In the Matter of:

ANTHONY MENENDEZ,

COMPLAINANT,

v.

HALLIBURTON, INC.,

RESPONDENT.

ARB CASE NOS. 09-002
09-003

ALJ CASE NO. 2007-SOX-005

DATE: September 13, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Anthony Menendez*, pro se*, Sugar Land, Texas

For Respondent:
W. Carl Jordan, Esq.; Corey E. Devine, Esq.; *Vinson & Elkins L.L.P.*, Houston, Texas

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

Anthony Menendez filed a complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX) on May 8, 2006.[1] Menendez alleged that his employer, Halliburton, Inc. (Halliburton) retaliated against him in violation of SOX's employee protection provisions after he alerted the SEC and Halliburton's Audit Committee to concerns about violations of Generally Accepted Accounting Principles (GAAP) with respect to revenue recognition and joint venture accounting practices. After a three-day hearing (September 24-26, 2007), a Department of Labor (DOL) Administrative Law Judge (ALJ) found that Menendez engaged in SOX-protected activity, but failed to prove that Halliburton subjected him to retaliatory adverse action. The ALJ dismissed Menendez's complaint.

As explained below, the ALJ correctly found that Menendez engaged in protected activity. Substantial evidence also supports the ALJ's finding that Halliburton did not constructively discharge Menendez. The ALJ erred however in concluding that Halliburton's breach of Menendez's confidentiality with regard to his complaint filed with Halliburton's audit committee was not adverse action. We remand for a determination of whether Menendez's protected activity was a contributing factor to this adverse action and, if so, whether Halliburton demonstrated by clear and convincing evidence that it would have acted adversely in the absence of Menendez's whistleblowing.

BACKGROUND

We note the ALJ's thorough recitation of the evidence appended to the opinion. We have carefully reviewed the record and find that it generally supports the ALJ's factual findings. Therefore, we will summarize.

Halliburton hired Menendez as Director of Technical Accounting Research & Training in March 2005 to support Halliburton's Finance and Accounting (F&A) organization.[2] His duties included monitoring and researching technical accounting issues and advising and training field accountants. Menendez reported directly to Mark McCollum, Halliburton's Chief Accounting Officer (CAO).

One of Menendez's early projects involved variable interest entity (VIE) guidelines contained in Interpretation No. 46 ("FIN 46") issued by the Financial Accounting Standards Board (FASB) to address abuse of off-balance-sheet accounting in the wake of Enron. Menendez was asked to review GMI, a joint venture set up between Halliburton and other

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[1] 18 U.S.C.A. § 1514A (West Supp. 2011). In 2010, Congress amended Section 1514A. See the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). The amendments do not affect our decision. Implementing regulations are found at 29 C.F.R. Part 1980 (2010).

[2] *Menendez v. Halliburton, Inc.*, ALJ No. 2007-SOX-005, slip op. at 3 (Sept. 18, 2008)(D. & O.).

investors to develop technology and perform research and development.[3] When Menendez reviewed the financial statements, he noticed that as the cash went in, it went directly out.[4] Menendez's recommendation on GMI was that the entity was valueless and should be written off. McCollum and J.R. Sult, former Vice President and Controller for Halliburton's Energy Services Group,[5] agreed, and GMI was ultimately written off.[6]

Menendez also raised specific concerns about Halliburton's accounting in connection with revenue recognition practices under Standard Accounting Bulletin (SAB) 104 (realizing earned income) and Emerging Issues Task Force (EITF) 00-21 (multiple deliverables).[7] Based on his review, Menendez thought defects in recognition practices could have a major impact on Halliburton's financial statements, and in June 2005 he approached McCollum to discuss his concerns.[8] On July 15, 2005, Menendez circulated a memorandum taking the position that Halliburton could not recognize revenue on certain products prior to their delivery into the physical possession of the customer.[9] Menendez met with McCollum on July 18, 2005, to discuss the memo.[10] Menendez taped the meeting.[11] McCollum told him that his memo was good, but told Menendez he was not a team player, was insensitive to politics at Halliburton, and should collaborate more with his colleagues in working on accounting issues.[12] Menendez also discussed his revenue recognition concerns with Sult, then Controller for the Energy Services Group, and to others who were working on the issue.[13] Sharing Menendez's concerns, Sult

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3 D. & O. Evidentiary Appendix (E.A.) at 21. (The Evidentiary Appendix (E.A.) is attached to the ALJ's Decision and Order, and is treated as part of the Decision and Order for purposes of the Board's review.).

4 *Id.* at 22.

5 *Id.*

6 A few weeks later Menendez looked at Fiberspar, another joint venture with Halliburton. His group researched Fiberspar and issued a memorandum suggesting that the proper accounting treatment would require this entity to be written off as well. Fiberspar was written off. E.A. at 23.

7 E.A. at 24.

8 *Id.* at 30, 31.

9 D. & O. at 3; E.A. at 29.

10 E.A. at 29-30; D. & O. at 3.

11 E.A. at 30.

12 E.A. at 30; D. & O. at 3, 9.

13 E.A. at 29.

ordered a new study of Halliburton's revenue recognition practices under SAB-104.[14] Halliburton and KPMG ultimately disagreed with Menendez's recognition concerns.[15]

In October 2005, Menendez e-mailed McCollum requesting another meeting to discuss his accounting concerns. McCollum declined to meet with Menendez at that time or at anytime during the remainder of 2005.[16] In late 2005, Menendez met with Charles Muchmore, Halliburton's Vice President of Financial Controls, and objected to certain of the company's accounting practices.[17] Muchmore told Menendez that if he felt strongly about his opinions, he could contact the Audit Committee of the Board of Directors under the Sarbanes-Oxley Act.[18]

On November 5, 2005, Menendez contacted the SEC by e-mail and reported that Halliburton, with the knowledge of KPMG, Halliburton's external auditor, was engaging in "questionable" accounting practices with respect to revenue recognition.[19] Menendez filed his complaint with the SEC confidentially.[20]

On February 4, 2006, Menendez learned that the SEC had contacted Halliburton. After ascertaining his right to whistleblower confidentiality,[21] Menendez sent an e-mail communication to Halliburton's Audit Committee stating that the company was in violation of GAAP with respect to revenue recognition and joint venture accounting practices.[22] Menendez's complaint to the Audit Committee raised essentially the same issues and concerns that he had brought to the SEC's attention.[23] Both complaints implicated McCollum and KPMG.[24]

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14 D. & O. at 3; Hearing Transcript (TR)-Sult at 377, 384-385.

15 D. & O. at 4; TR-Youngblood at 809-11. On January 19, 2006, Youngblood issued a second memorandum addressing multiple element arrangements. He concluded that Halliburton operations satisfied the requirements of EITF 00-21. All involved, except Menendez, agreed with the conclusion. D. & O. at 4.

16 TR-McCollum at 991-992.

17 D. & O. at 4; TR-Menendez at 568.

18 E.A. at 137.

19 D. & O. at 4.

20 E.A. at 32, 33; TR-Menendez at 323, 457-458.

21 Prior to sending his communication to the Audit Committee, Menendez studied Halliburton's code of business conduct, the Audit Committee's complaint procedures, and the Sarbanes-Oxley Act to ascertain his right to whistleblower confidentiality with regard to his submission. E.A. at 33; TR-Menendez at 458.

22 D. & O. at 4; Respondent's Exhibit (RX) 2.

23 E.A. at 106. .

Although Menendez provided his name and contact information in the e-mail to the Audit Committee, he fully expected that his identity would be kept confidential, just as it had been with the SEC.[25]

Upon receipt of Menendez's e-mail complaint, Richard Mize (Halliburton's Assistant General Counsel) forwarded it to the Audit Committee.[26] Despite Halliburton's stated policy assuring confidentiality,[27] Mize also forwarded copies of Menendez's complaint to Bert Cornelison (Halliburton's General Counsel) and Chris Gaut (Halliburton's Chief Financial Officer).[28] Gaut, in turn, forwarded Menendez's Audit Committee complaint to Dennis Whalen with KPMG, and to McCollum and Evelyn Angelle (Halliburton's vice president for investor relations).[29]

On February 8, 2006, the SEC notified Cornelison that it was opening an investigation and directed Halliburton to suspend its normal document retention policy and retain all documents and information related to variable interest entities and revenue recognition transactions.[30] The same day, in a follow-up to the SEC notice, Cornelison issued a "document retention" e-mail instructing that specified documentation and information be preserved and retained. However, Cornelison prefaced this e-mail by identifying Menendez; "the SEC has opened an inquiry into the allegations of Mr. Menendez."[31] Cornelison sent the e-mail to a number of company management officials, including Gaut and McCollum.[32] The same day (February 8, 2006), McCollum forwarded Cornelison's e-mail connecting Menendez with the

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[24] D. & O. at 4; RX 2.

[25] TR-Menendez at 457.

[26] D. & O. at 4: E.A. at 72.

[27] Halliburton's policy of confidentiality with respect to whistleblower submissions to the Audit Committee states in relevant part: "Your confidentiality shall be maintained unless disclosure is: Required or advisable in connection with any governmental investigation or report; In the interests of the Company, consistent with the goals of the Company's Code of Business Conduct; Required or advisable in the Company's legal defense of the matter." RX 1.

[28] D. & O. at 4; E.A. at 72; RX 3.

[29] E.A. at 93, 117; TR-McCollum at 875-876; RX, 3.

[30] D. & O. at 5; RX 4.

[31] D. & O. at 5; E.A. at 140; RX 4.

[32] *Id.*

SEC investigation to fifteen members of Halliburton's F&A Group, including Menendez himself.[33]

It is undisputed that Halliburton was unaware of Menendez's complaint to the SEC prior to Cornelison's e-mail connecting him to the SEC investigation. Menendez testified that he did not inform anyone of his complaint to the SEC,[34] and no one testifying on Halliburton's behalf stated that they knew of Menendez's SEC complaint prior to Cornelison's announcement.[35] Moreover, Menendez's testimony that the SEC assured him, subsequent to Cornelison's e-mail, that it did not reveal his name in connection with its inquiry to Halliburton is uncontroverted.[36]

When Menendez realized that his confidential communications with the SEC and the Audit Committee had been disclosed and his identity revealed, he was stunned.[37] He testified that it was probably the worst day of his life.[38] Immediately following the distribution by McCollum of Cornelison's e-mail, Menendez left the office. He stayed out for the remainder of the week on prescheduled leave.[39] When he returned to the office the following week, he received no phone calls, few e-mails, and his co-workers generally avoided him.[40] KPMG's auditors, with whom Menendez normally worked closely, also refused to interact with him.[41]

For approximately one month after the distribution of Cornelison's e-mail, Menendez was often absent from the office.[42] On March 9, 2006, Menendez's legal counsel requested that

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33 D. & O. at 5; RX 5.

34 TR-Menendez at 456-457.

35 For example, McCollum testified that he did not know of Menendez's involvement with the SEC until Cornelison's e-mail. TR-McCollum at 971, 981.

36 E.A. at 33; TR-Menendez at 456-457.

37 E.A. at 33: TR-Menendez at 457, 462.

38 E.A. at 33: TR-Menendez at 457.

39 D. & O. at 5; E.A. at 33-34; TR-Menendez at 463-464.

40 E.A. at 33-34; TR-Menendez at 460, 464-468.

41 After being notified that Menendez had lodged complaints with the SEC, the Public Company Accounting Oversight Board, and Halliburton's Audit Committee, Whalen notified Halliburton that legal counsel had instructed KPMG's auditors not to interact with Menendez on accounting issues until the complaints were resolved. D. & O. at 5; E.A. at 77, 97; TR-McCollum at 892-894; TR-Christopher at 686-689.

42 D. & O. at 5; TR-Paquette at 163. Menendez testified that Halliburton had granted him leave during that period to meet with his attorneys to prepare for the SEC and Audit Committee investigations. TR-Menendez at 533.

Halliburton grant Menendez paid administrative leave, "given the current environment and circumstances involving the SEC investigation."[43] On March 30, 2006, Halliburton notified Menendez that it had approved his request and that he was granted up to six months of paid leave with benefits, effective April 2nd,[44] on the condition that he "fully cooperate with the [SEC] and with the Company in the investigation" into his allegations.[45]

Menendez had been asked to teach two revenue recognition courses and one course in derivatives at Halliburton's Finance and Accounting Summit, scheduled for June 2006. Laura Lewis, manager of benefits accounting and risk management, was the project lead.[46] Lewis, along with Nick Stugart, the executive sponsor, and a steering committee, which included McCollum, were in charge of organizing presenters.[47] Concerned about Menendez's revenue recognition views, as well as his availability, Stugart recommended a substitute teacher for the revenue recognition course. McCollum approved the change, shortly after learning that Halliburton had granted Menendez administrative leave.[48]

By October of 2006, Menendez's leave of absence was about to expire and both the SEC and the Audit Committee investigation had concluded.[49] The SEC formally notified Halliburton on September 19, 2006, that no enforcement action was being recommended. The Audit Committee's investigation likewise concluded with no changes in the company's accounting practices.[50] Halliburton informed Menendez by letter, dated September 19, 2006, that he must return to work by October 2, 2006.[51] The letter also informed Menendez that he would return to the same position that he left; the only change was that his position would report to Charlie Geer, the director of external reporting for the F&A group, whom McCollum promoted in December

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[43] D. & O. at 5; RX 15.

[44] Menendez's effective date for his leave of absence was adjusted to April 2, 2006, so that he could receive his salary increase for the year. D. & O. at 5.

[45] D. & O. at 5; RX 16.

[46] D. & O. at 5; TR-Lewis at 774-775.

[47] D. & O. at 5; TR-Lewis at 775-776.

[48] TR-McCollum at 895; D. & O. at 5; E.A. at 97-98; RX 8.

[49] D. & O. at 6.

[50] *Id.*

[51] D. & O. at 6; RX 18. There ensued a series of letters between Halliburton and Menendez's counsel regarding the requirement to return to work. See RX 19-23.

2005.[52] Halliburton subsequently extended Menendez's return date to October 18, 2006, placing him on unpaid leave after October 1.[53]

By letter dated October 17, 2006, Menendez resigned his employment.[54] In his resignation letter, Menendez stated that he thought that Halliburton had demoted him by requiring him to report to Geer.[55] In addition, Menendez stated, "I have every reason to believe that Halliburton intends to persist in violating securities laws and filing inaccurate and misleading financial information. Professionally and ethically, I can not return to active employment under these conditions."[56] He had taken a job as a consultant to a law firm in July 2006 during his leave of absence.[57]

PROCEEDINGS BELOW

On May 8, 2006, Menendez filed a Sarbanes-Oxley whistleblower complaint (Section 806) with the U.S. Department of Labor, alleging that Halliburton retaliated against him because he filed complaints with the Audit Committee and the SEC.[58] On October 2, 2006, the Acting Regional Administrator for the Occupational Safety and Health Administration (OSHA), acting on behalf of the Secretary of Labor, notified Menendez that his SOX complaint was dismissed.[59]

Menendez requested a hearing before a Department of Labor Administrative Law Judge, which the ALJ held on September 24-26, 2007. Alleging retaliation in violation of Section 806 for having filed whistleblower complaints with the SEC, Halliburton's Audit Committee, and his supervisors, Menendez requested reinstatement "to his former position at Halliburton as Director of Technical Accounting and Research reporting to the Chief Accounting Officer, that he receive special and compensatory damages of no less than $1000.00 to remedy the adverse actions taken against him," and "an award of attorney's fees and costs, and for such further relief as the Department of Labor deems appropriate."[60]

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52 D. & O. at 6; RX 18; TR-McCollum at 921.

53 RX 20, 21.

54 RX 24.

55 *Id.*

56 *Id.*

57 D. & O. at 6.

58 D. & O. at 6; CX 76. Menendez amended his complaint twice. See CX 77, 78.

59 RX 38.

60 Compl. Post-Hearing Br. at 40-41.

The ALJ dismissed the complaint, finding that Menendez failed to demonstrate that Halliburton has taken adverse actions against him. Menendez filed a timely petition for review with the Board. Halliburton filed a cross appeal.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under SOX to the Administrative Review Board (ARB or Board).[61] Pursuant to SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.[62] Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[63] An ALJ's factual findings are entitled to respect and should be upheld when supported by substantial evidence, even if we "would justifiably have made a different choice had the matter been before [us] de novo."[64] Nevertheless, our review must be meaningful and the Supreme Court has stressed the importance of not simply rubber-stamping agency factfinding.[65] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision …."[66] Therefore, the Board reviews an ALJ's conclusions of law de novo.[67]

ISSUES

The issues before the Board in this case are:

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61 *See* Secretary's Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). See also 29 C.F.R. § 1980.110.

62 *See* 29 C.F.R. § 1980.110(b).

63 *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See also Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

64 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

65 *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

66 5 U.S.C.A. § 557(b) (West 1996).

67 *See Getman*, ARB No. 04-059, slip op. at 7.

(1) Whether the ALJ erred in concluding Menendez engaged in activity protected under Section 806 of SOX;

(2) Whether the ALJ erred in concluding that Menendez did not sustain adverse employment action within SOX Section 806 as a result of a breach of whistleblower confidentiality, isolation, investigation, removal of duties, demotion, and/or constructive discharge.

DISCUSSION

Section 806 of SOX, 18 U.S.C.A. § 1514(A), provides in relevant part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –
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> (A) a Federal regulatory or law enforcement agency;
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> * * * *
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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).[68]

Section 806 complaints filed are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2010).[69] To prevail on his SOX complaint,

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68 18 U.S.C.A. § 1514A(a).

69 *See* 18 U.S.C.A. § 1514A(b)(2)(C).

Menendez must prove by a preponderance of the evidence that: (1) he engaged in SOX-protected activity; (2) he suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action.[70] If Menendez carries his burden of proving causation Halliburton can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[71]

A. Protected Activity

The parties stipulated that: (1) there was an employee/employer relationship between Menendez and Halliburton; (2) Menendez provided information about Halliburton's accounting practices to the SEC, the PCOAB, Halliburton's audit committee, and various supervisors and company officials; and (3) Halliburton was aware of these communications.[72] The first issue to be addressed on appeal is that raised by Halliburton pursuant to its cross-appeal, i.e., whether the ALJ erred in finding that Menendez engaged in protected activity.

The ALJ found that there was no dispute that Menendez provided information to the SEC, Halliburton's audit committee, and his supervisors claiming that Halliburton was not in compliance with accounting standards relating to revenue recognition.[73] The ALJ also found that there was no question that Menendez participated in the SEC investigation of his complaint.[74] Halliburton does not dispute these findings, but argues to the Board that the ALJ erred in finding that Menendez engaged in protected activity because the ALJ failed to properly evaluate the objective reasonableness of Menendez's belief that Halliburton violated SEC rules and engaged in fraudulent activity. Halliburton contends that Menendez's belief was not objectively reasonable.[75]

The SOX whistleblower provision, Section 806, protects an employee who provides information regarding not just fraud, but also a "violation of …any rule or regulation of the Securities and Exchange Commission."[76] To prevail, Menendez had to establish by a preponderance of the evidence that he complained about conduct that he "reasonably believed"

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70 *See* 18 U.S.C.A. § 1514A(b)(2).

71 *Getman*, ARB No. 04-059, slip op. at 8; *cf.* 29 C.F.R. § 1980.104(c); *see* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv).

72 D. & O. at 2, citing TR at 49.

73 D. & O. at 8.

74 *Id.*

75 Halliburton, Inc.'s Initial Brief on Appeal (Halliburton's Initial Br.) at 16-22.

76 18 U.S.C.A. § 1514A(a)(1). *See Klopfenstein v. PCC Flow*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 17 (ARB May 31, 2006).

constituted a violation of an SEC rule or regulation.[77] The ALJ correctly noted that an employee's reasonable belief must be both subjectively and objectively reasonable,[78] and that the determination of whether a whistleblower's belief is objectively reasonable is based on "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience."[79]

Menendez testified, at length and in great detail, about the technical underpinnings and the rationale for his belief. Based thereon, the ALJ found that Menendez believed that Halliburton was violating SEC rules and that the company was not properly recognizing revenue.[80] We agree and find that substantial evidence of record supports the finding that Menendez's belief was subjectively reasonable.

In evaluating the objective reasonableness of Menendez's belief, the ALJ considered the testimony of numerous witnesses in addition to Menendez, including his supervisor McCollum, other Halliburton management officials, and F&A group members. The ALJ noted that both J. R. Sult (former Vice President and Controller of Energy Services Group division of Halliburton) and James Paquette (accountant who reported to Menendez) also agreed with some of Menendez's concerns that Halliburton was not adhering to the revenue recognition guidelines under SAB 104 (relating, in part, to delivery), FIN 46 (consolidation of variable interest entities), and EITF 00-21 (multiple element arrangements).[81] The ALJ observed that McCollum thought that Menendez's July 15, 2005 memorandum concerning the issues was good.[82] On the other hand, the ALJ recognized that Menendez often disagreed with others, including many members of the F&A group; Halliburton's CFO; and the outside auditors, KPMG.[83] Noting that "the weight of the testimony was that the accounting issues in question are not simple and require judgment and thoughtful analysis" and that Halliburton's witnesses admitted the issues Menendez raised were those on which reasonable minds may differ, the ALJ found "that, at the outset, it was possible for [Menendez] to have reasonably believed he had discovered accounting

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77 *See* 18 U.S.C.A. § 1514A(a)(1).

78 *See, e.g., Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 1000-1001 (9th Cir. 2009); *Harp v. Charter Commc'ns, Inc*., 558 F.3d 722, 723 (7th Cir. 2009).

79 *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 20 (ARB July 14, 2000)(citing *Minard v. Nerco Delamar Co.,* No.1992-SWD-001, slip op. at 7 n.5 (Sec'y Dec. Jan. 25, 1994).

80 D. & O. at 9-10.

81 *Id.*

82 *Id*.

83 *Id.*

practices that were contrary to relevant standards and therefore in violation of SEC rules."[84] The ALJ concluded that Menendez established the element of protected activity.[85] We defer under the substantial evidence standard to the ALJ's factual finding regarding the "objective reasonableness" of Menendez's belief.[86]

Halliburton also contends that the ALJ should have considered the materiality of the issues Menendez raised.[87] However, Section 806's plain language contains no materiality requirement for whistleblower complaints.[88] As we explained recently in *Sylvester v. Parexel*,[89] a complainant need not allege the substantive elements of fraud, including materiality, to warrant Section 806 protection; the complainant need only have a reasonable belief that the activity alleged constitutes fraud. Even assuming a materiality threshold exists, there is no question it was met. Halliburton management, the SEC, and the Audit Committee demonstrated that they took Menendez's complaints seriously when they undertook extensive and independent investigations into the matters Menendez raised. Had Menendez's complaints been immaterial or unreasonable, they would not have warranted one external and two internal investigations.[90] Each investigation ultimately concluded that Halliburton's accounting methods were sustainable; they nevertheless show that Halliburton and the SEC, at least initially, shared some of Menendez's concerns.[91]

Furthermore, the reasonableness of Menendez's position is not necessarily undermined by the fact that the SEC ultimately approved Halliburton's accounting methods. An employee's non-frivolous complaint does not have to ultimately withstand internal or external review to

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84 *Id.*

85 D. & O. at 10.

86 *See Allen v. Administrative Review Bd.*, 514 F.3d 468, 478 (5th Cir. 2008)("Because reasonable minds could disagree on this issue, the ALJ's factual finding regarding the 'objective reasonableness' issue is entitled to deference under the substantial evidence standard.").

87 Halliburton's Initial Br. at 21.

88 *See Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008) (concluding that "[a]lthough many of the laws listed in § 1514A of the Sarbanes-Oxley Act contain materiality requirements, nothing in § 1514A . . . indicates that § 1514A contains an *independent* materiality requirement").

89 ARB 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 21-22 (ARB May 25, 2011).

90 *See* Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, as reprinted in 2002 WL 863249, at **17 (May 6, 2002).("Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief.").

91 *See Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004).

merit Section 806 protection; such a standard would clearly undermine employee initiatives in bringing to light perceived misconduct**.**[92] The Board has ruled that an employee's reasonable but mistaken belief in employer misconduct may constitute protected activity.[93] Courts have also concluded, "[t]o encourage disclosure, Congress chose statutory language which ensures that 'an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.'" [94]

For the foregoing reasons, we affirm the ALJ's determination that Menendez engaged in protected activity. The ALJ's conclusion that Menendez engaged in SOX-protected activity when he complained about Halliburton's alleged violations of SEC rules to his supervisors, the SEC, and the Board of Director's Audit Committee is supported by substantial evidence of record and is in accordance with applicable law.

B. Adverse Action

The ALJ dismissed the case after finding Halliburton took no "retaliatory adverse action" against Menendez for his protected activity.[95] On appeal, Menendez argues that Halliburton subjected him to five adverse employment actions: (1) breach of confidentiality; (2) isolation; (3) removal of duties; (4) demotion; and (5) constructive discharge.[96] Halliburton also appealed claiming the ALJ should have applied the "ultimate employment decision" or "tangible consequences" standard for adverse action, rather than the standard the Supreme Court announced for Title VII retaliation cases in *Burlington Northern & Santa Fe Railway Co. v. White*,.[97] In actuality, the ALJ *did* apply the "tangible consequences standard"[98] but use of this standard was error. Because of this and the other legal errors the ALJ made in connection with his rulings on adverse action, we reverse his dismissal of the action and remand.

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92 See *Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 479 (3d Cir. 1993).

93 *Halloum v. Intel Corp*., ARB No. 04-068, ALJ No. 2003-SOX-007, slip op. at 6 (ARB Jan. 31, 2006).

94 *Van Asdale*, 577 F.3d at 1001 (quoting *Allen*, 514 F.3d at 477).

95 D. & O. at 20.

96 Although Menendez mentions the ALJ's additional ruling that an investigation and/or monitoring of his work initiated by McCollum did not constitute adverse action (Complainant's Initial Brief at 14), he does not challenge that ruling on appeal.

97 Halliburton Initial Br. at 24-26; *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

98 D. & O. at 12, 17.

Citing this Board's adoption of the Supreme Court's *Burlington* standard in AIR 21 cases, the ALJ held Title VII's definition of adverse action, likewise applies to SOX whistleblower claims. However, in *Williams v. American Airlines*, this Board recently clarified that *Burlington's* adverse action standard, while persuasive, is not controlling in AIR 21 cases.[99] As we discuss below, we similarly hold that *Burlington* is a particularly helpful interpretive tool, but the plain language of Section 806's adverse action provision controls.

i. Statutory Construction

SOX Section 806's plain language states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment."[100] By explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers.[101]

Moreover, an expansive interpretation of SOX Section 806 conforms to the remedial purposes of whistleblower provisions generally as well as SOX specifically. Since their inception, whistleblower laws consistently have been recognized as remedial statutes warranting broad interpretation and application.[102] Whistleblower provisions in the nuclear industry and those contained in the environmental laws were aimed at protecting the public from serious harm.[103] Squelching public disclosures of regulatory violations literally could cost lives. Whistleblower laws were broadly construed to encourage employees to aid in the enforcement of the substantive statutes by promoting workplaces relatively free from the threat of intimidation.[104] The purpose of the SOX was to protect investors and restore confidence to the markets; the whistleblower protections contained in the statute are central to fulfilling that

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99 *Williams v. American Airlines, Inc*. ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at. 12-15 (ARB Dec. 29, 2010).

100 18 U.S.C.A. § 1514(A)(a)(emphasis added).

101 *Hendrix v. American Airlines*, ALJ Nos. 2004-AIR-010, 2004-SOX-023, slip op. at 14, n.10 (ALJ Dec. 9, 2004).

102 *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985); *Deford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Poulos v. Ambassador Fuel*, No. 1986-CAA-001, slip op. at 6 (Sec'y Apr. 27, 1987).

103 *See, e.g., Polizzi v. Gibbs & Hill*, No. 1987-ERA-038, slip op. at 2 (Sec'y July 18, 1989).

104 *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 478; *Van Der Meer v. Western Kentucky University*, ARB No. 97-078; ALJ No. 1995-ERA-038, slip op. at 4 (ARB Apr. 20, 1998); *Boytin v. Pennsylvania Power & Light Co.*, 1994-ERA-032, slip op. at 6.(Sec'y Oct. 20, 1995).

purpose.[105] As Senator Leahy stated in connection with Section 806: "[t]he law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market."[106] Recent expansion of whistleblower rights contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203) demonstrate Congress' continuing commitment to encouraging and protecting corporate whistleblowers.

ii. Burlington Northern & Santa Fe Railway Co. v. White

Because the statute itself and its legislative history provide enough guidance, we do not find it necessary in this case to turn to the definition of adverse action articulated in Title VII cases like *Burlington*. However, because the parties in this case (and this Board in other cases) have argued the relevance of the *Burlington* adverse action standard, we will address it.

We have detailed *Burlington*'s facts and legal findings in previous opinions.[107] Briefly, the Supreme Court's holding in *Burlington* addressed both the degree and scope of protection Title VII's anti-retaliation provision (Section 704) affords. With respect to the *degree* of actionable harm, the Court held that a Title VII plaintiff bringing a retaliation claim need only show the employer's challenged actions are "materially adverse" or "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." The Court explained that this low threshold was necessary to prevent employer interference with access to Title VII's remedial protections. [108]

Section 806's express statutory language is more expansive than either of the Title VII provisions addressed in *Burlington* and consequently demands a correspondingly broader interpretation. Title VII's anti-discrimination provision (Section 703) states in relevant part, that it is an unlawful employment practice for an employer "*to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual*." Title VII's anti-retaliation provision (Section 704) similarly states: "It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment."

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105 *See* Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, as reprinted in 2002 WL 863249, at **17 (May 6, 2002)("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies."); S. Rep. No. 107-146, at **9 (2002)("often, in complex fraud prosecutions . . . insiders are the only firsthand witnesses to the fraud.").

106 *See* 149 Cong. Rec. S1725-01, 2003 WL 193278, at *S1725 (Jan. 29, 2003).

107 *See, e.g., Williams,* ARB No. 09-018, slip op. at 13-14; *Melton v. Yellow Transp.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 14-16 (ARB Sept. 30, 2008).

108 *Burlington*, 548 U.S. at 68 (citation omitted).

Unlike either Title VII provision, Section 806 states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee." As explained above this language *explicitly* proscribes non-tangible activity, which evinces a congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. This difference in statutory construction convinces us that adverse action under SOX Section 806 must be more expansively construed than that under Title VII.[109]

Considering these differences in statutory language, in *Williams,* we held that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions.[110] Because of its similarity to the adverse action language construed in *Williams* and for reasons explained below, we adopt the *Williams* standard of actionable adverse action as likewise applicable to Section 806 cases. Under this standard, "the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged."[111] Nevertheless, the Supreme Court's reasoning in *Burlington* addressing the contours of adverse action under Title VII's anti-retaliation provision is compelling and serves as a helpful guide for the analysis of adverse acts under SOX.

The Supreme Court in *Burlington* also held that the *scope* of actionable harm under Title VII's anti-retaliation provision was broader than that of Title VII's anti-discrimination provision (Section 703). By contrasting the language of the anti-discrimination provision (Section 703) with the anti-retaliation provision (Section 704), the Court explained why the correct standard for claims under Title VII's anti-retaliation provision should not be limited to "ultimate employment decisions" or "tangible employment actions."[112] The Court pointed out that the anti-discrimination provision contained language limiting its scope to the "terms, conditions, or privileges of employment" whereas the anti-retaliation provision contained no such limiting language. According to the Court, this difference in language reflected a difference in purpose and a corresponding difference in the means needed to effectuate those purposes. The Court concluded that Title VII's anti-discrimination provision by its terms protected an individual only from employment-related discrimination, but that the anti-retaliation provision was not so limited.

Noting the distinction the Court drew between Sections 703 and 704, the Respondent argues that the *Burlington* "deterrence" standard should not apply to Section 806 because the

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109 *See McClendon v. Hewlett Packard*, ALJ No. 2006-SOX-029, slip op. at 75 (Oct. 5, 2006) ("differences in statutory language signify that adverse action should be interpreted more broadly under whistleblower claims than under Title VII claims").

110 *Williams*, ARB No. 09-018, slip op. at 10-11 n.51, citing *Hendrix,* ALJ Nos. 2004-AIR-010; 2004-SOX-023, slip op. at 14, n.10.

111 *Id.* at 15.

112 *Burlington*, 548 U.S. at 61- 63, 67.

language of Section 806, unlike the anti-retaliation provision at issue in *Burlington*, contains explicit language limiting actionable adverse action to the "terms and conditions of employment."[113] Because Section 806 more nearly parallels the language of Title VII's anti-discrimination provision, the Respondent argues that the more appropriate definition of adverse action would be an "ultimate employment decision." Recognizing that the two-fold holding in *Burlington* addressed both the degree and scope of actionable adverse action, the ARB majority in *Melton* explained that "terms and conditions" language was relevant only to the *scope* of coverage but not the *degree* of actionable harm.[114] The *Melton* majority reasoned that, while the *scope* of harm must be employment-related, the *degree* of actionable harm for both the Title VII anti-retaliation provision and whistleblower provision were the same – that which would deter a reasonable employee from engaging in protected activity. Broad protection effectively serves similar purposes for both provisions by effectively deterring the myriad forms that retaliation may take and frees employees to engage in protected activity.

Today, we pick up where the *Melton* majority left off. Rather than a limitation on what is to be considered adverse action under Section 806, we are of the opinion that "terms and conditions of employment" are not significant limiting words and should be construed broadly within the remedial context of Section 806. We find the Court's more extensive explanation in *Meritor Savings Bank, FSB v. Vinson*, to be more convincing:

> First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment.[115]

Under Section 806, the language "in the terms and conditions of employment" does not limit Section 806's intended protection to economic or employment-related actions.

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113 Halliburton's Initial Brief on Appeal at 25-26.

114 *Melton v. Yellow Transp., Inc*., ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 18 (ARB Sept. 30, 2008).

115 *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)(citations omitted). In *Merito,r* the Court also cited with approval the Fifth Circuit's decision in *Rogers v. E.E.O.C.*, 454 F. 2d 234 (1972) . *Rogers* articulated the reasoning behind an expansive construction of adverse action; "Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues." 454 F. 2d at 238, disapproved of on other grounds, *E.E.O.C. v. Shell Oil Co*., 466 U.S. 54 (1984).

iii. Application of Title VII precedent

The ALJ applied a number of different standards to the adverse actions alleged in this case including "no tangible job consequences," "no material change in working conditions," "would not deter a reasonable employee from engaging in protected activity," "not a central job responsibility," and "no material impact on ability to do job."[116] This confusion may be a reflection of the Board's own confounding precedent in this area, which we attribute, in part, to the incautious application of Title VII precedent to whistleblower cases.

As demonstrated above, Section 806 contains very different language than the comparable Title VII provisions and a correspondingly different construction is required. Without careful analysis, the application of precedent interpreting one statute to the interpretation of a different statute may create mischief.[117]

Whistleblower law before 2000 consistently prohibited an expansive array of employment actions not necessarily limited to "tangible" consequences, monetary loss or ultimate employment decisions. [118] For example, in *Diaz-Robainas v. Florida Power & Light Co.*, the Secretary of Labor held an order to submit to psychological evaluation to be actionable adverse action. Citing numerous earlier cases, the Secretary aptly characterized the scope of adverse actions under whistleblower law: "[g]enerally speaking, any employment action by an employer that is unfavorable to the employee's 'compensation, terms, conditions, or privileges of employment' may be considered an 'adverse action' for purposes of the prima facie case."[119] This precedent accurately reflected the existing whistleblower regulations found at 29 C.F.R. § 24.2(b), which stated: "Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or *in any other manner discriminates* against any employee who has [engaged in protected activity]."[120]

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116 D. & O. at 12, 13, 15, 17, 18.

117 *See Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

118 *See Guitierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 7-8 (ARB Nov. 13, 2002); *Van Der Meer*, ARB No. 97-078, slip op. at 4-5; *Smith v. Esicorp, Inc*., No. 1993-ERA-016, slip op. at 12-13 (Sec'y Mar. 13, 1996)(a series of cartoons ridiculing the Complainant's protected activity found to be actionable adverse action); *Diaz-Robainas v. Florida Power & Light Co.*, 1992-ERA-010, slip op. at 4 (Sec'y Jan. 19, 1996); *Boytin*, No. 1994-ERA-032, slip op. at 6; *Bassett v. Niagara Mohawk Power Corp*., No. 1985-ERA-034, slip op. at 3 (Sec'y Sept. 28, 1993)(holding that negative comments in a performance evaluation can constitute adverse action, even absent a showing of adverse economic impact).

119 *Diaz-Robainas*, No. 1992-ERA-010, slip op. at 4 (citing *DeFord*, 700 F.2d at 286; *Bassett*, No. 1985-ERA-034; *McCuistion v.TVA*, No. 1989-ERA-006 (Sec'y Nov. 13, 1991).

120 29 C.F.R. § 24.2(b)(emphasis added) applied from 1980 to 1998 to whistleblower provisions contained in: the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i); Water Pollution Control Act, 33

Over the last decade, this explicitly broad DOL jurisprudence has been gradually replaced by adverse action standards imported from Title VII cases[121], including "tangible job consequences," "significantly diminished material responsibilities" and "ultimate employment decisions." This reliance on Title VII adverse action precedent had the effect of narrowing the scope of actionable activity in direct contravention of earlier DOL precedent, which more faithfully reflected the congressional intent to provide broad protection for employees who engage in behavior Congress sought to encourage.[122]

However, the Title VII decision in *Burlington* reinstated a broader definition of the term "adverse action" – namely, activity that would dissuade a reasonable employee from engaging in protected activity – that is consistent with the expansive construction required of whistleblower statutes. Accordingly, *Burlington* may provide a useful starting place for reviewing Section 806 adverse action allegations; *Burlington*'s deterrence standard prohibiting actions that would deter a reasonable employee from engaging in protected activity would be actionable under Section 806 as well. In this case, however, the ALJ not only ignored Section 806's clear statutory language, but he also misapplied the *Burlington* adverse action standard.

iv. Adverse Action Findings Below

The ALJ repeatedly applied an overly strict standard, including the standard of "tangible job consequences," to each of the adverse actions Menendez alleged.[123] This directly conflicts with the *Burlington* holding that requires only that the conduct would deter a reasonable employee from engaging in protected activity. The ALJ also failed to recognize the body of decisional law holding that the absence of a tangible injury goes only to remedy, not to whether the employer committed a violation of the law.[124] Finally, the ALJ should have considered the

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U.S.CA. § 1367; Toxic Substances Control Act, 15 U.S.C.A. § 2622; Solid Waste Disposal Act, 42 U.S.C.A. § 6971; Clean Air Act, 42 U.S.C.A. § 7622; Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851.

[121] *See, e.g., Ilgenfritz v. U.S. Coast Guard Acad.*, ARB No. 99-066, ALJ No. 1999-WPC-003, slip op. at 8 (ARB Aug. 28, 2001), *citing Oest v. Illinois Dep't of Corrs*., 240 F.3d 605 (7th Cir. 2001).

[122] *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 478 ("Such 'whistle-blower' provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Water Act and nuclear safety statutes. They are intended to encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels.").

[123] D. & O. at 12, 13, 15, 17.

[124] *See e.g., Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997)(the employer's dissemination of an adverse job reference "violated Title VII because it was a 'personnel action'

adverse actions in the aggregate, as well as separately; minor acts of retaliation can be sufficiently substantial when viewed together to be actionable.[125] Nevertheless, as explained below, we do not so much reject the ALJ's findings as view them from a different perspective.

a. Breach of confidentiality

In rejecting Menendez's claim that Halliburton's breach of his confidentially as a whistleblower constituted unlawful retaliation, the ALJ focused on the identification of Menendez by Cornelison (Halliburton's General Counsel) and McCollum (Halliburton's Chief Accounting Officer and Menendez's immediate supervisor) as the individual who filed the SEC complaint.[126] The ALJ determined that since "the weight of the evidence shows that Respondent did no more than identify Complainant as having made allegations against the company to a group of people who would have known it was him anyway," the identification of Menendez in connection with the SEC investigation had "no practical impact" and therefore failed to constitute adverse action under SOX.[127]

However, Menendez's breach of confidentiality claim did not exclusively rest on his identification as the individual who initiated the SEC investigation. In his claim filed with OSHA, and in his complaint subsequently filed with the Office of Administrative Law Judges (OALJ), Menendez alleged that the revelation of his identity in connection with the complaint he filed with Halliburton's Audit Committee breached his right to confidentiality, in violation of SOX Section 301.[128] Consistent with the allegations of his complaint, Menendez's attorney

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motivated by retaliatory animus. That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability."); *Smith v. Secretary of the Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981)("questions of statutory violation and appropriate statutory remedy are conceptually distinct"); *Griffith v. Wackenhut Corp*., ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 13 (ARB Feb. 29, 2000); *Boytin*, No. 1994-ERA-032, slip op. 4.

125 *See Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010).

126 D. & O. at 11-12.

127 D. & O. at 12. Thus, the ALJ concluded, Menendez "failed to prove that the disclosure of his name in the case was such that it would dissuade a reasonable employee in these circumstances from engaging in protected activity." *Id*.

128 In rejecting Menendez's claim, OSHA expressly understood Menendez to allege as adverse action "revelation of his identity as the complainant in a complaint he made to the audit committee." Findings of OSHA Dismissing Complaint (Oct. 2, 2006) at 3 (Respondent's Exhibit 38). In his subsequent complaint filed with the ALJ (December 18, 2006), Menendez alleged that on February 4, 2006, he "provided what he believed would be a confidential report to Halliburton's Audit Committee" pertaining to concerns he had regarding questionable accounting and auditing matters implicating McCollum and KPMG. Complaint, at p. 36. "As Director of Technical Accounting Research and Training, Mr. Menendez . . . was obligated, as part of his job as a high ranking accounting professional in the Halliburton organization, to bring these practices to the attention of the Company's Audit Committee. . . . Because Mr. Menendez had to take steps that risked retaliation . . .

focused in his opening statement at the hearing before the ALJ on Menendez's filing with the Audit Committee, and tied the subsequent disclosure of his involvement in the SEC investigation to the earlier revelation of Menendez's name in connection with his complaint to the Audit Committee:

> In February of 2006, [Menendez] went to the audit committee. At that point, there was an e-mail sent out by Mr. McCollum informing everybody that Mr. Menendez had gone to the SEC. And he had, but that apparently was just an assumption because he had gone to the audit committee. When he made his audit committee filing, the first thing that went out is, they notified the CFO of the company. In fact, they notified the CFO even before they notified the audit committee, even though it's a complaint to the audit committee.[129]

Notwithstanding the allegations of Menendez's complaint and his counsel's arguments on this point, the ALJ did not address the disclosure of Menendez's identity in conjunction with his complaint to the Audit Committee. Understandably, in his appeal Menendez thus focuses on his "outing" by Cornelison and McCollum as the initiator of the SEC investigation, but his claim of Halliburton's breach of his confidentiality rests upon Section 301's right to confidentiality that attached to his complaint to the Audit Committee.[130] Menendez notes that on February 7, 2006, Gaut (Halliburton's CFO) forwarded his complaint to the Audit Committee to McCollum and Whalen (KPMG), who along with Cornelison, had earlier received a copy of the e-mail complaint from Mize (Halliburton's Assistant General Counsel).[131] Based on this chain of events, Menendez argues that Cornelison's mention of Menendez's name in his February 8th document retention e-mail had to have been because Cornelison was aware of Menendez's complaint to the Audit Committee,[132] inasmuch as the SEC had maintained the confidentiality of his identity.[133]

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a procedure for confidential reporting was an essential term and condition of his employment. . . . The decision to expose Mr. Menendez's identity therefore violated a vital term and condition of his employment and clearly qualifies as retaliation under Sarbanes-Oxley." Complaint, at 40- 41.

[129] Opening statement of Joseph Ahmad on behalf of Menendez, TR at 24-25. In his post-hearing reply brief (2/5/08), Menendez again cited the right to confidentiality that Section 301 affords audit committee complaints in arguing that his right to confidentiality was violated when the General Counsel's e-mail identifying Menendez as the initiator of the SEC investigation was circulated. Complainant's Post-Hearing Reply Brief at 18.

[130] Complainant's Initial Brief, at 14-16; Dec. 18, 2006 Complaint, at 40.

[131] Complainant's Initial Brief, at 2. As previously noted in the Background Statement, supra at 4-5, Gaut and Cornelison had received a copy of Menendez's complaint to the Audit Committee from Halliburton's Ass't General Counsel Mize.

[132] Complainant's Rebuttal Brief at 3-4.

Section 301 of SOX, 15 U.S.C.A. § 78j-1(m)(4), requires that publicly-traded companies such as Halliburton establish procedures for:

> (A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and
>
> (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

The reason for requiring audit committees to create confidential and/or anonymous disclosure procedures is evident. Employee whistleblowers are one of the most effective sources of information concerning questionable accounting and auditing matters as well as fraud and corporate crime.[134] Since employees are more willing to identify misconduct if they can do so anonymously,[135] it stands to reason that anonymous and/or confidential reporting mechanisms encourage internal reporting of corporate misconduct. Furthermore, the confidentiality that Section 301 provides allows employees to report problems directly to the independent audit committee and thus effectively to their employer, while at the same time permitting the whistleblowing employee to avoid possible retaliation from supervisors or high-ranking company managers who may be defensive about wrongdoing in which they might be implicated. Congress well recognized the importance of encouraging the reporting of accounting irregularities and potential fraud by means of confidential disclosures. As Senator Stabenow, author of Section 301's confidentiality provision, stated:

> With Enron and other scandals, people in the company knew there were problems but had nowhere to turn. They were trapped in a corporate culture which squashed dissent. My amendment guarantees that there will be a designated way to report problems to people who are in a position to do something about it, and it

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133 *See* Background Statement, *supra* at 5; TR-Menendez at 456-457; TR-McCollum at 971, 981; E.A. at 33.

134 *See* Association of Certified Fraud Examiners, 2010 Report to the Nation on Occupational Fraud and Abuse, pp. 16-17; Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYULR 1107, 1117.

135 *See* Association of Certified Fraud Examiners, 2010 Report to the Nation on Occupational Fraud and Abuse, p. 17; Richard E. Moberly, *supra*, 2006 BYULR at 1143 and n.268.

> seeks to protect those employees who are simply acting in the best interests of their companies and their companies' investors.[136]

Since the purpose of confidentiality is to encourage employees to come forward with information about SOX violations, permitting an employer to indiscriminately expose the identity of an employee who presents information concerning questionable accounting or auditing matters would most assuredly chill whistleblower-protected activity, thereby defeating the very purpose the confidentiality provided by Section 301 was meant to achieve and, as a result, undermining the SOX's overall purpose and objectives. Employees who exercise their right under Section 301 to engage in confidential disclosures should be protected from employer retaliation under the Section 806's whistleblower provisions if the employer fails to provide the requisite confidentiality.

We consider Section 301 a critical component of SOX, legislation composed of a number of separate and distinct provisions designed to address corporate fraud and financial wrongdoing. To further this legislative intent, we necessarily construe the protection Section 301's requirement (that covered employers establish confidential channels of communication for their employees) affords consistently with SOX Section 806's[137] anti-retaliation provisions and hold that Section 806 provides whistleblower protection to employees who make use of such channels.[138] We agree with Menendez's argument that the right to confidentiality Section 301 affords effectively establishes a "term and condition" of employment within the meaning of Section 806's whistleblower protection provision, and that the exposure of Menendez's identity in connection with his complaint to Halliburton's Audit Committee constituted a violation of that employment term and condition.

Particularly in light of the chain of events the breach of Menendez's confidential Audit Committee complaint precipitated,[139] Halliburton's action constituted adverse action. As the

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136 148 Cong. Rec. S6300-01, 2002 WL 1398761, at *S6301 (daily ed. June 28, 2002) (remarks by Senator Stabenow).

137 *See* 2A SUTHERLAND STATUTORY CONSTRUCTION, § 46:5 (7th ed.)("Whole statute" interpretation). Additionally, a number of the DOL whistleblower statutes passed in recent years contain confidentiality requirements within the very statute, evidencing a clear congressional recognition of the importance of maintaining confidentiality in the context of whistleblower disclosure. *See, e.g.*, 49 U.S.C. § 31105(h); 49 U.S.C. § 20109(h).

138 The Board has similarly held that SOX Section 307 (mandatory reporting requirement for attorneys) should impliedly be read consistent with SOX Section 806 to provide a remedy. *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 14-17 (ARB Sept. 30, 2009).

139 As the ARB noted in *Williams v. American Airlines*, ARB No. 09-018, a proper assessment of whether the action at issue rises to the level of adverse action requires, among other things, "examination of the particular circumstances (the context) in which the employment action takes place. As the Court [in *Burlington*] stated, 'The real social impact of work-place behavior often

evidence in this case attests, once Mize revealed Menendez's identity to Halliburton's General Counsel and its Chief Financial Officer, the proverbial cat was out of the bag. Three days after Menendez reported questionable accounting practices to Halliburton's Audit Committee, Halliburton's CFO revealed his identity as a whistleblower to, among others, the very subjects of Menendez's complaint (McCollum and Walen/KPMG).[140] A day later, Halliburton's General Counsel compounded the harm by identifying Menendez as the whistleblower who had initiated the SEC investigation.[141] Given the similarity of the issues raised in his Audit Committee complaint to the issues identified in the complaint he filed with the SEC, Menendez's identification with the SEC investigation was readily made[142] – resulting in a cascading chain of events beginning with the reluctance of Menendez's co-workers to associate with him (see discussion, infra).

The ALJ based his conclusion that disclosure of Menendez's identity as a whistleblower was not adverse principally on testimony that Menendez's colleagues would have guessed Menendez complained to the SEC regardless of whether Halliburton had disclosed the fact.[143] However, once Menendez's confidentiality was breached, evidence that he may have been identified some other way is not only purely speculative,[144] it is immaterial to an analysis of adverse action. If Menendez were suing Halliburton under a tort theory of harm caused by Halliburton's negligent release of his identity, a determination of how his colleagues learned he was a whistleblower might be relevant to any finding of liability.[145] But it is not relevant to the analysis of whether the act itself may be considered an adverse action under Section 806.

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depends on a constellation of surrounding circumstances, expectations, and the relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.'" Slip op. at 14, quoting *Burlington*, 548 U.S. at 69.

140 RX. 3.

141 RX 4, 5.

142 TR McCollum at 971, 981.

143 D. & O. at 11.

144 Menendez and his colleagues were generally aware that revenue recognition had been a focus of recent SEC scrutiny in the oilfield services industry (CX 62; TR at 261-264) – the SEC might have instituted an inquiry into Halliburton sua sponte or one of Halliburton's competitors may have done so. In any case, there is a big difference between colleagues suspecting someone of whistleblowing and being identified by the highest levels of Halliburton officialdom as having alleged possible fraud against the firm and thereby precipitated an SEC investigation.

145 This argument might not absolve Halliburton of liability even under proximate cause jurisprudence. *See* RESTATEMENT (SECOND) OF Torts § 432 (1965)("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.").

Menendez need only demonstrate that such activity would deter a reasonable person from engaging in protected activity. Clearly, a reasonable employee in Menendez's position would be deterred from filing a confidential disclosure regarding misconduct if there existed the prospect that his identity would be revealed to the very people implicated in the alleged misconduct.[146]

b. Isolation, removal of duties, and demotion as indicia of harm rather than independent adverse actions

The ALJ separately addressed and analyzed Menendez's allegations and evidence of isolation, removal of duties, and demotion and found that none constituted adverse action. As we noted above, the ALJ appeared to apply overly strict standards to these allegations of adverse action, including requiring "tangible job consequences," "long term impact," and "material change in working conditions."[147] Nevertheless, the ALJ's conclusions were supported by sufficient evidence, and we do not disturb them. However, we view the events that Menendez experienced after his identity as a whistleblower was revealed from a different perspective.

Clearly the breach of Menendez's confidentiality adversely affected the conditions of his employment. Following the revelation of his identity to his co-workers, which Menendez characterized as "the worst day of my life,"[148] he was subjected to a harmful chain of events. Evidence of record strongly suggests that the exposure of Menendez's identity led inexorably to the circumstances and events that followed, including the isolation and loss of professional opportunities and advancement. We view these conditions as fallout, inextricably connected to the disclosure of Menendez's identity, from which the *degree* of adversity or harm associated with the breach may be measured. Of course, exposure of a whistleblower's identity does not always result in untoward consequences, much less compensable harm. But this is not such a case. Indeed, the facts of this case exemplify the very reason why Congress mandated that publically-traded firms set up confidential avenues to report wrongdoing.

Immediately after Menendez was "outed," his life on the job changed for the worse. People avoided him and normal, every day contact with his colleagues was all but shut down. No one came by his office, no one engaged him in conversation, few people called or e-mailed him, and he was excluded from decision-making.[149] Youngblood and Geer no longer consulted with him and KPMG auditors refused to meet with him. Menendez's job description required him to work closely with the external auditors[150] and his inability to do so necessarily represented a diminution in his authority and responsibility. John Christopher of KPMG, whom

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146 *See Hicks*, 593 F.3d at 170.

147 D. & O. at 12, 13, 15, 17.

148 TR-Menendez at 457.

149 E.A. at 33-34.

150 RX 29; TR-Christopher at 764-765; TR-McCollum at 996-997.

he had considered a close friend, told Menendez he would not even set foot in his office.[151] The testimony of Paquette and Christopher substantiated this dramatic change in Menendez's working conditions.[152]

The ALJ largely attributed the problems Menendez faced following the breach – his sense of isolation and the loss of job opportunities – to his voluntary absence from the office.[153] But this absence was itself a manifestation of the harm the breach of his confidentiality produced. Menendez left the office shortly after McCollum disclosed his name in an e-mail to the F&A Group. Not surprisingly, he reacted to the foreseeable hostility of his colleagues by absenting himself from the office. When he returned to the office, he encountered both personal and professional hostility.[154] A month after he was exposed as having reported alleged misconduct to the SEC and the Audit Committee, Menendez requested paid administrative leave because of "the current environment and circumstances involving the SEC investigation."[155] His request for leave, and the resultant absence from the office, further marginalized Menendez, setting the stage for diminution of his authority, responsibility, and opportunity for professional advancement.

The events that began following the breach of his confidentiality and ended with his resignation ostensibly harmed Menendez. Although these events may not individually constitute actionable "adverse action" under SOX Section 806, they may nevertheless constitute indicia of harm and a measure of the damages to which Menendez may be entitled should the ALJ conclude, upon remand, that his protected activity was a "contributing factor" to the breach of Menendez's confidentiality and the resultant harm.

c. Constructive discharge

Menendez also argues on appeal that his resignation was the culmination of the hostile working environment he had endured since his exposure as a whistleblower. He contends that he had, in effect, no job to return to and that, had he returned, he would have been subjected to continuing retaliation: "Halliburton employees no longer went to him with accounting issues, KPMG employees refused to work with him, he was excluded from at least one critical meeting

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151 TR-Menendez at 460; E.A. at 33.

152 E.A. at 59, 83; TR- Paquette at 127-129, 186; TR-Christopher at 764-765.

153 D. & O. at 13, 15.

154 D. & O. at 5; E.A. at 33, 59, 83; TR-Menendez at 466-468.

155 RX 15. Although Menendez did not so allege, we note that the paid administrative leave, despite being requested by Menendez, was itself possibly an adverse action occasioned by Menendez's protected activity. In *Van Der Meer*, ARB No. 97-078, slip op. at 5, the Board held that, although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus.

related to the performance of his duties, and stripped of his responsibility to teach revenue recognition courses."[156] He also alleges, based on McCollum's memo documenting a performance review that never occurred, that his "job duties and responsibilities were significantly altered" and his new reporting requirements were "designed to monitor his activities."[157] Many of these facts are undisputed, and they may well have motivated Menendez to resign. It is not unlikely that Menendez would have encountered hostility had he returned to work at Halliburton given that he had by then embarked upon this litigation against the company.[158] Nevertheless, substantial evidence supports the ALJ's ultimate conclusion that Menendez was not constructively discharged.[159]

To prevail on a constructive discharge claim, "the complainant must prove that working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign."[160] The ALJ held that "[e]ven if the cumulative effect of all of the alleged adverse actions are taken into account, the record falls short of establishing constructive discharge at the time Complainant refused to return to work."[161] Rather, the ALJ found, based on Menendez's demeanor and his testimony, that Menendez's

> motivation for refusing to return to work for [Halliburton] was that he subjectively believed its accounting practices were deeply flawed and misleading. He was frustrated that it refused to correct those practices in accordance with his views. He did not want to return to an organization that engaged in that type of accounting. Moreover, he had another job that paid at least as well and allowed him to advocate his views on accounting issues. In short, he ultimately refused to return not because of any personnel related alleged adverse actions by [Halliburton], but because of a fundamental disagreement over accounting policy.[162]

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156 Compl. Reb. Br. at 11.

157 *Id.*; RX 30.

158 RX 38.

159 D. & O. at 19-20.

160 *Gattegno v. Prospect Energy Corp.*, ARB No. 06-018, ALJ No. 2006-SOX-008, slip op. at 21 (ARB May 29, 2008) (citing *Hooker v. Westinghouse Savannah River, Co.*, ARB No. 03-036, ALJ No. 2001-ERA-016, slip op. at 7 (ARB Aug. 26, 2004)).

161 D. & O. at 19.

162 *Id.* at 19-20.

The ALJ's finding that Menendez resigned because he did not approve of Halliburton's accounting practices is supported by substantial evidence.[163]

Furthermore, we decline to find constructive discharge in this case based upon the speculative harm inferred in Menendez's argument. Once Halliburton improperly breached Menendez's confidentiality and identified him as an SEC whistleblower, harm to his career was predictable. Nevertheless, under the circumstances, Halliburton properly granted Menendez six months of paid administrative leave. On October 17, 2006, after over six months of paid leave, Menendez resigned before ever returning to work. Had he returned to work, evidence suggests that he may well have been subjected to circumstances that would have supported a constructive discharge claim.[164] However, when he resigned, he was unaware of McCollum's intention to strictly monitor his conduct. While we do not rule that facts may never support a constructive discharge based upon future threat of harm, we do not believe this record supports such a claim. We therefore affirm the ALJ's conclusion that Menendez was not constructively discharged.

C. Causation

The ALJ conflated the separate elements of "adverse action" and "contributing factor" and improperly imported a requirement of "retaliatory motive" to several of his findings regarding adverse action.[165] An adverse action however is simply something unfavorable to an employee, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of analysis. Because the ALJ confused these standards of law, he did not make clear findings regarding whether protected activity was a contributing factor to any of the

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[163] Menendez's October 17, 2006 letter of resignation (RX 24) reads in part as follows. "I have every reason to believe that Halliburton intends to persist in violating securities laws and filing inaccurate and misleading financial information. Professionally and ethically, I can not return to active employment under these conditions."

[164] Respondent's Exhibit 30 is a draft memo dated September 28, 2006 documenting Menendez's alleged performance deficiencies. The professional deficiencies McCollum cited in the draft performance memo included: 1) failure to provide timely accounting advice; 2) failure to be a "team player" and 3) articulation of "personal views" as representative of GAAP or company policy rather than staying "on message." Failure to be a "team player" is a pejorative designation often used to describe whistleblowers and justify retaliatory discipline. *See Hall v. U.S. Army, Dugway Proving Ground*, 1997-SDW-005, slip op. at 32 (ALJ Aug. 8, 2002); *Sayre v. Alyeska*, 1997-TSC-006, slip op. at 51-52 (ALJ May 18, 1999). McCollum's reference to Menendez espousing "personal views" of GAAP likely pertain to Menendez's view that Halliburton's revenue recognition accounting violated GAAP. These alleged performance problems largely arose either as a result or manifestation of Menendez's protected activity and as such are indicative of retaliatory motive. *See Passaic Valley Sewerage Comm'rs*, 992 F.2d at 481 (the alleged "personality" problem or deficiency of interpersonal skills was "reducible" to the problem of the inconvenience caused by the employee's protected activity).

[165] *See, e.g.*, D. & O. at 12, 16, 20.

adverse actions Menendez alleged. Nevertheless, the ALJ made causation findings that Menendez appealed and the Respondent addressed. We therefore address causation in connection with our conclusion that the breach of Menendez's confidential complaint to the Audit Committee constituted adverse action.

Despite stated company policy pledging confidentiality,[166] Mize testified that he forwarded Menendez's Audit Committee complaint revealing Menendez's identity to Halliburton's CFO (Gaut) and the company's General Counsel (Cornelison) because he believed they had a "need to know" of the potentially serious allegations.[167] As previously noted, Gaut in turn forwarded the information he received to McCollum who, after receiving Cornelison's e-mail associating Menendez with the SEC investigation, publicized the information to key Halliburton employees with whom Menendez worked, including identification of Menendez as the party initiating the SEC investigation. With respect to the revelation of Menendez's name in connection with the SEC, Halliburton argues that Menendez's name was revealed based solely on a desire to retain documents necessary for a review of the accounting practices that Menendez identified to the SEC.[168] This argument is disingenuous at best. Halliburton's General Counsel obviously could have identified the requisite documents by their subject matter without identifying Menendez – just as the SEC had done.[169] Based on the evidentiary record before us, there does not appear to be any legitimate reason to divulge Menendez's name in connection with the document retention notice Halliburton circulated in preparation for the SEC inquiry.

Given the facts in evidence, it appears unlikely that Cornelison would have had any reason to link Menendez with the SEC investigation, had Cornelison not been notified of Menendez's similar allegations to the Audit Committee. It is possible that Menendez's direct supervisors and colleagues – given their previous knowledge of Menendez's objections to Halliburton accounting policy – might have guessed that Menendez contacted the SEC with similar allegations. But there is no evidence in the record suggesting that Cornelison was aware of Menendez's protected activity prior to the breach of Menendez's confidential allegations to

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166 As previously noted, Halliburton's Section 301 policy maintains the confidentiality of an employee's complaint to the Audit Committee "unless disclosure is: Required or advisable in connection with any governmental investigation or report; In the interests of the Company, consistent with the goals of the Company's Code of Business Conduct; Required or advisable in the Company's legal defense of the matter." RX 1.

167 E.A. at 72.

168 Halliburton's Reply Brief at 17. McCollum also testified that he publicized Menendez's name as a means of demonstrating to Menendez that Halliburton was addressing his complaint to the SEC. D. & O. at 11. Halliburton does not directly address the element of "causation" in connection with the breach of Menendez's confidential communications with the Audit Committee.

169 As previously noted, the undisputed evidence of record indicates that in notifying Halliburton that it was initiating an inquiry, the SEC did not reveal Menendez's identity. TR-McCollum at 971, 981; TR-Menendez at 456-457.

the Audit Committee. The near simultaneous breach of Menendez's allegations to the Audit Committee assured that Cornelison would deduce that Menendez had likewise complained to the SEC and thereby triggered the SEC investigation, which in turn prompted Halliburton to expose Menendez's identity in connection with the document retention effort.

Halliburton claims nevertheless that Menendez's protected activity did not *cause* the breach because Halliburton officials harbored no discriminatory motive when they breached Menendez's identity. The ALJ adopted this reasoning in his finding that "the record shows by clear and convincing evidence that there was no retaliatory motive."[170] According to the ALJ, this lack of retaliatory motive was evidenced by McCollum's testimony that he never intended to harm Menendez by exposing his identity and, moreover, believed that Menendez would *appreciate* that his concerns were being addressed.[171] This testimony is neither credible nor necessarily relevant to a finding of contributing factor.

McCollum was Halliburton's Chief Accounting Officer and was identified by Menendez as complicit in alleged fraud. Common sense dictates that a named target of alleged wrongdoing would resent such criticism. It is unlikely that McCollum was attempting to garner Menendez's appreciation by breaching his confidentiality. No reasonable CAO would assume that exposing a whistleblower's identity would be welcome. The ALJ also credited McCollum's efforts to counsel Menendez's colleagues against retaliation after his identity as a whistleblower had been exposed (by McCollum himself). McCollum's subsequent efforts to prevent his action from causing harm, cannot exonerate him – the genie was already out of the bottle.[172]

Furthermore, the ALJ's finding that McCollum lacked retaliatory motive in breaching Menendez's confidentiality does not preclude a finding of causation. Nothing in Section 806 requires a showing of retaliatory intent. The statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer. Proof of "retaliatory motive" is not necessary to a determination of causation.[173] McCollum's breach of

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170 D. & O. at 12.

171 *Id.* at 11.

172 RESTATEMENT (SECOND) OF TORTS § 437 (1965)("If the actor's negligent conduct is a substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm.").

173 *Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993)("a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action: 'Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing.' S.Rep. No. 413, 100th Cong., 2d Sess. 16 (1988) (accompanying S. 508)."). The Board has adopted the definition of "contributing factor" stated in *Marano*, 2 F.3d at 1140, interpreting the Whistleblower Protection

confidentiality, however well meaning, nonetheless demonstrates a lack of understanding of its foreseeable consequences and does not absolve Halliburton of responsibility.[174] The ALJ thus erred as a matter of law in deciding that lack of retaliatory motive precluded a finding of causation.

We also note that disclosure of Menendez's identity in connection with his complaint to the SEC happened on the heels of the revelation of his identify in connection with his virtually identical complaint to the Audit Committee, by individuals who had been made aware of his Audit Committee complaint and it is therefore impossible to determine whether the harm that ensued would have happened in the absence of one or the other revelation. Nor does it serve to distinguish between them in terms of which action may have *caused* the ultimate harm given that the disclosures are so inextricably connected.

In any case, we leave it to the ALJ upon remand to determine whether Menendez's protected activity, including his internal allegations and those to the SEC and the Audit Committee, contributed to the breach of the confidentiality to which his complaint to the Audit Committee was entitled and whether, if it did, Halliburton can prove by clear and convincing evidence that there existed legitimate business reasons dictating the disclosure of Menendez's identity. [175] If the ALJ determines that Halliburton cannot sustain this burden, the ALJ will then have occasion to fashion relief as he deems appropriate in light of our holding that the fallout from the exposure of Menendez's identity – personal and professional isolation as well as loss of professional opportunities and advancement – should serve as a measure of damages.

CONCLUSION

Accordingly, we affirm in part and reverse and remand in part. We **AFFIRM** the ALJ's conclusion that Menendez engaged in protected activity under the SOX whistleblower provisions when he filed complaints with the SEC in November 2005 and with Halliburton's audit

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Act, 5 U.S.C. § 1221(e)(1). *See, e.g., Evans v. Miami Valley Hosp.*, ARB No. 07-118, -121, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009).

[174] RESTATEMENT (SECOND) OF TORTS § 435 (1965)("If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.").

[175] It would seem self-evident that Menendez's complaint to Halliburton's Audit Committee was a contributing factor to the breach of his identity as a whistleblower. Mize testified that he forwarded Menendez's Audit Committee complaint to Gaut and Cornelison because he believed they had a "need to know" of the potentially serious allegations. E.A. at 72 Nevertheless, since the ALJ did not directly address the element of causation, that determination must be left to the ALJ upon remand.

committee in February 2006. We **AFFIRM** the ALJ's conclusions that Menendez's allegations of isolation, removal of job duties, demotion, and constructive discharge did not independently constitute adverse action.

The Board **REVERSES** the ALJ's finding that Menendez failed to demonstrate that Halliburton subjected him to adverse action when it breached his confidentiality. We **REMAND** to the ALJ to make findings on whether Menendez's protected activity was a contributing factor to this adverse action and, if so, whether Halliburton demonstrated by clear and convincing evidence that it would have acted adversely in the absence of Menendez's whistleblowing. If the ALJ does not so find, he should award damages consistent with this opinion.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge