detailing the financial improprieties.
August 21, 2003:	Ms. Kalkunte telephoned two members of DVI's Board of Directors to inform them of the contents of her memorandum and to reiterate her concerns about the

	financial improprieties. The Board members told Ms. Kalkunte that they would hire independent counsel immediately. Thereafter, the law firm of Arnold & Porter was hired to investigate the allegations. Mr. Toney was advised that Arnold & Porter would be investigating the improprieties the following morning, and that he should facilitate a meeting between Arnold & Porter and Ms. Kalkunte.
August 22, 2003:	Arnold & Porter arrived at DVI and met with Ms. Kalkunte.
August 25, 2003:	DVI filed for bankruptcy. Upon filing for bankruptcy, Mr. Toney became the new CEO of DVI.
August 27, 2003:	In a significant reduction in force, DVI notified over ninety employees that their positions were being eliminated. Ms. Kalkunte, however, was not discharged at this time.
September 10, 2003:	Ms. Kalkunte raised the issue of the Arnold & Porter investigation in an email.
September 12, 2003:	Ms. Kalkunte attended a meeting with Mr. Toney and Ms. Clay, at Mr. Toney's direction. During the meeting, the status of the Arnold & Porter investigation was discussed.
September 18, 2003:	Ms. Kalkunte was terminated.
January, 2004:	Robert DeCandia, an attorney in DVI's executive department, was transferred to the legal department, Ms. Kalkunte's former department.

FINDINGS OF FACT

June 2001: DVI Hires Ms. Kalkunte on a Contract Basis

In June, 2001, Ms. Kalkunte was hired on a contract basis to serve as an attorney at DVI. Tr. at 264-265. Her duties included supporting DVI's General Counsel, Melvin Breaux, on a variety of legal matters, including drafting documentation and negotiating provisions of loan agreements, lease agreements, guarantees and security agreements. *Id*. at 265. She also reported to Jennifer Santangelo of DVI's documentation department, which generated the loans and lease documents for DVI. *Id*. When she first started working at DVI, Ms. Kalkunte performed ninety percent of her work for Ms. Santangelo, whose job it was to negotiate provisions to the loan agreements, lease agreements, guarantees, and security agreements. *Id*. Ms. Kalkunte "pretty much enjoyed everything about DVI" and testified that working in-house at a finance company was "pretty much the pinnacle of what [she] wanted to accomplish in [the] legal field." Tr. at 265-266; CX 2.

October/December 2002: Ms. Kalkunte Becomes a Full-Time Employee of DVI

In October, 2002, after nineteen months of working for DVI on a contract basis, senior management offered Ms. Kalkunte a full-time, in-house position. Tr. at 266-267. She negotiated her salary with Richard Miller, the president of DVI, to whom she would be reporting. CX 4, 5. Thereafter, on or about December 13, 2002, Ms. Kalkunte became a permanent employee at DVI. Tr. at 267; CX 3. Her new title was Associate Counsel, which was the title of all the other in-house counsel. Notwithstanding her change in title, she continued to perform the same duties as before. Tr. at 267-268. She testified that, although her official duties did not change, Mr. Breaux, DVI's former General Counsel, had left the company, which "left a wide gap, and senior management decided to ignore the issue and/or not replace their general counsel." Tr. at 268.

Accordingly, Ms. Kalkunte testified that her workload increased. Tr. at 268; CX 16:1. In addition to performing domestic work, she started working with DVI's international branches on a number of their legal and business issues. Tr. at 268; CX 16:1. Toward the middle of 2003, she was asked by senior management to draft opinion letters on behalf of the corporation for the securitization of finances, which had been one of Mr. Breaux's duties. Tr. at 268.

May 2003: Ms. Kalkunte's Title Changes

In May, 2003, senior management changed Ms. Kalkunte's title to Assistant General Counsel. Tr. at 269. Ms. Kalkunte believed that the primary reason for the change was that she had been drafting opinion letters on behalf of the corporation, and it was believed that the lenders would be more comfortable if the person drafting those letters had the title of Assistant General Counsel rather than Associate. *Id*.

Summer 2003: Ms. Kalkunte Learns of Alleged Financial Improprieties at DVI

During the summer of 2003, Ms. Kalkunte learned of alleged financial improprieties at DVI. In her testimony, she indicated that at least some, if not all, of these financial improprieties were connected to the fact that in early June, 2003, Deloitte & Touche, DVI's independent auditors for many years, abruptly resigned. Tr. at 269-270. According to Ms. Kalkunte, DVI's stock began "dropping dramatically" when this news "hit the market." *Id*. at 270. The SEC, which had already started questioning DVI about its prior disclosure statements to the public, began to inquire about the significance of the Deloitte & Touche resignation. *Id*. Moreover, as a result of the Deloitte & Touche resignation, DVI's institutional lenders declared an event of default, and by late August, 2003, DVI lost all of its liquidity sources. *Id*. With no cash available, DVI could no longer conduct business as usual. *Id*.

Specifically, Ms. Kalkunte learned of one allegation of financial impropriety from Pam Turner, a Senior Vice President of DVI Business Credit ("DVIBC"), a subsidiary of DVI. Tr. at 270-271. According to Ms. Kalkunte, Ms. Turner advised that after the default, DVIBC "sort of panicked" and began improperly commingling funds.[9] *Id*. at 270. In addition, Ms. Turner showed Ms. Kalkunte paperwork that suggested the allegation was true. *Id*. at 271. Ms. Kalkunte learned of a second allegation of financial impropriety from Ray Fier and Joe Mallott, members of the Credit Committee that established the delinquency level every quarter. *Id*. at 273-274. According to Ms. Kalkunte, Mr. Fier and Mr. Malott advised her that senior management had changed the delinquency numbers and incorporated

[9] In essence, the business credit department was financing receivables, paying them into a pool, and then requesting draws on their line of credit to receive money back. Tr. at 270-271. DVI began taking money in, but refusing to honor the lines drawn on it by customers who were non-defaulting. *Id*. Instead, DVI applied the funds to the customers who were defaulting, since those customers also happened to have a huge amount of exposure to DVI's financial services and this would avoid going into default under their large loans. *Id*. Ms. Kalkunte testified that this was "a breach of contract in addition to … a lot of … other improprieties." *Id*.

Ms. Kalkunte testified that Ms. Turner had told her it was Terry Cady, the president of DVIBC, who had instructed that the funds be rerouted in this manner. Tr. at 271. According to Ms. Kalkunte, Ms. Turner showed her the paperwork to prove this allegation, at which point Ms. Kalkunte became "livid" and advised the subsidiary to "cease and desist sending e-mail around to all the various business people" and further advised that it must "re-reconcile their numbers, so that non-defaulting customers were receiving their draws and notices of default were sent to defaulting customers." *Id*.

those changes into the disclosure statements filed to the public. Tr. at 273-274; CX 16:2. Ms. Kalkunte testified that Mr. Fier and Mr. Mallott further told her they had "actual documentary evidence that they took home and put in their vault to protect them[selves] in case the issue ever came up." Tr. at 274; CX 16:2. Ms. Kalkunte learned of additional allegations of financial impropriety from DVI's Chief Financial Officer, Steve Garfinkel, who advised Ms. Kalkunte of further instances of improper conduct on the part of various individuals in senior management. Tr. at 271-272.

AP Hired by DVI

Meanwhile, in early August 2003, DVI's Board of Directors hired outside professionals to assist with the financial distress being experienced by DVI. *Goldberg Deposition* at 15. After interviewing two or three firms, the Board selected AP to serve as "bankruptcy specialists" and "turn around consultants. *Goldberg Deposition* at 18-20, 69; CX 11:¶ 4. Specifically, Mr. Toney of AP was to serve as a restructuring advisor in which capacity he would assist DVI in preparing for bankruptcy. Tr. at 520. Then, effective August 25, 2003, Mr. Toney would actually become DVI's CEO, at which time Michael O'Hanlon, who had been serving as DVI's CEO, would resign. CX 11:¶ 4; *Goldberg Deposition* at 20; Tr. at 517-518, 520; CX 19.

As CEO of DVI, Mr. Toney was to report to DVI's Bankruptcy Committee of the Board of Directors, DVI's Creditors' Committee, and the Bankruptcy Court. Tr. at 592; *Goldberg Deposition* at 74. Overall, Mr. Toney brought a team of about eight other AP principals and associates to assist him at DVI. CX 47:¶ 8. In particular, Ms. Clay another Principal of AP, became the Chief Administrative Officer of DVI and performed human resources and administrative functions at DVI at the direction of Mr. Toney. Tr. at 243; CX 47:¶ 8; 48: ¶ 1. As CEO of DVI, Mr. Toney had the authority to hire and fire employees of DVI. *Id*. at 242.

In addition to retaining AP, DVI also retained outside legal assistance just prior to and during the bankruptcy. Specifically, Mr. David Heller of Latham & Watkins was to serve as lead bankruptcy counsel, and his partner, Mr. Josef Athanas, was to oversee the day-to-day aspects of the bankruptcy. Tr. at 530-531; *Heller Deposition* at 6:13-14. Mr. Richard Meller of Latham & Watkins was to serve as the General Counsel of DVI, though he would not be working in DVI's Jamison office; rather, his associate, Zachary Judd, would be working as an attorney "on the ground" at DVI and would report to Mr. Meller. *Id*. at 530-531, 601-602. The law firm of Adelman & Lavine also provided counsel. Tr. at 530-531. Mr. Goldberg testified that AP and outside legal counsel "carried out their activities against the broad construct of board resolutions" and that there were frequent board meetings to monitor the activities and progress of the bankruptcy specialists. *Goldberg Deposition* at 69, 73.

Early-Mid August, 2003: Ms. Kalkunte Contacts Thatcher, Proffitt & Wood

In the meanwhile, Ms. Kalkunte was "very confused" as to what she should do regarding the allegations of financial impropriety that she had learned. Tr. at 274. She did not know much about the Sarbanes-Oxley Act other than the fact that attorneys, whether they are in-house or outside counsel, have a "very specific responsibility" when they learn of improprieties that may implicate SEC laws or fraud on shareholders. *Id*. Therefore, on August 11 or 12, 2003, she telephoned a friend and mentor, Steven Whelen, a partner at the law firm of Thatcher, Proffitt & Wood ("Thatcher, Proffitt"), to obtain some information about her obligations under the Sarbanes-Oxley Act. *Id*. at 274-275. Ms. Kalkunte explained her situation to Mr. Whelen, who consulted with other partners from his firm, and

advised Ms. Kalkunte that the matter was serious and that she had an obligation to report the improprieties to the president of the company and the Audit Committee members.[10] *Id*. at 275. On August 13, 2003, Thatcher, Proffitt sent Ms. Kalkunte a letter in which they made clear that she had a duty to report the improprieties "up the chain." Tr. at 276; CX 50.

August 18, 2003: Ms. Kalkunte Drafts Memorandum to Audit Committee Members

On August 18, 2003, Ms. Kalkunte drafted and transmitted a memorandum to the Audit Committee members setting forth the same improprieties that she had discussed with Thatcher, Proffitt, and some other improprieties that had come to her attention. CX 7; Tr. at 277-278.

August 21, 2003: Ms. Kalkunte Telephones Mr. Shapiro and Mr. Goldberg

On August 21, 2003,[11] Ms. Kalkunte telephoned Mr. Shapiro and Mr. Goldberg to discuss with them the improprieties described in her memorandum. Tr. at 280-281; *Goldberg Deposition* at 36-37. According to Ms. Kalkunte, Mr. Shapiro and Mr. Goldberg were "very upset" and expressed a "deep concern about these particular improprieties." Tr. at 281. They advised Ms. Kalkunte that Susan Gibson, DVI's Director of Operations, had drafted a similar type of memorandum alleging some financial impropriety at DVI. Tr. at 281; EX 2. They requested that Ms. Kalkunte get a copy of Ms. Gibson's memo and review it so that she could "get involved in that aspect as well." Tr. at 281. Finally, they advised Ms. Kalkunte that they wanted to hire someone to investigate these matters right away, "even before the bankruptcy commenced." *Id*. Similarly, Ms. Kalkutne emphasized the need for an investigation to commence immediately in light of her obligations under the Sarbanes-Oxley Act. *Id*. She was concerned that the matter be disclosed to the public immediately so that it did not appear as though DVI was attempting to go through the bankruptcy without the public being aware of this information. *Id*. at 282. Later that evening, Mr. Goldberg called Ms. Kalkunte back, and advised her that Arnold & Porter had been retained to start investigating at DVI the next morning, August 22, 2003. *Id*.

Mr. Goldberg also provided testimony on his multiple telephone calls with Ms. Kalkunte that day. During the first call, Ms. Kalkunte stated that the reason for her call was to seek clarification from the Audit Committee regarding how the investigation of alleged collateral reporting improprieties was being carried out. *Goldberg Deposition* at 41. During the second call, Ms. Kalkunte reported that she had reason to believe there had been improper or incorrect collateral reports prepared by management and furnished by management to the company's lender. *Id*. at 43. She further stated that two mid-level executives involved in credit and collections activities, Ray Fier and Joe Mallott, had removed from DVI for safekeeping documents that they had prepared, which proved that senior executives of DVI had subsequently altered those documents. *Id*. at 43-45. Ms. Kalkunte believed that these documents had been provided to the Board in their altered state, and then incorporated into the company's SEC filings.[12] *Id*. at 45. Finally, Ms. Kalkunte reported that she had seen garbage bags at the

[10] Audit Committee members Goldberg and Shapiro are also referred to as Board members throughout.

[11] The transcript incorrectly states September 21, 2003. Tr. at 282-283.

[12] Mr. Shapiro also provided testimony on his multiple telephone calls with Ms. Kalkunte that day. He similarly testified that Ms. Kalkunte advised of the delinquency reports being provided to the Board of Directors. *Shapiro Deposition* at 12. He testified: "[I]f the reports that were being presented to us were being changed for the director's

company, which could have contained shredded paper. *Id*. at 46. According to Mr. Goldberg, he and Mr. Shapiro thanked Ms. Kalkunte for coming forward and "doing the right thing." *Id*. at 47. They advised her that they would take the allegations seriously and act upon them immediately by hiring independent counsel. *Id*. at 47-48. In addition, they asked Ms. Kalkunte to memorialize her report in writing. *Id*. at 47.

August 21, 2003: Arnold & Porter Investigation Planned

After speaking with Ms. Kalkunte, Mr. Goldberg and Mr. Shapiro contacted Mr. Meller to determine which firm to retain for the independent investigation and how to safeguard the company's books and records. *Goldberg Deposition* at 49-50. Later that evening, the Board met and formed the "Special Committee" comprised of Mr. Goldberg, Mr. Shapiro, and Mr. McHugh, for purposes of investigating allegations of certain financial and/or accounting and/or other irregularities, including possible misrepresentations as to the amount and nature of collateral pledged to lenders. CX 11:¶ 1; *Goldberg Deposition* at 48-49. In addition, an engagement letter with the law firm of Arnold & Porter was executed to conduct the investigation. *Goldberg Deposition* at 57; CX 8; CX 11:¶ 2.

Later that evening, Mr. Meller telephoned Mr. Toney to advise him that Arnold & Porter had been retained to perform an investigation of allegations of accounting improprieties at DVI. Tr. at 244, 560. Mr. Meller further informed Mr. Toney that Ms. Kalkunte had called the Board and alerted them to shredding going on at the company. *Id*. at 243-244, 560. Finally, Mr. Meller requested that Mr. Toney make available all records and personnel necessary to aid the investigation and facilitate a meeting the next morning between the Arnold & Porter investigators and Ms. Kalkunte. Tr. at 244-245; *Meller Deposition* at 55-56. Immediately thereafter, at approximately 10:00 or 11:00 at night, Mr. Toney called all AP managers and told them to "go all the way through the building . . . find every shredder, shut it down and lock it down . . ." Tr. at 561.

August 22, 2003: Arnold & Porter Investigators Arrive at DVI

The following morning, August 22, 2003, Arnold & Porter investigators, Jeffrey Bromme, a partner with the firm, and Charles Malloy, his associate, arrived at DVI. Tr. at 282; *Bromme Deposition* at 18. At that time, Mr. Toney discussed with them, as a preliminary matter, what needed to be done to "secure everything." Tr. at 561; *Bromme Deposition* at 18. Mr. Toney then set about facilitating a meeting between the Arnold & Porter investigators and Ms. Kalkunte.[13] Tr. at 245, 561. He led the investigators to Ms. Kalkunte's office, introduced everyone, and explained to Ms. Kalkunte that the investigators had come to speak with her about the allegations she had made to the Board. *Id*. at 561-562. Mr. Toney then walked everyone over to a conference room and told Ms. Kalkunte to be forthright and "to tell them everything that she wanted to share with them and to take as much time as they needed." *Id*. Mr. Toney testified that subsequent to that initial introduction, he did "nothing at all" to interfere with Ms. Kalkunte's ability to communicate

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booklets, these reports were then going to the public. That is indeed an inaccuracy that is being presented to the public marketplace." *Id*. at 13.

[13] According to Mr. Toney, when the Arnold & Porter investigators arrived, they had a list of the employees with whom they wished to meet; first and foremost was Ms. Kalkunte. Tr. at 561. Mr. Bromme testified that Ms. Kalkunte was the only person substantively interviewed that day. *Bromme Deposition* at 18.

with the investigators. *Id*. at 562. He viewed the Arnold & Porter investigation as independent and understood his role to be one of providing assistance rather than leading or conducting the investigation. *Id*. at 566. He stated that the investigators were an "independent party" and he "did not get into who they talked to, who they wanted to talk to." *Id*.

Ms. Kalkunte provided testimony on the substance of her meeting with the Arnold & Porter investigators. During the meeting, which lasted five or six hours, she discussed the improprieties set forth in her August 18, 2003 memo, and reiterated the points that she had discussed with Mr. Shapiro and Mr. Goldberg. Tr. at 283. She mentioned the names of the individuals whom she knew had copies of the delinquency reports (*i.e.* Mr. Fier and Mr. Mallott). *Id*. Ms. Kalkunte testified that, generally, she had been "extremely blunt" about what was happening at DVI. *Id*. Mr. Bromme also provided testimony as to the substance of the meeting, which according to him, lasted approximately three hours. *Bromme Deposition* at 21. He testified that Ms. Kalkunte did the best she could to provide information and was helpful in increasing their knowledge of the situation. *Id*. at 30. She covered a number of allegations of impropriety at DVI, described how the company was organized, and provided a sense of some of the personalities that had been at the company. *Id*. at 30-31. She also identified some individuals at DVI from whom the investigators might be able to gain more complete information.[14] *Id*. at 31.

Mr. Bromme provided a detailed description of the issues raised by Ms. Kalkunte during the interview. The first issue raised by Ms. Kalkunte was improper document destruction at DVI. *Bromme Deposition* at 35. Although she had not witnessed this, Ms. Kalkunte had learned from her secretary that there seemed to have been excessive shredding at the company. *Id*. at 35. Ms. Kalkunte had also seen some bags of shredded materials in the hallway. *Id*. The second issue raised by Ms. Kalkunte dealt with accounting/record keeping problems; she identified people at DVI who would know more about these problems. *Id*. at 36. The third issue raised by Ms. Kalkunte dealt with pools of assets that had been improperly described by people at DVI to make it appear as though creditors had more collateral than they actually had.[15] The fourth issue raised by Ms. Kalkunte dealt with an allegation she had learned from Mr. Boyle regarding records being "shaped by management." *Id*. at 40-41. The fifth issue raised by Ms. Kalkunte dealt with her dissatisfaction at how her prior boss, Mr. Breaux, had been treated. *Id*. at 37. She believed that Mr. O'Hanlon, as CEO, had "marginalized" the legal department and that her boss, Mr. Breaux, been "pushed out" of the company. *Id*. at 38. Further, Ms. Kalkunte did not understand why Mr. Breaux had not yet been replaced and why he had not been replaced by her. *Id*.

[14] According to Mr. Bromme, Ms. Kalkunte did not exactly make allegations; rather, she reported matters that she believed to be worthy of further investigation. *Bromme Deposition* at 32. Thus, what was most important from their meeting was not the substance of Ms. Kalkunte's comments but that she pointed them in the right direction as to whom else at DVI they should contact to learn more about these allegations. *Id*. at 42-43. While it did not appear that Ms. Kalkunte had firsthand knowledge of these matters, she was clear in distinguishing between things that she had just heard and things that she knew. *Id*. at 32.

[15] Mr. Bromme testified that this issue had also been identified in a memo written by another DVI employee, and that he followed up on this issue with her. *Bromme Deposition* at 47.

August 25, 2003: DVI Files for Bankruptcy

On August 25, 2003, DVI filed for relief under Chapter 11 of the United States Bankruptcy Code. CX 11:¶ 3; Tr. at 284-286. According to Mr. Toney, DVI had been "moving towards a very rapid meltdown" and the idea was to "at least stabilize it and do it as a wind down in an orderly manner." Tr. at 527. Mr. Toney testified as to the reasons that it made sense for DVI to file for bankruptcy. He stated that, while DVI had been operating in the hope of remaining an ongoing entity, it became clear that the company was not writing new loans, not generating new business, and not marketing its services. *Id*. DVI was "out of cash" and did not know how it was going to pay its payroll. *Id*. at 521. Creditors were "tightening down completely to the point that they wouldn't fund the organization." *Id*. In other words, as cash receipts came in, creditors were not allowing the company to use that cash. *Id*. Moreover, the allegations of impropriety were another reason for DVI to file for bankruptcy. *Id*. Mr. Toney testified that, since DVI was a publicly traded company, much of the information sought by the creditors could not be obtained without sharing it with the general public. *Id*. However, the bankruptcy process would allow "it to be more like a microscope … a fishbowl where information [could be] more freely shared and open to other constituents or parties of interest in the case." *Id*.

Mr. Toney testified that once he assumed the role of CEO at DVI, he immediately held a meeting with all DVI employees to introduce himself as the new CEO, explain that the company had filed for Chapter 11 protection under the Bankruptcy Code, and that it was in the process of securing financing to ensure that employees would continue to be paid post-petition. Tr. at 527-528. He also explained the policy regarding retention of records (*i.e.* that no records were to leave the organization and that there was to be no destruction of any electronic or corporate files). *Id*. In addition, he explained that an investigation had been launched by the Board into some allegations about the company and that all employees were asked to cooperate fully. *Id*. Finally, he alerted the employees that due to the financial crisis at the organization, a reduction in force ("RIF") would be necessary and that it would be taking place within the next few days. *Id*. at 531-532.

August 27, 2003: Reduction in Force at DVI

On August 27, 2003, there was a significant reduction in force ("RIF") at DVI. Tr. at 531. Mr. Toney testified that a RIF had been necessary in order to stabilize the company and "wind down" in an orderly manner. *Id*. at 527. Once he assumed the role of CEO, Mr. Toney testified that he was the ultimate decision maker at all times regarding the RIF. *Id*. at 537. To assist him in these decisions, he assigned Ms. Clay to work on human resources ("HR") issues related to the RIF. *Id*. at 532-533. Ms. Clay was to work in conjunction with Nancy Cascioli, a human resources manager at DVI, who did not have experience in RIFs during a bankruptcy.[16] Tr. at 532-533; *Cascioli Deposition* at 93-97.

Mr. Toney testified that the August 27, 2003 RIF had been contemplated even before DVI filed for bankruptcy as DVI's creditors had advised that the company would not be getting funding for all of its employees. Tr. at 532-533. Thus, Mr. Toney testified that,

[16] Mr. Toney also assigned several other professional managers to help supplement the organization, since DVI was in a "crisis situation", there were allegations of fraud at the company, and he needed to assess whether the managers in place at the time could adapt to the crisis-type environment. Tr. at 536-537. Thus, Mr. Toney supplemented the "key parties" or key managers in place at the time with additional managers. *Id*. Mr. Toney testified that he relied on his AP managers "quite a bit" to keep him informed. *Id*. at 537.

before he assumed the role of CEO at DVI, the "initial phase" of the RIF had been originated by several of DVI's senior managers. *Id*. at 532. Ms. Cascioli similarly testified that upper level management at DVI had been making its own first attempt at a RIF list in anticipation of the fact that RIFs were inevitable given the circumstances of the company. *Cascioli Deposition* at 103-104.

Ms. Clay also testified as to the planning stages of the August 27, 2003 RIF. She stated that her first and immediate task at DVI had been to work with the then-senior managers at DVI to identify staff whose jobs could be eliminated. CX 48: ¶ 4. She was to organize a layoff of those employees in order to decrease expenses while assisting in maximizing the value of the company's assets. *Id*. Over the weekend of August 23-24, 2003, Ms. Clay met with Mr. Boyle, Mr. Miller, Mr. Turek, and Mr. Cady to discuss which DVI positions could be immediately eliminated based on the current business condition. *Id*. at ¶ 5. Ms. Clay accepted the recommendations of these managers as to whom to include in the RIF.[17] *Id*. at ¶ 6. On Monday, August 25, 2003, Mr. Toney announced at an all-staff meeting that DVI would be laying off a sizable portion of its workforce that week. CX 48: ¶ 7. On Monday and Tuesday, August 25 and 26, 2003, Ms. Clay shared the list of employees selected for termination with Mr. Toney for his approval, and on Wednesday, August 27, 2003, DVI informed ninety-three employees throughout all U.S. operations that their positions were eliminated, effective immediately. *Id*. at ¶ 8.

Ms. Kalkunte testified that prior to the bankruptcy filing, several individuals in senior management had warned her there would be a significant layoff once DVI filed for bankruptcy. Tr. at 286. Although she had not known in advance who was on the RIF list, Ms. Kalkunte had not been concerned about her own job security because she had been assured by Mr. Miller that she would not be laid-off. *Id*. at 293-294. According to Ms. Kalkunte, Mr. Miller had actually advised her and the other in-house counsel that they need not worry about being laid off, because "now more than ever [DVI] would need attorneys to help them in Chapter 11 . . ." *Id*. at 294. In addition, Mr. Turek had also advised Ms. Kalkunte that she would not be laid-off, since she had worked on a deal just prior to the bankruptcy, and the money brought in as a result was earmarked to go toward the bonus of all the attorneys, including Ms. Kalkunte. *Id*. at 293-294. Ms. Cascioli had also indicated that no one in the legal department, including attorneys and secretaries, would be laid-off. *Id*. at 294-295.

Plans for an Ongoing RIF at DVI

Mr. Toney testified that the August 27, 2003 RIF was but one of a series of RIFs that would need to take place at DVI. As to his ongoing plan for the RIF, Mr. Toney testified that every dollar allotted by the Bankruptcy Court had to be accounted for in terms of benefit to the creditors. Tr. at 533-534. He further indicated that the "creditors scrutinize very closely where every dollar's going" and that, in this case, "they frequently came in and looked at the personnel list as to what everyone was doing." *Id*.

Mr. Toney testified that the main factor to be considered in terms of whom to include in a RIF was whether the employee could contribute to the "immediate needs of the situation" at

[17] Ms. Cascioli testified that, while Ms. Clay used this initial list as a starting off point, it ultimately did not include enough employees. *Cascioli Deposition* at 108. Thereafter, a growing list of employees to be included in a RIF was formed. *Id*. at 110.

DVI. Tr. at 532-533. Mr. Toney stated: "This was not a training ground. This was not going to be a long run. It was basically what could they bring in the short run and can these people be adaptive to the environment." *Id*. Moreover, he indicated that the RIF was to be "complete across the board." *Id*. at 533. He further stated: "It wasn't to be the clerks and the receptionists because that wasn't going to be the significant savings. It had to be senior management all the way down to the mailroom and the cleaning staff basically." *Id*. Mr. Toney testified that "every role had to be justified." *Id*. at 534-535. He used the analogy of being in a boat that was filling up with water, and to keep the boat afloat in the pond, people needed to be bailing water out of it. *Id*. Mr. Toney stated: "[I]f people weren't keeping it afloat or bringing value to the estate or providing assistance to keeping it afloat, then we couldn't justify it to the creditors." *Id*.

Ms. Clay similarly testified that after the first round of layoffs on August 27, 2003, all DVI employees were evaluated on a daily or near daily basis regarding the value they brought to DVI. Tr. at 651; CX 48: ¶ 9. Ms. Clay specified: "We looked at all the levels, from the executives to admin secretaries to the utilities people, everyone was getting a look." Tr. at 651. In addition, she and Mr. Toney discussed not only whether certain inside counsel working at DVI were necessary to the organization but also "challeng[ed] outside counsel as to whether they needed as many paralegals and staffing in general." *Id*. at 654.

Ms. Kalkunte's Responsibilities at DVI Post-Bankruptcy

Ms. Kalkunte testified that, to her surprise, she was never asked to meet with Ms. Clay post-bankruptcy to discuss her duties at DVI or the value she brought to the company. Tr. at 286. However, at hearing, Ms. Kalkunte provided testimony on these responsibilities. As DVI was no longer getting any financing after the bankruptcy, Ms. Kalkunte no longer had the task of drafting opinion letters. *Id*. at 289-290, 352. Nevertheless, her duties and work hours increased. *Id*. at 289-292, 352. First, she began working with the treasury department to put together schedules regarding the location of DVI's assets globally as well as domestically.[18] *Id*. at 286-287. Second, Ms. Kalkunte began working on buying the problem loans, which the SEC had been eyeing, "out of the securitization pool" to reduce risk exposure to shareholders. *Id*. at 287-288. Third, she began drafting and changing resolutions for the company because DVI was undergoing many personnel changes at the time. *Id*. at 288-289. Fourth, Ms. Kalkunte began fielding telephone calls from many of DVI's international offices inquiring as to the impact of the bankruptcy. *Id*. at 289-290. Fifth, Ms. Kalkunte was in charge of the litigation schedule and reviewing various matters for which the company was being sued.[19] *Id*. at 291. She was also called upon to review

[18] Specifically, Ms. Kalkunte was working heavily with treasury to determine all the faults in the various documents and to put together a list of the assets and the value of the assets. Tr. at 287. She realized that this would take a long time as there were no proper books and records. *Id*. Ms. Kalkunte noted that, at that time, Mr. Garfinkel, who was most knowledgeable about these matters, had been put on administrative leave. *Id*. Additionally, Phil Jackson, who had been a senior vice president in the treasury department, had resigned prior to the bankruptcy. *Id*. Although a replacement had been hired, he was very new to DVI and had not known the company was going into bankruptcy and "really had no idea of the structures, the financing, the securitization, the Fleet line, et cetera." *Id*.

[19] An email dated September 19, 2003, from John Boyle to Steve Garfinkel indicates this to be the case. CX 15. In that email, Mr. Boyle states that he had been passing information regarding lawsuits along to Ms. Kalkunte, but since she had been terminated, he was wondering where to direct this type of information. *Id*.

various bankruptcy documents and schedules. *Id*. at 291, 352. According to Ms. Kalkunte, she was frequently called upon by Mr. DeCandia to answer various questions as he "wasn't familiar with other goings on in the company other than the matters he worked on with Rich Miller, the president of the company." *Id*. at 291.

According to Mr. Toney, however, when DVI brought in the law firm of Latham & Watkins to be its lead bankruptcy and corporate counsel, the firm undertook an audit of DVI's corporate books and took over many of Ms. Kalkunte's duties. CX 47:¶ 10. Ms. Clay similarly testified that Ms. Kalkunte's role in the company following the bankruptcy was "never well-defined." CX 48:¶ 14. According to Ms. Clay, Ms. Kalkunte's "main task was to handle corporate bookkeeping – to keep track of stock certificates, corporate minutes, and corporate resolutions for DVI and all of its many subsidiaries." *Id*.

Mr. Meller also provided testimony on Ms. Kalkunte's role at the company. Mr. Meller admitted that he never actually met Ms. Kalkunte in person, though he spoke with her on the telephone several times. *Meller Deposition* at 7. He also admitted that he never had any conversations with Ms. Kalkunte post-bankruptcy regarding her role at DVI, since Mr. Toney had indicated that he would discuss that matter with her. *Id*. at 9. Nevertheless, Mr. Meller provided testimony on what his expectations of Ms. Kalkunte post-bankruptcy. Primarily, he expected her to know where corporate and legal records were kept and where contracts and minute books were kept.[20] *Id*. at 9-10. Mr. Meller also pointed out that, since DVI was not involved in any new contracts with customers, that aspect of Ms. Kalkunte's job was no longer relevant after the bankruptcy. *Id*. at 9. He testified: "What was relevant though was what she might know about the contracts as well as what she knew about the corporate history, corporate structure subsidiaries …" *Id*. In addition, Mr. Meller expected that Ms. Kalkunte would understand the corporate structure and be able to describe it in terms of who owned stock of what company and where those certificates were kept. *Id*. at 9-10.

Ms. Kalkunte Follows-Up on the Status of the Arnold & Porter Investigation

Ms. Kalkunte made several inquiries as to the status of the Arnold & Porter investigation post-bankruptcy; however, she experienced difficulty obtaining information in this regard. She testified: "I must've read that attorney section a hundred times and I'm still not exactly sure what I was responsible for. But I was required to follow up on that investigation and look into the improprieties." Tr. at 295-296. On a regular basis, Ms. Kalkunte asked other DVI employees about the investigation and whether they had been interviewed by Arnold & Porter. *Id*. at 296. She also spoke to the Board members about it and followed up with Mr. Heller, Mr. Toney, and Ms. Clay. *Id*.

September 10, 2003 Email

On September 10, 2003, Ms. Kalkunte made one such attempt to follow-up on the status of the Arnold & Porter investigation. Specifically, on the morning of September 10, 2003, she sent an email to Mr. Toney and Mr. Heller stating, among other things, that she needed to discuss the status of the Arnold & Porter investigation with Mr. Goldberg, who was

[20] However, Ms. Kalkunte testified that at no time while employed by DVI was she ever responsible for maintaining the company's corporate books and records. Tr. at 268-269. Rather, Mr. Breaux, while he was General Counsel of DVI, had hired a paralegal, Jackie Greene, who exclusively took care of those tasks. *Id*. at 269.

copied on the email. CX 10:2-3. Four hours later, Mr. Heller sent an email to Mr. Toney stating: "Suggestion: have her get you a 'job description' for the next two weeks and have her update it weekly -- where she thinks she can add value. You can then 'yes/no' it and tell her you will task her with anything beyond that. Might work." CX 24:1. At his deposition, Mr. Heller testified there were two reasons for his having sent Mr. Toney this email. First, Mr. Toney was concerned that "managing [Ms. Kalkunte] was becoming from [Mr. Toney's] perspective almost a job in itself." *Heller Deposition* at 16-17. Second, Mr. Heller testified that he needed to assist Mr. Toney, who needed to make reductions in force, and Mr. Toney had felt [the attorneys from Latham & Watkins] "would be in a good position to comment on what [Ms. Kalkunte] might or might not add." *Id*. Accordingly, Mr. Heller had the following suggestion:

> [F]or two weeks Ms. Kalkunte could let us know everything she thought she could do and give it to [Mr. Toney] and [he] made an analysis of what she should or shouldn't be doing to both, A, understanding Shelia's view of how she could add to the process, and, B, having [Mr. Toney] be in a position to communicate to her succinctly here is what I wanted you to do and here's what I don't want you doing. Because there had been some confusion about what she might and might not be doing, what she should and should not be doing and whether or not there was anything for her to do at all under the circumstances.

Id.

Mr. Heller further testified that there become a time when Ms. Kalkunte was "not a distraction but someone that was taking attention from solving the problems we thought needed to be solved as opposed to helping us solve them … I can say that at some point Ms. Kalkunte was not someone we felt would facilitate what we needed to get done on a very expedited basis." *Id*. at 24-25.

Complications with Arnold & Porter's Retention

Arnold & Porter continued to investigate the improprieties at DVI even after the company filed for bankruptcy; however, there were complications obtaining Court approval of Arnold & Porter's retention. Mr. Bromme testified that Arnold & Porter had been aware "from the beginning" that its retention would not be approved at the outset just as all the other major professionals would not receive immediate approval. *Bromme Deposition* at 81. In addition, Arnold & Porter had been aware that because Deloitte & Touche was one of its important clients, and because Deloitte & Touche had served as DVI's accountant, there could be a problem obtaining Court approval. *Id*. at 84. Mr. Bromme testified that this relationship had been disclosed to the Special Committee from the beginning, and that while arguments had been developed to defend the retention of Arnold & Porter notwithstanding its relationship with Deloitte, "everybody in the case recognized during September that those arguments might not succeed." *Id*. at 85.

Mr. Bromme testified as to what degree having not received Court approval affected Arnold & Porter's investigation. As the retention application was to be brought for hearing in early October 2003, Mr. Bromme testified that "the aim was to responsibly discharge their investigatory task during September [2003], obtain court approval in early October [2003], and then go to the 'second phase.'" *Bromme Deposition* at 78. Mr. Bromme testified that the

investigators wanted to do as much "legwork as [they] could without being on the scene" so that when the investigators returned "at the end of September [2003] for a three-day series of interviews, those could be done efficiently." *Id*. at 77-78. Mr. Bromme further stated that Arnold & Porter was "conscious of the fact that [DVI] was downsizing dramatically during that time period and wanted to ensure that the witnesses preliminarily determined to be important to the fact-gathering process would remain available." *Id*. at 78.

September 12, 2003 Meeting

On September 12, 2003, Ms. Kalkunte met with Mr. Toney and Ms. Clay ("the September 12th meeting"), at Mr. Toney's direction. Tr. at 297. According to Ms. Kalkunte, at the meeting, Mr. Toney stated: "You work for me and I'm the CEO of the company."[21] *Id*. at 298. He also "reprimanded" her about the tone of her e-mails. *Id*. Mr. Toney advised Ms. Kalkunte that they "needed to work together" and that her role was "now to work for Latham & Watkins, that they were the attorneys at DVI and … [her] job was to assist Latham & Watkins only." *Id*. In addition, Ms. Kalkunte's $10,000 bonus was discussed. *Id*. at 299-300. Ms. Kalkunte had been inquiring about the $10,000 bonus that had been guaranteed as part of her salary, and Mr. Toney indicated that "they still hadn't decided what to do on that issue." *Id*. at 300.

Significantly, the status of the Arnold & Porter investigation was also discussed at the September 12th meeting. *Id*. at 298. According to Ms. Kalkunte, Mr. Toney indicated that the investigation had ceased because Arnold & Porter was not getting paid. *Id*. According to the Ms. Kalkunte, this information conflicted with her presumption that the investigation had been moving forward.[22] *Id*. at 299. Although she had presumed Arnold & Porter's retention had "gone through" weeks beforehand, Mr. Toney advised her that this was not the case and that "he had removed them from that list ..." *Id*. According to Ms. Kalkunte, Mr. Toney then proceeded to state that "there was no way in hell that the estate would pay for Arnold & Porter's investigation." *Id*. He also stated: "don't worry," because "at some point" she would "get [her] justice," and that it would be "brought up probably by the Unsecured Creditors Committee or the U.S. Attorney's Office, [which would] look into these improprieties." *Id*. Moreover, Mr. Toney stated that there was "no benefit to the estate to have these improprieties looked into." *Id*. Ms. Kalkunte testified that Mr. Toney was "clearly angry" at her, and from that point forward, it was "very clear" that Mr. Toney was telling her the investigation was none of her business. *Id*. at 299, 300-301.

Mr. Toney also provided testimony on his version of the September 12th meeting. According to Mr. Toney, he began the meeting by explaining to Ms. Kalkunte that "he was the CEO and that all the employees of the company reported to [him]", and that she worked for him. Tr. at 245-246, 551. He admitted to having been direct, if not angry, with Ms. Kalkunte during the meeting. *Id*. at 551. He nevertheless maintained: "I candidly can tell you that I did not stand up and point my finger as has been dramatized in this courtroom and say, 'You work for me.' I basically said, as an employee of this company, and I am the CEO

[21] Ms. Kalkunte testified that, while Mr. Toney claimed "she worked for him," her role was as an attorney for DVI (*i.e.* for the corporation, post-bankruptcy, for what was best for the creditors of the estate). Tr. at 300-301. She testified: "That was my employer, as far as I was concerned, not one particular person at DVI." *Id*.

[22] Ms. Kalkunte had presumed as much because on August 16, 2003, she was asked to draft something explaining Arnold & Porter's role in order to get them paid immediately. Tr. at 299.

of the company, you do work for me." *Id*. Another topic of discussion was Ms. Kalkunte's $10,000 bonus, which had been a recurring question. *Id*. at 541-542. Mr. Toney told Ms. Kalkunte that there had been no resolution of how or if the bonus could be paid. *Id*. at 542. Another topic of discussion was the need for Ms. Kalkunte, as a manager and attorney in the organization, to be "very sensitive" regarding her conversations with individuals outside the organization. *Id*. at 550. Earlier in the week Mr. Toney had learned that Ms. Kalkunte called Andy Rahl, counsel for the Creditor's Committee, and represented to him that she, as well as other employees at DVI, was concerned about receiving pay. *Id*. Mr. Rahl had not yet received Court approval at that time, and therefore Ms. Kalkunte's representations to him concerned Mr. Toney. *Id*. Mr. Toney felt compelled to remind Ms. Kalkunte that "she was an employee of the company, and as an attorney and manager, she needed to be a leader and support the bankruptcy process and try to keep the process moving in a positive direction for the creditors." *Id*. at 551.

A final topic of discussion at the September 12th meeting was the status of the Arnold & Porter investigation. Tr. at 249, 547. Mr. Toney testified that he had advised Ms. Kalkunte that the Bankruptcy Court had not yet approved the retention of Arnold & Porter. *Id*. at 249. He explained that just as the retention of Latham & Watkins, Adelman & Lavine, and AP had required Court approval so too did the retention of Arnold & Porter. *Id*. at 250. Mr. Toney further explained that Arnold & Porter was concerned about investing a significant amount of time in the investigation and then not receiving Court approval. *Id*. Thus, Arnold & Porter was "walking a balance" of trying to keep the investigation moving forward but also protecting itself in case it ultimately did not receive Court approval. *Id*. at 547-548. Mr. Toney advised Ms. Kalkunte that he was not pleased with the pace of the investigation either but assured her that it was moving forward. *Id*. In contrast to Ms. Kalkunte's testimony, Mr. Toney denied ever discussing the cost of the investigation to the estate. Tr. at 548. Moreover, he denied ever using the words: "There's no way in hell I'm going to allow the estate to pay for this investigation." *Id*. at 549. In that regard, he testified: "I'm a professional. I treat employees, especially in these situations, in a professional manner, and I wouldn't have used, while I won't deny that there are times when I will swear, it's not something that I would use in a discussion with an employee in a meeting like this." *Id*. He added that he had been involved in the bankruptcy process "for a long time" and realized that DVI would be responsible for paying for an investigation regardless of which entity was ultimately chosen or approved to conduct it. *Id*.

Finally, Ms. Clay provided testimony on her version of the September 12th meeting. Ms. Clay denied that Mr. Toney stated: "There was no way in hell the estate would pay for the Arnold & Porter investigation." Tr. at 645-646. However, she admitted that Mr. Toney told Ms. Kalkunte that she worked for him. *Id*. at 646. Ms. Clay testified that she believed Mr. Toney stated as such because "there seemed to be some ambiguity in Ms. Kalkunte's reporting relationship" as there was no general counsel at the company, and Mr. Toney wanted to clarify that reporting relationship. *Id*. Ms. Clay testified that during the meeting, Mr. Toney's demeanor was one of "professionalism, firmness, in a conversational tone." *Id*. She stated that, while the issue of Ms. Kalkunte's desire to obtain her $10,000 bonus was raised, there "wasn't time to address it." *Id*. at 647. However, Mr. Toney did instruct her to follow up with Ms. Kalkunte on that issue. *Id*.

Ms. Kalkunte's Actions After the September 12th Meeting

After the September 12th meeting, Ms. Kalkunte spoke to various colleagues about the September 12th meeting. Tr. at 300. She also called her mentor, Mr. Whelan, and advised him "exactly again the conversation that [she] had with Mark Toney." Tr. at 301-302. Ms. Kalkunte testified:

> [Mr. Whelan] was stunned, also, that somebody would say something like that so brazenly, and when I say, say something like that, I don't just mean that I work for him, but say that there was [no] way in hell that the estate would pay for the Arnold & Porter investigation. So he said, let me think about it and call you back. He called back and told me again, the only thing he can see as my obligation is to report it up the chain again, and if reporting to the CEO would be futile, then report it to the audit committee.

Id.

Since reporting to the CEO would have meant reporting to Mr. Toney, Ms. Kalkunte instead contacted Mr. Goldberg and Mr. Shapiro again. Tr. at 302; CX 16:3. She told them about the September 12th meeting and specifically "expressed [a] concern that refraining from retaining the special counsel until after the expedited sale of substantially all of DVI's assets in Chapter 11 would look improper." CX 16:3. According to Ms. Kalkunte, Mr. Goldberg and Mr. Shapiro told her that they would look into it right away and get back to her, just as they had said on August 21, 2003, when she originally told them about the improprieties. Tr. at 302.

Mr. Goldberg also provided testimony on his version of the communications with Ms. Kalkunte at this time. *Goldberg Deposition* at 87. His testimony suggests that the topic discussed was Ms. Kalkunte's sign-on bonus that had not been paid. *Id*. at 87.

There is an issue regarding when Mr. Toney learned of the above discussion between Ms. Kalkunte and the Special Committee Members. During his deposition, Mr. Toney testified that he learned of the above discussion during a Board meeting that took place sometime after September 15, 2003, the filing date of the motion for Arnold & Porter's retention, but before September 18, 2003, the date of Ms. Kalkunte was termination. *Toney Deposition* at 272-273. However, at hearing, Mr. Toney testified that he did not learn of the above discussion until September 22, 2003, after Ms. Kalkunte had been terminated. Tr. at 575-576.

Mr. Toney admitted that, in this regard, his hearing testimony conflicted with his deposition testimony. Tr. at 575-576. He realized his error when he read the transcript from his deposition, reviewed the Board meeting minutes from that day, and learned the date of that meeting. Tr. at 576, 585-587; EX 75. Mr. Toney testified that at the September 22, 2003 Board meeting, he, among other things, advised the Board of recent resignations and terminations. He advised that Ms. Kalkunte had resigned on September 10, 2003, and had been terminated on September 18, 2003. Tr. at 587-588. In addition, the issue of Arnold & Porter's retention was raised. Tr. at 588. Specifically, when Mr. Toney advised that the motion had been filed on September 15, 2003, and would be heard on October 3, 2003, the Board was surprised because Ms. Kalkunte had alleged that Mr. Toney "pulled" the retention papers. Tr. at 588.

September 15, 2003: Retention Application Filed

On September 15, 2003, two attorneys from Adelman & Lavine filed Arnold &

Porter's retention application. Tr. at 572; CX 11.

September 18, 2003: Ms. Kalkunte is Terminated

On September 18, 2003, Ms. Kalkunte was called in to meet with Ms. Clay and Ms. Cascioli. Tr. at 304. According to Ms. Kalkunte, Ms. Clay proceeded to say: "[T]his is the hardest thing I've ever had to do, but we're terminating your position and letting you go." *Id*. The purported reason for terminating her was that her position was no longer necessary; allegedly it had "nothing to do with performance" but was "part of the continuing risk" that ensued from the bankruptcy.[23] Tr. at 304; CX 48: ¶ 22; *Cascioli Deposition* at 144. Ms. Kalkunte testified that she was very surprised by the news of her termination. Tr. at 305. No severance package was offered and she received nothing. *Id*. According to Ms. Cascioli, Ms. Kalkunte reacted negatively to the news of her termination and asked whether other employees with JDs were being retained. *Cascioli Deposition* at 146. Ms. Clay responded that "the RIF was according to job duty, not by other criteria." *Id*.

After the meeting, Ms. Kalkunte testified that she was escorted to her office by Ms. Cascioli where they spent about five minutes reviewing exit papers. Tr. at 305. At this time, Ms. Kalkunte again inquired as to the status of her pre-petition guaranteed bonus, indicating that it was her understanding that the Court had approved payment of it. Tr. at 305; *Cascioli Deposition* at 183. Ms. Kalkunte also inquired as to whether she could take her private file of the opinion letters she had drafted as that liability would follow her. Tr. at 305. At that point, Ms. Cascioli asked Ms. Clay to rejoin them in Ms. Kalkunte's office, since Ms. Cascioli did not know how to respond to Ms. Kalkunte's questions. Tr. at 305; *Cascioli Deposition* at 184. Thereafter, Ms. Clay advised Ms. Kalkunte that there was no decision yet regarding the guaranteed bonus. Tr. at 656; *Cascioli Deposition* at 184. She also advised that Ms. Kalkunte would not be permitted to take her opinion letters as all employees who left the company were not permitted to take any corporate papers with them. Tr. at 656.

Finally, Ms. Cascioli escorted Ms. Kalkunte out of the building as she had been directed to do by Ms. Clay.[24] Tr. at 306; *Cascioli Deposition* at 148-149. While she did not know why Ms. Clay had given this instruction, it did not strike Ms. Cascioli as unusual, since employees who are involuntarily terminated with little notice are often escorted. *Cascioli Deposition* at 150. Ms. Kalkunte testified that she was livid and extremely embarrassed because she was "being escorted out of the building like a criminal." Tr. at 306. Ms. Cascioli testified that during the elevator ride, Ms. Kalkunte stated that "[her termination] would give her more time to do what she needed to do and that she would place a call to the SEC and have DVI crawling." *Cascioli Deposition* at 148.

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[23] A review of Ms. Kalkunte's "Personnel Action Notice" dated September 18, 2003 states that she was terminated as part of a reduction in force. CX 14.

[24] Ms. Clay testified that she directed Ms. Cascioli to escort Ms. Kalkunte out of the building because Ms. Kalkunte had had access to sensitive documents given the nature of her position and was "situated differently" in terms of the importance of her title. Tr. at 655-657. Ms. Clay stated: "This is about the position. It's not about Ms. Kalkunte. Anyone sitting in Ms. Kalkunte's chair would have been treated similarly." *Id*. at 657. In addition, Ms. Clay testified that due to the ongoing investigation, it was "reasonable and prudent" to expect that at some point there would be questions from investigators regarding the process Ms. Kalkunte underwent in leaving the company. *Id*. Ms. Clay stated: "We needed to be able to tell the investigators that all the papers were in fact left behind." *Id*.

Ms. Kalkunte's Actions Post-Termination

After being escorted from the building, Ms. Kalkunte emailed her former colleagues to alert them that she had been laid off. CX 13. She advised them that she believed her termination was due to the fact that she had "informed the board of directors on Monday that Mark Toney had haulted the independent investigation by Arnold & Porter into allegations of 'improprieties.'" *Id*. Ms. Kalkunte further wrote: "After my discussion with the board, they insisted that AlixPartners move to retain [Arnold & Porter] in an emergency motion on Tuesday evening that was heard Wed (among other things). I don't think Mark Toney likes anyone to disagree with him. I also think they considered me a 'rabble rouser' with respect to employee issues." *Id*.

In addition to emailing her former colleagues, Ms. Kalkunte called Mr. Goldberg and Mr. Shapiro and left messages for them asking whether they had had anything to do with her termination. Tr. at 308. She never heard back from them. *Id*. at 307-308. Mr. Goldberg similarly testified that he received a message from Ms. Kalkunte asking whether he was aware that she had been terminated. *Goldberg Deposition* at 85-86. Until he received her message, Mr. Goldberg had not known of her termination. *Id*. at 86. Rather than call Ms. Kalkunte back, Mr. Goldberg asked the attorney representing the outside directors, Robert Romano, to contact her.[25] *Id*.

Investigation Into Ms. Kalkunte's Termination

After learning of Ms. Kalkunte's termination, Mr. Goldberg directed Mr. Meller to perform an investigation into it. *Goldberg Deposition* at 96-97. Accordingly, Mr. Meller requested Ms. Kalkunte's complete personnel file from Ms. Clay. CX 52; Tr. at 446. Subsequently, Mr. Meller reported to Mr. Goldberg that the work performed by Ms. Kalkunte could be performed with adequate or better quality at a lower cost by assigning it to outside counsel, and that some of the work she was involved in was "beyond her personal experience base." *Cascioli Deposition* at 97-98.

Reasons Provided for Ms. Kalkunte's Termination

Mr. Toney was the ultimate decision maker on Ms. Kalkunte's termination. Tr. at 552, 594. He denied that her communication with the Arnold & Porter investigators or her concerns about the retention application had any impact on his decision to terminate her.[26] Tr. at 588-589. Rather, by the third week of September 2003, Mr. Toney determined that Ms. Kalkunte was not providing "significant enough" value at DVI to keep her on. *Id*. at 552. Mr. Toney stated that he had wanted to "give the benefit of the doubt to Ms. Kalkunte"

[25] On September 19, 2003, Mr. Romano called Ms. Kalkunte and, according to Ms. Kalkunte, advised her that while Mr. Goldberg and Mr. Shapiro were "not unsympathetic" to her position, they felt it best to no longer communicate directly with her. Tr. at 308. Instead, all communications were to go through Mr. Romano. *Id*. On September 22, 2003, Mr. Romano sent correspondence to Ms. Kalkunte stating that neither Mr. Goldberg nor Mr. Shapiro had been aware of her termination until learning of it from her, and that they did not make the decision to terminate her, nor did they authorize anyone at DVI to make that decision. CX 51. Also on September 22, 2003, Ms. Kalkunte drafted a memorandum to Mr. Goldberg and Mr. Shapiro formalizing her previous discussions with them. CX 16.

[26] Moreover, Mr. Toney testified that whether an employee participated in the Arnold and Porter investigation did not influence his decision making with regard to any terminations. Tr. at 566-567. In fact, he could not even recall which DVI employees participated in the investigation other than Ms. Kalkunte. *Id*. at 566.

and therefore characterized her termination as a RIF for her benefit so that she could draw unemployment and have an easier time finding a new job. *Id*. at 628. He testified that, just like all DVI employees after the bankruptcy filing, Ms. Kalkunte's role was continuously under evaluation. *Id*. at 537. When questioned specifically as to whether Ms. Kalkunte's work performance affected his decision to terminate her, Mr. Toney stated that as with all employees, he assessed the value that she brought to the estate in terms of her day-to-day workload and concluded that she was not bringing value. *Id*. at 627-628. When questioned as to how Ms. Kalkunte's salary factored into his decision to terminate her, Mr. Toney testified that Ms. Kalkunte's rate of compensation was one factor in assessing how much value she brought to the estate. Mr. Toney added that Ms. Kalkunte's role was as in-house counsel and, in that capacity, she needed to be able to "adapt and be moved and be flexible" in her tasks.[27] *Id*. at 537. In that regard, Mr. Toney admitted having told Ms. Kalkunte that the only employees needed at DVI were those willing to "have a bucket in their hand and throw the water out."[28] *Id*. at 255. Mr. Toney stated that Ms. Kalkunte was not adapting to the "crisis situation" but was instead "fighting with outside counsel," which was not beneficial to the estate. *Id*. at 635-636.

Mr. Toney and Ms. Clay "evaluated the usefulness of having Ms. Kalkunte perform basic corporate duties" and concluded that "unlike the other attorneys working for DVI, Ms. Kalkunte was adding no value to the company, and her role was largely redundant." CX 47: ¶ 11. To that end, Mr. Toney stated that once Latham & Watkins became DVI's lead bankruptcy and corporate counsel it undertook an audit of DVI's corporate books and took over many of Ms. Kalkunte's duties. *Id*. at ¶ 10. Specifically, Mr. Toney's understanding was that Latham & Watkins had needed an individual "on the ground" to help locate records, and that Mr. Meller had assigned an attorney from Latham & Watkins to perform that function. Tr. at 553. Accordingly, Mr. Toney concluded that whatever needs of DVI Ms. Kalkunte had been fulfilling could be covered by another resource within the company or one of the outside attorneys. *Id*.

In addition, Mr. Toney based his decision to terminate Ms. Kalkunte on comments he received from other managers and attorneys. Tr. at 552, 594. Specifically, he discussed Ms. Kalkunte's role and work performance with Mr. Heller, Mr. Athanas, Mr. Meller, and Mr. Schildhorn.[29] *Id*. at 538. Mr. Toney testified that Mr. Heller's assessment was that he

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[27] Mr. Toney further testified that the situation at DVI post-bankruptcy was not one where there were specific job descriptions for each employee. Tr. at 554. Mr. Toney testified: "It's not a union contract where, no, they don't step outside of the bounds of what they're supposed to be doing. I look at an attorney in-house or any organization as being able to adapt to the environment and do whatever is needed to keep the process moving." *Id*.

[28] Mr. Toney testified that in crisis situations, such as the one at DVI, he often used the metaphor of "a little boat on the river and it's got a few holes in it." Tr. at 255-256. He further stated: "And in this situation, there were quite a few holes. And so when I'm looking at a crisis situation, the people that are there, they either have a bucket and they're bailing water out, or I don't need the people in the boat. I need to keep that boat afloat, and the objective there was to try to stabilize this company." Tr. at 255-256. Mr. Toney testified that he used this metaphor in regard to all employees and professionals that had been working on the DVI engagement. Tr. at 256. He stated: "My job is to be as efficient as possible and manage the creditors' money, and so I have to have that philosophy." Tr. at 256.

[29] Mr. Schildhorn was one of the attorneys from Adelman & Lavine who served more as local counsel in Delaware, where the bankruptcy was filed, and whose job it was to prepare the paperwork and ensure that it was filed with the Court. Tr. at 540.

"really wasn't utilizing [Ms. Kalkunte] that much." *Id*. at 539. Mr. Toney testified that Mr. Athanas's remarks regarding Ms. Kalkunte were a "little different in that he had worked with her on a specific situation [that had been] a little disappointing ..." Tr.. at 540; *Athanas Deposition* at 7-8, 11. According to Mr. Toney, Mr. Schildhorn's remarks were that he "basically … was not using her. He said that she had been cooperating in helping with getting the motions." Tr. at 540. Mr. Toney also instructed Ms. Clay to obtain a list of Ms. Kalkunte's day-to-day job responsibilities and to report back to him. Tr. at 252-253, 541. However, he never received such a list from Ms. Clay.[30] *Id*. at 254, 541.

A *Certification* signed by Mr. Toney addresses certain problems caused by Ms. Kalkunte while at DVI; however, these problems, purportedly, were not the reasons for her termination. CX 47:¶ 35. For example, after DVI filed for bankruptcy, Ms. Kalkunte "repeatedly inquired about the pay and benefits of terminated employees, as well as her own fiscal year 2003 bonus." *Id*. at ¶ 20. She "even went so far as to contact the attorneys for the unsecured creditors committee to say that she was representing DVI employees who are unsecured creditors with claims against the company." *Id*. at ¶ 21. Handling and advancing such inquiries were not Ms. Kalkunte's responsibility and contacting the unsecured creditors committee while serving as an attorney for DVI "posed a major conflict of interest and caused considerable confusion between and among the unsecured creditors committee and DVI's outside counsel." *Id*. at ¶ 22. Another example of Ms. Kalkunte causing problems at DVI involved a "very sensitive negotiation over debtor-in-possession financing." *Id*. at ¶ 23-27. According to the *Certification*, Ms. Kalkunte was made aware of certain aspects of the negotiation through the inadvertence of outside counsel, and then demanded information regarding it "in a confrontational manner." *Id*. at ¶ 28.

The *Certification* also states that on September 12, 2003, Mr. Toney was prompted to meet with Ms. Kalkunte regarding her actions. CX 47:¶ 29. During that meeting, he reminded her that she worked for him, criticized her for the tone with which she addressed her colleagues and superiors both inside and outside DVI, and made clear that certain confidential matters did not concern her. *Id*. at 31-32. In addition, the issue of Ms. Kalkunte's bonus was addressed, and Mr. Toney explained the statutory limitation under the bankruptcy code on paying out compensation earned pre-petition. *Id*. at ¶ 33. Finally, in response to Ms. Kalkunte's questions about the status of the investigation, Mr. Toney explained the circumstances surrounding the retention of Arnold & Porter and DVI's impending application for Court approval to pay Arnold & Porter. *Id*. at ¶ 34. According to Mr. Toney, although Ms. Kalkunte's demeanor and judgment were addressed during the September 12, 2003 meeting, they were not the reasons for her termination. *Id*. at ¶ 35. In that regard, Mr. Toney stated: "If the September 12th meeting had anything to do with Ms. Kalkunte's termination, it helped focus Ms. Clay and me on the lack of a role for Ms. Kalkunte in the organization, hastening our inevitable decision to terminate her." *Id*. at ¶ 36.

Ms. Clay also testified about the decision to terminate Ms. Kalkunte. She admitted that during the month of September, 2003, Ms. Kalkunte was the only employee terminated by

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[30] Mr. Toney also admitted that he never asked of Ms. Clay, nor did she ever provide him with, a list of the responsibilities of the other in-house counsel, Robert DeCandia, Ed Bell, Jennifer Santangelo, and Robert Blau. Tr. at 254. He testified that the reason he never asked this of Ms. Clay was that "those people reported primarily to other individuals and [he] was talking to those managers to find out what they were working on." *Id*.

DVI at her initiative and the initiative of Mr. Toney. Tr. at 444. Ms. Clay stated that during the first half of September 2003, as a part of a constant reevaluation of positions required given the change in circumstances at DVI, she reviewed Ms. Kalkunte's role in the company. CX 48:¶ 16. In September 2003, DVI's legal department consisted of only Ms. Kalkunte and her secretary. *Id*. at ¶ 17. Together with Mr. Toney, Ms. Clay evaluated the necessity of having Ms. Kalkunte perform basic corporate duties. *Id*. at ¶ 18. They concluded that unlike the other attorneys working for DVI, Ms. Kalkunte's position was no longer required in light of all the outside counsel performing essentially the same functions as she. *Id*. at ¶ 19.

In evaluating Ms. Kalkunte's value to DVI post-bankruptcy, Ms. Clay spoke with persons who would be knowledgeable on Ms. Kalkunte's duties, which included Mr. Judd, Mr. Schildhorn, and Mr. Meller. Tr. at 647. In general, they all told her that Ms. Kalkunte was performing "more of a record keeping type function rather than day-to-day transactional business functions, and that [her] role in their opinion was more administrative." *Id*. In addition to speaking with counsel, Ms. Clay testified that Mr. Toney had also asked her to meet with Ms. Kalkunte to discuss her job functions. *Id*. at 648-649. Ms. Clay claimed that, while she made a point of asking Ms. Kalkunte to provide a list of her job duties at the September 12th meeting, Ms. Kalkunte never provided such a list. *Id*.

Mr. Meller also provided testimony on the decision to terminate Ms. Kalkunte. He stated that around September 5 or 6, 2003, he spoke with Mr. Toney regarding the value that Mr. Turek, Ms. Kalkunte, and one other employee brought to DVI. *Meller Deposition* at 10-11. Mr. Meller stated he had no opinion on Mr. Turek's value to DVI; however, he did not find Ms. Kalkunte "necessary to the operation." *Id*. at 10. Specifically, he advised Mr. Toney that Ms. Kalkunte did not "seem to have the command of the facts we need and we have to build this from scratch so it is easier to go do it ourselves." *Id*. Mr. Meller also stated that in his attempt to obtain information regarding who owned what stock and which stock certificates were getting pledged, Ms. Kalkunte had provided charts that were "just plain wrong." *Id*. at 11-12. Accordingly, he determined that Latham & Watkins attorneys would need to perform the functions that he had hoped Ms. Kalkunte would be able to perform.[31] *Id*. at 12.

Mr. Heller also provided testimony on Ms. Kalkunte's competence. He testified that "[t]here became a time that it became clear … that [Ms. Kalkunte] was not in a position to get us all the information we needed and all the data we needed and there was a lot of things that she should have known them, but clearly she was not a wealth of information and, yes, viewing Shelia as the source of information that changed." *Heller Deposition* at 10-11. Mr. Heller stated that viewing Ms. Kalkunte "as a conduit to information" changed when it became clear that for "whatever reason" she could not immediately access what was needed, and "with respect to the general operations of the company, there were things she indicated that she just didn't know." *Id*. However, Mr. Heller further stated: "… I don't mean to suggest for one moment that she should have known. I don't know what her job responsibilities were before we got to the scene. But it was clear to me that we were unable to get from [Ms. Kalkunte] what one would be hoping to be able to get from internal counsel." *Id*.

[31] Mr. Meller admitted, however, that he never spent any time at DVI's headquarters in Jamison, never witnessed Ms. Kalkunte at work, and had no idea how busy she was. *Meller Deposition* at 61-62. In addition to the work she performed for him, Mr. Meller was aware that Ms. Kalkunte performed contract review, helped on the DIP facility, and handled some of the day-to-day legal matters, and some litigation. *Id*. at 62.

Ms. Cascioli also provided testimony on the decision to terminate Ms. Kalkunte. Her understanding of the reason for Ms. Kalkunte's termination was that it involved "legal expenses and outside counsel versus the need for inside counsel." *Cascioli Deposition* at 140, 145. Ms. Cascioli testified that between December 2002 and September 2003, she got the general sense that Ms. Kalkunte would "rub people the wrong way . . ." *Cascioli Deposition* at 130. Specifically, she recalled an "email situation" between Ms. Kalkunte and her paralegal, Jackie Green. *Id*. at 131. Other than that, Ms. Cascioli could not recall any conversations with DVI employees regarding Ms. Kalkunte's performance. *Id*. Ms. Cascioli testified that once she was advised of Ms. Kalkunte's termination, she prepared the necessary paperwork and handled it as all other RIFs were handled. *Cascioli Deposition* at 139, 141-142; CX 12. However, she did not prepare the letter that was typically prepared for DVI employees notifying them of a RIF. *Cascioli Deposition* at 142. As to why she failed to prepare this letter, Ms. Cascioli stated: "I don't believe that … letters were prepared either for the person that left on September 15th or … Shelia on the 18th. It became more routine, if I am not mistaken, with the November … reductions and beyond and more recent." *Id*.

Evaluating the Value of Other Employees

Mr. Toney testified that an ongoing process of evaluation was applied to all DVI employees, including managers and executives, assessing the value that each employee brought to the estate. Tr. at 556-557. Specifically, a cost-benefit analysis was performed in terms of whether the employee's work was important to the creditors, the estate, and the bankruptcy process. *Id*. Mr. Toney testified that this evaluative process began before the bankruptcy filing and continued "all the way through the end of it." *Id*.

Mr. Toney, Ms. Clay, and Ms. Cascioli all provided testimony on how the cost-benefit analysis was applied to specific employees, and, in particular, attorneys at the company. Regarding Mr. DeCandia, an attorney at DVI, Ms. Clay testified that he had been "working closely with the Adelman group on a lot of transactional work." Tr. at 650. Ms. Clay consulted with Mr. Schildhorn, outside counsel from Adelman & Lavine, about Mr. DeCandia's value to the company, since Mr. Schildhorn was most familiar with his work. *Id*. Ms. Clay further stated: "[A]s I did with Ms. Kalkunte, I had a conversation with Mr. DeCandia about the work that he was doing at the time."[32] *Id*. at 650-651. Mr. Toney testified that he relied on managers working with Mr. DeCandia, as well as Ms. Clay, to observe Mr. DeCandia's work and value to the estate. *Id*. at 558. Ms. Cascioli's understanding of Mr. DeCandia's job duties was that he worked on "specific major accounts specific to DVI Financial Services." *Cascioli Deposition* at 153.

In January, 2004, Ms. Cascioli processed the transfer of Mr. DeCandia from the executive department to the legal department to assume the position of associate counsel. *Cascioli Deposition* at 158-159; CX 18. However, she could not recall Mr. Toney having provided a reason for the transfer. *Cascioli Deposition* at Depo. at 159. Ms. Cascioli testified: "It's not a big deal. It probably was just to more accurately reflect the type of work that he was doing at that point in time. He was no longer working on large accounts like he had been hired for workout situations." *Id*. Mr. Toney admitted that after he terminated Ms. Kalkunte, he spoke with Mr. DeCandia and explained to him that, since Ms. Kalkunte had left DVI, "if there were things that might fall through the crack [sic], he would have to pick up those

[32] I note that Ms. Clay had no such conversation with Ms. Kalkunte.

items."[33] Tr. at 256-257. In her *Certification*, Ms. Clay stated that since outside counsel had been able to handle all of DVI's general legal needs, the company had not filled Ms. Kalkunte's position with anyone else since her termination. CX 48: ¶ 20. Mr. DeCandia's last day of employment at DVI was in May, 2004, when he was included in a RIF. *Cascioli Deposition* at 190-191.

Regarding Ms. Santangelo, an attorney who headed the documentation department, Ms. Clay testified: "The sense that I had when I heard about Ms. Santangelo, unsolicited, was that she was really seen as one of the stars in the company and we were hoping that she would stay with the company." Tr. at 649. Mr. Toney similarly testified that Ms. Santangelo, who had been earning a higher salary than Ms. Kalkunte, was not terminated because she had been working in documentation, and a large task had been to secure all the files at DVI. Tr. at 614-615, 634-635; EX 63:16. Mr. Toney testified that all managers had agreed that Ms. Santangelo was doing "an extremely good job" and providing "significant assistance" to all outside parties, creditors, and banks. Tr. at 634-635.

Regarding Mr. Bell, another attorney at DVI, Ms. Clay testified: "Mr. Bell was recouping monies for the corporation, which had been an important task given the condition of the company at that time." Tr. at 650. Ms. Clay consulted with one of her AP colleagues about Mr. Bell's value to DVI. *Id*. at 649-650. According to Ms. Clay, Mr. Bell's performance was described in terms similar to that of Ms. Santangelo. *Id*. at 650. Ms. Cascioli's understanding of Mr. Bell's duties was that he worked on "loan workout, which is major accounts in distress who are behind in payments and coming up with a way for them to get back on track with payments." *Cascioli Deposition* at 152-153. Ms. Cascioli testified that Mr. Bell's last day of employment was in April or May, 2004. *Id*. at 191.

Regarding Mr. Blau, another attorney at DVI, Ms. Clay testified that his services were "necessary to the company at that time." Tr. at 650. Ms. Clay consulted with one of her AP colleagues about Mr. Blau's value to DVI. *Id*. Ms. Cascioli's understanding of Mr. Blau's job duties was that prior to August, 2003, he had similar duties to Mr. Bell, and then in August, 2003, he began "workout type work similar to what he had done for financial services for the business credit division." *Cascioli Deposition* at 153-154. Ms. Cascioli also testified that Mr. Blau was part of a RIF on October 1, 2004. *Id*. at 191.

Ms. Cascioli testified that, after the bankruptcy filing on August 25, 2003, it was believed that everyone at DVI would be unemployed by September 30, 2003. *Cascioli Deposition* at 178. According to Ms. Clay, six employees were laid off in November, 2003, ten in January, 2004, and fifteen in February, 2004. CX 48: ¶ 11. At the time of her deposition, Ms. Cascioli testified that there were twelve remaining domestic employees in DVI's Florida office. *Cascioli Deposition* at 71. There were also three or four part-time employees. *Id*. at 71-72. There were no longer any attorneys on DVI's payroll. *Id*. at 72.

Comparitor Situation: Rebecca Kolbe

Rebecca Kolbe, a DVI employee who worked as an executive assistant, also left the

[33] Mr. Toney reemphasized DVI's need to have someone gather records, and noted that after DVI terminated Ms. Kalkunte, he discussed with Ms. Clay rehiring a paralegal who had worked with Ms. Kalkunte and been let go in the initial RIF. Tr. at 556. The idea was that the paralegal could be rehired at a lower cost to facilitate record gathering. *Id*. As it turned out, the paralegal did not wish to return to the company. *Id*. Mr. Toney testified that, even though DVI never ended up filling the position, the workload was fortunately absorbed and picked up as needed. *Id*.

company in September, 2003. Toward the end of her employment at DVI, Ms. Kolbe had served as an executive assistant to Mr. Garfinkel. *Kolbe Deposition* at 7, 21. However, when Mr. Garfinkel left DVI in August, 2003, Ms. Kolbe began unofficially reporting to Mr. Turek. *Id*. at 7-9. While reporting to Mr. Turek, Ms. Kolbe's tasks involved helping with "whatever [AP] or Toney needed help with." *Id*. at 23. She further stated: "I kind of helped a lot of different departments, treasury and anybody else who needed help, I kind of was a wanderer when there was nothing to do. So my duties were to help whoever needed help." *Id*. With regard to whether she had had a lot of work at this time, Ms. Kolbe testified: "No. I made myself a lot of work. I wasn't – Toney didn't have a lot of work for me, and [AP] had a couple of things, but, you know, they – it was a little stressful but not bad, as far as what was going on." *Id*.

Ms. Kolbe was not included in the initial RIF that took place on August 27, 2003. *Kolbe Deposition* at 9. That notwithstanding, Ms. Kolbe testified that after the initial RIF, "we all knew, nobody told us, but everybody knew we were all going to go eventually." *Id*. at 10-11. She anticipated that she would be let go soon as she worked for Mr. Garfinkel; however, no one at either DVI or AP ever told her that her position had been identified for elimination or that her termination was inevitable. *Id*. at 10-11, 14-15. Since she assumed that her termination was inevitable, and since she had personal items to take care of at home, at the end of August/beginning of September, 2003, Ms. Kolbe told Mr. Turek that she wished to be let go for "personal reasons." *Id*. at 10-12. While initially Mr. Turek expressed an interest in keeping Ms. Kolbe employed by the company, he ultimately complied with her request. *Id*. at 17-18.

According to Ms. Kolbe, Mr. Turek consulted with Ms. Clay, who determined that Ms. Kolbe should take her two-week vacation immediately and would then be let go at some point when she returned.[34] *Kolbe Deposition* at 10-13. The day after her conversation with Mr. Turek and Ms. Clay, Ms. Kolbe took her two-week vacation. *Id*. at 13-14. Although she was supposed to be terminated on September 11, 2003 (a Thursday), she had acquired another vacation day, and therefore was terminated the following Monday, September 15, 2003. *Id*. at 14. In completing the forms at the time of her termination, Ms. Kolbe was instructed by Ms. Cascioli to check the box marked "terminated without cause." *Id*. at 16-17, 25. Ms. Kolbe testified that she was not escorted to the door when her employment ended. *Id*. at 18.

Ms. Clay provided a different version of events with regard to Ms. Kolbe's termination. She testified that after the initial RIF, Mr. Turek initiated a conversation with her about whether Ms. Kolbe's services were still needed in light of the fact that Mr. Turek had begun performing less work at the company. Tr. at 438-439, 441. Ms. Clay testified that ultimately Ms. Kolbe was terminated because it was determined that "her function was no longer needed."[35] *Id*. at 651. Ms. Clay further indicated that neither Ms. Kolbe nor Mr. Turek had been "upset" with the termination. *Id*. at 652. Ms. Clay testified that the process used to evaluate Ms. Kolbe did not differ from the process she used in evaluating all DVI employees: she spoke with the person most familiar with her work at the time, Mr. Turek, before the determination was made to terminate her. *Id*. at 652-653.

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[34] The rationale was that Ms. Kolbe could not be let go immediately, since after the initial RIF the Court would not allow another RIF for a certain period of time. *Kolbe Deposition* at 12.

[35] Similarly, Ms. Clay's *Certification* states that on September 15, 2003, Rebecca Kolbe's position as an administrative assistant to Mr. Turek was eliminated because the minimal administrative support Mr. Turek required could be provided by other staff. CX 48: ¶10.

CONCLUSIONS OF LAW

The evidentiary framework for whistleblower claims under the Sarbanes-Oxley Act is specifically set forth in the statute. 18 U.S.C. § 1514A(b)(2)(C). An action brought under the Sarbanes-Oxley Act "shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code." *Id*. Under the statutory framework, a complainant must show by a preponderance of the evidence that the protected activity in which she engaged was a contributing factor in the unfavorable personnel action taken against her. 49 U.S.C. § 42121(b)(2)(B)(iii). The respondent may avoid liability if it can demonstrate by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1980.109. Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq and other anti-discrimination statutes. *See* ***Overall v. Tennessee Valley Authority***, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, ***McDonnell Douglas Corp. v. Green****,* 411 U.S. 792 (1973); ***Texas Dep't of Community Affairs v. Burdine****,* 450 U.S. 248 (1981); ***St. Mary's Honor Center v. Hicks****,* 450 U.S. 502 (1993); and ***Reeves v. Sanderson Plumbing Products, Inc.****,* 530 U.S. 133 (2000).

A complainant may meet her evidentiary burden through direct or circumstantial evidence. Direct evidence is "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected [activity]." ***Wright v. Southland Corp.***, 187 F.3d 1293, 1297 (11th Cir. 1999). In other words, direct evidence is "smoking gun" evidence that the respondent acted with discriminatory (retaliatory) motivation. *See* ***Gavalik v. Continental Can Co.****,* 812 F.2d 834, 852-53 (3d Cir.), *cert. denied,* 484 U.S. 979 (1987). However, since direct evidence of discriminatory (retaliatory) intent may not be available, a complainant may also satisfy her evidentiary burden through the introduction of circumstantial evidence. *See id*. When relying on circumstantial evidence, the complainant must show that: (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. 29 C.F.R. §§ 1980.104(b), 1980.109(a); *See* ***Bartlik v. U.S. Dept. of Labor***, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); ***Carroll v. U.S. Dept. of Labor***, 78 F.3d 352, 356 (8th Cir. 1995); ***Cohen v. Fred Meyer, Inc.***, 686 F. 2d 793, 796 (9th Cir. 1982).

The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under the traditional Title VII analysis, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. ***Burdine***, 450 U.S. at 253. However, under the Sarbanes-Oxley Act, which contains an affirmative defense which most of the other whistleblower statutes do not, once a complainant has made a showing that protected activity "was a contributing factor" in the adverse action, the burden of persuasion shifts to the respondent to demonstrate "by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1980.109. This defense

appears to be a statutory adoption of the dual or mixed motive analysis in ***Mt. Healthy City School Dist. Bd. of Education v. Doyle***, 429 U.S. 274, 287 (1977) (First Amendment case).[36]

Significantly, in cases where a complainant is able to produce direct evidence of discrimination (retaliation), the burden-shifting framework described above does not apply. *See* ***Swierkiewicz v. Soreman***, 534 US 506 (2002); ***Trans World Airlines, Inc.* v. *Thurston***, 469 U. S. 111, 121 (1988); ***Lockhart v. Westinghouse Credit Corp.***, 879 F.2d 43, 48 (3rd Cir. 1989). *See also* ***Goodman v. Lukens Steel Co.,*** 777 F.2d 113, 130 (3d Cir.1985) ("The presumptions and shifting burdens are merely an aid--not ends in themselves. When direct evidence is available, problems of proof are no different than in other civil cases.") (citing ***Trans World Airlines****, supra;* ***United States Postal Serv. Bd. of Governors v. Aikens,*** 460 U.S. 711 (1983); ***Furnco Constr. Corp. v. Waters,*** 438 U.S. 567, 577 (1978)), *cert. granted,* 479 U.S. 982 (1986); ***Dillon,*** 746 F.2d 998, 1005 (1984)("Once the plaintiff establishes liability the sine qua non for the [*McDonnell Douglas*] formula no longer exists."); ***Bell v. Birmingham Linen Serv.,*** 715 F.2d 1552, 1556 (11th Cir.1983), *cert. denied,* 467 U.S. 1204 (1984) ("*McDonnell Douglas ...* pertains primarily ... to situations where direct evidence of discrimination is lacking").

Direct Evidence

As stated above, direct evidence is "smoking gun evidence" or "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected [activity]." Generally speaking, comments made by a manager or those closely involved in employment decisions may constitute direct evidence of discrimination. *See* ***Randle v. LaSalle Telecommunications, Inc.,*** 876 F.2d 563, 569 (7th Cir. 1989); *see also* ***Beshears v. Asbill,*** 930 F.2d 1348, 1354 (8th Cir. 1991). For example, in ***Blake v. Hatfield Electric Co.,*** 87-ERA-4 (Sec'y Jan. 22, 1992), the Deputy Secretary of Labor held that a supervisor's disapproval of an employee's complaining to a government agency indicated discriminatory intent. *Id*. at 5. Specifically, it was held that a supervisor's comment on a performance evaluation that the complainant "use[d] N.R.C. (Nuclear Regulatory Commission) as a threat" virtually amounted to direct evidence of discrimination. It was further held that this remark could not be considered a mere "stray remark," ***Price Waterhouse v. Hopkins,*** 490 U.S. 228, 277 (1989) (O,Connor, J., concurring), but rather, spoke directly to the issue of discriminatory intent and related to the specific employment decision in the case.

Here, Ms. Kalkunte alleges that there is direct evidence in the form of emails and statements made by Mr. Toney and Mr. Heller. In that regard, she first refers to an email that she sent to Mr. Toney (among others) on the morning of September 10, 2003, stating, among other things, that she needed to discuss the status of the Arnold & Porter investigation with Mr. Goldberg, who was copied on the email. CX 10:2-3; *Complainant's Summary Trial Brief* at 36. Within four hours of Ms. Kalkunte's email, Mr. Heller sent an email to Mr. Toney stating: "Suggestion: have her get you a 'job description' for the next two weeks and have her update it weekly -- where she thinks she can add value. You can then 'yes/no' it and tell her you will task her with anything beyond that. Might work." *Id*. Although the Complainant asserts that this email constitutes direct evidence of retaliation, she does not specifically articulate how this is so. I find that this does not qualify as direct evidence as this does not amount to "smoking gun"

[36] In a mixed motive Title VII case, the burden on the employer is to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." ***Price Waterhouse v. Hopkins***, 490 U.S. 228, 258 (1989).

evidence. The significance of Mr. Heller's email to Mr. Toney is not readily discernible; rather inferences must be drawn to view it as indicative of Respondents' whistleblower animus. While it may qualify as circumstantial evidence of retaliation, as will be discussed herein, it does not constitute direct evidence of retaliation.

In alleging direct evidence of retaliation, the Complainant next refers to her September 12th meeting with Mr. Toney and Ms. Clay. Tr. at 298; *Complainant's Summary Trial Brief* at 36. The Complainant argues that Mr. Toney's remarks during that meeting, wherein the status of the Arnold & Porter investigation was discussed, were directly indicative of his decision to terminate her for engaging in protected activity. *Complainant's Summary Trial Brief* at 36-37. Specifically, the Complainant asserts that Mr. Toney stated that there was "no way in hell the estate would pay for [the investigation]" but that she should not worry -- at some point she would "get her justice" as the improprieties would probably be brought up by the Unsecured Creditors Committee or the U.S. Attorney's Office. *See id*. *citing* Tr. at 299-300. The Complainant further asserts that, when reflecting back on this meeting, Mr. Toney admitted that it helped to focus both he and Ms. Clay "on the lack of a role for Ms. Kalkunte in [the] organization, hastening [the] inevitable decision to terminate her." *See id*. *citing* CX 47-57; Tr. at 618.

I find that Mr. Toney's remarks during the September 12th meeting do constitute direct evidence of retaliation. As noted previously, I credit Ms. Kalkunte's testimony over that of Mr. Toney and Ms. Clay, and therefore credit her version of what was said at the meeting. Initially, when Ms. Kalkunte met with the Arnold & Porter investigators on August 22, 2003, Mr. Toney had told her to be forthright and "tell them everything." Tr. at 561-562. Conversely, however, in the execution, when Ms. Kalkunte was actively providing information of wrongdoing, it is clear that she was inhibited by Mr. Toney. And it is clear that Ms. Kalkunte's inquiries and concerns and the Arnold and Porter investigations were to be impeded.

On September 10, 2003, the Complainant sent an email to Mr. Toney and Mr. Heller (among others) stating, among other things, that she needed to discuss the status of the Arnold & Porter whistleblower investigation with Mr. Goldberg, who was copied on the email. CX 10:2-3.

Two days later, she was called to a meeting. I accept that Mr. Toney stated there was "no way in hell" the estate would pay for the investigation and that Ms. Kalkunte would one day "get her justice" when the improprieties were investigated by other authorities.

I also accept Ms. Kalkunte's testimony that Mr. Toney was "clearly angry" at her during the September 12th meeting due to her whistleblowing activities, and essentially told her that the investigation was none of her business. Tr. at 299, 300-301. I infer that the source of this anger was the Complainant's whistleblowing activities.

I also find that Mr. Toney's admission that the September 12th meeting hastened the inevitable decision to terminate Ms. Kalkunte.

Mr. Toney's admission, taken together with his remarks, tone and demeanor at the September 12th meeting, constitute direct evidence of retaliation.

Moreover, I accept that after the September 12th meeting, Ms. Kalkunte contacted her mentor, Mr. Whelan, and told him "exactly again the conversation that [she] had with Mark Toney", including the fact that Mr. Toney had stated there was "no way in hell that the estate would pay for the investigation." Tr. at 301-302. Mr. Whelan was stunned by this news and advised Ms. Kalkunte that she had a duty to "report up the chain" again, and that if reporting

to the CEO would be futile, then she must report to the audit committee.[37] *Id*. at 302.

Acting on Mr. Whelan's advice, Ms. Kalkunte contacted Mr. Goldberg and Mr. Shapiro and advised them that Mr. Toney was trying to kill the internal investigation at the September 12th meeting. Tr. at 302; CX 16:3. It is uncontroverted that Goldberg and Shapiro were contacted. It is uncontroverted that the issue regarding the Arnold and Porter investigation was discussed.

Mr. Toney admitted that he was notified about Ms. Kalkunte's discussion with Mr. Goldberg and Mr. Shapiro, but provided conflicting testimony as to when he became apprised of it. At hearing, he testified that he learned of the discussion during an update call with the Special Committee on September 22, 2003, which would have been after Ms. Kalkunte's termination on September 18, 2003. Tr. at 575. At his deposition, Mr. Toney again testified that he learned of the discussion during an update call with the Special Committee, but testified that the update call took place after the filing of the motion for Arnold & Porter's retention on September 15, 2003, but prior to Ms. Kalkunte's termination on September 18, 2003. *Toney Deposition* at 272-273. At hearing, Mr. Toney explained the discrepancy in his testimony by stating that once he reviewed the transcript from his deposition in conjunction with the minutes from the update call, he realized his error with regard to the date of the update call. Tr. at 575-576.[38]

I discount this testimony. There is no contemporaneous record. The Complainant substantiates this incident in part because it is clear that she reported to her mentor and to the Special Committee. This is an extremely crucial incident and the date is important to Respondents' case. The recantation is made *post litem motem* and does not have the ring of truth.

Finally, in asserting direct evidence of retaliation, the Complainant refers to the following statement made by Mr. Toney: "[W]e have a boat that's leaking water. Either people have a bucket in their hand and throw the water out or we don't need those people." *Toney Deposition* at190. The Complainant argues that this statement is direct evidence of Mr. Toney's view that Ms. Kalkunte's inquiries into the status of Arnold & Porter's investigation were "meddlesome and distracting." *Complainant's Summary Trial Brief* at 37. I find that this does not qualify as direct evidence of retaliation. I note that it is unclear from Mr. Toney's testimony when he made this statement, and it can only be inferred that it was made at some point during conversations he had with Ms. Clay regarding the value of various DVI employees, including Ms. Kalkunte. *See Toney Deposition* at 190-192. Again, in this instance, I must draw inferences to view this statement as indicative of Respondents' whistleblower animus. While it may qualify as circumstantial evidence of retaliation, as will be discussed herein, it does not constitute direct evidence of retaliation.

Circumstantial Evidence

In addition to finding that the Complainant has set forth some direct evidence of retaliation, I make an alternative finding that she has done so through circumstantial evidence. As outlined above, relying on circumstantial evidence requires the Complainant to prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew

[37] This evidence is uncontroverted as Respondents never deposed Mr. Whelan.

[38] There is also a conflict whether the words "no way in hell" were conveyed to Goldberg and Shapiro. I accept the Complainant's version.

of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.

Complainant Engaged in Protected Activity

To demonstrate that she engaged in protected activity, Ms. Kalkunte must prove that she engaged in a lawful act to provide information regarding conduct that she reasonably believed constituted a violation of any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1). Thus, Ms. Kalkunte is not required to show an actual violation of the law, only that she "reasonably believed" there to be a violation of one of the enumerated laws or regulations.[39] The legislative history of the Sarbanes-Oxley Act states that the reasonableness test "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts." Legislative History of Title VIII of HR 2673: The Sarbanes- Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), available at 2002 WL 32054527 (citing ***Passaic Valley***, 992 F.2d 474 (3d Cir. 1993)). "The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." *Id*. The reasonableness standard is based on the employee's access to information, experience, and background. ***Collins v. Beazer Homes***, 334 F.Supp.2d 1365 (N.D. Ga. 2004) (citing the legislative history, which intended the reasonable belief test to "impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts"). Cong. Rec. S7418, S7420 (Daily ed. July 26, 2002).

As applied to Ms. Kalkunte, the issue is whether an attorney with her information, experience, and background would reasonably believe that the allegations she brought forward to Respondents constituted a violation. I conclude that Ms. Kalkunte more than meets the reasonableness standard in this regard. Among the myriad instances of financial impropriety alleged by Ms. Kalkunte, she principally contended that: (1) DVI's senior management had altered delinquency reports and incorporated those altered reports into disclosure statements filed to the public; and (2) DVIBC improperly commingled funds. Tr. at 270-271; CX 7. These activities plainly violate SEC rules and regulations, and constitute fraud against shareholders. The first allegation, which involves filing altered delinquency reports disseminated to the general public, is a blatant fraud against shareholders. Mr. Shapiro testified as much when he stated: "[I]f the reports that were being presented to us were being changed for the director's booklets, these reports were then going to the public. That is indeed an inaccuracy that is being presented to the public marketplace." *Shapiro Deposition* at 13. The second allegation, which involves commingling of funds, is an overt violation of SEC regulations. Any attorney with Ms. Kalkunte's experience and background would easily discern these activities as potential violations of the Sarbanes-Oxley Act. Moreover, Ms. Kalkunte was not basing her allegations on mere conjecture; she had documentary evidence to support these allegations. Ms. Gibson, Mr. Fier, and Mr. Mallott, all of whom were her colleagues at DVI, provided documentary evidence to support these allegations. Accordingly, I find that Ms. Kalkunte possessed a reasonable belief in the allegations she brought forward to Respondents.

Now that Ms. Kalkunte has proven a reasonable belief in her allegations, she must prove that Respondents had knowledge of her protected activity. The Sarbanes-Oxley Act protects

[39] *See*, *e.g.*, ***Halloum v. Intel Corp***., 2003-SOX-7, at 15 (ALJ Mar. 4, 2004) (holding that a "[t]he accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections").

employees who provide information to any "person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514A(a)(1)(C). I conclude that Ms. Kalkunte proves her allegations were communicated to, among others, Mr. Toney, DVI's CEO and self-proclaimed ultimate decision-maker regarding her termination.

Preliminarily, I note that DVI attempted to stipulate that Ms. Kalkunte engaged in protected activity in one instance but not in any other instance. Specifically, DVI stipulated that Complainant engaged in a protected activity in August, 2003, when she reported allegations of fraud and accounting improprieties to the Board of Directors of named party DVI. *See* DVI Proposed Findings I (1); Tr. 49-50, 208-209, 738-739. In addition, DVI stipulated that the decision maker at issue, Mark Toney, knew of the August, 2003 protected activity. *See* DVI Proposed Finding I (1); Tr. 49-50, 208-209, 738-739. However, DVI did not stipulate that Ms. Kalkunte engaged in protected activity when she reported to Board members Goldberg and Shapiro her belief that Mr. Toney was attempting to obstruct and/or slow down the Arnold & Porter investigation by obstructing and/or slowing down the process by which Arnold & Porter would be compensated for its services by the estate. *See* DVI Proposed Finding II (1). DVI requested that I find, as a matter of law, that the Complainant did not engage in a second protected activity when she reported to DVI Board members Goldberg and Shapiro. *Id*. I am further requested to find that Mr. Toney had no knowledge of Complainant's second alleged protected activity, and that there was no causal connection between Complainant's second alleged protected activity and her adverse employment action.[40] *Id*. at (2)(3).

DVI's partial stipulation suggests that it has misconstrued the statutory elements of proof in whistleblower cases by conflating two elements of proof (whether the complainant engaged in protected activity and whether there is a nexus between that activity and the adverse employment action) into one element of proof. As noted above, in creating an inference of unlawful discrimination, Ms. Kalkunte's first task is to show that she engaged in protected activity. The inquiry involves the question of whether she did or did not engage in protected activity. Thus, it makes no sense for DVI to stipulate as to one but not all instances of protected activity. Indeed, in admitting to even one instance of protected activity, DVI seemingly stipulates to the overall issue of whether or not Ms. Kalkunte engaged in protected activity. Accordingly, I will ignore DVI's stipulation and analyze the evidence of record to determine whether or not Ms. Kalkunte engaged in protected activity.

I find that Ms. Kalkunte demonstrates that she engaged in protected activity, and that Respondents were put on notice of her protected activity, several times. She first engaged in protected activity on August 21, 2003, when she communicated her concerns regarding financial impropriety to DVI Board members Goldberg and Shapiro. That evening, a Special Committee was formed to address the allegations of financial impropriety, and Mr. Meller telephoned Mr. Toney to advise him that Arnold & Porter was being retained to investigate such matters. CX 8; CX 11: ¶ 2; *Goldberg Deposition* at 48-49. Mr. Meller further advised Mr. Toney that the Arnold & Porter investigators would be arriving at DVI the following morning, August 22, 2003, and that he should assist in facilitating a meeting between the Arnold & Porter investigators and Ms. Kalkunte. Tr. at 244-245, 560. Thus, while he may not have known the exact nature of Ms.

[40] I am also advised that an alleged third protected activity at the close of the hearing represents an attempt by the Complainant to amend her Complaint under 29 C.F.R. § 18.5(e). *See* DVI Proposed Finding III (1). DVI asserts that granting such proposed amendment would unduly prejudice DVI. *See id*.

Kalkunte's allegations, Mr. Toney was clearly put on notice that she had come forward with allegations of financial impropriety in some form.

Moreover, when the Arnold & Porter investigators arrived at DVI on August 22, 2003, Mr. Toney did as directed and facilitated a meeting between Ms. Kalkunte and the investigators. Although he was not present during that meeting, Mr. Toney told Ms. Kalkunte to be forthright and "to tell them everything that she wanted to share with them and to take as much time as they needed." Tr. at 561-562. By directing Ms. Kalkunte to tell the investigators "everything", Mr. Toney demonstrated that he knew she had come forward with allegations. In the days that followed, DVI filed for bankruptcy (August 25, 2003), and underwent a significant reduction in force (August 27, 2003). CX 11; ¶ 3; Tr. at 284-286, 531. However, Ms. Kalkunte was not included in the August 27, 2003 RIF, nor were any of her attorney colleagues at DVI. During this time, Arnold & Porter's investigation continued, as Ms. Kalkunte, concerned about her own liability under SOX, made repeated attempts to learn about the progress of the investigation. Tr. at 295-296. According to Ms. Kalkunte, she regularly asked other DVI employees whether they had been interviewed by Arnold & Porter, and followed up regarding the status of the investigation with DVI Board members Goldberg and Shapiro, Mr. Heller, Mr. Toney, and Ms. Clay. Tr. at 296. One such attempt was made by Ms. Kalkunte on September 10, 2003. That morning, she sent an email to Mr. Toney and Mr. Heller (among others) stating, among other things, that she needed to discuss the status of the Arnold & Porter investigation with Mr. Goldberg, who was copied on the email. CX 10:2-3. The fact that Ms. Kalkunte was concerned about the status of the investigation was again brought to Mr. Toney's attention.

On September 12, 2003, Ms. Kalkunte's concern about financial impropriety was once again brought to Mr. Toney's attention. That day, Ms. Kalkunte attended a meeting with Mr. Toney and Ms. Clay during which a variety of issues were discussed, including the Arnold & Porter investigation. Ms. Kalkunte, Mr. Toney, and Ms. Clay all provided testimony as to the topics discussed at the September 12th meeting, and there is no dispute that the issue of the Arnold & Porter investigation was raised. Tr. at 245-246, 249, 298-300, 542, 547, 550-551. That notwithstanding, the witnesses provide varying accounts of what exactly was said regarding the investigation. According to Ms. Kalkunte, Mr. Toney claimed that the investigation had ceased because Arnold & Porter was not getting paid. Tr. at 299. She claimed that Mr. Toney stated there was "no way in hell the estate would pay for [the investigation]" but that she should not worry -- at some point she would "get her justice" as the improprieties would probably be brought up by the Unsecured Creditors Committee or the U.S. Attorney's Office. Tr. at 299. By contrast, Mr. Toney testified that he advised Ms. Kalkunte that, while the retention of Arnold & Porter had not yet been approved by the Bankruptcy Court, the investigation was nevertheless moving forward. Tr. at 249-250. According to Ms. Clay, Mr. Toney never said there was "no way in hell the estate would pay for [the investigation]." Tr. at 645-646. Ms. Clay did not provide further testimony on what Mr. Toney did say, if anything, regarding the investigation. Despite the conflicting testimony regarding the substance of Mr. Toney's remarks, there is no dispute that the investigation was, at the very least, discussed in some form. Accordingly, Mr. Toney was again put on notice of Ms. Kalkunte's concerns about financial impropriety at DVI.

According to Ms. Kalkunte's testimony, after the September 12th meeting, she contacted her mentor, Mr. Whelan, seeking advice on how to proceed. Tr. at 301-302. Mr. Whelan advised that she had a duty to "report up the chain" again. Tr. at 302. However,

since reporting to the CEO would have meant reporting to Mr. Toney, Ms. Kalkunte instead contacted Mr. Goldberg and Mr. Shapiro and advised them of what had unfolded at the September 12th meeting. Tr. at 302; CX 16:3. Mr. Toney admitted that he learned of Ms. Kalkunte's discussion with Mr. Goldberg and Mr. Shapiro, but provided conflicting testimony as to when he became apprised of it. At hearing, he testified that he learned of the discussion during an update call with the Special Committee on September 22, 2003, which would have been after Ms. Kalkunte's termination on September 18, 2003. Tr. at 575. At his deposition, Mr. Toney again testified that he learned of the discussion during an update call with the Special Committee, but testified that the update call took place after the filing of the motion for Arnold & Porter's retention on September 15, 2003, but prior to Ms. Kalkunte's termination on September 18, 2003. *Toney Deposition* at 272-273. At hearing, Mr. Toney explained the discrepancy in his testimony by stating that once he reviewed the transcript from his deposition in conjunction with the minutes from the update call, he realized his error with regard to the date of the update call. Tr. at 575-576.

I find that whether Mr. Toney learned of this discussion prior to or after Ms. Kalkunte's termination is not crucial to the issue of whether Ms. Kalkunte engaged in protected activity. Even if Mr. Toney did not learn of the discussion until after Ms. Kalkunte's termination, she has already proven, through other instances, that Mr. Toney was put on notice of her protected activity. To summarize, these instances include: August 21, 2003, when Mr. Toney received a call from Mr. Meller about the investigation; August 22, 2003, when Mr. Toney facilitated a meeting between the investigators and Ms. Kalkunte; September 10, 2003, when Ms. Kalkunte sent an email to Mr. Toney, among others, stating that she needed to discuss the status of the investigation with Mr. Goldberg; and September 12, 2003, when Ms. Kalkunte met with Mr. Toney and Ms. Clay and discussed the status of the investigation. I conclude that Mr. Toney's conflicting testimony is more relevant with respect to undermining his credibility than it is to the issue of whether Ms. Kalkunte engaged in protected activity.

Complainant Suffered an Adverse Employment Action

The evidence of record demonstrates, and DVI so stipulated, that Ms. Kalkunte suffered an adverse employment action when she was terminated by DVI on September 18, 2003. *See* DVI Proposed Findings I(1); AP Brief.

Complainant's Protected Activity as a Contributing Factor in the Adverse Employment Action

Ms. Kalkunte must now prove that her allegations of financial impropriety at DVI likely contributed to Mr. Toney's decision to terminate her. 29 C.F.R. §§ 1980.104(b), 1980.109(a); ***Matvia v. Bald Head Island Mgmt, Inc.***, 259 F.3d 261, 271 (4th Cir. 2001); ***Causey v. Balog***, 162 F.3d 795, 803 (4th Cir. 1998); ***Macktal v. U.S. Dept. of Labor***, 171 F.3d 323, 327 (5th Cir. 1999); ***Trimmer v. U.S. Dept. of Labor***, 174 F.3d 1098, 1101-02 (10th Cir. 1999); ***Dysert v. Sec'y of Labor***, 105 F.3d 607, 609-10 (11th Cir. 1997); ***Platone v. Atlantic Coast Airlines Holdings, Inc.***, Case No. 2003-SOX-00027 (DOL Apr. 30, 2004). A contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." ***Marano v. Dep't of Justice***, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citations omitted) (defining "contributing factor" in the Whistleblower Protection Act for federal employees). A whistleblower need not prove his

protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in an adverse personnel action.

Temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was the likely motivation for the adverse action. ***Overall v. Tennessee Valley Authority***, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001); ***Abu-Hjeli v. Potomac ElecTric Power Co***., 89-WPC-1 (Sec'y Sept. 24, 1993); ***White v. The Osage Tribal Council***, 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997); *Collins* at 1379. 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).

In this case, the short span of time between Ms. Kalkunte's protected activities in August and September 2003, and her termination on September 18, 2003, is circumstantial proof of nexus. It has already been established that Mr. Toney, the decision-maker, was put on notice of Complainant's protected activity on August 21, 2003, when she reported allegations of financial impropriety to Mr. Goldberg and Mr. Shapiro. As noted earlier, that evening, Mr. Toney became aware that Ms. Kalkunte had come forward with allegations of financial impropriety in some form. Tr. at 244-245, 560. Moreover, his knowledge that Ms. Kalkunte had engaged in protected activity was reinforced the following morning, August 22, 2003, when Mr. Toney carried out his duty to facilitate a meeting between Ms. Kalkunte and the Arnold & Porter investigators.[41] Concerned about the improprieties as well as her own liability under SOX, Ms. Kalkunte made several inquiries regarding the status of the investigation after she met with Arnold & Porter on August 22, 2003.[42] Tr. at 295. According to Ms. Kalkunte, on a regular basis, she asked other DVI employees about the investigation and whether they had been interviewed by Arnold & Porter, and she followed up with Mr. Heller, Mr. Toney, Ms. Clay, Mr. Goldberg, and Mr. Shapiro. Tr. at 295-296.

On September 10, 2003, approximately two weeks after she met with the Arnold & Porter investigators, Ms. Kalkunte made one such attempt to gain information about the progress of the investigation. She sent Mr. Toney and Mr. Heller an email, on which she copied Mr. Goldberg, stating that she needed to discuss the status of the Arnold & Porter investigation with Mr. Goldberg. CX 24:1-2; *Complainant's Summary Trial Brief* at 36. A mere four hours later, Mr. Heller sent an email to Mr. Toney stating: "Suggestion: have her get you a 'job description' for the next two weeks and have her update it weekly -- where she thinks she can add value. You can then 'yes/no' it and tell her you will task her with anything beyond that. Might work." CX 24:1; *Complainant's Summary Trial Brief* at 36. The plain text of Mr. Heller's email does not directly reveal whistleblower animus on the part of Respondents, and thereby disqualifies it as direct evidence; however, Mr. Heller's deposition testimony reveals the context of this email, and shows that it constitutes circumstantial proof of whistleblower animus.

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[41] Moreover, Respondents have stipulated that Complainant engaged in protected activity in August, 2003, when she reported allegations of fraud and accounting improprieties to the Board of Directors of named party DVI, *and* that the decision maker at issue, Mark Toney, knew of that protected activity. *See* DVI Proposed Finding I (1); Tr. at 49-50, 208-209, 738-739.

[42] Based on the advice she had been given by Thatcher, Proffitt, Ms. Kalkunte knew of her duty as in-house counsel for DVI to report the improprieties "up the chain." Tr. at 276; CX 50. Ms. Kalkunte testified: "I must've read that attorney section a hundred times and I'm still not exactly sure what I was responsible for. But I was required to follow up on that investigation and look into the improprieties." Tr. at 295-296.

According to Mr. Heller, he sent the email to Mr. Toney for two reasons. First, Mr. Toney was concerned that "managing [Ms. Kalkunte] was becoming from [Mr. Toney's] perspective almost a job in itself." *Heller Deposition* at 16-17. Second, Mr. Heller needed to assist Mr. Toney in evaluating which employees were brining value to DVI, and Mr. Toney had felt [the attorneys from Latham & Watkins] "would be in a good position to comment on what [Ms. Kalkunte] might or might not add." *Id*. Mr. Heller explained the suggestion that he made to Mr. Toney in the email as follows:

> [F]or two weeks Ms. Kalkunte could let us know everything she thought she could do and give it to [Mr. Toney] and [he] made an analysis of what she should or shouldn't be doing to both, A, understanding [sic] Shelia's view of how she could add to the process, and, B, having [Mr. Toney] be in a position to communicate to her succinctly here is what I wanted you to do and here's what I don't want you doing. Because there had been some confusion about what she might and might not be doing, what she should and should not be doing and whether or not there was anything for her to do at all under the circumstances.

Id.

In sum, Mr. Heller testifies that he sent the email to Mr. Toney merely to assist him in making a determination about Ms. Kalkunte's role at DVI in the context of the ongoing RIF. However, the text of the email does not comport with Mr. Heller's explanation. Specifically, the part of the email that reads: "You can then 'yes/no' it and tell her you will task her with anything beyond that. Might work" does not leave the impression that Mr. Heller was trying to assist Mr. Toney in clarifying Ms. Kalkunte's role for her benefit or for the benefit of DVI. Rather, suggesting that Mr. Toney "task" Ms. Kalkunte with duties beyond the areas in which she believed she was already adding value leaves the impression that Mr. Heller and Mr. Toney were looking for a way to push Ms. Kalkunte out of DVI. I accept that the email itself does not constitute direct evidence of whistleblower animus because it does not fully "spell out" a discriminatory motive. However, in the context of the events that soon followed, I consider Mr. Heller's September 10, 2003 to be circumstantial proof of such animus.

Significantly, a mere two days after receiving Mr. Heller's September 10, 2003 email, Mr. Toney met with Ms. Kalkunte and demonstrated his disdain for Ms. Kalkunte's inquiries into the status of the investigation. Not even one week later, on September 18, 2003, Ms. Kalkunte was terminated. The temporal proximity between Ms. Kalkunte's protected activities and her termination is strong evidence of nexus. Not even one month had elapsed between the date that she initially engaged in protected activity, August 21, 2003, and the date that she was terminated, September 18, 2003. Moreover, not even one week had elapsed between the September 12th meeting and Ms. Kalkunte's termination on September 18, 2003. Accordingly, I find that the Complainant has demonstrated proof of nexus through circumstantial evidence.

Respondents' Failure to Meet its Burden to Avoid Liability

Respondents may avoid liability if they can demonstrate by clear and convincing evidence that they "would have taken the same unfavorable personnel action in the absence of [Ms. Kalkunte's protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1980.109. Mr. Toney, the ultimate decision-maker on Ms. Kalkunte's termination, alleged that whistleblowing activity aside, Ms. Kalkunte was terminated as part of the ongoing RIF taking place at DVI after the bankruptcy filing. He claimed that, just like all DVI employees

after the bankruptcy filing, Ms. Kalkunte's role was continuously under evaluation, and that by the third week of September, 2003, he realized she was no longer bringing value to the estate in terms of her day-to-day workload. *Id*. at 552. Specifically, unlike other in-house counsel working for DVI, Ms. Kalkunte's role had become largely redundant post-bankruptcy as outside counsel from Latham & Watkins had taken over many of her duties. CX 47: ¶ 11. Ms. Clay, who aided Mr. Toney in his decision to terminate Ms. Kalkunte, similarly stated that during the first half of September, 2003, as part of a constant reevaluation of positions required at DVI in light of the bankruptcy, it was determined that Ms. Kalkunte's position was no longer required as outside counsel had begun performing essentially the same functions as she. CX 48: ¶ 19. Respondents also seem to allege that Ms. Kalkunte's work performance was lacking, and therefore another reason that she did not add value to the estate. However, for reasons that will be addressed herein, it is not entirely clear whether Respondents intended to offer Ms. Kalkunte's work performance as another reason for terminating her.

The Complainant argues that Respondents' proffered reason for terminating her was pretextual, and that their "real reason for terminating [her] was in retaliation for her whistleblowing and incessant inquiries into the progress of the Arnold & Porter investigation when DVI, AP, and Mr. Toney had more important matters on which to focus their attention." *Complainant's Summary Trial Brief* at 40-41. First, she argues that she was the only employee terminated in September, 2003, and that a "reduction in force of one" is evidence of pretext. *Id*. at 41 *citing* ***Bhatia v. AT&T, Inc.***, 310 F. Supp.2d 29, 31-32 (D. D.C. 2004) (holding that Plaintiff could make a *prima facie* case by showing he was the target of a "RIF of one") (*citing* ***Elliott v. British Tourist Auth.,*** 172 F.Supp.2d 395, 401 (S. D.N.Y.2001)). In so arguing, the Complainant dismisses Respondents' claim that Ms. Kolbe was also included in a September, 2003 RIF, asserting that the evidence shows that Ms. Kolbe voluntarily resigned. *Id*. Second, the Complainant argues that after terminating Ms. Kalkunte as part of a one-person RIF, Respondents then transferred her work to another in-house attorney, Mr. DeCandia. *Id*. at 41-42. The Complainant contends that constructively replacing Ms. Kalkunte with a worker outside of the protected class in this scenario gives rise to an inference of discrimination. *Id*. at 42 *citing* ***Boulton v. Inst. of Int'l Ed.***, 808 A.2d 499, 502 n.5 (D.C. 2002)*;* ***Bellaver v. Quanex Corp.***, 200 F.3d 485, 495 (7th Cir. 2000). Third, the Complainant argues that Respondents' inconsistent post-hoc explanations for their employment decisions are probative of pretext. *Id*. at 43 *citing* ***E.E.O.C. v.See EEOC v. Sears Roebuck***, 243 F.3d 846, 852-53 (4th Cir. 2001). In that regard, the Complainant contends that while the initial reason provided for her termination was that her position was no longer necessary, Respondents subsequently alleged performance-based reasons in addition. *Id*.

The Complainant's arguments are persuasive. I find the Complainant's assertion regarding the phoniness of the September, 2003 "reduction in force of one" particularly compelling in light of the fact that Ms. Kalkunte was specifically not included in the August 27, 2003 RIF. According to Ms. Kalkunte, she had been advised by senior management at DVI that she and the other in-house counsel need not worry about being laid off, because "now more than ever [DVI] would need attorneys to help them in Chapter 11 . . ." Tr. at 294. While Respondents allege, and it is no doubt true, that DVI had plans to engage in additional RIFs after the initial August 27, 2003 RIF (Tr. at 533-534), it nevertheless strains credulity to believe that Ms. Kalkunte's termination was actually part of a RIF in September, 2003. Significantly, Ms. Kalkunte was the only employee terminated as part of a so-called RIF in

September, 2003,[43] notwithstanding that subsequent bona fide RIFs occurred in November 2003, when six employees were terminated, January 2004, when ten employees were terminated, and February 2004, when fifteen employees were terminated. CX 48: ¶ 11. If Respondents had truly intended to include Ms. Kalkunte in a RIF, she could have been included in one of any number of bona fide RIFs that took place in late 2003 and early 2004. Moreover, none of the other in-house attorneys at DVI were terminated until April 2004, at the earliest, and one attorney, Mr. Blau, was laid-off as late as October 2004.[44] In addition, Ms. Cascioli did not prepare for Ms. Kalkunte the letter she typically prepared for DVI employees notifying them of a RIF and her explanation as to why she failed to do so was unpersuasive: "I don't believe that … letters were prepared either for the person that left on September 15th [Ms. Kolbe] or … [Ms. Kalkunte] on the 18th. It became more routine, if I am not mistaken, with the November … reductions and beyond and more recent." *Cascioli Deposition* at 142. I find that the likely reason Ms. Cascioli did not prepare such a letter for Ms. Kolbe or Ms. Kalkunte is that they were not actually part of a RIF at all, but were terminated for other reasons. In sum, all of the foregoing facts tend to show that there was on RIF in September, 2003 RIF.

Next, I will address the Complainant's contention that constructively replacing Ms. Kalkunte with a worker outside of the protected class gives rise to pretext. I note here that Respondents' alleged legitimate, non-discriminatory reason for terminating Ms. Kalkunte was that her role had become largely redundant, and there was no longer any work for her to do at DVI post-bankruptcy. In that regard, Ms. Clay claimed that DVI did not fill Ms. Kalkunte's position with anyone else after she was terminated because outside counsel had been able to handle all of DVI's general legal needs. CX 48: ¶ 20. Similarly, Mr. Toney testified that, while Respondents had contemplated hiring a paralegal to gather records, which had presumably been one of Ms. Kalkunte's primary duties, no one was ever hired in such capacity, and Ms. Kalkunte's workload was "fortunately absorbed and picked up as needed." Tr. at 556. The evidence shows, however, that in January, 2004, approximately four months after Ms. Kalkunte was terminated, Mr. DeCandia, another in-house attorney, was transferred from the executive department to the legal department to assume the position of associate counsel. *Cascioli Deposition* at 158-159; CX 18. The fact that Mr. DeCandia was transferred to the legal department into what had ostensibly been Ms. Kalkunte's position shows that whoever initiated the transfer, namely Mr. Toney, felt there to be a compelling need for him to do so (*i.e.* there was work to be done in the legal department). Moreover, Mr. Toney admitted that he had advised Mr. DeCandia of his responsibility to address items that might "fall through the cracks"

[43] In that regard, I accept the Complainant's assertion that Ms. Kolbe voluntarily resigned, and therefore does not qualify as an employee included in any so-called September, 2003 RIF. Ms. Kolbe's deposition testimony substantiates this assertion. She testified that she was the one who initiated her termination, and that she wished to be let go for "personal reasons." *Kolbe Deposition* at 10-12, 17-18. I note that Ms. Clay claimed Ms. Kolbe's termination was initiated by Mr. Turek, who allegedly claimed that Ms. Kolbe's services were no longer needed at DVI. Tr. at 438-439, 441. However, since I have determined that Ms. Clay's testimony is entitled to diminished weight, I credit Ms. Kolbe's version of these facts over Ms. Clay's version.

[44] I accept that the duties of the other in-house counsel may have differed from those of Ms. Kalkunte, notwithstanding that they all shared the general baseline trait of being attorneys who worked for the company. In that sense, I accept that it is not wholly accurate to compare when other in-house counsel were terminated in analyzing whether there is pretext. Nonetheless, it is worth noting that none of the other in-house attorneys were terminated until well after Ms. Kalkunte.

as a result of Ms. Kalkunte's termination. Tr. at 257. I also note Ms. Kalkunte's testimony that prior to her termination, she was frequently called upon by Mr. DeCandia to answer various questions, since he "wasn't familiar with other goings on in the company …" *Id*. at 291. The fact that Respondents would transfer another attorney into Ms. Kalkunte's former department, a department in which there was allegedly no work to be done, and would transfer an attorney with potentially less know-how than Ms. Kalkunte, points to pretext.

Finally, I will address the Complainant's assertion that Respondents' inconsistent post-hoc explanations for their employment decisions are evidence of pretext. Throughout this case, Respondents have reiterated several times that the Complainant was terminated as part of a RIF and that her performance played no role in Mr. Toney's decision to terminate her. Tr. at 304; CX 47: ¶35; CX 48: ¶ 22; *Cascioli Deposition* at 144. That notwithstanding, Respondents also provided a great deal of testimony on various performance problems and interpersonal issues faced by Ms. Kalkunte. In his *Certification*, Mr. Toney stated that Ms. Kalkunte improperly contacted attorneys for the Unsecured Creditors Committee and demanded information regarding a sensitive issue to which she was not privy in a confrontational manner. CX 47: ¶21-28. Although Mr. Toney stated that he addressed these issues with Ms. Kalkunte in the September 12th meeting, he also specifically alleged that these issues were not the reason for her termination. *Id.* at ¶35. Moreover, at hearing, Mr. Toney was questioned outright as to whether performance played a role in his decision to terminate Ms. Kalkunte, and he responded by stating:

> Her performance or lack thereof or the support of the bankruptcy case obviously comes into the decision making as it does with every employee. As I assessed every employee and asked them -- or assessed to see what they're bringing to the estate as far as their day-to-day workload, that comes into influence, and their performance, if they're making mistakes or if they're doing a great job, that comes into should they be kept on or should they not.
> I concluded that the proposition of the value and efforts that were being contributed were not bringing value. If you want to consider it as a performance, the performance part of it may have come in to be a contribution. What I would say from that standpoint is that I wanted to give the benefit of the doubt to Ms. Kalkunte, and instead of making it more difficult because again this was a bankruptcy company, there were many employees that were actually impacted by it, and I wasn't at a point that I wanted to make it more difficult on the employees. So we made it a RIF for her benefit so that she could draw Unemployment and, and not terminate her so that she could go out and find another job.

Tr. at 629-630. I find that Mr. Toney's testimony is not directly responsive to the question of whether Ms. Kalkunte's work performance played a role in his decision to terminate her. Although it is unclear, Mr. Toney's testimony seems to suggest that he based his decision to terminate Ms. Kalkunte on the fact that she was not adding value to the estate, and he determined that she was not adding value to the estate based on her work performance, at least in part. The fact that work performance played a role is substantiated by Mr. Toney's testimony that he consulted with other managers and outside counsel regarding Ms. Kalkunte's work performance before deciding to terminate her. According to Mr. Toney, these managers and attorneys indicated that they were either not using Ms. Kalkunte's services or were unimpressed with her performance. Tr. at 552, 594. Specifically, he discussed Ms.

Kalkunte's role and work performance with Mr. Heller, Mr. Athanas, Mr. Meller, and Mr. Schildhorn. *Id*. at 538. Accordingly, I find that Respondents have also alleged, at least to some extent, that Ms. Kalkunte's work performance was an added reason for her termination. I accept that Respondents' testimony alluding to performance-based reasons for Ms. Kalkunte's termination is inconsistent with other statements made by Respondents signifying that work performance played no role in the decision to terminate Ms. Kalkunte. *See e.g*. Tr. at 304; CX 47: ¶35; CX 48: ¶ 22; *Cascioli Deposition* at 144. In that regard, I accept that these statements may be viewed as inconsistent post-hoc explanations indicative of pretext.

Although the fact that Respondents offer differing explanations may point to pretext, I must nevertheless analyze those differing explanations to assess the validity of either/both of them. First, I will address the proffered reason that Ms. Kalkunte's role became largely redundant post-bankruptcy. This proffered reason is articulated by Mr. Toney in his *Certification*, wherein he states that, post-bankruptcy, outside counsel from Latham & Watkins took over many of Ms. Kalkunte's responsibilities, in particular basic corporate duties. CX 47: ¶10. Mr. Toney's statement presupposes that many of Ms. Kalkunte's duties had indeed been to administer basic corporate duties. Ms. Clay believed this to be the case, stating that while Ms. Kalkunte's role at DVI following the bankruptcy was "never well-defined", her main task was "to handle corporate bookkeeping and to keep track of stock certificates, corporate minutes, and corporate resolutions for DVI and all of its many subsidiaries." CX 48:¶ 14. Mr. Meller also understood Ms. Kalkunte's main tasks to include locating corporate and legal records as well as contracts and minute books, though Mr. Meller admitted that he never engaged in a discussion with Ms. Kalkunte post-bankruptcy about her role at DVI. *Meller Deposition* at 9-10.

Importantly, however, at hearing Ms. Kalkunte gave no indication that administering basic corporate duties constituted her main task at DVI post-bankruptcy. In fact, at one point she specifically testified that at no time while employed by DVI was she ever responsible for maintaining the company's corporate books and records; rather, a paralegal had exclusively handled those tasks. Tr. at 268-269. Ms. Kalkunte testified that her duties and work hours increased post-bankruptcy. *Id*. at 289-292, 352. She also provided testimony as to her new set of responsibilities post-bankruptcy, which included putting together schedules on the location of DVI's assets, buying problem loans out of the securitization pool, drafting and changing resolutions for the company, fielding telephone calls from DVI's international offices, taking charge of the litigation schedule, and reviewing various matters for which DVI was being sued. Tr. at 286-292. In that respect, contrary to Mr. Toney's assertion that she was not adding value to the estate or being adaptable in light of the bankruptcy, Ms. Kalkunte's testimony suggests just the opposite: it demonstrates that post-bankruptcy she undertook a whole new set of responsibilities.

It is clear that Ms. Kalkunte's understanding of her post-bankruptcy duties was markedly different than that of Mr. Toney, Ms. Clay, and Mr. Meller. To put these differing views in perspective, it is useful to recall Mr. Toney's testimony that the situation at DVI post-bankruptcy was not one where there were specific job descriptions for each employee. Tr. at 554. He testified: "It's not a union contract where, no, they don't step outside of the bounds of what they're supposed to be doing. I look at an attorney in-house or any organization as being able to adapt to the environment and do whatever is needed to keep the process moving." *Id*. In that regard, I accept that there was no formal job description for Ms. Kalkunte's position post-bankruptcy, that she was expected to be adaptable to the new demands faced by the company, and that the chaos created by the bankruptcy explains why

there was ambiguity and confusion surrounding Ms. Kalkunte's precise role. However, from Ms. Kalkunte's testimony, it appears that she was being adaptable to the crisis situation by taking on new responsibilities and working longer hours, and that her role was not redundant.

The record reflects that at one point a seeming attempt was made by Mr. Toney to clarify Ms. Kalkunte's role post-bankruptcy. He specifically requested that Ms. Clay obtain a list of Ms. Kalkunte's job duties from Ms. Kalkunte herself and report back to him. Tr. at 252-254, 541, 647-649. However, Ms. Clay never obtained the list.[45] *Id*. Instead, Respondents set about consulting with everyone but Ms. Kalkunte about what her role at the company was. Mr. Toney testified that he consulted with Mr. Heller in this regard, and that Mr. Heller explained that he "really wasn't utilizing Ms. Kalkunte that much." Tr. at 539. According to Mr. Toney, Mr. Schildhorn's remarks were that he "basically … was not using [Ms. Kalkunte]. He said that she had been cooperating in helping with getting the motions." *Id*. at 540. Ms. Clay testified that Mr. Judd, Mr. Schildhorn, and Mr. Meller all told her that Ms. Kalkunte was performing "more of a record-keeping type function rather than day-to-day transactional business functions, and that [her] role in their opinion was more administrative." *Id*. at 647.

I accept that Respondents may have expected Ms. Kalkunte's role to change post-bankruptcy, and I accept the possibility that her role could have become redundant given the changed circumstances at DVI. However, I find that Respondents have failed to prove that Ms. Kalkunte was unwilling to adapt, and further failed to prove that her role did actually become redundant post-bankruptcy. As pointed out above, the notion that Ms. Kalkunte was unwilling to adapt is belied by her testimony that she undertook a whole new set of responsibilities post-bankruptcy. Furthermore, upon inspection of the evidence relevant to whether Ms. Kalkunte's role had become redundant, it is clear that Respondents failed to clarify with Ms. Kalkunte whether this was so, and instead based their determination on some remarks made by outside counsel working for the company. Accordingly, I do not find that the Respondents have persuasively proved that Ms. Kalkunte's role had become largely redundant post-bankruptcy.

Moreover, I find that the Complainant is more credible than Respondents. If they had such suspicions, they failed to document anything contemporaneous to the time of discharge.[46]

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[45] Ms. Clay claimed that, although she made a point of asking Ms. Kalkunte to provide a list of her job duties at the September 12th meeting, Ms. Kalkunte never provided such a list. *Id*. at 648-649. Ms. Kalkunte testified that post-bankruptcy she was never asked to discuss her job duties with Ms. Clay. Tr. at 286. I again credit Ms. Kalkunte's testimony over Ms. Clay's testimony.

[46] I note that Respondents submitted several emails (EX 8, 12, 13, 14, 28) between Ms. Kalkunte and various individuals working at DVI, revealing a certain degree of discord. However, these emails do not document work performance problems on the part of Ms. Kalkunte. Rather, they involve Ms. Kalkunte's frustration with the manner in which certain matters were being handled by DVI.

- EX 8 (September 4, 5, 2003): Ms. Kalkunte expressing frustration that Bob Blau was "collecting litigation information and failing to provide it" to her and to Mr. DeCandia. Mr. Turek replying that there was "enough work for everybody to do" without "creating fiefdoms."
- EX 12 (September 9, 2003): Ms. Kalkunte requesting that she be apprised of what was going on with the "second DIP financing" and the "DVIBC lender issues." Mr. Toney replying that she should talk with Mr. Athanas or Mr. Meller and while he "appreciate[d] her interest in these topics" they were "sensitive" issues. Mr. Toney further advising that she would not be receiving a response from the Latham & Watkins team on these specific issues.

Next, I will address the proffered reason that Ms. Kalkunte's work performance was flawed. I note that much of the evidence supporting this assertion is derived from comments made by outside counsel working for DVI. For example, Mr. Athanas testified that Ms. Kalkunte had provided him with inaccurate information on a project. *Athanas Deposition* at 7-8, 11; Tr. at 540. Mr. Meller also indicated that Ms. Kalkunte had provided charts that were "just plain wrong." *Meller Deposition* at 11-12. Mr. Heller indicated that for "whatever reason" Ms. Kalkunte could not immediately access what was needed, and "with respect to the general operations of the company, there were things she indicated that she just didn't know." *Heller Deposition* at 10-11. In addition, Ms. Cascioli testified that between December 2002 and September 2003, she got the general sense that Ms. Kalkunte would "rub people the wrong way . . ." *Cascioli Deposition* at 130. In Mr. Toney's *Certification*, he alluded to certain errors in judgment on Ms. Kalkunte's part, but states that these were not the reasons for her termination. CX 47:¶ 35. Specifically, he pointed to the fact that in one instance she improperly contacted attorneys for the Unsecured Creditors Committee and in another instance demanded information regarding a sensitive issue to which she was not privy in a confrontational manner. *See id*. at ¶ 20-28.

I accept all of these performance problems alleged by Respondents as true. In particular, I note that Ms. Kalkunte was a whistleblower, who admittedly made repeated inquiries into the status of an investigation at her company. Therefore, Respondents' testimony that she "rubbed people the wrong way" or demanded information regarding goings-on at the company in a confrontational manner is not difficult to believe. As Ms. Kalkunte herself indicated in an email to her colleagues post-termination, she believed Respondents considered her a "rabble rouser" with respect to employee issues. CX 13. I also accept the assertions of Mr. Athanas and Mr. Meller that Ms. Kalkunte provided them with inaccurate information as I found their deposition testimony to be credible, and Ms. Kalkunte never disputed these assertions.

Notwithstanding my acceptance of Respondents' allegations regarding Ms. Kalkunte's work performance, I must weight all of the evidence discussed above to determine whether Respondents have met their burden to prove by clear and convincing evidence that they would have taken the same unfavorable personnel action in the absence of Ms. Kalkunte's protected behavior. I find that they failed to do so. In sum, I rejected the Respondents' assertion that Ms. Kalkunte's role had become largely redundant as I concluded that the evidence was not strong enough to support such an assertion. On the other hand, I accepted that there is credible evidence demonstrating Ms. Kalkunte's flawed work performance; however, such a finding does not compel me to find that the Complainant's flawed performance was the true reason for her termination. Indeed, if such problems with Ms. Kalkunte's work performance rose to a serious level, I would expect documentation contemporaneous to the time of discharge. None was submitted by Respondents. By contrast, the Complainant

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- EX 13 (September 10, 2003): Ms. Kalkunte stating that "strangers employed by DVI that are wandering the halls know about these sensitive issues than [she did]." Requesting that Mr. Toney, the Board, and Mr. Heller send her an email setting forth the issues that she should not be involved in so she could refrain from reviewing any such information or making inquiries into those issues.
- EX 14 (September 10, 2003): Ms. Kalkunte expressing frustration that she was not receiving her wages in the sum of $10,000. Mr. Heller advising Ms. Kalkunte that he understands her frustrations and will check into the situation.
- EX 28 (September 17, 2003): Ms. Kalkunte expressing frustration that she was not being told what work was being delegated to others instead of being assigned to her.

asserted three persuasive points in undermining Respondents' alleged reasons for discharge: (1) the phony "reduction in force of one"; (2) Mr. DeCandia's transfer to Ms. Kalkunte's former department; and (3) Respondents' inconsistent post-hoc explanations for termination. Accordingly, I find that Respondents have failed to meet their burden to prove by clear and convincing evidence that they would have taken the same unfavorable personnel action in the absence of Ms. Kalkunte's protected behavior.

DAMAGES

The Sarbanes-Oxley Act provides that any employee who prevails in an action under the whistleblower provision of the statute "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). Relief under the Act includes reinstatement, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees, and reasonable attorney fees. *See* 18 U.S.C. § 1514A(c)(2)(A)-(C). The back pay and benefit considerations may include lost overtime, lost vacation and other chargeable pay remedies such as compensatory time, sick time, etc., and may include lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked. However, the Complainant failed to request reinstatement of fringe benefits in this case.

Reinstatement

DVI is no longer in business, and therefore reinstatement is not a proper remedy in this case. Normally, reinstatement is the preferred remedy for unlawful employment discrimination, and front pay is the disfavored alternative, available only when reinstatement is impracticable or impossible. ***Ford Motor Co. v. EEOC***, 458 U.S. 219, (1982); ***Hobby v. Georgia Power Co,*** ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); ***Martin v. The Department of the Army***, 93-SDW-1 (Sec'y July 13, 1995); ***Kucia v. Southeast Ark. Cmty. Action Corp***., 284 F.3d 944, 948-49 (8th Cir.2002) (Title VII case). However, in this case, there is no job to reinstate. In ***DeFord v. Tennessee Valley Authority***, 81-ERA-1 (Sec'y Aug. 16, 1984), the Secretary issued an Order on Remand from the Sixth Circuit, *see* ***DeFord v. Secretary of Labor***, 700 F.2d 281 (6th Cir. 1983), in which he implemented the court's direction to revise DeFord's remedies. The Secretary directed respondent to reinstate complainant to his former position, and stated that "[i]f his former position no longer exists or there is no vacancy, TVA shall apply to the Administrative Law Judge for approval of the job in which it proposes to place DeFord with an explanation of the duties, functions, responsibilities, physical location and working conditions of the job sufficient for the ALJ to determine whether it is comparable to DeFord's former position."

Back Pay

A complainant has the burden of establishing the amount of back pay that a respondent owes. ***Pillow v. Bechtel Construction, Inc***., 87-ERA-35 (Sec'y July 19, 1993). The purpose of reinstatement and a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on all of the earnings the employee would have received but for the discrimination. ***Blackburn v. Metric Constructors, Inc***., 86-ERA-4 (Sec'y Oct. 30, 1991). In ***Mosbaugh v. Georgia Power Co***., the Secretary held that reasonable salary increases should be included in the award of back pay. 91-ERA-1 and 11 (Sec'y Nov. 20, 1995).

In this case, the Complainant asserts that, after termination, it took her several months to

find work, and she eventually had to accept a job paying $95,000.00 a year, which she alleges is $45,000 per year less than what she was earning at DVI, and $43,000.00 per year less than the median income for attorneys in the Washington, D.C. metropolitan area who possess the number of years experience she has. Tr. at 78.

As of December 15, 2004, the date of trial, Dr. Richard Edelman, an economist, calculated that Ms. Kalkunte's lost backpay award is equal to $151,976.00. CX 54.

DVI alleges that even if damages are due, there is no more than about $100,000, or less, at issue in this matter. *See* Brief. DVI alleges that Complainant refused "the chance OSHA gave her" to mitigate her damages through reinstatement in April, 2004. I am told that DVI was liquidating and, "no matter what", was not going to offer Complainant the opportunity to continue to make her $130,000 salary beyond 2004.[47]

Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. ***McCafferty v. Centerior Energy***, 96-ERA-6 (ARB Sept. 24, 1997); ***Johnson v. Bechtel ConsTruction Co***., 95-ERA-11 (Sec'y Sept. 11, 1995).

Mitigation of Damages

DVI argues that Ms. Koslow's expert analysis of lost wages did not take into consideration that Complainant refused reinstatement at DVI when offered it by OSHA in May, 2004. Tr. 98. It argues that the Complainant's back pay damages should be cut off from that point. I am advised by DVI that the Complainant had relocated to the Washington, D.C. area by that time, after she married in April, 2004.

Although the SOX employee protection provision does not explicitly require victims of employment discrimination to attempt to mitigate damages, the ARB has consistently imposed such a requirement, in keeping with the general common law "avoidable consequences" rule and the parallel body of damages law developed under other anti-discrimination statutes. The respondent bears the burden of proving that the complainant did not properly mitigate.[48] DVI relies on ***Fiedler v. Indianhead Truck Line, Inc.,*** 670 F.2d 806, 809 (8th Cir. 1982), to assert that failure to accept an offer of reinstatement precludes damages such as back pay and front pay. ***Wilson v. S & L Accuisition Co***., 940 L2d 1429, 1433 n. 6, 1434 (11th Cit 1991).

A respondent bears the burden of proving that the complainant did not properly mitigate damages. To meet this burden, the respondent must show that (1) there were substantially

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[47] "If DVI is liable at all, it is for Complainant's lost salary from mid-September 2003 through April 2004, or about $81,250. (Seven and a half months of salary at $10,833 per month, or $130,000 annually.)" *See* Brief.

[48] ***Timmons v. Franklin Electric Coop***., 1997-SWD-2 (ARB Dec. 1, 1998); ***Jones v. EG&G Defense Materials, Inc.***, ARB No. 97- 129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998); ***West v. Systems Applications International***, 94-CAA-15 (Sec'y Apr. 19, 1995). *See also* II Dan B. Dobbs, ***Law Of Remedies*** §6.10(4) at 221-22 (2d ed. 1993); II Barbara Lindeman and Paul Grossman, ***Employment Discrimination Law*** 1792 (3d ed. 1996) ("Although the burden of proving damages generally falls upon the plaintiff, the defendant carries the burden of pleading and establishing, as an affirmative defense, the plaintiff's failure reasonably to mitigate."). To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. ***Johnson v. Roadway Express, Inc***., ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 15 (ARB Mar. 29, 2000); ***Rasimas v. Michigan Dep't of Mental Health***, 714 F.2d 614, 624 (6th Cir. 1983). *See also*, II Charles A. Sullivan et al, ***Employment Discrimination*** §14.4.5 (1988). "Substantially equivalent employment" would be a position providing the same promotional opportunities, compensation, job responsibilities, working conditions, and status. *See, e.g.*, ***Ford Motor Co. v. EEOC***, 458 U.S. 219, 102 S. Ct. 3057, 3065 (1982).

equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of the doubt ordinarily goes to the complainant. ***Hobby v. Georgia Power Co.***, *supra*; complainant may be "expected to check want ads, register with employment agencies, and discuss potential opportunities with friends and acquaintances." ***Doyle v. Hydro Nuclear Services***, 89-ERA-22 (ARB Sept. 6, 1996), *quoting* ***Helbing v. Unclaimed Salvage and Freight Co., Inc.***, 489 F.Supp. 956, 963 (E.D. Pa. 1989), *quoting* ***Sprogis v. United Air Lines***, 517 F.2d 387, 392 (7th Cir. 1975).

The record shows that on September 18, 2003, Ms. Kalkunte was terminated by Respondents. Thereafter, she remained in Pennsylvania, performing work searches until she ran out of funds, in March or April, 2004. Tr. at 315, 426. She testified that she loved her job at DVI. *Id*. She sent her resume to fifty to sixty different places, and to headhunters, but was told that the market for her services was poor at that time. *Id*. at 313-314.

Respondent DVI asserts that in May, 2004, the Complainant was offered reinstatement and she declined. *See* Brief. In that regard, I am referred to Tr. at 98-99. A review of the colloquy shows that Mr. Edelman was asked on cross examination by DVI to assume the offer was made as a matter of fact. Mr. Edelman was asked:

> Hypothetically speaking, if you knew that Ms. Kalkunte had the opportunity to return to her DVI employment at the same salary level in April/May, 2004, and refused, would that have changed your calculations at all?

Tr. at 142.

The record does not contain any evidence of an offer. There is a reference to "waiver" of reinstatement in OSHA's Preliminary Order of April 7, 2004, but this does not mean that the Complainant overtly waived an offer of reinstatement made by Respondents. There is no showing who made the offer and DVI's Brief states that an offer was made by OSHA, which I find is irrational. There is no showing of terms of any offer. There is no evidence submitted to substantiate the assumed fact not in evidence (that a rejection had been made to a valid offer) set forth by DVI's questioning at Tr. at 98-99.

After a review of the evidence, I find that the Complainant made an acceptable attempt to mitigate damages, and in fact secured alternative employment. I find that there is no offer of reinstatement of record and no rejection of any offer in evidence.

After a review of the entirety of the record, I find that any reinstatement offer has not been admitted into evidence, and therefore I discount the question asked of the experts as it was based on a false assumption of facts not of record. My rulings can be issued only on consideration of the record of the hearing. 5 USC § 556(d)(Administrative Procedure Act). The transcript of testimony and exhibits is the exclusive record for decision and shall be made available to parties. 5 U.S.C.§ 556(e).

If I had found that the Complainant refused reinstatement, I would have accepted that an offer to return to past work is a reasonable equivalent to show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. An employer charged with discrimination in hiring can toll the continuing accrual of back pay liability by unconditionally offering the complainant the job previously denied, and the employer is not required to offer seniority retroactive to date of the alleged discrimination, and that absent special circumstances, rejection of the unconditional job offer ends the accrual of potential back pay liability. ***Ford Motor Co. v. EEOC***, *supra*; ***Blackburn v. Metric Constructors, Inc***., 86-ERA-4 (Sec'y Oct. 30, 1991).

I note that DVI was in bankruptcy in May, 2004, when the offer was supposed to have

been made. However, I credit the Complainant's testimony and DVI's argument that DVI's ability to last until 2009 was speculative. EX 64:311- 312

However, I find that the Respondents fail to prove that (1) there were substantially equivalent positions available; and (2) the Complainant failed to use reasonable diligence in seeking these positions. ***Ford Motor Co. v. EEOC***, *supra* and ***Hobby v. Georgia Power Co,*** *supra*.

Extent of Back Pay

The Complainant began working at Kramer & Levine as an associate attorney in June 2004. Tr. at 263. She should be entitled to full back pay to that date. DVI's Brief states:

> The backpay analysis is a simple, back-of-the-envelope calculation … If DVI is liable at all, it is for Complainant's lost salary from mid-September 2003 through April 2004, or about $81,250. (Seven and a half months of salary at $10,833 per month, or $130,000 annually.)

I accept the premise and find that the Complainant is entitled to back pay from September 18, 2003, to June, 2004, when she went to work for Kramer and Levine, easily ascertained by a ministerial calculation.

However, the Complainant alleges that she earned $140,000.00 per year at date of termination, as calculated by Ms. Koslow. Tr. at 77. According to the Complainant, this was "$140,000 structured into [her] receiving $130,000 base salary with a guaranteed bonus of $10,000 to be received at the end of June 2003." Tr. at 268. She was told that even in the event of bankruptcy, the bonus was "earmarked" for her and other DVI attorneys. Tr. at 295. As she was being terminated, Ms. Clay told her that no decision had been made about the guaranteed bonus. Tr. at 306.

After a review of the record, I find that the Complainant is credible regarding the bonus obligation, and I accept that although the company was in bankruptcy, and DVI asserts a right not to pay it based on what it considers a reasonable basis, she is entitled to it. Ms. Clay's testimony constitutes an admission that the Complainant was due a bonus. Tr. at 166, 542-543. Mr. Toney testified that none of the other employees received a bonus because the company could not afford to pay them. In essence, he accepts the obligation but asserts an incapacity to pay as an affirmative defense. "It did not have the budgetary allowance to do it. Second is under the Bankruptcy Code, it's [because] there is a maximum that's allowed to be paid towards priority or pre-petitioned wages to employees." Tr. at 542-543. However, Mr. Toney admitted that after the close of the DVI project, *he* is entitled to receive a bonus from AP. Tr. at 643. The purpose of back pay is to provide full recovery, not discount recovery because collection would be difficult or even impossible.[49] I find that the law in whistleblower cases is to place the complainant in a position that she would have been in if not discriminated against. ***Blackburn v. Metric Constructors***, Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). However, after reviewing the expert testimony, I find that the experts do not show a rational basis to conclude that a performance bonus was an ongoing part of her employment contract as there is no evidence that the bonus was to be ongoing.

Ms. Koslow testified that Ms. Kalkunte was actually earning "what she should have been [earning]" when she was at DVI. Tr. at 78. However, while the Complainant is entitled to receive the bonus, it should not be considered as back pay for the period after she obtained new

[49] The record does not establish whether the bonus was claimed in the bankruptcy proceeding. The Respondents did not provide any authority to exert a unilateral right to avoid a contractual obligation.

employment. A review of the Complainant's testimony and the testimony of the experts shows that there was no foundation to assume that the bonus is anything more than a one-time contingency.

Therefore, I find that the Complainant is entitled to $10,833.00 per month from September 18, 2003, to June, 2004; nine (9) months totaling $97,497 in back pay for that period.

Dr. Edelman notes and the record substantiates that the employer contribution for pensions, yields about 4 percent of monetary income, Complainant also lost employer paid insurance, which is 2.8 percent of income. Those total 6.9 percent of income, or $747.48 per month. Tr. 136-137. There is no evidence in the record to refute this testimony. As the record shows that these benefits are not provided by Kramer & Levine, Complainant is entitled to these payments from September 18, 2003 to the date that the Respondents pay them.

The Complainant is also entitled to an additional $10,000.00 for the bonus she was entitled to receive under her 2003 employment contract.

I note that the Complainant became employed as of June, 2004. At that time she earned $95,000 per year, or $7916.67 per month. From that date to the present, her back pay will be reduced from $10,833 per month to $3663.81 ($2916.33 plus $747.48) per month from June, 2004 to the date of payment by the Respondents. Back pay continues to accrue until paid. ***Chapman v. T.O. Haas Tire Co***., 94-STA-2 (Sec'y Aug. 3, 1994). If there is a dispute as to the calculation of back pay, the Department of Labor, Division of Fair Labor Standards, shall perform the necessary calculations.

Prejudgment Interest on Back Pay

Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified by the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See* ***Palmer v. Western Truck Manpower, Inc***., 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced).

Therefore, I find that the Complainant should provide prejudgment interest from the date of termination to the date of payment of this Order.

Front Pay

Although front pay is an equitable remedy, ***Excel Corp. v. Bosley***, 165 F.3d 635, 639 (8th Cir.1999), I may not bypass the procedural protections of our adversarial system in resolving disputed adjudicative facts, ***Lussier v. Runyon***, 50 F.3d 1103, 1113 & n. 13 (1st Cir.1995), and a front pay award must be based on evidence. *See* ***Davoll v. Webb***, 194 F.3d 1116, 1143-45 (10th Cir.1999). ***Downes v. Volkswagen of America, Inc.,*** 41 F.3d 1132, 1141-43 & n. 10 (7th Cir.1994). However, in ***Simmons v. Florida Power Corp***., 89-ERA-28 and 29 (ALJ Dec. 13, 1989) (Supplemental Decision ALJ, Apr. 11, 1990), dismissed on review by the Secretary based on settlement agreement in decision consolidated with 88-ERA-28 and 30, ***Simmons v. Fluor Constructors***, Inc., 88-ERA-28 and 30 and 89-ERA-28 and 29 (Sec'y June 28, 1991), another ALJ found it appropriate despite the difficulty in predicting the extent of future employment.

In the abstract, front pay could be considered compensation for "future pecuniary losses", in which case it would be subject to the statutory cap. The term "compensatory damages ... for future pecuniary losses" is not defined in the statute, and, out of context, its ordinary meaning could include all payments for monetary losses after the date of judgment. Front pay, like

reinstatement, is a form of equitable relief. ***Pollard v. E.I. du Pont de Nemours & Co***., 532 U.S. 843, 847-48, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001).

Dr. Koslow, a vocational expert (Tr. at 73), opined that it will take the Complainant between four and five years to reach her DVI salary level. Tr. at 78.

Dr. Edelman, the economist, opined that the valuation of Ms. Kalkunte's lost income and benefits through 2009 is $272,208.00. Tr. 129, 136. He relied on Dr. Koslow's report. Dr. Edelman, determined that after reduction of the future value to present value, "November, 2004 dollars", the Complainant would be entitled to $272,208.00 in back and front pay and other employee benefits. Tr. at 130, 135; CX 21. As a payment of future damages, a front pay award must be discounted to present value. ***Berkman v. U.S. Coast Guard Academy***, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000).

He relied on the Complainant's vital statistics such as age and date of birth, a description of the 401(k) profit-sharing plan at Kramer & Levine, the DVI December 13, 2003 employment letter, Ms. Kalkunte's resume, 2003 tax returns and W-2 forms, an October 24, 2004 Kramer & Levine pay stub, and an April 25, 2004 letter showing her COBRA payments. Tr. at 131-134. He also referenced federal government documentation involving life expectancy, work life expectancy, projection of wages, inflation and "the like". He explained that the $272,208.00 would replace the loss to date, and then from that investment, the Complainant could withdraw an amount that would return the difference between the income she should have earned at DVI, the income she is anticipated to earn on her new job, and that in the middle of 2009 there would be nothing left in the investment. Tr. at 135-136.

The record shows that Dr. Edelman predicated the income at DVI at $140,000.00 per year. In addition to that, there are fringe benefits, which are those benefits that an employer buys for an employee. I find, as stated above, that her back pay was at a rate of $130,000.00. However, he added:

> And in this particular case, we had two fringe benefits at DVI. One, the contribution into pensions, which is about 4 percent of monetary income, and then the value of the lost insurance, which is 2.8 percent of income. Those total 6.9 percent of income.
>
> Next, each year the income grows in compensation for cost of living and merit productivity. For a professional, a person with a professional specialty, the average rate of growth that we project is a little bit over 4 percent per year, it's about 4.5 percent per year.
>
> Subtracted from that is the column that is labeled post termination income. And in 2003, that is the amount that was actually paid to her, plus benefits from DVI. She didn't work from the point of termination from September 18th, 2003 to June 2004. And she began work at $95,000 in June 2004.
>
> This was at Kramer [and Levine], and at Kramer there is no insurance. There is a 401(k) and the company will contribute 4 percent into it and begin that contribution after three months of service.
>
> The vocational expert told me, through her report, that between four to five years she would reach parity with her former level of income, and that is an increase of roughly $17,600 per year, until May 2009, where she will be at the same income she was before. So the loss diminishes, gets smaller and smaller each year as it catches up.

Tr. at 136-137. Dr. Edelman assumed a growth in wages, a termination of the loss,

reaching parity in May, 2009, and a reduction for survival probabilities, as well as cost-of-living adjustments. Tr. at 137-138. He testified that if the Complainant were to reach parity by the end of 2007, loss would be $257,097. *Id*.

On cross examination, however, Dr. Edelman acknowledged that if the Complainant would have ultimately been terminated in 2004, "it would lower the loss." Tr. at 139. Dr. Edelman estimated that if the hypothetical layoff were true, the Complainant's loss would be reduced to about $100,000. *Id*. He estimated the loss based on a wage growth factor of 16 to 17 percent growth each year. Dr. Edelman also acknowledged that the facts surrounding the alleged Complainant's refusal of reinstatement would also reduce her loss. *Id*. at 142.

Geographic Area of Job Search

DVI advises that Ms. Koslow's analysis is suspect for several other reasons:

> For one, she drew at random a 50-mile circle around Washington, D.C., and made the assumption that all of the attorneys within the circle should be considered comparable in terms of earning potential. That assumption dramatically weakens Ms. Koslow's analysis. The 50 mile radius has no connection to the economics of the Washington, D.C. legal market. For example, Baltimore is only about 44 miles from Washington, yet Ms. Koslow apparently would count a lawyer who works in downtown Baltimore as part of the Washington, D.C. legal market. In fact, according to Ms. Koslow, an attorney with five to eight years of experience who works in a small, three-person firm six miles north of Baltimore should expect to make about $138,000 per year. And query whether the reverse is also true: are lawyers working on K Street actually in the Baltimore legal market? Perhaps in other areas of the country, 50 miles is an appropriate radius to draw around a metropolitan center (though it is doubtful.) As it pertains to this case, however, attorneys that work 50 miles outside of Washington D.C., (or about 32, as Complainant does) do not make anywhere near their counterparts who work in the city themselves.

See Brief citing Tr. at 66:7-67:7. DVI also asserts that Ms. Koslow failed to research the Pennsylvania legal market.

Neither Respondent placed any evidence into the record of the geographic area and other factors to discount Ms. Koslow's vocational assumptions. I accept that the Complainant remained in Pennsylvania until March or April, 2004, while she looked for work. I therefore credit her testimony in part.

DVI also failed to present evidence concerning the Pennsylvania market to impeach Ms. Koslow's testimony.

But I do not fully credit her testimony as to future earnings or earning capacity given that DVI's apparent insolvency was not adequately referenced as a predicate to her conclusions. I also discount her estimate of the base to be used to establish back pay, and therefore front pay. *See* discussion above.

DVI further alleges that Ms. Koslow performed no analysis of the effect that legal specialization has on earning potential. Tr. at 85-86. The argument is that her assessment fails to take into consideration whether corporate attorneys like the Complainant are any more or less in demand than patent attorneys or other specialists. Neither Respondent offered any expert testimony to controvert this evidence.

DVI concludes that as a result of the weaknesses in Ms. Koslow's analysis, Dr.

Edelman's work is "rendered meaningless" because he based his analysis on that of Ms. Koslow. *Id*. at 138. Dr. Edelman based his calculation of the Complainant's lost income on the difference between her last salary at DVI and her income at her new position over the course of five years, adjusting for expected annual gains. CX 21:8.

After reviewing all of the evidence, I discount much of the testimony of both expert witnesses. I accept the argument that it is apparent that DVI was in liquidation and at the time the experts testified, it appeared that liquidation would occur in 2004, and that there would no positions left for anyone after that. However, I do not accept that liquidation excuses the Respondents from liability.[50]

Front pay is intended to compensate the complainant for wages and benefits she would have received from the defendant employer in the future if not for the discrimination. ***Pollard***, *supra*; ***Tyler v. Union Oil Co. of Cal.,*** 304 F.3d 379, 402 (5th Cir.2002)(ADEA); ***Raefenhain v. Pabst Brewing Co***., 870 F.2d 1198, 1213 (7th Cir.1989); ***Dalal v. Alliant Techsystems, Inc.,*** No. 94-1483, 1995 WL 747442, at *2-3 (10th Cir. Dec.18, 1995). However ***Tyler*** affirms a denial of front pay where an award would be purely speculative. But "[c]alculations of front pay cannot be totally accurate because they are prospective and necessarily speculative in nature." ***Reneau v. Wayne Griffin & Sons, Inc***., 945 F.2d 869, 869 (5th Cir.1991). Loss of future earnings is proved with reasonable certainty by evidence of (1) the amount of wages lost for some determinable period and (2) the future period over which wages will be lost.

Despite the flaws in the logic of the Complainant experts, I accept the conclusion, based on a review of the Complainant's work history, that she will need additional time to resume appropriate compensation. I note that the Complainant makes less now than she did when she worked for DVI. I also accept that it will take the Complainant at least four years to overcome the effects of the Respondent's conduct. I do not need to rely on the logic that requires a comparison with similarly situated lawyers to reach this conclusion, as I note that she makes significantly less and I accept the testimony from Dr. Edelman that there are growth and inflation factors to consider. As back pay continues to accrue until paid, ***Chapman v. T.O. Haas Tire Co***., *supra*, I accept that front pay of four years shall commence, for a period of four years from the date that the Complainant's back pay award is satisfied.[51] The front pay award should address the equitable needs of the employee, such as the ability to obtain employment with comparable compensation. ***E.E.O.C. v. HBE Corp.***, 135 F.3d 543, 555 (8th Cir.1998).

I credit Dr. Edelman's testimony that for five years there should be income growth of between four (4) percent per year and about 4.5 percent per year. Tr. at 136-137. Dr. Edelman assumed a growth in wages, a termination of the loss, reaching parity in May, 2009, and a

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[50] *See* ***Belk v. City of Eldon***, 228 F.3d 872, 883 (8th Cir.2000) (upholding denial of front pay reduction for farming income that employee would have had in any case). Like the remedy of reinstatement, the availability of front pay is committed to the discretion of the trial court, and review of its decision is for abuse of discretion. ***Shore v. Federal Express Corp***., 42 F.3d 373 (6th Cir.1994) (front pay under Title VII, 42 U.S.C. § 2000e-5(g), authorizing "equitable relief"); ***Roush v. KFC Nat'l Management C***o., 10 F.3d 392, 398 (6th Cir.1993), *cert. denied*, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994).

[51] ***Schwartz v. Gregori***, 45 F.3d 1017, 1023 (6th Cir.1995). In determining the amount of front pay, a district court is to consider a number of factors, including the employee's work life expectancy. ***Shore v. Federal Express Corp***., 777 F.2d 1155, 1160 (6th Cir.1985). The fact that an employee is an at-will employee, like Schwartz, alone would not justify a refusal of front pay, but can be taken into account in fashioning an appropriate remedy. *See* ***Reneau v. Wayne Griffin & Sons, Inc***., 945 F.2d 869, 871 (5th Cir.1991); ***Andover Newton Theological Sch., Inc. v. Continental Casualty Co***., 930 F.2d 89, 94 (1st Cir. 1991).

reduction for survival probabilities, as well as cost-of-living adjustments. Tr. at 137-138.[52] I accept this rationale. However, I discount the reference to other employees' wages and the extrapolation that gives rise to the increase of roughly $17,600.00 per year, until May, 2009. I find that back pay and front pay are subject to the same kinds of calculations as suggested by DVI in its Brief. ***Pollard***, *supra*. I note that the Respondents have not proffered an alternative as to time.

Using the differential that I have accepted for back pay, $3663.81.00, multiplying that figure by four years and reducing that figure to present value, I find that the Complainant is entitled to $150,328.33 in front pay.[53] In reaching this conclusion, I find that inflation and any cost of living adjustments will, to a reasonable degree of probability, relying on the testimony of Dr. Edelman, offset future value, reducing the future value of $175,862.88 to $150,328.33 in present value.

Special Damages

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. Compensatory damages are designed to compensate not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. ***Martin v. Dep't of the Army***, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), *citing* ***Memphis Community Sch. Dist. v. Stachura***, 477 U.S. 299, 305-307 (1986); ***Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996)*** (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); ***Crow v. Noble Roman's, Inc.***, No. 95-CAA-08, slip op. at 4 (Sec'y Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); ***Jones v. EG&G Defense Materials, Inc***., ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and Truck repossessed deemed sufficient bases for awarding the compensatory damages).[54]

The testimony of medical or psychiatric experts is not necessary, but it can strengthen a

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[52] I note that in some cases, courts have affirmed a front pay award for the remainder of a complainant's working life, where he had been employed by the defendant for twenty-three years. ***Newhouse v. McCormick & Co***., 110 F.3d 635, 641-42 (8th Cir.1997). However, I accept that it is not appropriate in this case, where the Complainant has a lengthy work life expectancy.

[53] The present value of a sum is the amount of money that a party must have today in order to amount to a value equal to the loss at a date in the future. ***Jones & Laughlin Steel Corp. v. Pfeifer***, 462 U.S. 523 (1983). Using a present value calculator at 4% for four years. http://www.moneychimp.com/calculator/present_value_calculator.htm. http://www.uic.edu/classes/actg/actg500/pfvatutor.htm

[54] Compensatory damages are intended to redress the concrete loss suffered by reason of the wrongful conduct. Restatement (Second) of Torts § 903. ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 60 Fed. R. Evid. Serv. 1349 (U.S. 2003). Actual damages are not limited to out-of-pocket losses, but encompass all the elements of compensatory awards generally, including those such as impairment of reputation, personal humiliation, and mental anguish and suffering. ***Rasor v. Retail Credit Co***., 87 Wash. 2d 516, 554 P.2d 1041 (1976).

complainant's case for entitlement to compensatory damages. ***Thomas v. Arizona Public Service Co.***, 89- ERA-19 (Sec'y Sept. 17, 1993); ***Busche v. Burkee***, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981). *See also* ***United States v. Balistrieri***, 981 F.2d 916, 931-32 (7th Cir.1992) (a party's own statements can support a mental suffering award if they are more than simply conclusory), *cert. denied*, 510 U.S. 812, 114 S.Ct. 58, 126 L.Ed.2d 28 (1993).

Ms. Kalkunte testified that as a direct and proximate result of her termination she had to spend $12,000.00 in savings and $30,000.00 in credit card debt for living and legal expenses. Tr. at 311, 318-19.

The Complainant also alleges that she was left unable to sleep, was diagnosed with diabetes, suffered depression, and her hypertension worsened, she suffered from weight loss, weight gain, stress, anxiety, low self-esteem, and other similar problems. Tr. at 309, 319-320. I am requested to award an additional $151,976.00 in special damages to compensate her for emotional distress.

I am advised by DVI that Complainant's special damages claim must be proved with a high degree of specificity. ***Boale v. McClure***, 332 L3d 1347, 1359 (11th Cir. 2003). To prove special damages, the complainant needs to show an "itemization of such costs and expenses, including supporting documentation." ***Welch v. Cardinal Bankshares Corp.,*** 2003-SOX-15, slip op. at 71 (ALJ Jan. 28, 2004). DVI argues that the Complainant has offered no proof of the "special damages" she claims, and they therefore should be denied.

"Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff." ***Carey v. Piphus***, 435 U.S. 247, 263-264 (1978). *See* ***Memphis Community School Dist. v. Stachura***, 477 U.S. 299, 306-307 (1986)(testimony required as to some form of disagreeable emotion, anxiety, feeling of intimidation, etc.); ***Hobson v. Wilson,*** 737 F.2d 1, 61-62 and n.173 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985) (factfinder may measure this testimony against the circumstances of case to gauge whether violation justifies distress alleged); ***Seaton v. Sky Realty Co***., 491 F.2d 634, 636-637 (7th Cir. 1974). The complainant must prove the existence and magnitude of subjective injuries with "competent evidence." ***Carey v. Piphus***, 435 U.S. at 264 n.20. I credit the Complainant's testimony that she has been unable to sleep, was diagnosed with diabetes, suffered depression, and her hypertension worsened, she suffered from weight loss, weight gain, stress, anxiety, low self-esteem, and other similar problems. Tr. at 309, 319-320. However, she submitted no medical evidence to substantiate her claims, and therefore, although I find that she has had emotional distress to some extent, she has not proved permanency, and has not shown that her diabetes is related to the whistleblower claim. In determining pain and suffering damages, I may consider the nature and extent of the injured party's suffering and his "internal condition perceptible to his senses". ***Jones v. Miller***, 290 A.2d 587, 590 n. 5 (D.C.1972). I am to make her "whole", to put her in position she would have been placed, but for respondent's conduct. ***Croley v. Republican Nat. Committee, 759 A.2d 682 (D.C. 2000).***

I do not find that the Complainant has submitted evidence of past medical expenses or future expenses. She did not produce any medical testimony. Therefore, I find that the Complainant is not entitled to medical expenses.

However, I find that she is entitled to compensation for pain, suffering, embarrassment and mental anguish, and the effect on her credit. I note that in other cases, where no medical expert witnesses were called and no psychiatric evidence was forthcoming, whistleblowing complainants were awarded as much as $250,000.00 for compensatory damages based on

emotional distress.[55] I accept DVI's argument that the Complainant has a "garden variety"

[55] ***Hobby v. Georgia Power Co***., ARB No. 98- 166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001)($250,000.00). Other cases include:

- ***Hall v. U.S. Army, Dugway Proving Ground***, 1997-SDW-5 (ALJ Aug. 8, 2002). $400,000 in compensatory damages, based upon his mental anguish, adverse health consequence, and damage to his professional reputation. Complainant presented a "most compelling case of repeated and continuous discrimination and retaliation that has resulted in Complainant suffering greatly … most particularly his mental health has been compromised, and his professional reputation has been destroyed, perhaps forever."
- ***Roberts v. Marshall Durbin Co***., ARB No. 03–071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004). Award of $10,000 for compensatory damages although Complainant failed to mitigate and look for work for a period of time.
- ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003). No award. Emotional distress is not presumed; it must be proven. "Awards generally require that a plaintiff demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Id*. "To recover for emotional distress … the complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm." ***Gutierrez v. Univ. of California***, ALJ No. 98-ERA-19, ARB No. 99-116, slip op. at 9 (ARB Nov. 13, 2002).
- ***Hillis v. Knochel Brothers, Inc***., 2002-STA-50 (ALJ July 21, 2003). Complainant suffered mental anguish and was forced into bankruptcy from the impact of the Respondent's employment action. Complainant was awarded $20,000 in damages for pain and suffering.
- ***Trueblood v. Von Roll America, Inc***., 2002-WPC-3 to 6, 2003-WPC-1 (ALJ Mar. 26, 2003). $50,000 in compensatory damagers for emotional distress.
- ***Jackson v. Butler & Co***., ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004). $4000 in damages for emotional distress.
- ***Van der Meer v. Western Kentucky University***, ARB Case No. 97-078, ALJ Case No. 95-ERA-38, ARB Dec., Apr. 20, 1998. The ARB awarded Van der Meer $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.
- ***Gaballa v. The Atlantic Group***, Case No. 94-ERA-9, Sec'y Dec., Jan 18, 1996, slip op. at 5. Gaballa had been blacklisted, and testified that he felt his career had been destroyed by the respondent's action. The Secretary reviewed the compensatory damages awards for mental and emotional suffering made in a number of cases, which ranged from $10,000 to $50,000, and awarded Gaballa $35,000.
- ***LaTorre v. Coriell Institute for Medical Research***, 97-ERA-46 (ALJ Dec. 3, 1997). The ALJ found that Complainant had testified credibily about his loss of self esteem and emotional pain and suffering resulting from Respondent's adverse employment action, and reviewing compensatory damages awards of similar complaints, determined that the circumstances justified an award of $26,500 in compensatory damages.
- ***Creekmore v. ABB Power Systems Energy Services, Inc.***, Case No. 93-ERA-24, Dep'y Sec'y Dec., Feb. 14, 1996, slip op. at 25. The Deputy Secretary awarded Creekmore $40,000 for emotional pain and suffering caused by a discriminatory layoff. Creekmore showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company.
- ***Michaud v. BSP Transport, Inc***., ARB Case No. 97-113, ALJ Case No. 95-STA-29, ARB Dec. Oct. 9, 1997, slip op. at 9. The ARB awarded $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist. Evidence also showed foreclosure on Michaud's home and loss of savings.
- ***Smith v. Littenberg***, Case No. 92-ERA-52, Sec'y Dec., Sept. 6, 1995, slip op. at 7. The Secretary affirmed the ALJ's recommendation of award of $10,000 for mental and emotional stress caused by discriminatory discharge where Smith supported his claim with evidence from a psychiatrist that he was "depressed, obsessing, ruminating and ha[d] post-traumatic problems."
- ***Blackburn v. Metric Constructors, Inc***., Case No.1986-ERA-4, Sec'y Dec. after Remand, Aug. 16, 1993, slip op. at 5. The Secretary awarded Blackburn $5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children.

emotional distress claim, as the Complainant has a history of psychiatric problems that began prior to her employment at DVI. DVI accepts that while at DVI, the Complainant received psychiatric counseling and took prescribed anti-depressants. *See* Brief. "There is little question that Complainant's termination from DVI made her upset, but it is not clear that she would have been any less upset had she been terminated in the normal course of DVI's windown." I accept that pre-existing conditions may be aggravated or exacerbated by current problems caused at DVI, but the Complainant has failed to show that the mental anguish was completely caused by Respondents' conduct. However, I find that the Complainant did suffer symptoms of depression, and suffered humiliation as a result of Respondents' conduct. I credit the Complainant's testimony that she was embarrassed and humiliated by the way she was relieved of her job.

I also find that her testimony that she spent $12,000.00 in savings and $30,000.00 in credit card debt as a result of losing her job is credible, and is documented by her testimony, and that this is an accurate measure of further economic special damages. However, I discount the extent of her legal expenses as they are otherwise recoverable. *See* section "Attorney's Fees and Costs", infra.

After a review of all the evidence, I find that the Complainant is entitled to $22,000.00 in damages for her pain, suffering, mental anguish, the effect on her credit and the humiliation that she suffered.

Interest is not awardable on compensatory damages. ***Smith v. Littenberg***, 92-ERA-52 at 5 (Sec'y Sept 6, 1995).

ATTORNEY FEES AND COSTS

Attorney fees which are reasonably incurred by the Complainant in connection with bringing the complaint upon which the order was issued will be awarded. ***Deford v. Secretary of Labor***, 42 U.S.C. Section 5851(b)(2)(B). A reasonable fee is not necessarily that agreed to by the Complainant and her counsel. ***Blanchard v. Bergeron***, 489 U.S. 87 (1989); ***Blackburn v. Metric Constructors, Inc***., 86-ERA-4 (Sec'y October 30, 1991. Factors to be considered in awarding fees are:

1. Time and labor required;
2. Customary fee;
3. Novelty and difficulty of the questions;
4. The skill requisite to perform the legal service properly;
5. Preclusion of other employment by the attorney due to acceptance of the case;
6. Limitations imposed by the client or the legal circumstances. Priority work that delays the lawyer's other legal work is entitled to some premium;
7. Amount involved and the results obtained;
8. Experience, reputation, and ability of the attorney;
9. "Undesirability" of the case;
10. Awards in similar cases;

- ***Bigham v. Guaranteed Overnight Delivery***, Case No. 95-STA-37, ARB Case No. 96-108, ARB Dec., Sept. 5, 1997, slip op. at 3. The ARB awarded Bigham $20,000 for mental anguish resulting from discriminatory layoff.
- ***Lederhaus v. Paschen***, Case No. 91-ERA-13, Sec'y Dec., Oct. 26, 1992, slip op. at 10. The Secretary awarded Lederhaus $10,000 for mental distress caused by discriminatory discharge where Lederhaus showed he was unemployed for five and one half months; foreclosure proceedings were initiated on his house; bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted.

11. Whether the fee is fixed or contingent; and
12. Nature and length of the professional relationship with the client.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974).

In addition, litigation costs and expenses are also reimbursable, including monies reasonably spent in pursuing the cause of action. ***Goldstein v. Ebasco Constructors, Inc***. No. 86-ERA-36 (May 17, 1988). This includes lodging, paralegal expenses, and the Complainant's transportation expenses to and from the hearing.

RECOMMENDED ORDER

Accordingly, **IT IS RECOMMENDED** that Respondents DVI Financial Services, Inc. and AP Services, LLC:

1. Pay to the Complainant back pay from September 18, 2004 to the date that back pay is made to the Complainant. If disputed, ministerial calculations of back pay should be performed by the Division of Fair Labor Standards based on the discussion in the Findings as to damages;

2. Pay to the Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;

3. Pay to the Complainant front pay in the amount of $150,328.33.

4. Pay to the Complainant compensatory damages in the amount of twenty two thousand dollars ($22,000.00) in compensation for distress suffered as a result of the depression, humiliation and retaliation endured.

5. Pay to the Complainant, all costs and expenses, including reasonable attorney fees incurred by her in connection with this proceeding. Counsel for the Complainant will have thirty days from the date of this Order in which to submit an application for attorney fees and expenses reasonably incurred in connection with this proceeding. A service sheet showing that proper service has been made upon the Respondents and the Complainant must accompany the application. Respondents will have fifteen days following receipt of the application to file objections.

SO ORDERED.

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: ***To appeal you must file a petition for review (Petition) within ten business days of the date of this decision with the Administrative Review Board ("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. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.***

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If you do not file a timely Petition, this decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a)