



In the Matter of:

ANTHONY MENENDEZ,

ARB CASE NO. 12-026

COMPLAINANT,

ALJ CASE NO. 2007-SOX-005

v.

DATE: March 15, 2013

HALLIBURTON, INC.,

DATE REISSUED: March 20, 2013

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Joseph Y. Ahmad, Esq.; Ahmad, Zavitsanos, Anaipakos, Alavi, & Mensing PC,
Houston, 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**

FINAL DECISION AND ORDER

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), 18 U.S.C.A. § 1514A, on May 8, 2006. Menendez alleged that his employer,

Halliburton, Inc. (Respondent or 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, 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.

On September 13, 2011, the Administrative Review Board (ARB or Board) reversed the ALJ and remanded the case. We held that Halliburton's breach of Menendez's confidentiality was an adverse action and remanded 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. On December 8, 2011, the ALJ again dismissed Menendez's complaint finding that Halliburton proved its affirmative defense. The ALJ, however, issued an alternate finding in favor of Menendez and awarded compensatory damages and attorney fees. We affirm the ALJ's alternate finding in favor of Menendez and reverse the dismissal of his complaint.

BACKGROUND

1. Factual Background

We include here the same summary of the facts contained in our 2011 Decision and Order of Remand.

Halliburton hired Menendez as Director of Technical Accounting Research & Training in March 2005 to support Halliburton's Finance and Accounting (F&A) organization.¹ 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). These guidelines address abuse of off-balance-sheet accounting in the wake of Enron. Menendez was asked to review an entity called GMI, a joint venture set up between Halliburton and other investors to develop

¹ *Menendez v. Halliburton, Inc.*, ALJ No. 2007-SOX-005, slip op. at 3 (Sept. 18, 2008) (Decision and Order (2008 D. & O.)).

technology and perform research and development.² When Menendez reviewed the financial statements, he noticed that as the cash went in, it went directly out.³ 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,⁴ agreed, and GMI was ultimately written off.⁵

Menendez also raised specific concerns about Halliburton's revenue recognition practices under Standard Accounting Bulletin (SAB) 104 (realizing earned income) and Emerging Issues Task Force (EITF) 00-21 (multiple deliverables).⁶ 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.⁷ 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.⁸ Menendez met with McCollum on July 18, 2005, to discuss the memo.⁹ Menendez taped the meeting.¹⁰ McCollum told Menendez that his memo was good but that he was not a team player, was insensitive to politics at Halliburton, and should collaborate more with his colleagues in working on accounting issues.¹¹ 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.¹²

² 2008 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.).

³ *Id.* at 22.

⁴ *Id.*

⁵ A few weeks later, Menendez and his group researched Fiberspar, another joint venture with Halliburton, 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.

⁶ E.A. at 24.

⁷ *Id.* at 30, 31.

⁸ 2008 D. & O. at 3; E.A. at 29.

⁹ E.A. at 29-30; 2008 D. & O. at 3.

¹⁰ E.A. at 30.

¹¹ E.A. at 30; 2008 D. & O. at 3, 9.

¹² E.A. at 29.

Sharing Menendez's concerns, Sult ordered a new study of Halliburton's revenue recognition practices under SAB-104.¹³ Halliburton and KPMG ultimately disagreed with Menendez's recognition concerns.¹⁴

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 any time during the remainder of 2005.¹⁵ 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.¹⁶ 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.¹⁷

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.¹⁸ Menendez filed his complaint with the SEC confidentially.¹⁹

On February 4, 2006, Menendez learned that the SEC had contacted Halliburton. After ascertaining his right to whistleblower confidentiality,²⁰ 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.²¹ Menendez's complaint to the Audit Committee raised essentially the same

¹³ 2008 D. & O. at 3; Hearing Transcript (TR)-Sult at 377, 384-85.

¹⁴ 2008 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's operations satisfied the requirements of EITF 00-21. Everyone involved, except Menendez, agreed with the conclusion. 2008 D. & O. at 4.

¹⁵ TR-McCollum at 991-92.

¹⁶ 2008 D. & O. at 4; TR-Menendez at 568.

¹⁷ E.A. at 137.

¹⁸ 2008 D. & O. at 4.

¹⁹ E.A. at 32, 33; TR-Menendez at 323, 457-58.

²⁰ 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.

²¹ 2008 D. & O. at 4; Respondent's Exhibit (RX) 2.

issues and concerns that he had brought to the SEC's attention.²² Both complaints implicated McCollum and KPMG.²³ 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.²⁴

Upon receipt of Menendez's e-mail complaint, Richard Mize (Halliburton's Assistant General Counsel) forwarded it to the Audit Committee.²⁵ Despite Halliburton's stated policy assuring confidentiality,²⁶ Mize also forwarded copies of Menendez's complaint to Bert Cornelison (Halliburton's General Counsel) and Chris Gaut (Halliburton's Chief Financial Officer).²⁷ 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).²⁸

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.²⁹ The same day, in a follow-up to the SEC notice, Cornelison issued a "document retention" e-mail instructing recipients that specified documents 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."³⁰ Cornelison sent the e-mail to a number of company management officials, including Gaut

²² E.A. at 106. .

²³ 2008 D. & O. at 4; RX 2.

²⁴ TR-Menendez at 457.

²⁵ 2008 D. & O. at 4; E.A. at 72.

²⁶ 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.

²⁷ 2008 D. & O. at 4; E.A. at 72; RX 3.

²⁸ E.A. at 93, 117; TR-McCollum at 875-76; RX 3.

²⁹ 2008 D. & O. at 5; RX 4.

³⁰ 2008 D. & O. at 5; E.A. at 140; RX 4.

and McCollum.³¹ The same day (February 8, 2006), McCollum forwarded Cornelison's e-mail connecting Menendez with the SEC investigation to fifteen members of Halliburton's F&A Group, including Menendez himself.³²

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,³³ and no one testifying on Halliburton's behalf stated that they knew of Menendez's SEC complaint prior to Cornelison's announcement.³⁴ 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.³⁵

When Menendez realized that his confidential communications with the SEC and the Audit Committee had been disclosed and his identity revealed, he was stunned.³⁶ He testified that it was probably the worst day of his life.³⁷ Immediately following McCollum's distribution of Cornelison's e-mail, Menendez left the office. He stayed out for the remainder of the week on prescheduled leave.³⁸ When he returned to the office the following week, he received no phone calls, few e-mails, and his co-workers generally avoided him.³⁹ KPMG's auditors, with whom Menendez normally worked closely, also refused to interact with him.⁴⁰

³¹ *Id.*

³² 2008 D. & O. at 5; RX 5.

³³ TR-Menendez at 456-57.

³⁴ 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.

³⁵ E.A. at 33; TR-Menendez at 456-57.

³⁶ E.A. at 33; TR-Menendez at 457, 462.

³⁷ E.A. at 33; TR-Menendez at 457.

³⁸ 2008 D. & O. at 5; E.A. at 33-34; TR-Menendez at 463-64.

³⁹ E.A. at 33-34; TR-Menendez at 460, 464-68.

⁴⁰ 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. 2008 D. & O. at 5; E.A. at 77, 97; TR-McCollum at 892-94; TR-Christopher at 686-89.

For approximately one month after the distribution of Cornelison's e-mail, Menendez was often absent from the office.⁴¹ On March 9, 2006, Menendez's legal counsel requested that Halliburton grant Menendez paid administrative leave, "given the current environment and circumstances involving the SEC investigation."⁴² 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,⁴³ on the condition that he "fully cooperate with the [SEC] and with the Company in the investigation" into his allegations.⁴⁴

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 leader.⁴⁵ Lewis, along with Nick Stugart, the executive sponsor, and a steering committee, which included McCollum, were in charge of organizing presenters.⁴⁶ 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's administrative leave.⁴⁷

By October of 2006, Menendez's leave of absence was about to expire, and both the SEC and the Audit Committee investigation had concluded.⁴⁸ The SEC formally notified Halliburton on September 19, 2006, that no enforcement action was being recommended. The Audit Committee's investigation likewise concluded that no changes in the company's accounting practices were necessary.⁴⁹ Halliburton informed

⁴¹ 2008 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.

⁴² 2008 D. & O. at 5; RX 15.

⁴³ 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. 2008 D. & O. at 5.

⁴⁴ 2008 D. & O. at 5; RX 16.

⁴⁵ 2008 D. & O. at 5; TR-Lewis at 774-75.

⁴⁶ 2008 D. & O. at 5; TR-Lewis at 775-76.

⁴⁷ TR-McCollum at 895; 2008 D. & O. at 5; E.A. at 97-98; RX 8.

⁴⁸ 2008 D. & O. at 6.

⁴⁹ *Id.*

Menendez by letter, dated September 19, 2006, that he must return to work by October 2, 2006.⁵⁰ 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 had promoted in December 2005.⁵¹ Halliburton subsequently extended Menendez's return date to October 18, 2006, placing him on unpaid leave after October 1.⁵²

By letter dated October 17, 2006, Menendez resigned his employment.⁵³ In his resignation letter, Menendez stated that he thought that Halliburton had demoted him by requiring him to report to Geer.⁵⁴ 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."⁵⁵ He had taken a job as a consultant to a law firm in July 2006 during his leave of absence.⁵⁶

2. Prior Proceedings

A. ALJ's 2008 Decision and Order

After a three-day hearing conducted September 24 through September 26, 2007, the ALJ issued his Decision and Order on September 18, 2008. Although the ALJ found that Menendez had engaged in protected activity, he ultimately dismissed the case based upon his findings that Halliburton took no adverse actions against Menendez and, in any case, Halliburton lacked retaliatory motive.

B. The ARB's 2011 Decision and Order of Remand

Both parties appealed the 2008 D. & O., and the ARB issued its Decision and Order of Remand on September 13, 2011, affirming the ALJ's Decision and Order in

⁵⁰ 2008 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.

⁵¹ 2008 D. & O. at 6; RX 18; TR-McCollum at 921.

⁵² RX 20, 21.

⁵³ RX 24.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 2008 D. & O. at 6.

part, reversing it in part, and remanding the case to the ALJ for further consideration. *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011) (ARB D. & O.). The Board affirmed the ALJ's finding of protected activity and lack of constructive discharge. However, noting the importance of confidentiality to the SOX statutory scheme, we reversed the 2008 D. & O. based upon our determination that the violation of Menendez's confidentiality constituted an adverse action.⁵⁷ The Board also rejected the ALJ's alternate finding that "the record shows by clear and convincing evidence that there was no retaliatory motive" (2008 D. & O.) – explaining that proof of retaliatory motive is not necessary to a determination of causation under SOX Section 806.⁵⁸ Accordingly, the Board directed the ALJ on remand to determine whether Menendez's protected activity was a contributing factor to Halliburton's breach of Menendez's confidentiality and, if so, whether Halliburton is able to demonstrate by clear and convincing evidence that it would have disclosed Menendez's identity in the absence of Menendez's protected whistleblowing.⁵⁹

C. ALJ's 2011 Decision and Order on Remand

On December 8, 2011, the ALJ issued his Decision and Order on Remand (2011 D. & O.), in which he described in some detail both his initial 2008 decision and the Board's decision on appeal. He based his ultimate holding dismissing Menendez's complaint on the following interpretation of the Board's Decision and Order of Remand:

In the main body of its opinion, the Board directs me to determine (1) if the protected activity contributed to the adverse action of disclosure and (2) if it did, whether Respondent proved by clear and convincing evidence legitimate business reasons dictating the disclosure. The end of the opinion orders me to find (3) if the protected activity was a contributing factor to this adverse action and (4) if so, whether Respondent demonstrated by clear and convincing evidence that it would have acted adversely in the absence of the protected activity.^[60]

Based upon his finding that "Respondent proved by clear and convincing evidence legitimate business reasons" for its disclosure of Menendez's identity, the ALJ once again dismissed Menendez's complaint.⁶¹

⁵⁷ ARB D. & O. at 21-26.

⁵⁸ *Id.* at 31-32.

⁵⁹ *Id.* at 33.

⁶⁰ 2011 D. & O. at 6.

⁶¹ *Id.* at 7.

Predicting that the Board would once again reverse him, he proceeded to enter secondary findings in favor of Menendez: “[the Board] may find that I have incorrectly applied the language from the main opinion and should have followed only the directions in the decretal section. In that event, my findings as to motive or legitimate business reasons were irrelevant.”⁶² In the ALJ’s secondary finding, he reasoned that (1) the causation element required no discussion because it was proven by operation of law, and (2) it would be “metaphysically impossible” for the Respondent to demonstrate its affirmative defense (i.e., proof by clear and convincing evidence that it would have violated his confidentiality in the absence of protected activity).⁶³ The ALJ then proceeded to make alternative findings on damages: one finding awarded Menendez \$1,000.00 in compensatory damages plus attorney’s fees and litigation costs, and an alternative finding awarded Menendez \$30,000.00 in compensatory damages plus attorney’s fees and litigation costs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under SOX to the Board.⁶⁴ Pursuant to SOX and its implementing regulations, the Board reviews the ALJ’s factual determinations under the substantial evidence standard.⁶⁵ Substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶⁶ 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.”⁶⁷ Nevertheless, our review must be meaningful and the Supreme Court has stressed the importance of not

⁶² *Id.*

⁶³ *Id.* at 6.

⁶⁴ *See* Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1980.110.

⁶⁵ *See* 29 C.F.R. § 1980.110(b).

⁶⁶ *Clean Harbors Env’tl. 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).

⁶⁷ *Van v. Portneuf Med. Ctr.*, ARB No. 11-028, ALJ No. 2007-AIR-002, slip op. at 6 (ARB Jan. 31, 2013) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

simply rubber-stamping agency fact finding.⁶⁸ 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"⁶⁹ Therefore, the Board reviews an ALJ's conclusions of law de novo.⁷⁰

DISCUSSION

As discussed above, the ALJ made findings of fact and legal conclusions along two paths. Based upon legal error, we reverse the ALJ's main holding dismissing the case, and, by applying the correct legal standard to facts already found by the ALJ, we find in Menendez's favor. In his alternate holding in Menendez's favor, the ALJ found that Halliburton failed to prove its affirmative defense. We affirm that finding for reasons explained below.⁷¹

To put the ALJ's most recent decision in context, we summarize his original 2008 findings on protected activity and adverse action, as well as our 2011 opinion affirming in part and reversing in part.

1. Protected Activity

In his initial 2008 Decision and Order, the ALJ found that there was no dispute that Menendez provided information to the SEC, Halliburton's audit committee, and his supervisors regarding his concerns that Halliburton was not in compliance with revenue recognition standards. The ALJ found that there was no question that Menendez participated in the SEC investigation of his complaint. The ALJ noted that Menendez testified, at length and in great detail, about the technical underpinnings and the rationale

⁶⁸ *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

⁶⁹ 5 U.S.C.A. § 557(b) (West 1996).

⁷⁰ *See Getman*, ARB No. 04-059, slip op. at 7.

⁷¹ "In the review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowan*, 302 U.S. 238, 245 (1937). No remand is necessary because it is clear from the ALJ's findings of fact and the record as a whole that the same result is inevitable on remand. Remand would amount to nothing more than a formality. *See Hussain v. Gonzales*, 477 F.3d 153, 157-158 (4th Cir. 2007) (when the result of a remand is a foregone conclusion amounting to a mere formality, the "rare circumstances" exception to the remand rule is met and remand is unwarranted); *Zhong v. U.S. Dep't of Justice*, 461 F.3d 101, 113 (2d Cir. 2006) (stating that an agency error does not warrant remand when it is clear from the record "that the same decision is inevitable on remand, or, in short, whenever the reviewing panel is confident that the agency would reach the same result upon a reconsideration cleansed of errors.") (citation omitted).

for his concerns. Accordingly, the ALJ concluded that Menendez demonstrated, both objectively and subjectively, that he reasonably believed that Halliburton violated securities laws. The ALJ ruled 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. In our 2011 opinion, we affirmed those findings as supported by substantial evidence of record and in accordance with applicable law.

2. Adverse Action

Menendez claimed 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. In his 2008 D. & O. the ALJ found that Menendez repeatedly engaged in protected activity; he nevertheless dismissed the complaint after concluding Halliburton had taken no "retaliatory adverse action" against Menendez for his protected activity. We affirmed all these adverse action findings except for the ALJ's finding on the breach of Menendez's confidentiality.

In our original opinion, we explained in great detail why we concluded that the violation of Menendez's confidentiality constituted an adverse action. We looked to the purposes of SOX as well as the statutory scheme to support our finding. Section 301 of SOX 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.^[72]

We observed that employee whistleblowers are some of the most effective sources of information concerning fraud and corporate crime.⁷³ Since employees are more willing to identify misconduct if they can do so anonymously, it stands to reason that anonymous and/or confidential reporting mechanisms encourage internal reporting of corporate misconduct.⁷⁴ Legislative history reflects that Congress recognized the

⁷² 15 U.S.C.A. § 78j-1(m)(4).

⁷³ 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 BYU L. Rev. 1107, 1117 (2006).

⁷⁴ A number of whistleblower statutes enacted in recent years, including Dodd-Frank, contain confidentiality requirements within the very whistleblower provisions, evidencing a

importance of reporting accounting irregularities, and potential fraud by means of confidential disclosures.⁷⁵ Accordingly, we construed the protection afforded by Section 301's requirement (that covered employers establish confidential channels of communication for their employees) consistently with SOX Section 806's anti-retaliation provisions and held that Section 806 provides whistleblower protection to employees who make use of such channels.⁷⁶ The right to confidentiality that Section 301 affords statutorily establishes a "term and condition" of Menendez's employment within the meaning of Section 806's whistleblower protection provision. 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 and was therefore an adverse action. Consequently, we remanded the case to the ALJ 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.

3. Causation

We turn now to the ALJ's findings contained in his 2011 Decision and Order on Remand. The ALJ correctly found causation, ruling that Menendez's protected activity was a contributing factor affecting Halliburton's disclosure of his identity, and we affirm. Proof of causation or "contributing factor" in a SOX whistleblower case is not a demanding standard. As the Third Circuit recently explained, Congress intended the "contributing factor" standard contained in SOX to be "protective of plaintiff-employees."⁷⁷ To establish that protected activity was a "contributing factor" to unlawful

clear congressional recognition of the importance of maintaining confidentiality in the context of whistleblower disclosures. *See, e.g.*, 15 U.S.C.A. § 78u-6(h)(2)(A); 49 U.S.C.A. § 31105(h); 49 U.S.C.A. § 20109(i).

⁷⁵ 148 Cong. Rec. S6300-01, 2002 WL 1398761, at *S6301 (daily ed. June 28, 2002) (remarks by Senator Stabenow) ("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 seeks to protect those employees who are simply acting in the best interests of their companies and their companies' investors.").

⁷⁶ 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).

⁷⁷ *See Araujo v. N.J. Transit Rail Operations Inc.*, No. 12-2148, 2013 WL 600208, at *6, *10 (3d Cir. Feb. 19, 2013) ("It is worth emphasizing that the AIR-21 burden-shifting framework . . . is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard.").

retaliation under SOX, a complainant need not prove that the protected activity was the only or primary factor to establish causation, or that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in the challenged personnel action.⁷⁸ Instead, a SOX complainant need only prove, by a preponderance of the evidence, that his protected activity, “alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.”⁷⁹ Thus, for example, a complainant may prevail by proving that the respondent’s reason, “while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant’s] protected activity.”⁸⁰

In our previous decision,⁸¹ we discussed at length the error contained in the ALJ’s original causation analysis.⁸² We explained why we have repeatedly ruled that motive or animus is not a requisite element of causation as long as protected activity contributed in any way – even as a necessary link in a chain of events leading to adverse activity.⁸³ We

⁷⁸ *Allen v. Stewart Enter., Inc.*, ARB No.06-081, ALJ Nos. 2004-SOX-060, -062; slip op. at 17 (ARB July 27, 2006); *Klopfenstein v. PCC Flow*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006). See *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act).

⁷⁹ *Evans v. Miami Valley Hosp.*, ARB No. 07-118, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009); *Klopfenstein*, ARB No. 04-149, slip op. at 18. *Accord Marano*, 2 F.3d at 1140.

⁸⁰ *Walker*, ARB No. 05-028, slip op. at 18.

⁸¹ ARB D. & O. at 29-32.

⁸² For example, 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.

⁸³ See *Araujo*, 2013 WL 600208, *5, *8 (an employee need not provide evidence of motive or animus in order to demonstrate that protected activity was a “contributing factor” to adverse action); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. 7-9 (ARB June 20, 2012); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012); see also *Marano*, 2 F.3d at 1141 (“[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 protection these whistleblower statutes afford shields employees from both intentional and unintentional adverse conduct resulting from retaliation for engaging in whistleblower protected activity, since in either case such conduct creates a “chilling effect” potentially discouraging employees from protected disclosures.

noted that it is difficult to conceive of any case in which a whistleblower's anonymous and confidential submission of concerns regarding questionable accounting or auditing matters to his employer would not be a "contributing factor" to any subsequent disclosure of his identity.

As the ALJ observed in his most recent opinion, in a strictly literal sense, the exposure of a whistleblower's identity is always "caused" by his whistleblowing. But this seemingly circular logic is supported by sound policy reasons. The availability of confidential avenues for reporting fraud is required under SOX and crucial to encouraging employees to expose violations of law. Effective enforcement of SOX requires a prophylactic rule prohibiting the disclosure of a whistleblower's identity where anonymity is reasonably to be expected as Section 301 provides.⁸⁴ Given the Board's previous ruling that the right to confidentiality afforded by Section 301 constitutes a "term and condition" of Menendez's employment, the breach of which constitutes an adverse action in violation of SOX Section 806, the conclusion is inescapable under the facts of this case that Menendez's protected activity was a contributing factor in the disclosure of Menendez's identity.

4. Respondent's Affirmative Defense

The ALJ concluded that Halliburton proved by clear and convincing evidence that it had a legitimate business reason for the disclosure.⁸⁵ The ALJ has misconstrued our remand directive and SOX's affirmative defense.

SOX's statutory text provides that if Menendez carries his burden of proving that protected activity contributed to an adverse action, 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.⁸⁶ Instead, the ALJ found that "Respondent proved by clear and convincing evidence legitimate business reasons for the disclosure."⁸⁷ The ALJ's characterization of the Respondent's affirmative defense does not comport with the statutory text. The Respondent's burden to prove the affirmative defense under SOX is purposely a high one. The Respondent must show by clear and convincing evidence that it would have taken the adverse action even in the absence of

⁸⁵ 2011 D. & O. at 7.

⁸⁶ 18 U.S.C.A. § 1514A(b)(2)(A) ("Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."), incorporating 49 U.S.C.A. § 42121(b)(2)(B)(iv); *cf.* 29 C.F.R. § 1980.104(c); *see Getman*, ARB No. 04-059, slip op. at 8.

⁸⁷ 2011 D. & O. at 7.

protected activity. A quick review of the legislative history of SOX's burdens of proof puts the ALJ's legal error in context.

SOX whistleblower cases are governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b) (Thomson/West 2007), which contains whistleblower protections for employees in the aviation industry. The AIR 21 burdens of proof were modeled after the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851.⁸⁸ The burdens of proof contained in the 1992 ERA amendments – the same as those now contained in SOX – were intentionally drafted by Congress to provide complainants a lower hurdle to clear than the bar set by other employment statutes: “Congress desired to make it easier for whistleblowers to prevail in their discrimination suits”⁸⁹ In addition to *lowering* a complainant's burden, Congress also *raised* the respondent's burden of proof – once an employee demonstrates that protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity. As the Eleventh Circuit observed, “[f]or employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves.”⁹⁰

The ALJ erred by allowing the Respondent to prevail under the lower “legitimate business reason” standard, which is no longer applicable to statutes (including SOX) that contain the tougher standard for employer's affirmative defense.⁹¹ Nevertheless, the ALJ's confusion regarding the application of the SOX affirmative defense in this case is understandable given the difficulty of applying the classic whistleblower law formula to the particular facts of this case. The ALJ observed: “It is metaphysically impossible for Respondent to show that if Complainant had never filed his complaints (the protected activity), it still would have disclosed him as the one who made them (the adverse action).”⁹² Certainly Halliburton's burden of proof is a high one and, as explained above, purposely so. But it is not impossible. For example, a court order would provide a ground for disclosure extrinsic to the whistleblowing activity itself.

⁸⁸ *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

⁸⁹ *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999).

⁹⁰ *See Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

⁹¹ 2011 D. & O. at 7.

⁹² 2011 D. & O. at 7.

5. The Evidence is Insufficient to Establish Halliburton’s Affirmative Defense

In identifying the ALJ’s error concerning SOX’s affirmative defense, we need not describe or exhaust the outer ends of SOX’s clear-and-convincing-evidence standard. We find that the ALJ applied the wrong standard. Applying the correct standard, substantial evidence of record supports the conclusion that Halliburton failed to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of Menendez’s protected activity.

The ALJ made numerous findings “related to why Respondent made the disclosure.”⁹³ He cited the following findings in support of his conclusion that Halliburton demonstrated “legitimate business reasons” by clear and convincing evidence: (1) McCollum and his colleagues were already aware of Menendez’s standing objections to accounting practices; (2) McCollum wanted Menendez to know his concerns were being taken seriously; (3) McCollum had no intention of punishing Menendez and he personally warned Menendez’s colleagues not to engage in discriminatory behavior; and (4) disclosure of Menendez’s identity would “marginally assist in identifying documents for retention.”⁹⁴ Assuming the validity of these findings of fact and that all are “legitimate business reasons,” none of them address the issue of whether the Respondent would have disclosed Menendez’s identity in the absence of his protected activity.

The fact that Menendez’s colleagues were aware that he had raised accounting concerns internally is simply not tantamount to identifying him as having contacted the SEC and thereby instigating an investigation of Halliburton’s accounting practices. Once Menendez took his concerns outside the company – to an enforcement agency, no less – and thereby “aired dirty laundry,” he was “marginalized and at times ostracized.”⁹⁵ In any event, the fact that his colleagues were aware of his accounting concerns is irrelevant to the question of whether Halliburton would have disclosed his identity for reasons outside of his protected whistleblowing activity.⁹⁶ Claiming that the disclosure was harmless does nothing to show that the disclosure advanced a legitimate business reason that would have occurred for reasons extrinsic to the activity itself.⁹⁷ Nor did McCollum’s desire to show that the company was “addressing Menendez’s concerns”

⁹³ *Id.*

⁹⁴ *Id.* at 7.

⁹⁵ 2011 D. & O. at 10.

⁹⁶ By way of analogy, a physician could not defend a HIPPA privacy violation charge – for example the unauthorized release of a patient’s pregnancy – to a patient’s relative on the basis that the physician thought that relative was already aware of the pregnancy.

⁹⁷ Complainant’s Brief at 15-16.

require the disclosure of his identity. Had the document retention e-mail identifying the documents sought by the SEC been circulated without disclosing Menendez's name, he would have known his concerns were being addressed – since he instigated the SEC investigation. Alternatively, Halliburton could have reached out in private with Menendez to discuss his concerns.

Neither the record as a whole nor the ALJ's findings of fact "related to why Respondent made the disclosure" establish by clear and convincing evidence that Halliburton's disclosure of Menendez's identity was dictated by a legitimate, non-discriminatory business reason unrelated to his protected activity. We conclude as a matter of law that the evidence of record is insufficient to support a finding by clear and convincing evidence that Halliburton would have disclosed his identity absent his protected activity and the contents thereof. Since the Respondent failed to prove its affirmative defense, we turn now to the appropriate relief.

6. Compensatory Damages

The ALJ on remand offered alternate compensatory damage awards.⁹⁸ Assuming liability, the ALJ first explained his reasoning for an award of \$1,000 in compensatory damages to Menendez. Predicting that the Board might view the evidence as supporting a finding of greater damages than the ALJ felt was warranted, the ALJ made an alternate award of \$30,000. We find there is ample evidence in the record of Menendez's emotional distress and reputational harm to affirm the ALJ's alternate award of \$30,000.

Halliburton argues that non-pecuniary damages are not authorized under SOX and, in any case, Menendez failed to prove entitlement to emotional distress or reputational harm.⁹⁹ Halliburton also contends that comparative cases do not support the ALJ's alternate award of \$30,000.¹⁰⁰

⁹⁸ The ALJ addressed compensatory damages under the assumption that this Board would adopt his alternate finding that Halliburton failed to establish its affirmative defense. 2011 D. & O. at 7.

⁹⁹ 2011 D. & O. at 21-28.

¹⁰⁰ In a footnote, Halliburton asserts that Menendez is barred from an award of damages because he failed to specifically plead entitlement to such damages. Hal. Br. at 22, n.13. However, the Secretary has held that a complainant is not required to include an explanation of the damages sought in his whistleblower complaint. See *Blackburn v. Metric Constructors, Inc.*, ALJ No. 1986-ERA-004, slip op. at 2-3 n.2 (Sec'y Aug. 16, 1993); *Sawyers v. Baldwin Union Free Sch. Dist.*, ALJ No. 1985-TSC-001, slip op. at 2-4 (Sec'y Oct. 5, 1988).

A. Non-pecuniary compensatory damages may be awarded under Section 806

As a preliminary matter, we reject Halliburton's argument that non-pecuniary compensatory damages are unavailable under SOX.¹⁰¹ As the ALJ recognized, the ARB has awarded non-pecuniary compensatory damages in SOX cases.¹⁰² Department of Labor precedent has countenanced damage awards for emotional distress and reputational injury under the SOX whistleblower statute. In *Kalkunte v. DVI Fin. Servs., Inc.*, ARB No. 05-139, ALJ No. 2004-SOX-056, slip op. at 15 (ARB Feb. 27, 2009), we affirmed the ALJ's award of \$22,000 in damages for mental anguish and humiliation suffered by the complainant as a consequence of retaliation. Recently, in *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049 (ARB Feb. 28, 2011), we affirmed without comment the ALJ's award of \$75,000.00 in compensatory damages for emotional pain and suffering.

Additionally, this Board has upheld countless compensatory damage awards under the whistleblower provisions of ERA and AIR 21, upon which Section 806 was modeled.¹⁰³ In a 2002 unpublished opinion, the Eleventh Circuit upheld the Board's decision affirming an award of \$250,000 in compensatory damages for emotional distress

¹⁰¹ Hal. Br. at 21-23. Federal case law interpreting Section 806 is split on the matter of compensatory damages. In *Hanna v. WCI Cmtys, Inc.*, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004), the district court held that reputational damage awards are consistent with the statute's mandate to provide "all relief necessary to make the employee whole." Citing *Hanna*, the district court in *Mahony v. KeySpan Corp.*, No. 04 CV 554 SJ, 2007 WL 805813 (E.D.N.Y. Mar. 12, 2007) reached the same conclusion. In contrast, the district court in *Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031, 1035 (E.D. Tenn. 2007) struck from plaintiff's complaint her claim for damages for emotional distress and injury to reputation because "these damages are not listed under the remedies provision of Section 806." Similarly, the district court in *Murray v. TXU Corp.*, 03- CV- 0888, 2005 WL 1356444 (N.D. Tex. June 7, 2005) suggested that the Act did not appear to allow for reputational injury given the lack of express language in the statute providing for reputational damages.

¹⁰² OSHA also takes the position that "[c]ompensatory damages may be awarded under all the OSHA whistleblower statutes." OSHA WHISTLEBLOWER INVESTIGATIONS MANUAL, at 6-2 (Sept. 20, 2011). The Manual lists a lengthy but inexhaustive list of things that qualify as compensatory damages including "compensation for mental distress due to the adverse action."

¹⁰³ Congress patterned Section 806 on similar whistleblower protection provisions in the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2011); AIR 21, 49 U.S.C.A. § 42121; and the Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C.A. § 60129 (Thomson/West 2007). See 69 Fed. Reg. 52,105. In particular, SOX's whistleblower-protection provisions very closely parallel the form of the employee-protection provision of Section 519 of AIR 21 codified at 49 U.S.C.A. § 42121. See Section 806, 18 U.S.C.A. § 1514A(b)(2) (incorporating sections of AIR 21 by reference).

and reputational injury to a prevailing ERA complainant.¹⁰⁴ In *Evans*, ARB Nos. 07-118, -121, slip op. at 20, we affirmed the ALJ's award of \$100,000.00 in non-economic compensatory damages for emotional harm and reputational injury.¹⁰⁵

The judicial backdrop of the passage of Section 806 reflects decades of Department of Labor precedent awarding non-pecuniary compensatory damages to prevailing employees under comparable whistleblower statutes.¹⁰⁶ These statutes share similar statutory language, legislative intent, and broad remedial purpose. They should therefore be interpreted consistently.¹⁰⁷ Furthermore, Congress acts with knowledge of existing law and expects its statutes to be read in conformity with established precedent. We find that Section 806 should be interpreted to allow awards of non-pecuniary compensatory damages.¹⁰⁸

¹⁰⁴ *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-030, slip op. at 30 (ARB Feb. 9, 2001), *aff'd sub. nom. Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (upholding award of \$250,000 in compensatory damages for emotional distress and damage to professional reputation). *See also Van der Meer v. W. Kentucky Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-038 (ARB Apr. 20, 1998) (affirming award of \$40,000 in compensatory damages for public humiliation).

¹⁰⁵ In *Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 110 (1st Cir. 2006), the First Circuit affirmed an ARB decision upholding an ALJ's non-economic compensatory damage award of \$50,000 for mental anguish.

¹⁰⁶ *See, e.g., Trueblood v. Von Roll Am., Inc.*, ALJ Nos. 2002-WPC-003 to 006, 2003-WPC-001 (ALJ Mar. 26, 2003) (awarding \$50,000 in compensatory damages for mental anguish, anxiety, and damage to career aspirations); *Van der Meer*, ARB No. 97-078, slip op. at 9-10 (awarding \$40,000 in compensatory damages for public humiliation); *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997); *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, No. 1993-ERA-024 (Sec'y Feb. 14, 1996) (awarding \$40,000 in compensatory damages for emotional pain and suffering).

¹⁰⁷ *See Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036, slip op. at 4 (Sec'y Apr. 7, 1992); *Poulos v. Ambassador Fuel Oil Co.*, No. 1986-CAA-001, slip op. at 5-7 (Sec'y Apr. 27, 1987).

¹⁰⁸ *See White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434-35 (11th Cir. 1997). It is also worth noting that the wording of the "special damages" provision in Section 806 is similar to that contained in the False Claims Act, 31 U.S.C. § 3730, which states that relief shall include "compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees." "Special damages" under the False Claim Act (FCA) have been interpreted to include non-pecuniary compensatory damages. *See, e.g., Hammond M.D. v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893-94 (8th Cir. 2000) (special damages under FCA include emotional distress damages); *Neal v. Honeywell Inc.*, 191 F.3d 827, 831-32 (7th Cir. 1999) (emotional distress damages recoverable under FCA).

B. Menendez supplied sufficient evidence of emotional distress and professional harm to sustain an award of \$30,000 in compensatory damages

In assessing the damages that Menendez sustained as a result of the disclosure of his identity, the ALJ focused on the workplace isolation that Menendez experienced:

He was clearly marginalized and at time ostracized in the workplace. He testified that he was stunned and had “probably the worst day” of his life [when his identity as a whistleblower was disclosed]. He lost the opportunity to participate in the RTA and training programs. . . .

The record shows that Complainant sustained distress related to isolation at the workplace because of the Respondent’s adverse action.^[109]

Despite these findings evidencing emotional and professional harm, the ALJ was of the opinion that, because Menendez suffered no financial loss or reputational harm outside of Halliburton and KMPG, he was entitled to only \$1,000 in damages. But entitlement to damages for reputational harm does not require proof of financial loss: “[c]ompensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress.”¹¹⁰ Even if we accept the ALJ’s confinement of Menendez’s reputational harm to Halliburton and KMPG,¹¹¹ a loss of reputation within two such large firms warrants more than nominal damages.

As the Board explained at length in our original decision, the ALJ’s findings along with the record evidence demonstrate that disclosure of Menendez’s identity resulted in real, if not quantifiable, professional and emotional harm:

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

¹⁰⁹ 2011 D. & O. at 10.

¹¹⁰ *Evans*, ARB No. 07-118, -121, slip op. at 20; *see also Van der Meer*, ARB No. 97-078, slip op at 9-10 (affirming \$40,000 compensatory damage award, ARB found that complainant suffered little out-of-pocket loss but unquestionably suffered professionally as well as personally).

¹¹¹ Menendez asserted that his reputation was publicly impugned in a press release Halliburton issued after he filed this case. Complainant’s Brief at 27, citing TR. 509-10.

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, everyday 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. 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 and his inability to do so necessarily represented a diminution in his authority and responsibility. John Christopher of KPMG, whom he had considered a close friend, told Menendez he would not even set foot in his office. The testimony of Paquette and Christopher substantiated this dramatic change in Menendez's working conditions.

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. 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. 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." 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.^{112]}

Based upon this evidence of harm, we are of the opinion that the ALJ's alternative compensatory damage award of \$30,000 for emotional distress and reputational harm is justified. The Complainant argues that the nature of the adverse action in this case is particularly suited to recognition of non-pecuniary compensatory damages.¹¹³ We agree. Although we declined to find that the facts of Menendez's resignation amounted to constructive discharge warranting reinstatement or back pay, we nevertheless recognize that Menendez suffered intangible professional damage, as a consequence of the exposure of his status as a whistleblower.¹¹⁴ The marginalization that resulted from his exposure as a whistleblower so poisoned his work environment that he felt compelled to resign from the job he had loved. Section 806 requires that prevailing employees are entitled to "all relief necessary to make [them] whole." Without compensation for the intangible damages to his reputation, Menendez would be left without meaningful relief.

Given the inherent subjectivity of non-pecuniary awards, the Board looks to damage awards in similar whistleblower cases for instruction.¹¹⁵ An award of \$30,000.00 is well within the range of awards for emotional distress and reputational injury under Section 806 and other whistleblower statutes.¹¹⁶

¹¹² ARB D. & O. at 26-27 (footnotes omitted).

¹¹³ Complainant's Reply Brief at 7.

¹¹⁴ "Potential whistleblowers face tremendous obstacles beyond direct employer retaliation. . . . [W]histleblowers may fear blacklisting from future employers who suspect disloyalty, as well as social ostracism from their coworkers. Additionally, the psychological burdens associated with whistleblowing, including the effects of public criticism and a lengthy stay in litigation's limelight, cannot be ignored." Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U.L. Rev. 91, 95 (Feb. 2007).

¹¹⁵ *Evans*, ARB Nos. 07-118, -121, slip op. at 20.

¹¹⁶ *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-003, -004 (ARB Oct. 25, 1999) (ARB affirmed a compensatory damage award of \$25,000 for damage to professional reputation); *Hobby*, ARB No. 98-166 (awarding complainant \$250,000 in compensatory damages for emotional distress, humiliation, and loss of reputation); *Van der Meer*, ARB No. 97-078, slip op. at 9-10 (affirming \$40,000 compensatory damage award, ARB found that complainant suffered little out-of-pocket loss but unquestionably suffered professionally as well as personally). See also *Kalkunte*, ARB No. 05-139, and *Brown*, ARB No. 10-050.

CONCLUSION

For the foregoing reasons, the Board finds that Menendez engaged in protected activity that contributed to adverse action taken against him by the Respondent, namely, the disclosure of his identity as a whistleblower. The Respondent having failed to prove by clear and convincing evidence that it would have taken the adverse action against Menendez in the absence of his protected activity, judgment is entered for Menendez and against Halliburton. Menendez is awarded \$30,000 in compensatory damages, to be paid by Halliburton, together with appropriate attorney's fees and litigation costs.

As the prevailing party, Menendez is entitled to costs, including reasonable attorney's fees, both before the ALJ and the ARB. The fees awards will be the subject of separate decisions by the ARB and ALJ for legal services performed before each respective body upon application by Menendez. Menendez's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the ARB, with simultaneous service on opposing counsel. Thereafter, Halliburton shall have 30 days from their receipt of the fee petition to file a response. A similar deadline is imposed upon Menendez for submission of a petition for legal fees and litigation costs to the ALJ, subject to any modification in time that the ALJ might order.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
**Deputy Chief Administrative Appeals
Judge**