



**Issue Date: 10 April 2019**

**CASE NO. 2016-SOX-3**

**NASSER MIDAMBA,**  
Complainant,

v.

**VERIZON WIRELESS TEXAS, LLC,**  
Respondent

**APPEARANCES:**

**B.R. JOHNSON, ESQ.**  
For Complainant

**RUTHIE WHITE, ESQ.,**  
For Respondent

**BEFORE: PATRICK M. ROSENOW**  
Administrative Law Judge

**DECISION AND ORDER**

**PROCEDURAL BACKGROUND**

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (the Act)<sup>1</sup> and implementing regulations<sup>2</sup> brought by Complainant against Respondent. Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on 9 Apr 13 alleging that Respondent had terminated his employment in violation of the Act. The OSHA investigation resulted in a report on 25 Sep 15 that dismissed the complaint. On 21 Oct 15 Complainant filed his objections to the report and requested a hearing before an administrative law judge.

On 7-8 May 18 and 16-17 Aug 18, I held a hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

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<sup>1</sup> 18 U.S.C. § 1514A.

<sup>2</sup> 29 C.F.R. Part 1980.

My decision is based upon the entire record, which consists of the following:<sup>3</sup>

Witness Testimony of

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<sup>3</sup> I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

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Valetta Wilson  
Jeffrey Eyler  
Patricia Towery  
Julanda Midamba  
Jason Leiker  
Complainant

Sandra Loughridge  
Jana McLelland (Luecke)  
Kirti Rosa (Gaur)  
Niraj Patel  
Harold Navarre  
Tiffany Uriarte

### Exhibits<sup>4</sup>

Complainant Exhibits (CX): 1-11, 13-28, 30-39  
Respondent Exhibits (RX): 1-5, 8-30, 32-33, 35-43, 45  
Joint Exhibit (JX): 1

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

### **FACTUAL BACKGROUND**

Complainant started working for Respondent in July 2008 as an engineer. His job was to manage Respondent's initiatives from the real estate side, including antenna sectorization, generator deployments, and generator upgrades. That required coordination and communication with other managers to allow Respondent to proceed with awarding contracts to third party vendors to start projects.

Respondent divided its Gulf Coast operations into East and West regions. Complainant worked in the West region. He first reported to Gary Critchlow, then Jeffery Eyler. In July 2012, Respondent combined the East and West region, let Eyler go, and placed Jana Luecke, who had been in charge of the East, in charge of the combined region. At that point, Luecke became Complainant's supervisor. Within a couple of weeks, Luecke placed Complainant on a performance improvement plan (PIP). The plan was extended one time, but Respondent eventually terminated Complainant's employment in January 2013.

### **STIPULATIONS**<sup>5</sup>

Jana Luecke worked for Charlie Craig & Associates (Charlie Craig) from 2004 to 2008. She was then hired by Respondent as a Real Estate Specialist and promoted to position of Real Estate Manager overseeing the West Division of the Gulf Coast Region shortly after being hired.

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<sup>4</sup> Counsel were cautioned that since a number of exhibits appeared to be *en globo* collections of records, counsel must cite during the hearing or in their post hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr.1205.

<sup>5</sup> Tr. 28-33; JX-1.

She was a Real Estate Manager until 2014, when she became Headquarters Network Real Estate Negotiator. Luecke left Respondent in 2017.

Hal Navarre was hired by Respondent in 1989 and is currently the Executive Director of Network for Respondent. In 2012, he was the Executive Director of the Houston Gulf Coast Region. Narij Patel was hired by Respondent in 2005 as a Manager of Systems Performance.

Complainant was hired by Respondent in July 2008 as a Base Transmission Station Engineer. He reported to Gary Critchlow. In March 2012, Complainant received and signed a 2012 Performance Agreement developed by Complainant and Jeffery Eyler. The agreement outlined several objectives for his performance.

Eyler was separated from Respondent on 27 Jul 12. On the same day, Luecke became Complainant's manager. On 31 Aug 12, Luecke issued Complainant a written sixty-day PIP. Complainant objected to being placed on the PIP and refused to sign it.

On 4 Dec 12, Complainant received an email from Luecke requesting to receive all generator jobs completed in November so that she could close out the PIP. On either 16 or 17 Jan 13, Complainant was terminated from Respondent. At the time of his termination, Complainant was earning a base salary of \$92,000 per year.

Complainant obtained employment with Systems Solution and Services around February 2013 working 50 hours per week. He filed a complaint with OSHA on 9 Apr 13. He obtained employment with AT&T Mobility sometime in September 2013 in Virginia.

#### **ISSUES IN DISPUTE & POSITIONS OF THE PARTIES**

Complainant maintains that he engaged in protected activity by raising his concerns that Luecke was funneling business to a company with which she had a personal relationship, failing to follow Respondent's own rules on proper contract bidding procedures, and using unlicensed vendors. He argues that his termination was at least in part due to his protected activity and any suggestion that it was due to his poor job performance is a pretext for the true retaliatory nature of Respondent's actions.

Respondent denies that anything Complainant did or said constitutes protected activity under the Act. It further maintains that those things Complainant alleges as protected activity played no role in its decision to terminate him, which was based solely on his poor performance.

#### **APPLICABLE LAW**

The Act creates a private cause of action for employees of publicly traded companies who are retaliated against for engaging in certain protected activity. It protects employees who provide information regarding any conduct which the employee reasonably believes constitutes a

violation of mail fraud,<sup>6</sup> wire fraud,<sup>7</sup> bank fraud,<sup>8</sup> securities fraud,<sup>9</sup> any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.<sup>10</sup>

The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)<sup>11</sup> govern SOX whistleblower actions.<sup>12</sup> To prevail, an employee must prove by a preponderance of the evidence<sup>13</sup> that (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.<sup>14</sup>

In order for a complainant to demonstrate that he engaged in protected activity, he must show that he had a reasonable belief that a violation occurred. Reasonableness is determined on the basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience.<sup>15</sup>

“Contributing factor” causation may be proven indirectly by circumstantial evidence such as temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.<sup>16</sup>

## EVIDENCE

### *Complainant testified at hearing in pertinent part:*<sup>17</sup>

He was born in Kenya and moved to the United States in 1993 to go to college at Kent State University. He met his wife there and graduated with majors in political science and

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<sup>6</sup> 18 U.S.C. § 1341.

<sup>7</sup> 18 U.S.C. § 1343.

<sup>8</sup> 18 U.S.C. § 1344.

<sup>9</sup> 18 U.S.C. § 1348.

<sup>10</sup> 18 U.S.C. § 1514A.

<sup>11</sup> 49 U.S.C. § 42121(b) (2011).

<sup>12</sup> 18 U.S.C. § 1514A(b)(2)(C) (2011).

<sup>13</sup> The employee is entitled to the relief provided by § 1514A(c) “only if the [employee] demonstrates that [his protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint.” 49 U.S.C. § 42121(b)(2)(B)(iii). The term “demonstrates” means to prove by a preponderance of the evidence. *See Dysert v. Sec’y of Labor*, 105 F.3d 607, 610 (11th Cir. 1997) (addressing analogous statutory burden-shifting framework under the Energy Reorganization Act of 1974 (ERA)).

<sup>14</sup> 49 U.S.C. § 42121(b)(2)(B)(iii); *Stojicevic v. Arizona-American Water*, ARB Case No. 05-081, 2007 WL 3286331, at \*7 (ARB Oct. 30, 2007); *Welch v. Cardinal Bankshares Corp.*, ARB Case No. 05-064, 2007 WL 1578493, at \*5 (ARB May 31, 2007); *see Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1380 (M.D. Ga. 2007); *see also* 29 C.F.R. § 1980.104(b)(1)(i)-(iv).

<sup>15</sup> *Grant v. Dominion E. Ohio Gas*, 2004-SOX 63 (ALJ Mar 10, 2005).

<sup>16</sup> *DeFrancesco v. Union R.R. Co.*, 2009-FRS-009, (ARB Feb. 29, 2012); *See, e.g., Id.; Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).

<sup>17</sup> Tr. 343-568.

international relations. He currently works for AT&T Mobility in San Antonio and has been there since December 2016. He commutes weekly from their home in Houston. His job with AT&T is as a project manager and for the past five years he has been rated as performing at or above standards.

He was hired on originally in 2008 as a Real Estate Regulatory Specialist managing the Omega Project. RX 1/CX 6<sup>18</sup>, is his performance review for 2008. He was evaluated as “performing” and described as a good addition to the company. He did sign it. So did Gary Critchlow, his manager.

CX 1 is his 2009 review. It described his performance as developing. It noted he needed to improve being on time and being prepared for meetings. He does not recall if those same criticisms were made in subsequent performance reviews. Looking at the performance reviews doesn’t refresh his memory or help him recall. He did not agree with the accuracy of that rating. All five employees working for that supervisor were given developing ratings. They all complained to the supervisor and to the director. Their supervisor was fired the next day. He was under the impression that rating would’ve been removed and changed to performing. He received the review, but never signed it.

CX 2 is the rating he received from Eyler for 2010. Eyler rated him at the performing level. CX 3 is his 2011 rating. He did not receive a similar document rating him for 2012. From the beginning of his employment until the point that Eyler was no longer his supervisor, he never received any written or verbal warnings.

His job was to manage Respondent’s initiatives from the real estate side. He managed antenna sectorization, generated deployments, and generator upgrades. He also managed inbound hall location and fly by projects, when operating teams ran into issues at existing sites.

CX 7 is his 2012 Performance Agreement from Eyler. It contains the performance goals that he and Eyler agreed to for 2012. The Performance Agreements normally did not change until the midyear review, at which time the supervisor would meet with the employee to have feedback about how the performance plan was progressing.

He did not have a midyear review in 2012. He never signed a midyear review document for 2012. At his deposition, he testified on multiple occasions that he did remember having a midyear review for 2012. However, at the deposition he was under duress and being yelled at.

CX 4 states that it is a midyear review. He never received that document from Eyler and does not recall ever signing it. He never received CX 5 either, and the first time he saw them was at his deposition. At his deposition, he said he did not know what CX 5 is.

He does not recall having seen RX 2 before the hearing. It does not look like the same document he was shown at his deposition. RX 2 talks about having realistic tracking up-

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<sup>18</sup> Bates stamp 204.

to-date. He does not recall any concerns that he was not up-to-date on tracking or missed dates by transport. RX 2 discusses concerns that he did not notify Eyler about delays on FTTCS, but that wasn't a concern after Eyler looked into his tracker and found the reasons why. He would agree that the goal was to have 44 sectorizations done and he did not meet that goal.

He believes he only had a total of 51 generators in 2012, because some projects were combined with Towery's projects. RX 4 sets forth his objectives for the year. The objectives are always fluid. Section 2 showed that he had 44 sectors to do and was supposed to have 80% completion by 31 Mar 12 and 100% completion by 30 Apr 12. That did not happen. He was also unable to meet his goal as to generators, because they ran into issues. He was short of his performance goals for sectorizations, FTTCS, and generators.

Some generators can be done in 60 to 90 days. Some can be done in a year. It all depends on location and other issues. If an extended environmental study is required it will take much longer. That is not an abnormality. He cannot recall how many of the 69 generators that were in his goal for 2012 required environmental studies. He would say that 1/3 of the 69 generators required environmental studies. Some of his generator sites had come from Luecke and were in Louisiana.

On 3 Aug 12, Luecke had her first staff meeting to announce that she was taking over. She asked him to stay after the meeting and met with him to discuss his projects. Luecke said she had heard from others that his projects were not trending well. She had no idea what projects he was doing, much less which projects were not trending. He explained to her what projects he was managing. At a second meeting on 9 Aug 12, Luecke told him she would be placing him on a PIP.

CX 8 says it is a memorandum PIP from Luecke to him dated 31 Aug 12. He received a hard copy of that document when he met with Luecke in the conference room on that day. She told him that Patel wanted to institute it. He received no other paperwork. The plan itself never even captured all of his projects and he still insisted that Luecke didn't really know what he was doing. Since Eyler was fired on 27 Jul 12, she hadn't had time to learn what he was doing by 3 Aug 12.

RX 5 is the PIP. It says he is supposed to have 45 generators done by 30 Sep 12 and 60 done by 31 Oct 12. It says he is supposed to complete the 8 remaining sectorizations. The PIP also says he should let people know if he cannot meet a deadline. That is not unreasonable. Luecke told him she was concerned that he wasn't responsive to inquiries from management. He never heard that from anyone else. She said the PIP was issued because they were past the point that the midyear review was supposed to have been done and the PIP was the most efficient way to review projects status.

At the time Luecke put him on the PIP, she was mad because he and Towery were resisting her efforts to give work to Charlie Craig. They told her that they thought she had a conflict of interest, but did not tell her everything they knew. They didn't say anything

to her about manipulating contracts. There was another time that Luecke walked up to his desk and took a notebook that had Charlie Craig information and walked away.

RX 14 is an email exchange between him and Luecke. It includes an attachment with a list of projects where funds were committed that indicates he had over \$300,000 in open commits and projects even though they were supposed to be largely complete. It also notes \$38,000 in open commits from the prior year. He needed to go check and make sure that the services were rendered so the contract could be paid and classified as received on.

He discussed his concerns on a number of occasions with Cecelia Lopez, the Human Resources representative. He talked to her over ten times and met with her on several occasions. Luecke was included in those meetings. He brought them evidence to clarify the exact status of his projects. For example, one site involved Indian burial grounds, which lead to an extended delay.

CX 17 is his email communication with Lopez expressing his concerns that the PIP was not justified. He and Luecke had regular meetings to review his progress while he was on the PIP. Lopez would attend those at times. Lopez at one point expressed her opinion that they should take a less corrective action than the PIP, because his progress was great. CX 18 is an email between him and Luecke following up on the PIP progress. RX 15 is an email he wrote Cecelia Lopez. It mentions he has 69 generators. Once he scrubbed the list, it was actually 51 generators.

They ended up revising his PIP four times. Luecke told him that they were extending his improvement plan. There was nothing put in writing. He had weekly meetings with Luecke and she essentially took over his Outlook planner. If he worked late one night and came in a little bit late the next day she would write a note about him being late. He has never seen CX 9. He never had a meeting with Luecke to go over that document and never signed that document.

RX 16 is an email from a budget specialist asking him to populate and amend a tracker by 14 Sep 12. There is a later email stating that the information was two weeks overdue and needed to be provided ASAP. Another email indicates that four days later he received another email indicating he had promised to have the information by the day before and it needed to be provided that day. He doesn't remember the email independently.

RX 17 contains emails involving Jason Leiker. At one point he was manager for project implementation. The email notes that the project implementation team created a tractor for him, but there was nothing in the tracker. He does not recall being asked to update the tracker. He doesn't recall an incident in which he missed a teleconference or being told that he should provide updates through someone else if he cannot. Luecke received a copy of the email. He does not know if Leiker was unhappy with his performance.



RX 18 is another email exchange that he does not recall. He doesn't recall any of the events in the email chain. He thinks it might be a fabricated email chain. RX 20 is a continuation of the same email chain.

He doesn't think it would be unreasonable for his manager to ask him to provide a list of lease termination dates. She thought the information was readily available to him. There was a national database where the leases were kept. He testified at his deposition that all leases were available locally, but the terminations could have been on an older site that was not readily available.

He recalls the email exchange at RX 26. Lynn Campbell worked for a tower company. They placed antennas and generators on the company's towers. There are a list of generator projects and purchase orders. The email indicates that finance was asking the third party company for an invoice so it could pay on the contract because the contract was showing complete. However the tower company responded that they were not invoicing because the work was not complete, notwithstanding his report. He had signed off on it as complete even though it wasn't, because Luecke asked him to do that. In other words, he submitted a list of generators as complete when they weren't, because he was told by Luecke to do so. They were trying to get dollars committed. He wasn't comfortable doing it but he did it. He never mentioned that in his deposition because nobody asked him. He was asked in his deposition to identify everything that Respondent did that was fraudulent.

In 2011, he had a conversation during which Towery told him real estate licenses were not necessary for the kind of work they did. His knowledge about any relationship between Luecke and Charlie Craig was based on what he found on the website in 2009. His conclusions about bidding were based on discussion he had with Eyler and an email from Diana Scudder, the budget manager for the area.

CX 26 is an email discussing bidding requirements. They include exceptions for Master Service Agreement (MSA) holders and sole-source vendors if there is only one responsible supplier.

In late May 2012, finance asked them to help put together a forecast concerning pending projects and purchase orders. Eyler asked Towery, who was his counterpart in real estate, to see how spending was trending. Most of the projects they had in the West had not started yet. They had spent a substantial amount of money, but it was going to one particular company in the East. The company was Charlie Craig. They understood that Luecke was a part owner of Charlie Craig. He decided to look into it and discovered that the funding for Charlie Craig projects were under the MSA, but not related to the scope of work. He does not believe Charlie Craig had an MSA that covered Louisiana or Florida.

That led to them asking for help from Jennifer Klawinsky. He mentioned what he found to Jennifer Ellis, who worked for finance but had previously been with Enron. Ellis told him that was the same trend they saw at Enron.

They noticed that Charlie Craig was being paid \$5,000 for a leasing project, where in Houston a typical site acquisition company would charge \$2,500 for the same thing. They noticed that on a given day there would be two or three purchase orders for \$49,500, which was suspicious. At that point, the discussion remained between him, Towery, and Klawinsky.

Ultimately they created CX 29, a list of Charlie Craig purchase orders. CX 12 is the same document except for the font size and the fact that it includes the vendor number.

At the end of June, he went to Eyler to tell him that the reason they were getting outspent by Luecke was because of money going to Charlie Craig. Luecke was sitting in the next cubicle at the time. He did not give Eyler any paperwork or mention the involvement of any other employees. He did indicate it was illegal and needed to be fixed. It was a five-minute conversation at Eyler's cubicle.

At deposition, he testified that he and Towery told Eyler they found where the money was going, because the documents were showing spent, but there were no projects launched. Even though they were spending as a cumulative market they were not launching integrated sites. Eyler told them he saw there was a spend but the projects were still in the pipeline. He and Towery responded that it looks like they spent, but the money is actually being spent on Charlie Craig by Luecke's team. Eyler responded that he had told them to spend, but she had already spent their money. He asked them how they were going to finish their projects with the money gone. They didn't say anything about Luecke owning Charlie Craig.

They had a number of discussions about Luecke spending money on Charlie Craig. They did not have discussions about Luecke owning Charlie Craig, or conflicts of interests or anything along that line.

He was worried that if he gave Eyler all the paperwork and data, he would get fired, so he asked Klawinsky if she could think of anyone they could go to that they could trust. Klawinsky approached Tiffany Uriarte and told her what the three of them had learned. Uriarte contacted him by email (CX 19) in November 2012 and said she'd like to have a meeting. He sent her a number of purchase orders and other documents and told her about their concerns. Around the same time Respondent was bringing in a number of new vendors that he hadn't heard of.

Uriarte said she would look into it and eventually Eyler was fired. The only two people they ever communicated their concerns to were Eyler and Uriarte. He also called the 1-800 number compliance hotline about the same time. That was an anonymous call. He mentioned something to Cecelia Lopez about inappropriate things going on, but did not give her the data. He complained to Niraj Patel when Patel introduced a new company and he found out the company wasn't even licensed in Texas.

CX 14, 15, 16, 17, 18, 20, and 22 are emails. Before he was placed on the PIP, he never received those kind of warnings. They all started when Luecke took over as his manager. He doesn't recall any of the incidents in those emails.

On 16 Jan 13, he was called into a room by Luecke and her manager, Christopher Windham. They told him the company had decided he was not a good fit and was terminating him. He told them he had been raising issues to Uriarte. Then they walked him out of the building. At that time, he had been employed by Respondent since 2008. He had been a contractor for the previous year, giving him about 5 years with the company. His salary when he was fired was \$87,500 per year. He does not recall getting a bonus for 2012.

RX 38 is a charge of discrimination he filed against Respondent alleging that his termination was because of sex and national origin. It alleges that Luecke issued him more than 20 written reprimands for poor work performance and failing to report to work. The actual number could have been more.

He found a job working for System Solutions Incorporated in Connecticut. It was a start-up business owned by a friend and he helped build the business. They did network integrations and deployments for Massachusetts Broadband. He worked there for about six to eight months starting in late January 2013. His total earnings for his time in Connecticut were \$14,500. They had hoped to make more money, but government shutdowns brought their business to a stop. When he left the job in Connecticut, he went to work for AT&T in Virginia, earning about \$95,000 per year. After four and a half years, he was able to get a job in Texas with AT&T.

His base salary at AT&T when he hired on was higher than his base salary at Respondent when he left. At deposition he testified that his incentive compensation was also higher at AT&T. He made more money at AT&T than he would have made with Respondent in 2014, 2015, 2016, 2017, and 2018.

He didn't move his family to be with him because he didn't want to sell one of his two houses and relocate his family with him. The market had gone down. He rents the house in Ohio for more than \$20,000 a year. They put it on the market four or five times but nobody wanted to buy it. He did not try to sell his house in Houston, because his family was there. He didn't think it would be feasible for his family to move to Virginia from Houston and it would have been very inconvenient.

He believes that he has suffered actual damages of over \$300,000 and paid \$60,000 in legal fees. He believes his damages in 2013 were about \$182,000. He calculated that by considering the money he borrowed, the wages he lost, the loans he had to take out, and all of his living expenses and travel expenses. He did the same for 2014.

The bulk of his damages were incurred in 2013. He had to pay state taxes in Virginia and he wouldn't have had to pay those in Texas, so he included those as damages. By the

time he moved to San Antonio with AT&T, he was making \$102,000 a year, which is more than he was making when he was fired from Respondent.

However, he has expenses forced upon them by living in San Antonio. He had an initial dip in income when he was in Connecticut, but started to make more than he made while he was working for Respondent. The problem was he had the expenses of dual residences.

***Patricia Towery testified at hearing in pertinent part:***<sup>19</sup>

She is a Real Estate Specialist with Smart Link. She also worked for Sprint as a Real Estate Specialist. She was employed as a Real Estate Specialist with Respondent from 2009 to 2013. She left Respondent in May 2013. Eyler was her boss and she worked with Complainant.

In 2012 they were working in the West region. She managed several teams of site acquisition vendors doing modification projects. She managed the project vendors to make sure they got all of the real estate and regulatory accomplished so the sites could go under construction. They had to comply with Sarbanes-Oxley, although she didn't feel that it had any real relevance in their industry. As a Real Estate Specialist, she did not actually file for regulatory compliance. The regulatory team did that. However, she did know about the paperwork that had to be put into place.

Respondent's personnel evaluation system involved an annual and midyear performance review. She had two performance evaluations with Eyler. After he left, she had one with Luecke. She thinks that may have been the midyear performance review. She recalls that Eyler was let go in the July time frame. He just kind of walked out of the building and they were told that Luecke would be her supervisor.

They would printout their annual reviews, go into a conference room, and review everything with Eyler. That included looking at goals and whether or not they had met those goals. Then they would go and type in their input through the computer. Then the review was sent electronically to Eyler and he would finalize it with his digital signature. She did not have any performance issues and was never placed on a PIP.

In 2009 she was working as a contractor through Connecticom. She was told by the person she replaced that she would need to stay away from Luecke. She talked to another person who showed her a website page with Luecke's photo on it as a principal of Charlie Craig. She shared that information with Eyler. Shortly after that the website was taken down. That was in 2009 while she was still a contractor.

When Luecke was transferred to the East region, she saw the handwriting on the wall. The industry is a good old boys' club and if you're not a man, you have to work harder. Respondent was not happy with Eyler, and she went to Eyler and told him he was going to be leaving. She also said she was not going to work for a crook.

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<sup>19</sup> Tr. 225-307.

She concluded that Luecke was a crook because Luecke was a manager for Respondent and on the website as a principal of Charlie Craig. Luecke shouldn't have been doing both. The only evidence she has of Luecke's involvement in Charlie Craig is the website from 2009. When she saw the website in 2009 she told Eyler about it. She doesn't know when the website was created. She does not know if the website was up-to-date. She never asked Luecke about it. The website was taken down shortly after she saw it in August 2009.

She told Luecke that she would refuse to be part of a purchase order that involved Charlie Craig or Sellinger & Associates (Sellinger). That was because she was aware of the relationship between Luecke and Charlie Craig from the website. If they were not related they were working awfully close together. When she looked at spreadsheets and saw Charlie Craig she would also see Sellinger. Charlie Craig was site acquisition and Sellinger was a survey company. She has no concrete knowledge that they were together but she refused to use them because of her speculation that they were together. She talked about the problem all the time with Complainant. She doesn't claim it was a legal issue; she thought it was more ethical, because of kickbacks. She has no financial evidence of any kickbacks between Charlie Craig and Sellinger, but her experience is that when a site acquisition company only uses one other company, there are kickbacks.

In 2012, the West was actually performing better than the East. The West had to pull projects because the East was not able to get them done. She and Complainant were actually outperforming the people in the East.

She liked working for Eyler, but at times when she took concerns to him, he just appeased her. It's not his personality to rock the boat. Eyler would come out of meetings browbeaten and making the comment that he was getting beat up because he would not handle issues in his department. She told him she hoped she wasn't the problem and he said she was not the issue. At that point she understood that Complainant was the issue.

When she left Respondent, she had 373 new builds. When she was doing the LTE project she had something like 278 sites. All of her projects were in the West. She did not have any in Louisiana. It was a numbers game. If Luecke was short 10 projects, then they needed to find 10 projects to do in the West. Complainant was primarily doing generated projects, along with some mods.

They really didn't have to bid anything, because their pricing was standard. All of their contractors had a price range. She knew the contractor's workload and employee count. She knew whether or not they could handle additional work. When Eyler started making them bid it, she bid lumps of sites. The reason they would group projects was to save time and money and be more efficient. She ended up giving contractors who won bids work that she didn't think they could get done.

Respondent had standard documents that the site acquisition vendors used to go out and negotiate with landowners. The vendors would use purchase order requests to submit to

Respondent that included milestones. Those purchase order requests were then sent to finance to cut the purchase orders.

She used the tracker. Complainant had his own tracker. She kept her tracker file on a flash drive. She did not put it on a public drive. She does not know if Complainant had his tracker on the public drive.

At one point in 2010, they were told that they had to use the bid process on their sites, regardless of amount. It didn't make any difference whether it was \$5,000 or \$50,000. After that, she bid every single job. The actual fiscal approval authority for the bids varied with the amount. She thinks they had fiscal approval for up to \$3,000.

Adding or modifying generators required municipality approval, because some municipalities won't allow propane generators. Some have a noise ordinance. Once that information is obtained, they have to go to the landlord and figure out where the generator was going to be placed. If a full environmental analysis was required, it could take up to six months and then a second phase of another six months. About half the sites fell into that category. The other half could take 60 to 90 days.

She would talk over projects with Complainant. They would bounce ideas off of each other. They regularly got emails about how they were doing spending their budget and completing projects within the deadline. CX 11 is one of those emails.

At some point after they received CX 11, Complainant started looking into how Luecke spent the East region money. Complainant was upset about it, especially after he got called out at a meeting for being behind. He would go through all the financials and try to figure out how they were spending money twice as fast as the West, and still following the rules. That was especially true since Louisiana zoning and permitting was much more difficult than Texas. Complainant looked on the share drive to see what kind of due diligence had been done on environmental reports. Complainant communicated his findings to Eyler. There was a big meeting in Navarre's office, but nothing ever came of it. She doesn't know what the meeting was about.

She saw the paperwork that Complainant produced. By that time Eyler was gone. She thinks it was in November 2012 when she saw Complainant going to Luecke's cubicle. He was angry and then Luecke got angry. She doesn't know what was said, but she did see the paperwork he had with him. The paperwork included purchase order copies and environmental studies. She can't say how much paperwork he had with him in terms of numbers of pages. The environmental paperwork indicated that they had failed to do a required phase one study for a propane generator. That was just one example of several. None of that has anything to do with Sarbanes-Oxley. It would have to do with Respondent's FCC license. She did not independently verify any of his findings. She can't recall anything specific, other than the East had not been doing its due diligence.

Complainant also took the data to Klawinsky in accounting. She assumes Klawinsky contacted Uriarte, because Uriarte called her in. She told Uriarte what she knew. It was the only conversation they ever had.

It ultimately turned out that Complainant was correct, because Respondent hired a full-time contractor to go back and complete the due diligence that had not been done. By that time Eyler was gone.

She had a rocky start working for Luecke after Eyler left. Luecke was requesting that they use Charlie Craig and Sellinger. In January 2013, she went into the conference room to talk to Luecke, who was bringing in some other vendors to handle the workload. She told Luecke she would not use either Charlie Craig or Sellinger and would bid out projects only in accordance with Respondent's policies and only use credible firms. She did not believe Charlie Craig or Sellinger were credible companies.

She never said anything to Luecke about Luecke owning Charlie Craig. She just said that she was uncomfortable because of ethical situations. She never mentioned that the ethical situations might have had to do with Luecke. She used other vendors that Luecke had brought in. She and Luecke were fine.

She left Respondent about 5 months later. She was never placed on a PIP or forced out. She was never punished in any way. She does not recall telling Uriarte that Complainant called her drunk and threatened that he was going to call CNN. She does not recall Complainant calling her and asking her to delete documents from his computer or delete a specific message from his email. She does not recall telling Uriarte that she thought Complainant was lazy.

Site acquisition firms do not require real estate licenses. She is not aware of any legal requirement that real estate projects be bid. Sprint uses site acquisition firms. Sprint uses some of the same firms. She doesn't know how Luecke selected vendors. She doesn't know if Respondent was doing business with Charlie Craig before Luecke went to work for it.

She never personally witnessed Complainant making any internal complaint about anything to do with Ms. Luecke or Charlie Craig or unlicensed vendors, except that he complained about her using firms that did not have a license. He made that complaint to Eyler. That was long before anything having to do with Luecke.

***Valetta Wilson testified at hearing in pertinent part:***<sup>20</sup>

She retired from Respondent in November 2012. At that time, she was working as a Regulatory and Compliance Specialist in the Texas region. She was involved with cell tower modifications and new cell tower construction. She collected data and paperwork that was sent to the corporate office so that they could have provided proposals for

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<sup>20</sup> Tr. 57-92.

construction and modification. They were responsible to ensure that projects complied with FCC and FAA regulations and requirements.

She worked in the real estate division and Eyler was her boss. Their department handled acquiring real estate for the construction of towers. They had to make sure that the towers did not violate FAA or FCC rules. Complainant and Patricia Towery were her coworkers. Complainant worked on microwave towers and real estate issues related to construction. One of his big projects was the installation and repair of generators. There is no regulatory approval for generators or other groundwork. Some of Complainant's work did involve towers.

Her job was to get documentation from real estate and the engineers and to check the paperwork for accuracy to make sure they had a complete and compliant package to send to corporate. There are height and other environmental restrictions that apply to tower construction and they had to make sure they complied with those restrictions. The paperwork needed to be 100% correct.

She never had any problems getting timely inputs from Complainant. They had a shared G Drive from which she could review Complainant's spreadsheet showing his progress on any particular project. Complainant was very good at keeping track and she never had to ask him anything. She could always refer to his spreadsheets on the G Drive. The drive was available to everyone in the office.

They had weekly meetings for the Texas and Louisiana regions to discuss issues by conference call. Complainant was part of those conferences. She does not recall any issue with Complainant not reporting to those meetings or advising his supervisor of projects status.

She first met Complainant when she moved to Texas from Georgia in June or July of 2011. She does not recall anyone having anything negative to say about Complainant. They did not work together often at all and she did not supervise him. She doesn't know what his goals were and has never seen his performance documents. She does not know whether Complainant was early, late, or on time with his projects. He was on the conference calls, but she really didn't know a lot about his specific projects, because she didn't need to for her job. She knows he did meet with Eyler regularly, as did they all. She wasn't part of those meetings.

Complainant never mentioned anything to her about Sarbanes-Oxley, but she doesn't know what Sarbanes-Oxley is. Complainant never complained to her about any FCC, vendor licensing, vendor bidding, or FAA issues.

***Jeffrey Eyler testified at hearing in pertinent part:***<sup>21</sup>

He currently works at MasTec Network Solutions. They do work as a vendor for Respondent and all of the other wireless carriers. He worked for Respondent from 1996

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<sup>21</sup> Tr. 92-225.



through May or June of 2012. He supervised Complainant for about two years, up until the point he was fired by Respondent in 2012. He does not recall his specific last day of work but it was sometime in June that he was no longer in the facility.

Complainant worked on lease amendments for various modification projects such as generators on cell sites and FTTCS. Respondent had every employee sign a Performance Agreement that outlined goals and objectives for the year. The supervisor would meet with the employee to discuss those goals and objectives and put them into a written document.

CX 2 is Complainant's Performance Agreement for 2010. He most likely was responsible for this performance review. It states that Complainant was performing, which meant he was meeting his goals and objectives. It specifically states that Complainant had been able to push to execution every single site that he had inherited with the exception of a problem site such as Badhwar, Ridge Farm, and Lake Houston. It also notes that Complainant accomplished NTPs in 55 of 57 sites. They signed that performance review on 24 Jan 11.

CX 3 is the performance review for 2011. They signed it on 26 Jan 12. There were no deficiencies in Complainant's performance, although he was sure there were some things he had coached Complainant on, it would have been nothing glaring. At that point, Complainant had done nothing to require a PIP.

He accomplished a Performance Agreement with Complainant for 2012. CX 7 was the Performance Agreement for Complainant for 2012. The agreement says that Complainant was a Real Estate Manager, but actually he was a Real Estate Specialist. The Performance Agreements are designed to be signed electronically. The objectives on pages 26 and 27 are an accurate reflection of the objectives they agreed upon. Their Performance Agreements were designed to be dynamic and could be changed as the year goes on. It was not uncommon for circumstances to require changes to be made true performance objectives.

The 2012 Performance Agreement called for 80% completion for real estate NTPs for 44 sites. The goal was to have 50% regulatory completion by 31 May 12 and 100% completion by 31 Aug 12. He worked with the regulatory group to get regulatory approvals in order to proceed. Where the sites were released, Complainant would go to the landlords and get approval for construction. The regulatory group would make sure that the construction was in compliance with FCC and FAA requirements.

LTE is long-term evolution, which is actually 4G technology. FTTCS is getting fiber optic communications to the cell site, which results in higher speed connections for cell phone users. The metric for FTTCS was to have a notice to proceed (NTP) done at least 75 days before the firm order commitment from the TELCO provider, which could be AT&T, Comcast, or any of those companies.

The gulf coast region had been split into two: East and West. He had the West and Complainant worked for him. At one point Luecke asked if Complainant could take on her FTTCS work in the East. That involved taking jobs from the East, in Louisiana and Mississippi, which increased the number of sites that he had. CX 10 is a group of emails. Page 5 refers to Complainant taking on that work. Complainant agreed to take on the extra work.

CX 4 is Complainant's midyear review for 2012. It covers the period of 1 Jan 12 to 30 Jun 12. He doesn't specifically recall doing a midyear review for Complainant in 2012. The document looks familiar and it's highly possible he created it. However, he was gone before he had a chance to do midyear reviews with his employees in 2012. Generally, he would work off of the performance plan, ask employees to give him positive items to include and provide any feedback they needed.

CX 4 is strange because typically the employee would sign the review before the manager. CX 4 shows Complainant signing on 27 Jul 12 and him signing on 16 Jul 12. It uses letters for the month. CX 5 states performance review, but not midyear review. It is also a review period from 1 Jan 12 to 30 Jun 12 for Complainant. It uses numbers for the months. He never gave Complainant a midyear review or signed any review documents for 2012. He did do that for 2010 and 2011.

The CAPEX bidding process just meant that items of a certain cost required bids from multiple companies rather than issuing the order without a formal bid process. They had discussed the process in a meeting and there was some written documentation sent out about it. CX 26 is an email that was sent out from finance discussing a new directive on what items would require a bid. It stated that bids would be required for items over a \$5,000 threshold, effective 1 Jan 12.

The bidding process was done electronically by sending out requests for bids to vendors on the preferred vendor list or vendors who already had contracts with Respondent and could do the type of work required. There might be three or four different eligible vendors. The vendors would send in their bids and someone in accounting would select the lowest bidder. Typically management would select the lowest bidder. He doesn't know if that was legally required, but it was Respondent's policy.

If Complainant had jobs that were over \$5,000, he would be responsible for requesting the bids. Generally, their real estate projects were all under the \$5,000 threshold. He does not recall having to bid out a project while he was in the real estate group. Accounting actually generated the purchase order at the request of the specialist. He believes there might have an exception for the bid requirement, if the vendor had an MSA.

He doesn't recall any requirement that a vendor doing site acquisition work have any specific license. Vendors were approved by the Sourcing department at Respondent's legal office. That office would've ensured that vendors had the required licenses. Sourcing and Legal also would've helped draft the MSAs. Respondent's contractors were all required to have an MSA.

CX 11 is a request from accounting for actual and projected spending as of 29 Apr 12. He forwarded that email to Complainant and Towery because he was concerned that the spending was not as robust as it he thought it should have been. He question the accuracy of the numbers and wanted to give them the chance to correct them. He doesn't specifically recall having a meeting with them in response to his emails. They probably did discuss it, because capital spending was a huge deal.

Each of Respondent's departments had their own capital budget. He and Luecke shared a budget for their region. If one of them was quicker to get funds committed and purchase orders cut, they could get a bigger share of the budget. The funds were not committed to be spent until a purchase order was cut. Once the purchase order was cut, the money was no longer available for any other use, even if the money had not been transferred to the vendor.

He recalls having a conversation with Complainant and Towery about the fact that Luecke was spending money quicker and using up the money from their joint allocated budget. He was concerned that they wouldn't have enough money to accomplish their objectives. Although it might vary from year to year and it was never an exact 50-50 split, his area and Luecke's areas were about the same size with the same types of projects. Part of his job was to make sure they spent their budget. The earlier they could get projects done, the sooner they could cut purchase orders, and commit the money.

The vendors were not supposed to be paid until they had completed the work. For example, if Complainant needed a site acquisition company to go to a landlord and negotiate a lease amendment to install a generator, they would not pay that company until they saw all the legal documents and the executed lease. Complainant did not deal with landlords himself. He had too many sites to do that. Generally, there was not much of a regulatory process that applied to generators.

Charlie Craig was a company that delivered site acquisition services. They never worked on any of his projects, but they did do work for Luecke. He doesn't know if Complainant ever used Charlie Craig, but doesn't think that he ever did. He does not recall Complainant ever raising a concern that Luecke had an interest in or relationship with Charlie Craig, a financial relationship with Charlie Craig, or a conflict of interest. He does not recall Complainant ever raising a concern that Luecke or anyone else was failing to follow bidding procedures, using unlicensed vendors, or owned an interest in any vendor. He does not recall Complainant ever raising any concerns related to Sarbanes-Oxley, shareholder fraud, or financial impropriety. Had Complainant raised any such issues, he would have investigated them and informed his superiors.

CX 7 is Complainant's Performance Agreement for 2012. He does not recall exactly when they completed the Performance Agreement. Typically it would not have been on the first day of the year, but would've been done sometime in January. The goals and objectives of the performance plan were not set in stone, but could be changed over the course of the year. Typically the changes would be reflected in the midyear review.

The agreement set a goal of a number of FTTCS projects, sectorizations, and generators to be completed. It also included performing regulatory audits for 900 Respondent-owned towers. The audit was just to make sure everything was accurate and up-to-date. The audit was required after they had discovered some problems with microwave regulatory filings.

Part of that job included keeping track of compliance with regulatory tasks. Complainant shared that job with a number of coworkers. One of the compliance areas included Sarbanes-Oxley. That, in turn included making sure that purchase orders were not created after the invoice. One of the goals of the 2012 Performance Agreement included completing nine generator sites to be completed over three quarters. During the year, perhaps in April, he assigned Complainant an additional sixty generators, after Complainant said he could handle the extra work. He made the assignment decision on his own without any direction from his supervisors.

It should take on average about sixty to ninety days to get a generator project from assignment to lease amendment. There can be a handful of problem projects that might take longer. There could also be very simple projects that would take less. Complainant had a total of 69 generators assigned to him by April 2012. Since funding was available in May, Complainant should have been able to start cutting purchase orders and assigning that work to vendors, as long as they were under the \$5,000 criteria for bidding process. Based on a ninety day timeline, he would've expected Complainant to have the 69 generators completed by late-summer, allowing for the possibility that the site acquisition firms might not be able to handle that much volume that quickly.

RX 4 is the 2012 Performance Agreement. The first item addresses LTE deployments in FTTCS sites. That is the area that Complainant failed to escalate delay issues to him in a timely manner. The second tasking involves sectorizations. Complainant was assigned 44 sites at the beginning of the year. His part of those projects should have been 80% of those 44 sites complete by 31 Mar 12. The remaining 20% should have been complete by 30 Apr 12. All 9 of Complainant's originally assigned generator projects were supposed to be done by 30 Sep 12.

RX 2 is the midyear review for 2012. Typically for a midyear review, he would give the employee a copy of the current Performance Agreement and ask for their input on how things have gone so far. He doesn't recall if he did that with Complainant for 2012. He thinks he had some input in the document and there are things that look familiar, but it doesn't seem to be in his style of writing. The data in the midterm review are accurate, but he knows he did not sign the document on 27 Jul 12.

It is like he started and someone else finished it. He does not recall calling him in for a midterm review. He never would have electronically signed it and approved it as a midyear review, because he wasn't supposed to do that until he had a conversation with the employee. He doesn't think he completed any midyear reviews for anyone for 2012.

Based on Respondent's password protections, it should have been impossible for someone else to sign a document as him.

Complainant was supposed to have 80% sectorizations complete by 31 Mar 21 and 100% by 30 Apr 12. As of 30 Apr 12, 34% were done. By 30 Jun 12, Complainant was at 75% complete. Complainant was supposed to get three generators complete per quarter for the first three quarters. He completed his goal for the first quarter, but for the second quarter completed only one of three. Complainant was assigned an additional sixty generators in April 2012, with thirty to be complete by 30 Aug 12 and thirty to be complete by 30 Sep 12. The delayed completion jeopardized their ability to obtain funds for the projects.

He thought that Complainant was generally meeting standards. There are always areas that an employee could work on, and Complainant was no different. If some of the problems that had started to come up couldn't have been turned around by the third or the fourth quarter, it would have been more of a problem. He would say that Complainant was not trending down or trending up. He likely mentioned to Luecke at the time that she took over both regions that getting the generators complete was going to be difficult for Complainant.

CX 38 is an email discussion he had with Complainant in May 2012 that indicated Complainant had a NTP on four of the generator projects.

CX 13 is a June 2012 email he sent to one of his peers in the transport group that for his real estate team to meet their objectives he needed to get design information from the transport group. In other words, he was complaining that their delays were impacting Complainant's ability to finish his objectives. Complainant should have called the problem to his attention sooner. Had Complainant done that he could have sent the email and addressed the delay more quickly.

CX 14 is a June 2012 email from one of the financial managers pointing out that Luecke was at 88% of her budget and he was at 41% of his budget. He then sent an email to Towery and Complainant pointing out that Luecke was way ahead and asking why they couldn't keep up. The capital spending projects that were behind were the direct responsibility of Complainant and Towery. He believes Luecke also had two Real Estate Specialists for her region.

RX 13 has capital spending data for projected projects to be funded from June to October 2012. It breaks out spending projections by manager. He forwarded the information to Complainant and Towery, noting that even though they had been lethargic in their spending, the number still looked suspect. He was actually thinking the numbers might be too high, based on the activity he was aware of.

Complainant had a tracker for FTTCS site projects and he could see from the tracker that Complainant was in jeopardy of not meeting his goals because transport had not

delivered designs. The tracker was a spreadsheet that Complainant created but made available on a shared server.

He wouldn't say that Complainant failed to keep him up to date. Complainant would answer questions. He would say that he coached Complainant to try to take the initiative to run with projects on his own. Sometimes Complainant tried to work through problems on his own instead getting help from his boss. He did not have any performance concerns regarding Complainant when he left Respondent in summer of 2012. There were a few things that were slightly behind, but they had talked about those. He did not believe Complainant needed to be put on a PIP.

***Jason Leiker testified at hearing in pertinent part:***<sup>22</sup>

He has been with Respondent for 14 years and is currently Director of Network Engineering for the Houston Gulf Coast and South-central Region. He has had that position for the past five months. Before that, he was doing the same job in central Texas and Little Rock.

He managed project managers from 2011 through the end of 2015. He was responsible for oversight of capital project plans including new builds, modification, generator additions, cell improvements, and other things like that. Respondent had a number of different teams involved in accomplishing its projects. They included engineering, real estate, regulatory, transport, construction, equipment engineering, network operations, cell performance, and RF engineering. He oversaw and coordinated the operation of those teams to make sure they could hit their timelines.

A project might generally start with RF providing a design. From there it would go to engineering and real estate to provide a location code or project number, depending on whether it was a pre-existing site. The next step would be to get a quote from a vendor in order to get a purchase order in place. At the same time, they would work through environmental and regulatory processes. Once all that was complete, the other groups could take action. Regulatory and real estate must be in place before the engineering and construction people could go to work. Real estate would be the last team with the deliverable before construction would start. If real estate and regulatory did not do its job, everything stopped and resources were wasted. All of the teams had goals to deliver their product.

In his role, he had the occasion to work with Complainant. Complainant sat a row over from him. He did not supervise Complainant and did not work with him closely on a day-to-day basis. He did attend meetings and oversaw projects that involved Complainant. They all generally worked together. They have had happy times together and he has been to Complainant's house.

Complainant was responsible for some LTE sites and sectorizations, along with generators and FTTCS projects. Complainant never got anything done. His

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<sup>22</sup> Tr. 569-637.

communication was poor and he did not attend meetings. They expected that if he was not going to attend the meeting, he would get with the other teams and share his information through updating his trackers. Complainant was always lagging behind by months on his commits. Timelines that should have been three, four, or five months turned into nine, ten, or eleven months. That stopped everything else from proceeding.

Eyler was Complainant's manager from 2011 to the middle of 2012. For the first four months in the job, he was getting up to speed and figuring out where they were. He didn't have any conversations with Eyler about Complainant in 2011.

In 2012, he had multiple discussions with Eyler about Complainant. They talked about how Complainant was behind in committing money, getting vendors in place, completing real estate tasks, not attending meetings, and not giving good updates prior to meetings. Complainant had a lack of communication, teamwork, and progress. At one point he told Eyler the same thing he told Luecke, which was that Complainant needed to be put on a PIP. Complainant was putting the entire network team in a bind and at risk of missing goals. He believes he would have sent Eyler memos or emails about Complainant, but does not have copies of any. He had those discussions with Eyler all the time, since they sat a few cubes away from each other and regularly attended the same staff meetings. When he would ask Eyler why they were behind, Eyler would respond that he was working on it.

Everyone else within the network community had their trackers on the shared drive. That allowed everyone to pull out information and determine what was going on. Complainant always kept his tracker on a private computer so no one else could see it. They would never be able to get the information they needed. At one point Complainant brought his computer and tracker to a meeting about generators. Complainant's tracker was huge, because he was tracking so many things. He thinks there may have been 100 columns and they were trying to find out where the projected completion date was. Everyone started laughing because that data ended up being in column BS in a system that goes from AA through AZ, BA through BZ, and so on. The tracker was not filled out very well and was missing dates and vendors. He promised at that meeting that he would have everything updated within the next week and put it on the share drive. That didn't happen. He thinks that occurred around the third quarter of 2012.

One of the managers assigned to the generator projects was frustrated all the time. One Friday, he was trying to get an update from the manager and they called Complainant. Complainant answered that he was on the golf course with a vendor, but would get the updates back to them.

RX 13, page 3, is a chart from the capital person responsible for budget moves. The chart reflects that they were three days away from the end of the month, but were still \$1.2 million short of their spending goal for the month. That report goes to essentially everyone in engine network engineering. They were allocated to specific budget for the year and were supposed to be able to spread their spending out over twelve months. If a region fails to spend its money, the money goes to other more effective areas. It also

means they won't be able to execute their projects, because they won't have any money. That means they wanted to at least get the money committed as quickly and early as they could. It was important to create the purchase order and commit the money. Then they could get the work started. Committed money could not be relocated to other regions.

The columns on the chart on RX 13 show the manager, the manager's total budget, the manager's amount spent, and the amount committed. A purchase order is considered an open commit until the work is done, at which point it becomes spent. The real estate managers on the chart were Luecke and Eyler.

The chart shows that Luecke's budget was \$11.1 million and Eyler's budget was \$8.9 million. However, the chart showed that Luecke had already spent \$5 million and Eyler had only spent \$1.4 million. Moreover, Luecke had opened commits of \$4.6 million and Eyler only had \$2.2 million. Consequently, the total for spent and committed for Luecke was \$9.7 million and for Eyler only \$3.6 million. Eyler was the lowest in engineering, which was not a good sign for the rest of the teams since they relied on him. She was at 86.7% and he was at 41%.

All that data indicated that Luecke's team was performing very well and Eyler's team was not. None of that indicates that Luecke was doing anything improper, just that she was getting her work done. He's not aware of any one who had to come in and correct any mistakes made on her projects because of the failure to do environmental compliance.

In 2013 one of their environmental staff discovered an issue on a site in Louisiana, which prompted them to conduct a larger audit. As part of the audit they ended up ripping out two generators that Complainant was supposed to have completed the lease and environmental on. Because of some residual environmental issues, they had to remove that equipment. Those were the only two problems he was aware of.

At the time, he believes Luecke had two employees and Eyler had four. The other two besides Complainant and Towery were Tiffany Redman and Leeann Henson. Redman worked regulatory more than real estate. Eyler had the authority to move his staffer around to work on different areas. He would be more likely than Eyler to know who Eyler had under his supervision. Because of the differential in team size, he moved some FTTCS projects to Eyler's team. Complainant was on Eyler's team and this is the same period that he was having ongoing discussions with Eyler about Complainant's performance. He does not know specifically if Complainant met his performance goals for 2012. Based on his performance, he doesn't think Complainant could have.

Finally, Luecke took over all real estate. At the time, he told her she had a lot of work to do to get the West team to perform as well as the East team. They had that conversation consistently. Luecke said she was going to learn the team and figure out what's going on to make it better. Luecke's West team did start to improve, except for Complainant. He's not aware if Luecke put Complainant on a PIP.



RX 17 is about a tracker that they created and put on the share drive for him to use. It was designed to make it easier for him to get his updates into the shared drive for others to see. He also asked Complainant to make sure that Complainant attended the conference calls and communicated. They took those steps because Complainant wasn't providing any tracker updates or any other communication. RX 17 also mentions a telephone meeting concerning one of Complainant's projects that Complainant missed without providing any advance notice or information. It was an important LTE project that could not be accomplished without the FTTCS work getting done. That was not the only meeting Complainant missed; he missed lots of meetings.

At that point he believed the problem was serious enough to involve Luecke's boss, Narij Patel, the Director of Network. It wasn't about just one missed meeting. He had talked to Complainant throughout the year about the same kind of problems. Complainant's response was always that he was working on it and getting his tracker updated. However, they never saw updates on the tracker.

In his fourteen years, he saw generator projects being completed in around four months. Some had environmental issues and other problems that might take longer. However, as long as they got money committed and site acquisition rolling and worked with the tower owners, they would be good to go in four months. For 2012, they had 314 generator projects. Of those, the East had 171 and the West had 143.

He would say that at least 70% of the 210 generator projects they completed in that four-month time frame were done in four to five months. Of those 210, the East region had 171 and the West had 43. The West goal was around 70 to 80, he thinks. They had brought in contractor help to try to assist the West to complete its projects. He doesn't know how many of the 43 generators completed by the West were done with contractor help. As an entire area, including both East and West, they did meet their activation goal, but did not meet their real estate goal. They had another 400 generators to do in 2013.

CX 21 indicates that doing 49 generators in December 2012 allowed them to meet their goal. However by falling short of their real estate goal, they had absolutely nothing ready to go for installation in 2013. The fact that they didn't meet their generator goal until the very last day of the year indicates that they were working from behind because of real estate problems.

If Complainant was assisting Luecke on some projects in the East region, it should not have impacted spending in the West, because the way the reports are polled is all based on buyer. Anything that Complainant would have created a purchase order on would've been credited to Eyler.

He's not aware of any licensing requirements for site acquisition vendors. Respondents sourcing team is responsible for vetting vendors. The vetting process is long, around six months. His understanding that real estate would have been working with vendors that all had become part of the MSA. Those vendors would've all been vetted through legal sourcing.

He believes the bidding threshold was \$10,000 in 2011 and 2012. However, the single site work for real estate was usually less than \$10,000. Major projects were broken out into various geographic zones and bid that way. Real estate vendors were normally anywhere from \$3,000 to \$5,000. Construction modification projects would run around \$100,000 and new construction would be around \$450,000. Those projects were virtually always bid. A vendor to do an entire LTE city at once would be bid, but a generator is a small thing and would not be bid.

He never heard of anything about a relationship that Luecke had with Charlie Craig. He's not aware of her having any ownership or financial relationship with Charlie Craig. He's not aware of any financial impropriety relating to Luecke, Charlie Craig, or other vendors. Complainant never raised any complaints to him about Sarbanes-Oxley, Charlie Craig, vetting, licensing, purchase order processing, or compliance in general.

***Sandra Loughridge testified at hearing in pertinent part:***<sup>23</sup>

She currently works for Respondent as Senior Manager of Network Assurance. She has been doing that for three years. From June 2012 to 2015, she was a Budget Manager. As Budget Manager she was responsible for making sure purchase orders were cut and tracking expense and capital budgets. She interacted with all of the operations teams in the network department. Her team directly made sure that the other teams cut all of the purchase orders and worked all of the reports for open commits. They received financial information from teams, including real estate teams. In 2012 she did have experience with Complainant.

Once a purchase order is cut, it goes onto the open commits report and stays there until the work is completed and the vendor is paid. The purchase order is supposed to be on the report for up until 90 days after the due date, which is assigned by the buyer. Complainant was the buyer, if he opened the purchase order. The problem was that Complainant's open commits consistently ran beyond his ninety-day due dates, causing a problem for her staff. She had seven employees working for her on the capital side. They would be considered Complainant's peers and would interact with him on a day-to-day basis. If they couldn't resolve issues by working with Complainant, they would escalate those problems to her. It was common that they did so in Complainant's case.

Shortly after she took over the budgeting job, Eyler left. She did not talk to Eyler about Complainant. However, she talked to Luecke on multiple occasions and explained that they were not getting updates from Complainant on his open commits. Her team would email him, but not get any responses. There were more problems with Complainant than the other Real Estate Specialists.

RX 17 shows an email exchange where one of her team members had asked for information and escalated it to her. It reflects that he was two weeks overdue and the team member was not getting a response. She sent an email to Complainant and copied

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<sup>23</sup> Tr. 637-664.

Luecke. Complainant responded on a Friday that he would get the information on Monday. However, she had to ask for it again on Tuesday and again copied Luecke. If reports are late, money can't be spent and will be moved to another market.

RX 13 is an email from Rebecca Capt with a capital spending report. They generated that report every day. The report indicates that Eyler was behind, not that Luecke was doing something nefarious.

Complainant never mentioned anything to her about Luecke engaging in any financial impropriety. He also never said anything about Charlie Craig, licensing, or budgeting, except for his open commits. At one point she did go to Complainant and asked him why he couldn't get his open commits completed. Complainant said he could use more training. They set up training for him, but he did not show up. She escalated the issue to Luecke, who set up a second training class that he did show up for. The training was set up for him, but they invited everyone from the entire real estate team. Complainant was the one who was chronically late and needed more training.

***Jana McLelland (Luecke) testified at hearing in pertinent part:***<sup>24</sup>

She has almost 20 years' experience in telecommunications and started in the industry working on the tower side. She had ten years with Respondent and another four as a contractor. She started working for Respondent in 2008. She left Respondent in early 2017. She now works for Hope Burch consulting. They do consultant work for telecommunications. They have no contracts with Respondent.

The contractor she worked for was Charlie Craig, who was one of Respondent's vendors for site acquisition and part of the Master Services Agreement. When she worked for Charlie Craig, she was involved in the Kentucky, Indiana, and Ohio markets. She never did any work in the Gulf area. While she was working for Charlie Craig on a Kentucky project, her supervisor, who was an employee of Respondent, was out on an extended medical leave. She moved her up to fill that role as Real Estate Manager, even though she was still a contractor. When her supervisor came back, Respondent was interested in bringing her on as an employee. However, they didn't have an opening in that market and offered her position in the Gulf Coast region. It wasn't uncommon for Respondent to hire contractors. The contractors were very familiar with the work.

She has never had any ownership interest in that company and never received any compensation from them after she stopped working for them. She never received any money from them while she was working for Respondent and had no financial interest in the company while she was working for Respondent. RX 29 is the conflict questionnaire they had to fill out as employees of Respondent. Page 2 shows that she did say she had accepted compensation from Charlie Craig, but that was because she had moved from being a contractor to working for Respondent that year.

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<sup>24</sup> Tr. 666-739, 752-930.

In 2008 or 2009, she was contacted by Respondent's Corporate Security about a listing on a website from the Kentucky Secretary of State that indicated she had filed for a business license on behalf of Charlie Craig and Associates. That was prompted by somebody walking by and slipping the website page under the door. Corporate Security flew out and interviewed her. She explained that the filing was because she had her office in Louisville and the company was conducting business there. She was not an officer of Charlie Craig, but only an employee. Corporate Security said there was no problem. She never thought about it again until later and had no reason to think it had anything to do with Complainant.

When she joined Respondent, the real estate management structure for the Gulf Coast was divided into East and West. She came on as the manager of the East. At the time she thinks Gary Critchlow may have been the West manager, but Jeff Foley took over quickly. There were five or six different managers on the West side while she managed the East side.

She doesn't recall if Complainant was in the West side when she came on. She does recall that at some point he was in the real estate group. There were occasions where work crossed from one region to another and her team would work directly with Complainant.

She got a lot of feedback from her team that he wasn't getting information to them, wasn't available for meetings, and wasn't contributing to the trackers. She recalls talking to Bernie Robertson, an Implementation Manager in the East, about Complainant. Robertson told her he actually gave up a position just to get Complainant off of his team, because Complainant was not productive.

Narij Patel was her boss and had a weekly Engineering Manager's meeting. Hal Navarre was his boss and had a quarterly Executive Director's meeting. She went to those meetings and would interact with Complainant's boss. They typically spent quite a bit of time going through projects at the weekly meetings, including a review of the status and financing. They discussed whether or not funds were going to be committed. Complainant's name came up a lot as being non-communicative, missing meetings, and not providing updates.

They were working on converting sites to fiber and her team needed some help. They had a contractor helping, but the contractor was unproductive. Eyler offered up Complainant, but her staff said they'd rather just do it themselves than have him involved. Navarre told them they had to use Complainant and Complainant became responsible for projects in both East and West. They ended up having problems with missing information and incomplete trackers. That would have been in early 2012 and is reflected in an email exchange in CX 10. Complainant was unhappy about the time frame he was given to do the projects.

Page 5 of CX 10 shows that Complainant also took on an additional project. Normally, if an employee had additional work assigned after the creation of the Performance Agreement, the additional work would be reflected in the midyear performance review.

Later in 2012, they consolidated the East and West Regions. CX 15 is an email showing that she took over managing the entire region. She does not recall Eyler's specific final day, but he worked up until the day they announced the consolidation of the regions and she took over. Patel told her that Eyler was leaving and she would be taking over real estate for the entire Gulf. He told her she needed to take a very close look at the projects and work on trying to fix some of the issues with the West team. He was concerned that the West team wasn't caught up with spending.

She started to look into what was going on in the West. She saw problems with commits and purchase orders. She saw a lot of projects were not being completed because they weren't in purchase order status. The vendors told her that they had been waiting for an extended period of time for purchase orders. She started having trouble figuring out the status of the project because trackers were not correctly up-to-date and completed. If she asked Complainant for a status he would send a tracker that was not the one the group was supposed to be using. Complainant would be the only one to actually know what was going on with the project.

Jason Leiker told her that Complainant wasn't filling in the tracker and providing input to project managers so that they could keep information up-to-date. Chris Windham told her Complainant wouldn't provide information to his team or ask a question when there was a problem in keeping a project from moving forward. In those cases where a delay was unavoidable, he would not share the information. She had already heard a lot of those comments in the weekly meetings, but they were now directed at her as Complainant's supervisor.

Once she became Complainant supervisor, she never had a chance to discuss Complainant's performance with Eyler before Eyler left. She had access to Complainant's personnel management paperwork and looked at his Performance Agreement and midyear performance review. She also met with him a couple of times.

RX 4/CX 7 is Complainant's Performance Agreement completed by Eyler for the 2012 calendar year. RX 2/CX 4 is his midyear review. She examined it online through a portal. She could see in her review that Complainant was not going to meet his performance objectives. She did not meet with Complainant personally to go over all of his projects and to get a real time update on their status. She tried to compare the goals in his agreement and review to the online trackers, but that didn't work because Complainant had failed to fill in his information.

She never took over Towery and Complainant's calendars, but did instruct them to make them accessible so she could track them. There was one occasion on which she apologized to Complainant and Towery for having said they had missed meeting, when in fact she had failed to invite them.

Complainant had been assigned 69 generators sites. Those were all assigned by Eyler. The vendors would tell her that they got projects from Complainant and Towery, but never got any purchase orders. The vendors asked her to help. She can't think of why there would have been a delay from May to July to obtain commitments on the generators. The funding was available in May. The goal for the last sixty of the generators Complainant was assigned was to have thirty by the end of August and another thirty by the end of September.

In the East, the typical timeline for a completed generator project was ninety days. Some were faster and some were longer if there was a wetlands or landward issue. Ninety days would be an industry norm. 20% might take longer and 20% might take less time, but 80% should be completed within ninety days. By assigning Complainant sixty generators in April, Eyler had given him four months to complete the first thirty and five months to complete the remaining thirty. Complainant was able to work on multiple generators at a time and the work is actually done by vendors.

After reviewing all the information about Complainant performance, she decided to go to Human Resources. Cecelia Lopez recommended a less severe action development plan, but she decided that the appropriate action would be a PIP. CX 17 reflects the meeting and Lopez's suggestion. Lopez was a temporary hire and not a full-time employee of Respondent. Respondent doesn't have a development action plan. It's essentially a PIP. She raised Lopez's suggestion to Patel, who said that Respondent doesn't have development action plans and they should use a PIP.

She met with Complainant about the PIP. He acted surprised and was very resistant. He complained that she did not understand what he did because she was not his supervisor. He said he didn't agree with his performance metrics or the goals and his midyear or Performance Agreement. She does not recall Complainant ever complaining that he didn't actually receive a midyear review, just that he didn't agree with anything she was saying.

She never told Complainant the only reason he was on a PIP was because she only become his supervisor and could not evaluate his performance. She did not tell him that she could not evaluate him because she did not know what he did. At that point she understood what Complainant was working on because she had done her research. She does not recall whether she asked him for a list of his current projects.

Her goal was to come up with a structured process to try to get things back on track. Complainant needed to attend meetings, be responsive, complete his trackers, and commit his funds. Since she had just recently come in as his supervisor, she asked him what he thought the dates and objectives for his performance should be. They went through the items and she had Complainant identify what the deliverable should be so they could get a plan in place to complete the projects. Complainant was the only employee she put on a PIP from that region.

The PIP was updated based on what Complainant thought he could do and then reissued to him. That PIP is RX 5 and dated 31 Aug 12. CX 8 is an email she sent to Complainant informing him about the PIP. It amended the goals to 45 generators by the end of September and 15 by the end of October, even though the generators had been initially signed in April and should have been done much earlier than that. She went through that document with Complainant. It references the midyear review, which indicated that thirty generators were to be done by August and thirty were to be done by September.

Complainant never mentioned that he had not had a midyear review. Complainant's Performance Agreement gave him a sectorization goal of 44 sites completed by the end of April. Only 36 of those sites had NTPs as of 21 Aug 12. The PIP also discussed improving time management, administrative, and communication skills. The PIP was sixty days.

RX 14 as an email exchange she had with Complainant in September 2012, while he was on the PIP. She had reviewed sectorization commits and saw there was money and purchase orders committed to projects that Complainant said could not be completed. She wanted him to either complete the project or make a request to kill the project, resolve the purchase orders and pay what they need to pay, and get the rest of the money back into the region to use on another project. Complainant also had problems with not ensuring vendors were being paid on completed work by advising accounting that the work was complete. She told him to check every day until he got it resolved.

Respondent has a policy against paying vendors for work they have not accomplished. On occasion that would inadvertently take place, but would be discovered in a subsequent audit and the responsible employee would be subject to corrective action. The vendor would also be cautioned. Complainant never told her he was concerned they were or might be paying vendors for work that wasn't done.

RX 20 was an email exchange in which her bosses were asking her for information from some stalled projects. She passed that task along to Complainant. However, the product he gave them wasn't anything near what they needed. She sent him an email on 19 Sep 12 indicating she had asked for it before, it was past due, and she needed it ASAP. Another email two weeks later asked for the same information. By 19 Oct 12, she was still waiting on the complete information.

RX 21 includes an email chain reflecting that she asked Complainant to provide information to another staff member. Complainant said he sent it to her, but the staff member said she didn't have it. This all took place at a time that he was on a PIP for being nonresponsive.

At the end of the sixty day period, Complainant had not met his goals for generators and was still having problems with communication, reporting, and attending meetings. Complainant blamed his failure to meet his goals on other people not getting their jobs done. However, he had never escalated that issue to anyone. Since he had not met the PIP goals, they decided to extend it. RX 8/CX 9 shows that they extended it into December.

They also brought in someone to help Complainant complete the generators. Those projects had to be completed. She still was trying to help him show that he could turn things around, attend meetings, be a team player, and be accountable. Kirti Guar was the HR employee who worked with her on the PIP extension. They met with Complainant to review the document.

By the time the extended PIP expired, Complainant was still performing in an unsatisfactory manner. She discussed the PIP with Patel, they had a meeting with Navarre and Gaur, and they made the recommendation to terminate Complainant. RX 9 showed that he failed to meet objectives, was late or absent from scheduled meetings, and was behind schedule. RX 10 was a tracker she started keeping on Complainant to monitor his performance while he was under the PIP. She attached it to the request for the termination.

Failing to meet metrics were not the only reason for his termination. He was also unaccountable and that led to lots of complaints about him from other people in the office. For example, after the hurricane over Labor Day weekend, she needed to have everyone work extra hours to provide coverage. Complainant refused to do the extra hours, telling her that he was in trouble anyway so why should he bother to do something extra. Complainant also refused to sign the PIPs.

It is not true that she wrote up Complainant for conducting an audit of Jeff Nyhus and only identifying items not in compliance with regulations. Nor did she place that in his PIP.

She recalls that sometime in 2012 she interviewed an engineering vendor out of Seattle called Camp and Associates. She doesn't recall Complainant ever saying he was refusing to use them because they weren't licensed to perform real estate work or refusing to have his name listed with any purchase orders from them.

She doesn't recall telling Complainant on 5 Nov 12 that she wanted him to use a specific vendor for the FTTCS project or that Complainant ever objected to having his name associated with any vendor that was not properly licensed. All vendors had to be approved by Sourcing. She relied on Sourcing to determine whether or not a vendor has the appropriate licensure. That's part of their job. If they determine the vendor requires additional licensing, the process takes a very long time. Respondent has law firms that oversee every single lease executor entered into by Respondent. She is not aware of Complainant or anyone else raising the failure to have a license as an issue. She doesn't think Charlie Craig ever performed services in the State of Texas and has no idea why it would need to be licensed in Texas.

On 27 Dec 12, she had an email exchange with Pat Towery. The point of the email exchange was to try to make sure they spent all of their budget for the year. If there was a purchase order that could be executed and invoiced by the end of the year, they wanted to try to do that. That could only happen if the work was actually done. Sometimes that



might mean moving a project that was scheduled for 2013 up into 2012, if it could be executed quickly enough to spend the money.

On 31 Dec 12, after consulting with Patel and Navarre to discuss Complainant's shortcomings in his communication and teamwork skills, along with his failed metrics, she submitted a request to HR for Complainant's termination. CX 24 is a termination form. She doesn't recall if there were any other supporting documents. She submitted it electronically. CX 22 is a document that was also submitted to HR with a termination date of 9 Jan 13.

She was unaware that Complainant had ever made any complaints about her relationship to Charlie Craig. He never complained about her using Charlie Craig. Charlie Craig worked primarily in the East Region, so Complainant would not have had much opportunity to be involved with that. She doesn't recall any instance in which Complainant approached Eyler and said something about the East spending West money on Charlie Craig. Up until the point that she fired Complainant, she had never had any conversations with Uriarte about any complaints he may have made about her. No one ever complained to her about using Charlie Craig. She made sure and cleared that with her leadership before she ever brought Charlie Craig in. She was unaware that Complainant had ever made any complaints about bidding, licensing, or any other impropriety that she may have engaged in.

The first time she had any indication that Complainant had raised any issues was after they delivered the termination and were escorting him to box up his things. Complainant looked at her and asked if it was because he filed a complaint about her.

She never went over to Complainant's desk and took a notebook with information relating to his investigation of Charlie Craig. She doesn't recall ever seeing Complainant's computer having anything related to an investigation of Charlie Craig on it.

Andrew Sellinger had an A&E firm that worked for her in Kentucky. When she came to work for Respondent in Louisiana, she changed out a number of vendors. Sellinger had a good record and she used them to do some work. She never had any financial incentive or other arrangement with Sellinger.

All of the vendors that she worked with in the real estate group were parties to the MSA, and not subject to the requirement for bidding. Most real estate projects were under \$5,000. She does not recall Towery bidding out every real estate project she ever did after 2010. CX 26 reflects the bidding requirements. It indicates that purchases of \$5,000 or more would have to be bid out as of 1 Jan 11. However, she does not recall that that's how they actually did it, since it didn't apply to vendors on the approved MSA. As far she knows, all of her real estate services work was purchased pursuant to the MSA. Sometimes a project would be split into multiple purchase orders to enable them to match the rollout time. That might result in taking the entire contract price beneath the

threshold. No one ever complained about splitting up contracts to put it below a bid level. She was not aware that Eyler required everyone to bid out every project.

Respondent's policy was that any project involving moving real estate required an environmental impact. A generator project would be such a project. Respondent's policy is that any time an antenna was installed, there had to be a regulatory review from the FCC and if the height changed there had to be an FAA review. Typical agency review periods were about 90 days. However, other work could have proceeded on the project while they waited for regulatory review. On the other hand, if the project simply could not be completed, it needed to be stopped so the money could be used for another executable project.

*Niraj Patel testified at hearing in pertinent part:*<sup>25</sup>

He has worked for Respondent since 2005 and is the Director of Network Engineering. He is responsible for wireless network infrastructure buildout. In 2012 and 2013, he was Director of Network Engineering for the Houston Gulf Coast Region. He had about seventy employees under his direct or indirect supervision. His direct reporting managers were Jeff Eyler and Jana Luecke. Eyler had the East Region and Luecke had the West.

In the middle of 2012, they decided to consolidate the regions under one manager. Luecke consistently provided solid results. Eyler's results were generally lacking in comparison to the other region. Luecke's performance and results were a step ahead of Eyler's. Luecke's region was not out performing Eyler's region because of any failure to follow regulatory requirements and rules about sources and bidding. Based on performance, and after consulting with Navarre, he elected to give the consolidated manager job to Luecke. Eyler was let go in late July 2012. Complainant was part of the real estate team and reported to Eyler until Eyler was let go. Then he reported to Luecke.

He was looking at overall region results and at the time they consolidated the regions, told Luecke to find out what the problems were. Based on what Luecke discovered, she came to him, and they decided to place Complainant on a PIP. Cecelia Lopez was the HR adviser at that point and wanted to implement a tool that would help Complainant.

Even before that, he had been made aware of Complainant's performance deficiencies by Eyler. He had also reviewed Complainant's midyear review. He can't differentiate between CX 4 and CX 5 as to which specific one he would've looked at. Based on what he had known about Complainant, he wasn't surprised that Luecke wanted to implement a PIP.

He also had other feedback from other managers in other functions that they were not getting what they needed from Complainant. He got that feedback during his weekly managers meeting. That feedback started mostly in the second quarter of 2012. He received that feedback from Sandra Loughridge, Jason Leiker, and Mark Nyhus. Their feedback was verbal and not in writing. It was in the context of them explaining why

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<sup>25</sup> Tr. 1010-1088.

there were delays and stating that Complainant had not provided the required information. He was also generally aware of the lack of progress through the way money was being spent. He also had access to the trackers to show him how projects were progressing.

He recalls one specific area in which Complainant's performance caused the problem, generators. Complainant's region significantly under performed. However because the other region performed way above expectations, the entire gulf area met its goal for 2012. They did it at the last minute, but it did prompt him to send out a congratulatory email at CX 21.

At the end of the PIP, he, Luecke, and Navarre, who was his Executive Director, evaluated Complainant's performance history and decided to terminate Complainant. They consulted with Kirti Gaur from HR and she concurred. That discussion took place in December of 2012.

Complainant never came to him to object that Luecke was asking him to utilize unlicensed vendors in Texas. Complainant never mentioned conflicts of interest or breaking and violating rules and regulations of Federal regulatory agencies. Complainant never came to him to complain at all about the propriety of anything being done by Respondent. He was never made aware of an investigation conducted by Corporate Security on a member of his staff.

He was not aware that Complainant had made any objections about vendors being unlicensed or Luecke failing to follow bidding procedures, or any other issues about Luecke. The first time he found out Complainant had made any complaints about Luecke was in the context of this trial. Complainant never came to him to object to Luecke's use of an unlicensed vendor named Camp and Associates.

He is familiar with a vendor named Charlie Craig. He does not know how much business Charlie Craig has done with his division. Charlie Craig was part of their MSA and would not have to have had to bid all of their projects. Vendors did not have to be bid if they were either part of the MSA or approved as sole sources. He doesn't know what Luecke's approval level was for contract value. He could approve up to \$500,000. Respondent does not pay vendors until the vendor has performed the work. He's not aware of any vendors that were paid for undone work in 2012 or 2013. No one ever made any complaints about that to him.

***Harold Navarre testified at hearing in pertinent part:***<sup>26</sup>

He has worked for Respondent for almost 30 years. His current position is Executive Director of Network Engineering. He is responsible for Respondent's network in Ohio, Michigan, Indiana, Kentucky, West Virginia, and half of Pennsylvania.

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<sup>26</sup> Tr. 1091-1139.

In 2012, he was the Executive Director for the Houston Gulf Coast Region. In that job he had about 300 employees and 40 to 50 direct contractors. He had an engineering director, Niraj Patel, who was responsible for real estate work. The real estate function was divided into an East and West Region. At the beginning of 2012, Luecke was the East manager and Eyler was the West manager.

They made a decision in 2012 to consolidate the two real estate areas. Luecke had better results and her team was out producing Eyler's team. Consequently, he and Patel elected to have Luecke take over the consolidated region and let Eyler go. That happened in the middle of 2012.

He knows Complainant and is certain that at some point he had passing conversations with him. He wouldn't be aware of Complainant's performance in 2008 through 2011 and never reviewed any of those performance documents. If an employee was doing satisfactory work he probably wouldn't be receiving information on that employee.

Through the first part of 2012, he became aware that Complainant was under-performing by way of his general operational meetings. He would ask why projects were slow in Eyler's region and in many cases the problem was within Complainant's responsibility. That information came not just from Patel, but from other managers and leaders in the business area. Eventually, Complainant was placed on a PIP. He wasn't involved in any of that, although as a higher level manager, he was in the loop that an employee was on a PIP.

Some of the real estate projects and generator projects they do require environmental study. He doesn't know the timeframe for an environmental study, but 120 days sounds reasonable. Other issues might take even longer for a specific generator. He doesn't know which, if any, of Complainant's projects that were identified as delayed required an environmental study.

His understanding was that Complainant didn't do any new build generators in 2012. A generator replacement with the shelter swap does not always require regulatory review.

In 2012, the West had a low generator completion percentage and in order to make the overall region goal, the East had to make up for it. However, they really needed the generators more in the West, so although they met their overall Gulf Coast goal, they failed to put the generators where they were most needed.

He does not know who John Quick is and does not recall Quick sending an email in 2012 saying they were at 100% on generator installations. He knows for a fact that Complainant did not complete all of his generator projects for 2012. He knows that from the project meetings and from Patel and Luecke. CX 20 is misleading because it doesn't have sufficient context to determine how Complainant was doing in the longer run. Based on a review of RX 8 and CX 20, it appears that even though Complainant completed 11 for the month of November, the goal was 15. That was not a terrible miss, but it was still a miss. It may be true that an additional seven were waiting on a signature, but it was

ultimately Complainant's responsibility to get that signature in a timely fashion. That was part of Complainant's job.

The decision to terminate Complainant was ultimately his, but based on the recommendation of Luecke and Patel. He made that decision at the end of 2012. He doesn't know what Complainant's last day of work would have been. They don't take firing someone lightly and had a meeting to discuss his performance. They talked about his results, how he was trending, how long he had been having problems, and what happened on the PIP. They also talked about how he was communicating. They discussed his performance numbers, not month by month but for aggregate over the year. They said he was woefully behind. He doesn't recall the specific numbers that supported that.

Luecke and Patel brought documents with them to the meeting where they discussed terminating Complainant. He did not review the documents himself, but relied on the verbal representations of Luecke and Patel and his knowledge of the lack of results in Complainant's region. They did not discuss Complainant's previous performance since 2008, but focused on 2012. He assumed Complainant had a Performance Agreement for 2012, since it was standard for all employees to have one. He did not review the Performance Agreement. He wasn't sure whether Luecke or Eyler issued the PIP. He was aware that they had extended the plan. In the normal course of business, there would have been no reason for him to review Complainant's midyear review. He would only look at the reviews of his direct reports.

Terminating Complainant was the last resort, but it was a unanimous decision. Kirti Gaur from HR was also in the room. She was there to make sure that they had followed the correct process and done the right things procedurally.

He doesn't know who Cecelia Lopez is and doesn't know anything about any communications between Complainant and Lopez. He doesn't know anything about any recommendations or comments Lopez may have made to Patel or Luecke. He has never seen CX 3, CX 17, CX 18, or CX 21.

Complainant never complained to him and he was not aware of Complainant complaining to anyone else about the workplace, using unlicensed vendors, Luecke having ownership in Charlie Craig, or failing to follow bidding processes. He was also not aware of any conversations between Complainant and Uriarte.

He's been interviewed by Corporate Security a number of times about various things over the years. He was never contacted by Corporate Security about any complaints Complainant made about financial mismanagement, licensing, or utilization of unlicensed vendors. He wasn't aware of any Corporate Security investigations related to financial fraud until he was informed about this litigation.

***Kirti Rosa (Gaur) testified at hearing in pertinent part:***<sup>27</sup>

In 2012 and 2013 her last name was Gaur. She is employed by Respondent and has been with them since 2006. She works as a Human Resources Consultant. During 2012 and 2013 she supported the network group in the Houston Gulf Coast Region. At the time, her HR manager was Uriarte. She was on special assignment managing the closure of a call center from March to October 2012 and did not work with the network group. Cecelia Lopez was a temp hired to take her place during her temporary absence.

When she returned in October 2012, Lopez told her that Complainant was on a PIP. Lopez mentioned that she was going to go to Patel and see if they could do something other than the PIP.

She was involved in meetings with Luecke and Complainant through October and November. She also had the opportunity to review his Performance Agreement and midyear review. Respondent's policy is that a midyear review should be signed by the supervisor before it is signed by the employee. The supervisor creates and signs the document, sending it to the employee. The employee then has the opportunity to do a self-assessment, sign it, and return it to the supervisor. The supervisor then completes the review and signs it.

Complainant did not submit any self-assessment in his 2012 midyear review. CX 4 indicates that Eyler released the review to Complainant on 16 Jul 12. It appears that Complainant signed it on 27 Jul 12, electing to file no comments. CX 4 and CX 5 have different date formats, even though they are supposed to be the same document. Only someone with Complainant's credentials and log on would've been able to complete the signature block for those documents.

At some point, the PIP was extended to the end of November. During the meeting in which they decided to extend that period, they talked about the progress that Complainant had made and the still open expectations that he had yet to fulfill. They discussed objectives and decided that he needed additional time. He was allowed additional time to see if he could meet expectations. They discussed possibly terminating him, but wanted to give him another opportunity.

Complainant stated that he was overwhelmed with conflicting priorities and could not be in two places at one time. They did modify some of the goals based on that. Complainant did not always understand what needed to be done and was told that he should go to Luecke if he was confused. Complainant said he did not want to bother her, since she was busy. Complainant never objected that his objectives were unreasonable or inaccurate. Her impression was that the objectives were clear. She did not believe Complainant provided any explanation that would've excused his inability to meet the objectives. He never complained that he was not getting credit for projects that actually had been completed or deadlines that he had actually met.

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<sup>27</sup> Tr. 933-1009.

RX 8 is the extended PIP that they reviewed with Complainant. He never complained that the objectives in the 2012 Performance Agreement were inaccurate. He never complained that he had not actually received a 2012 midyear review. CX 18 refers to revisions that were going to be made in the PIP.

At the conclusion of the extended PIP, she was involved in a meeting with Luecke, Patel, and Navarre. They reviewed Complainant's overall performance, his midyear review, his original PIP, and extended PIP. She does not recall if they looked at his Performance Agreement, although she reviewed it prior to the meeting. They also reviewed other documents. The purpose of the meeting was to discuss Complainant's progress on the PIP. They determined that Complainant had not been able to meet his objectives and was demonstrating the same deficiencies in terms of missing deadlines, being unresponsive, and not communicating. Luecke, Patel, and Navarre recommended termination for poor performance.

She agreed with their decision to terminate. In making those kind of decisions as an HR manager, she doesn't simply rely on what the supervisors had to say. She also relies on an independent review of the source documents and any explanation or information provided by the employee. She doesn't examine every exchange between an employee and a manager. She doesn't recall having seen CX 20 or RX 10 before today. She doesn't recall if she saw CX 16 before the termination meeting. She did receive CX 18 before the termination meeting.

Normally, employees receive an annual performance review in January or February for the previous year. Complainant did not receive a review for 2012. She has never heard of a development action plan. The PIP is the only tool Respondent has to formally address performance deficiencies. RX 9 is the termination request. RX 10 was documentation that Luecke provided to substantiate Complainant's performance was available to her for review at the time.

At no point was she aware of any complaints made by Complainant about Charlie Craig, about unlicensed vendors, or about following bid processes or any other type of financial impropriety or irregularity. She has no reason to believe Complainant was terminated for anything other than his poor performance.

***Tiffany Uriarte testified at hearing in pertinent part:***<sup>28</sup>

She is Senior Manager of Human Resources for Respondent. She provides HR business support for the network organization. In the beginning of 2012, she was the Human Resources Manager for call centers in northern California. In October 2012, she changed roles and began supporting both the West and South areas. That included the Houston Gulf Coast region. She knows Complainant. He was a Real Estate Specialist in the Houston Gulf Coast area.

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<sup>28</sup> Tr. 1140-1203.

In November 2012 she received a complaint from Klawinsky about general workplace environment issues in the treatment of some employees. Klawinsky recommended that she speak with Complainant. She scheduled a telephone meeting with Complainant and spoke with him on 19 Nov 12.

Complainant was a little bit all over the place in expressing his concerns. The bulk of his complaints were actually related to favoritism. He was not happy with the new manager that had come in and was unhappy about the work environment. Complainant talked a lot about conflict of interest and he mentioned he was on a PIP.

His concerns about the PIP were more related to process as to substance. Complaint was unhappy that he had been given the PIP only three weeks after his manager had taken over. He also mentioned that the PIP had been revised three times. He described it as an interactive process. They didn't talk much more about the PIP.

Complainant never mentioned not being given a midyear review or anything about it being unfair. Complainant said that Eyler was fired because Patel wanted him put on a PIP and Eyler refused to do that.

Complainant mentioned a number of managers in the department and conflicts of interest. He said that he had filed a compliance complaint. He specifically called out Luecke and alleged that there was a conflict of interest because she was a part owner of Charlie Craig. Complainant thought Luecke owned Charlie Craig and was giving them too much money. While they were on the phone, he had her pull up a website where it showed something related to Charlie Craig that had her name on the page. She thinks it was the Secretary of State website, but is not certain. Complainant also mentioned other companies that he thought were affiliated with Charlie Craig. Complainant was unhappy that Navarre favored Luecke and favored employees that she had hired over employees who had been working there previously. He also expressed his concerns that the East and the West didn't do things the same way.

She never told Complainant that she would protect him. She told him she would pass along his concerns to the appropriate people, including Corporate Security. She likely also said that Respondent does not tolerate retaliation and employees are encouraged to report retaliation.

After their conversation, she spoke with Gaur, who was the local HR and much closer to the situation than she was. She asked Gaur for the history of the real estate team and any concerns that Gaur was aware of. She never mentioned Complainant or Klawinsky, but just inquired in general. In the course of their discussions about problems in the office, Gaur mentioned that Complainant was on a PIP and that there had been some revisions as his manager worked with him through it. Gaur indicated she had been involved in some of those conversations. Gaur forwarded her the PIP documents.

Her review of the PIP documents indicated that the process had been fair, especially given Complainant's acknowledgment during the phone call that he had been told by



multiple leaders that there were performance concerns and that they were working with him. She had no concerns about the PIP.

She also mentioned the phone call to her manager and related Complainant's allegations about conflict of interest in Charlie Craig. Her manager told her there was an active investigation based on an anonymous compliance complaint that had been received. Her manager indicated that they had looked at Luecke and although Luecke had disclosed the relationship on her conflict-of-interest questionnaire, they were going to look at it further. Consequently she left that part of it to her manager and took no further action based on Complainant's phone call.

Gaur later informed her of a meeting she had attended with Luecke, Patel, and Navarre and the business leaders had determined that they wanted to terminate Complainant. Eventually, she received the written termination request from Gaur, along with some supporting documentation. They discussed what had happened with the PIP and Complainant's progress. She also called Luecke and discussed the same thing with her. Luecke conceded that Complainant had made some improvement and completed some projects but did not completely fulfill the PIP and had outstanding deficiencies with regard to his performance. She did not review the November email from Luecke to Complainant requesting updates. She did not review CX 16, 17, 18, or 20.

She consulted with Employee Relations who agreed that the process was complete and adequate. She also rechecked with her manager to see if the investigation was complete. The manager said that Corporate Security had concluded their investigation and found nothing to substantiate any of Complainant's allegations. Based on all of that, she supported the decision to terminate Complainant. She shared that with Gaur and Respondent was able to proceed with Complainant's termination. She never discussed Complainant's telephone conversation with Navarre, Patel, or Gaur.

She has no reason to believe that Eyler did not create the midyear review document. There is no way that that could be falsified. She did have one other employee who told her that she had been scheduled for a midyear meeting with Eyler and a midyear review document was pre-positioned with similar timing as Complainant. CX 4 and CX 5 have different titles because they are based on similar content but with the same template. There is a midyear review document, which is CX 4 and has only the midyear review and the comment specific to it. There is also a performance review document, which is the year-end document. That one captures all of the activity throughout the entire process. There are two different documents, the midyear says "in progress" because at the time it was in progress. CX 5 has no status because there was not a year-end review completed for Complainant.

The process starts with a Performance Agreement. When it's time for the midyear the data is automatically preloaded into the form, which is already defaulted to in progress upon completion of the Performance Agreement. Similarly, at the completion of the midyear, data is preloaded into the final annual review, which then shows in progress. That's why CX 4 says midyear review and CX 5 says performance review. The

documents are all password protected and it would not have been possible for Luecke to go and change data with Eyler's signature.

She never had any conversations with Luecke about Complainant's concerns about the workplace. Other than her supervisor, she never talked to anybody from Respondent about their telephone conversation.

She spoke with Complainant a couple of times after he was terminated. He sent her an email the day of his termination and sent another email the following day. The first time she called he was driving and couldn't speak. They ended up speaking with each other toward the end of January 2013. That conversation was the first time Complainant mentioned anything about concerns about licensing. Complainant never mentioned anything about the bidding process until after he had been terminated. She told Complainant Corporate Security had completed an investigation about Luecke and Charlie Craig.

***Julanda Midamba testified at hearing in pertinent part:***<sup>29</sup>

She has been married to Complainant for almost 17 years. They have one child, who is 11 years old. They lived in Houston. She worked at Kent State in Ohio for 23 years. It was a good job, so she stayed there even though her husband had jobs in other locations. They have had a commuter marriage since 2008, even before he started working for Respondent in Houston. He got hurt in May 2011 at a company picnic while working for Respondent. She had to quit her job and relocate to Houston to help him while he was out on Worker's Compensation.

She knows Complainant worked very hard and from what she understands, he was an excellent and exceptional employee. From what she knew, he was able to accomplish all of his objectives and goals. He never discussed being placed on a PIP with her.

She will never forget the day he was fired. She was in shock. After a few days they got a call from Uriarte, who was asking him for some help. She was mad at Complainant for helping Respondent after they had fired him.

He could not find a job in Houston. Eventually, Complainant was able to get a job through a friend. The job was in Connecticut and only paid \$9,000, which was not enough money for them to live on. Then, the next September, he obtained a position with the company in Virginia. Having the job in Virginia required them to maintain two households and was very expensive, even though his residence in Virginia is very sparse. In 2013 and 2014 their finances were so strained that she couldn't get her hair done or pay for her medicine. She had to go to a food bank and had her utilities cut off.

Maintaining a long-distance relationship has been a great stress on their marriage. Complainant is always tired and unable to be a husband to her. She has no support system in Houston. Ultimately, he left the Virginia job and started working in San Antonio.

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<sup>29</sup> Tr. 307-322.

Complainant has an excellent relationship with their daughter, but he has not been around for many of her school functions and other events.

***Complainant's performance records show in pertinent part:***<sup>30</sup>

In 2008, Gary Critchlow gave Complainant an overall assessment of performing. He described Complainant as a very good Project Manager, focused on his projects. He noted he would like to see Complainant work better with team managers and understand his roles and responsibilities, along with understanding how the budget works and affects the group.

In 2009, Gary Critchlow gave Complainant an overall assessment of developing. He noted that Complainant needed to pay more attention to detail, attend meetings on time, be prepared, know the status of his projects, manage projects from end to end, escalate issues faster so he can get assistance, be clear in his emails in what he is asking his manager to do, stop over engineering projects, proceed with the sense of urgency, not leave meetings early, and focus on understanding how budgets apply to his job. Complainant's manager noted that other managers said they had a problem communicating with Complainant and he had met with Complainant twelve times to discuss performance issues, but on many of those occasions Complainant did not accept the constructive criticism.

In 2010, Eyler gave Complainant an overall assessment of performing. He described Complainant as a nice addition to the real estate team in Houston and noted that he looked forward to Complainant improving tracking and accuracy on the tracker.

In 2011, Eyler gave Complainant an overall assessment of performing. He cited Complainant for great work on additional revenue finds, but noted that none of the team's specialists have a good consistent record of tracking ongoing capital spending and commitments, which would need to improve in 2012. He noted that Complainant was mostly successful in getting NTPs by year-end for sites that did not required design changes late in the game. He was pleased with Complainant's accomplishments, especially in the first half of the year but noted that several weeks elapsed before Complainant escalated issues to him.

Complainant's Performance Agreement for 2012 included objectives of:

- Completing 80% of 44 real estate NTP sectorizations by 31 Mar 12 and 100% by 30 Apr 12
- Completing 50% of 59 sites for regulatory compliance by 31 May 12 and 100% by 31 Aug 12
- Completing 33% of 9 generator real estate NTPs by 30 Mar 12, 67% by 30 Jun 12, and 100% by 30 Sep 12
- Ensure an effective tracker and documentation for all regulatory tasks

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<sup>30</sup> CX-1-9, 22-24; RX-1-5, 8-9, 43.

In a midyear review for 2012, Eyler noted that although Complainant completed a lot of approvals, the process was disjointed and there continued to be confusion. He noted that Complainant needed to provide realistic tracking that was up-to-date and that the first six months of 2012 had been a challenge for Complainant with several missed objectives. He also reported that Complainant's success in FTTCS had been overshadowed by his failure to deliver on a few key sites that resulted from disjointed and unclear tracking. He also noted that Complainant let RF make changes very late in the process and didn't escalate the problem to his manager in a timely fashion. Eyler instructed Complainant that copying him on an email would not qualify as an escalation, which needed to happen face-to-face. He cautioned Complainant to stay focused on his operations plan.

On 31 Aug 12, Luecke placed Complainant on a 60 day PIP. She indicated she has discussed his performance with Navarre and Patel. She noted that he had failed to meet his objectives in a number of areas: (1) Incomplete NTPs for 51 FTTCS projects; (2) Incomplete NTPs for 30 generators; and (3) Incomplete sectorization NTPs for 36 of 44 sites. She gave specific deadlines for completion in those areas. She also directed Complainant to show significant improvement in the areas of time management, commitment to deadlines, responsiveness, and collaboration port resolution. Luecke further noted that when a due date could not be met, Complainant must inform her ahead of time in order to include other stakeholders in the process. She specifically instructed Complainant to acknowledge and respond to inquiries in a timely fashion. She also admonished Complainant to arrive to meetings on time and be prepared to participate, informing his manager when he would be unable to attend and obtaining a suitable replacement.

On or about 11 Oct 12, Luecke extended the PIP to 10 Dec 12. Noting that Complainant had failed to meet a number of the deadlines set in the original PIP, she adjusted and extended some of them. She noted that she had again discussed with Complainant the importance of responding to his coworkers and repeatedly asked him to provide advance notice if he was going to be unable to complete a task. Complainant responded that he doesn't always understand what she is seeking and doesn't want to bother her because she is busy. She further noted that Complainant had missed a meeting and failed to make other arrangements or contact the meeting organizer to advise of his absence.

Luecke eventually closed the PIP with a recommendation for termination and on 31 Dec 12 submitted a request to terminate Complainant. As a reason for termination, Luecke cited poor performance through an initial 60 day PIP and noted that even with an additional 30 day extension, Complainant was unable to meet his goals as shown in an attached spreadsheet. She noted that (1) although he was able to complete 39 of 40 sectorizations by 20 Nov 12, he missed his targets for 15 Sep 12, 15 Oct 12, and 15 Nov 12; (2) 18 out of a goal of 45 generators were completed as of the end of November; (3) during the period of the PIP, he was late or failed to show for 9 schedule meetings; (4) while he completed his goal of FTTCS by the end of November, that was still behind schedule. Guar reviewed the request on 2 Jan 13, noting that Complainant had been unable to perform at a successful level during the PIP and was being recommended for termination.

***Respondent's email records show in pertinent part:***<sup>31</sup>

Respondent's threshold for required bidding was \$30,000 as of 1 Jul 11; \$15,000 as of 1 Oct 11; and \$5,000 as of 1 Jan 12. Exceptions to the requirement for bidding included sole-source vendors and vendors providing services contracted as an explicit term and condition of an existing approved MSA.

On 18 Jan 12, Eyler sent Complainant his draft appraisal for 2011. Complainant provided his draft inputs on 24 Jan 12.

In March and April 2012, Complainant took over some FTTCS project work from Luecke's region.

On 10 May 12, Eyler reviewed the generator projects Complainant was working on and asked for more data for each one. Complainant responded with a spreadsheet providing the data.

On 29 May 12, Rebecca Capt sent Eyler, Luecke, and other managers a table with spending data showing a shortfall of \$1.2 million spending with only 3 business days left in the accounting periods and asking for spending projections. Patel asked for breakouts by manager. Eyler asked Towery and Complainant about the data. He noted that as lethargic as they had been in their spending, the numbers were suspicious.

On 11 Jun 12, Rebecca Capt sent Eyler and other managers a spending chart by manager and noted that the spending for June appeared to be low with 15 business days left and a gap of \$117 million. Eyler noted to Towery and Complainant that Luecke's team keeps "kicking their butts" every month and asked why they struggle so much to get projects completed and money spent.

On 12 Jun 12, Eyler explained to Christopher Windham that he had reviewed Complainant's tracker to identify sites in jeopardy for meeting objectives. He identified 494 sites in that situation and asked Windham to examine those sites and adjust target dates.

On 27 Jul 12 the employees were informed that the East and West would be combined with Luecke in charge, Eyler would no longer be employed, and Towery and Complainant would report to Luecke.

On 7 Aug 12, Luecke asked Complainant how many total sites in the West needed generators and how many of those was he currently working. Complainant responded that he had 94 total new sites that he had been given plus 6 that he had already NTP'd for a total of 100. He then stated that the project management team had a target of 69 for NTP by the end of the year.

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<sup>31</sup> CX-10-11, 13-21, 25-27, 38; RX-11-27, 30, 35, 37, 44-45.

On 6 Sep 12, Luecke informed Complainant, Towery, and others that she had not received timely weekly reports and asked for completion numbers for August. Complainant responded that he had completed one generator, seven sectorizations, and 20 FTTCS.

On 8 Sep 12, Luecke asked Complainant to explain why there are six sectorizations that are not completed and only one is going to actually be NTP'd as a sectorization, since there are many purchase orders outstanding indicating sectorizations. She directed that they be received on or canceled immediately, since they are tying up over \$300,000. Luecke told Complainant to handle it immediately and noted she had been asking for purchase orders to get scrubbed to fund other projects and to help make good their spending commitments. She instructed Complainant to be on top of his spending every day.

On 10 Sep 12, Complainant informed Luecke that all lines showing NTP in lease should have been invoiced and he would follow up with the vendors to make sure they had been received on. He indicated he had signed off on most of those in the past and did not understand why they were still showing on the open commits report. Luecke responded less than an hour later, instructing Complainant to scrub this daily to ensure they are resolved.

On 13 Sep 12, Complainant sent Cecelia Lopez a copy of a 24 May 12 email discussing open generators. The same day, Oona Jennings asked various managers, including Luecke, Complainant, Patel, and Loughridge for updated data. On 14 Sep 12, Loughridge pointed out to Complainant and Luecke that the information was two weeks past due, Respondent needed it to move forward, and Complainant should provide it ASAP.

On 18 Sep 12, Patel asked Luecke for information on non-transmit sites. The next day, Luecke asked Complainant for data. She noted that she had asked for it several times, it was past due, and she needed it ASAP.

On 19 Sep 12, Jason Leiker told Complainant, Luecke, and Patel that a week earlier they had created a tractor for Complainant to use, but he had failed to update any information in the tracker. He also mentioned that Complainant had failed to appear on a telephone conference and needed to start making sure someone was available to provide his updates. He noted that the project was the region's number one priority and Complainant must make sure his tracker was updated in providing information in a timely manner. Seven minutes later, Luecke asked Complainant if he had notified the project manager/meeting leader that he would not be attending or providing any updates.

On 19 Sep 12, Complainant followed up with Cecelia Lopez on the meeting he had with her and Luecke. He noted that they were debating whether the personnel action was going to be a PIP or some form of development action plan and was confused as to the outcome. He also asked about being paid for additional hours, noting that real estate was the only group that works long hours without compensation. Lopez answered the next day that she would follow up with him about the PIP and that his position did not qualify

him for overtime. On 20 Sep 12, Complainant asked Lopez if she was coming over the next day. Lopez later responded that she had.

On 3 Oct 12, Luecke asked Complainant for information that she had previously requested on 10 Sep 12 and 19 Sep 12, but with no response. She instructed Complainant to have the information available the next day, with no exceptions. The next day, Complainant responded that he would provide the information that day. A few hours later, Complainant sent Luecke the updates. Within an hour, Luecke told Complainant that she could not identify when projects came up for renewals and determine whether Respondent could abandon the lease. She also noted it would be helpful to have the tower owner's name. A few hours later, Complainant indicated he would provide the additional information.

On 10 Oct 12, Complainant followed up with Luecke and Gaur on the PIP. He asked if he would be provided a revised development action plan based on the revisions that they had made to the original PIP, such as the removal of FTTCS 60-75 day requirements. He also asked if the priorities on the PIP still apply, since projects and timelines had changed. He was concerned about being held responsible for a project that would not meet the launch date. He was also concerned that he would be held responsible for incompletions that were due to contractor Crown not doing their work.

On 15 Oct 12, Luecke told Complainant that she had asked him to provide information to another manager. She noted that the deadline was the next day and asked him to get it to her immediately. Complainant responded ten minutes later that he had already sent the information. Four minutes later, Luecke asked Complainant when he sent the information, because she just spoke to the manager, who said she did not have it. Twenty-two minutes later, Complainant sent Luecke and the staffer the correct information.

On 16 Oct 12, Luecke admonished Complainant, indicating that everyone in the conference room were waiting on him and even the people from out of town had arrived. Luecke added that the email was official written notice that he has to be on time for meetings. The same day, Complainant sent a NTP to another manager. The next day, the manager responded to Complainant that the NTP was not usable for a number of reasons, including unacceptable drawings and unclear scope of work.

On 17 Oct 12, Luecke asked Complainant about four specific sites related to the 15 Oct 12 request and sent a copy to the manager.

On 22 Oct 12, Luecke informed Complainant that she had not yet received answers to her 15 Oct 12 and 17 Oct 12 emails. After a response from another manager with a question, Luecke clarified to Complainant that she needed him to answer whether or not Respondent still owns those sites. Complainant responded with some data and asked if he could provide the rest by noon the next day. Luecke asked Complainant not to go any later than the next day, because she had owed that information to someone else almost a week ago. Complainant provided the data to Luecke by email at 6:06 PM the next day.

On 19 Nov 12, Luecke told Complainant she was still waiting on the information she had requested on 4 Oct 12. The same day, Uriarte introduced herself to Complainant and asked to check in to see how things are going in his location.

On 4 Dec 12, Luecke asked Complainant for updated completion statistics so that she could close out the PIP. Complainant responded that the final sectorization had a NTP on 20 Nov 12, seven generators were held up pending Han's signature, and November generator NTPs were eleven.

On 31 Dec 12 at 7:57 PM, John Quick congratulated the region for achieving 49 generators during the month of December and reaching 100% completion for 2012. At 12:00 PM the next day, Patel added his congratulations.

On 10 Jan 13, the network coordinator sent Complainant a list of purchase orders and items that were closed by the buyer and needed to be cleared. On 14 Jan 13, a team leader responded that the PO had not been invoiced because the work was not complete. On 15 Jan 13, the network coordinator asked Complainant to confirm that.

On 16 Jan 13, Complainant sent Uriarte an official complaint of policy violation and other matters of concern regarding vendor ownership and relationships that place Respondent at risk under Sarbanes-Oxley, Sherman antitrust, and federal labor law. He noted that in the group of eight employees, he and Towery were the only ones not hired by Luecke, with the exception of Heinsohn, who was hired without any real estate experience. He further observed that he was the only male of African origin and fell under the same protection class as Towery, who was the other person "constantly targeted."

He also complained that Luecke's decision to implement the PIP was questionable, given that she had only been his manager for three weeks and had never attempted to meet with any individual members of her team, including him. He mentioned that he had over ten meetings with Lopez and Luecke to review the PIP and revised it at least three times, but it was never withdrawn. He argued that the revisions were based on evidence that he produced that the PIP was ill-conceived from the beginning. He stated that he raised the issue with Lopez, telling her in no uncertain terms that labor laws were being infringed upon and that Luecke was enforcing policies inconsistent with Respondent's policies. He added that Lopez acknowledged that a PIP was not necessary and that they would confer with Patel.

Complainant went on to explain that when his PIP expired on 30 Nov 12, he had no feedback on the PIP or dismissal of it. He complained that the PIP was not dismissed even though he had finished his FTTCs projects ahead of two other employees, completed sectorization on time, and helped his region meet its generator objectives. He cited that as a testament to the ill nature of the PIP that was issued for the sake of a manager drunk with power in a market that supports the violation of labor laws.



He noted that neither of the other two employees who failed to meet their goals on FTTCS for the third quarter suffered any consequences, even though Luecke said they would be punished separately. He then alleged that that favoritism was because those employees' were responsible for validating purchase orders to Charlie Craig which, according to records online and government offices, is associated with Luecke. He added that Charlie Craig had purchase orders under \$50,000 to help hide them from Respondent's review processes. Complainant finished by telling Uriarte there was much more to discuss and that he had been doing research that directly linked Luecke to the respective companies.

On 17 Jan 13, Complainant sent an email to Uriarte and Gaur complaining that he tried to protect Respondent by being a whistleblower and refusing to participate in Luecke's wrongdoing, which he reported on 19 Nov 12. He reported that in the past two weeks he had been asked several times to bring in CA Bass as a vendor and that Bass' owner was a former boss of Patel. Complainant alleges that he was being pushed to do this by Luecke because another employee could not do it, having recently been hired directly from Bass, which would create a conflict of interest.

Complainant reported that he was a victim for standing up for what is right and suffered harsh treatment from Luecke, who had been required by HR to apologize to him and Towery, only to retaliate later. Complainant alleged that his termination was not based purely on performance, since he was the only employee to have completed 17 sites that were reportable as complete from a real estate perspective. He informed them that he was protesting his dismissal as an illegal violation of the whistleblower provisions of the Sarbanes-Oxley act.

***Respondent's records show in pertinent part:***<sup>32</sup>

Luecke completed a conflict of interest questionnaire on 30 Jan 09. She stated that in the past twelve months she had not served as a director, officer, agent, employee or contractor of any business that is a supplier or competitor of Respondent. She did not own, sell or purchase a significant economic interest in any such business. She stated that she was an employee of Charlie Craig working as an in-house contractor to Respondent prior to and during January through 13 Mar 08. Her employment was terminated upon beginning employment with Respondent and all financial interest and ties were terminated at that time.

***U.S. Equal Employment Opportunity Commission Records show in pertinent part:***<sup>33</sup>

On 21 Jun 13, Complainant filed allegations of discrimination based on sex and national origin. He specifically alleged that:

Luecke assigned him more projects than his Caucasian and female coworkers, giving him impossible deadlines. Luecke issued him twenty

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<sup>32</sup> RX-29.

<sup>33</sup> RX-38.

written reprimands for substandard work performance and failing to report to various meetings, charges that he categorically denies. Luecke placed him on a PIP, even though she had only been his manager for one week. Luecke made fun of his accent and pretended to not understand. Luecke constantly directed inappropriate comments to him such as, “It must be a Kenyan thing.” Luecke rejected his request for transfer to other positions and to work at a remote location in Ohio, even though she allowed female employees the privilege to work remotely. Luecke informed him he was terminated because he did not “fit the profile.”

## **DISCUSSION**

In order to prevail, Complainant must show that it is more likely than not that he engaged in protected activity, Respondent took an adverse action against him, and the protected activity contributed in some part to the decision to take the adverse action. There is no dispute that Respondent took adverse actions against Complainant, including placing him on a PIP and terminating his employment. The parties have a fundamental dispute over whether Complainant engaged in any protected activity and what role, if any, it played in the adverse action.

In a number of instances, the testimony relevant to the resolution of those disputes is contradictory and requires assessment of credibility of the witnesses. Obviously, the most critical witness was Complainant. I first note that Complainant did not give the impression that he was fabricating testimony or unsure of what he was saying. Indeed, he appeared to be zealous in his conviction that his conclusions were correct. However, his testimony was often not corroborated by the other evidence in the case. When confronted with evidence that was inconsistent with his narrative, he would simply deny being able to recall anything about the matter. In short, Complainant gave the impression that he was unable to differentiate between what was his supposition and what was fact. While he may have testified to events as he believed them to be, that belief was frequently built upon unsubstantiated conclusions and interpretations. I weighed his testimony accordingly.

The same general analysis applies to Towery's testimony, who testified that when Luecke was transferred, she saw the handwriting on the wall, since the industry is a good old boys' club. She concluded that Luecke was a crook because of a website page that she had seen three years earlier and was taken down shortly thereafter. She conceded she did not know when the website was created or if it was current and never asked Luecke about it. She also stated that she refused to be part of a purchase order that involved Charlie Craig or Sellinger, because when she looked at spreadsheets and saw Charlie Craig she would also see Sellinger and “if they were not related, they were working awfully close together.” She agreed that she had no concrete knowledge that they were together but refused to use them based on speculation and even though she had no financial evidence, her experience told her there were kickbacks between Charlie Craig and Sellinger. Thus, many of her statements were made through the prism of her predisposition rather than objective facts.

### ***Protected Activity***

In the initial complaint, Complainant alleged a number of specific protected activities:

In May 2012, while reviewing spending for their region, he and a coworker discovered that Luecke had dispatched most of the budget to unlicensed vendors without using Respondent's bidding process. He concluded that vendors were submitting fraudulent purchase orders, receiving pay for services without documentation. He also concluded that one specific vendor was charging more than the maximum allowable amount permitted by the contract and was suspicious, because the vendor was not large enough to complete the contract at work. He noticed the purchase orders were kept under \$50,000, which was Respondent's audit and director approval threshold. He believed Luecke was a former employee of Charlie Craig and Associates and was funneling work to that business, along with helping them prepare fraudulent purchase orders. He communicated those findings to his manager, Eyler, in the presence of Luecke.

In October 2012, Luecke instructed him to use a vendor named Camp and Associates to do some work in Texas. He reviewed the records and determined that Camp was not registered or licensed. He reported that fact to Luecke and another manager named Nyhus and told them using Camp would be a crime. When they disagreed, he reported the problem to Luecke's boss, Patel. He also told Luecke and other managers that he would refuse unlicensed vendors.

In November 2012, he made an anonymous complaint to Respondent about the illegal vendors and Luecke's conflict of interest because of her association with Charlie Craig. He also refused Luecke's instruction to use an unlicensed vendor.

On 19 Nov 12, he complained to Uriarte about financial misappropriation or possible investor fraud by Luecke and other Houston management.

On 10 Jan 13, he informed Uriarte that a vendor was unlicensed and that Charlie Craig was listed as an officer of the vendor. He also provided Uriarte additional documents.

In his opening statement at hearing, Complainant's Counsel revisited his client's communication to Eyler in the presence of Luecke and subsequent anonymous hotline call. He also alleged that his client continued to report to Luecke his belief that they were violating company policies and subjecting Respondent to civil and criminal liability by using unlicensed vendors, failing to follow required bid processes, and constructing projects in violation of FCC and FAA regulations. He then re-urged the 19 Nov 12 conversation with Uriarte, adding that his client also mentioned to Uriarte suspected investor fund fraud, AIR-21 violations, financial fraud, and Sarbanes-Oxley violations by Luecke and other managers in the Houston area. He noted that his client continued to provide additional information about violations to Uriarte until he was fired.

In his post hearing brief, Complainant again cited as protected activity his communication to Eyler in the presence of Luecke his concern that Luecke was sending money to her former employer, Charlie Craig. However, he raised a new protected activity in the form of his

communication to Klawinsky that Luecke was funneling work to Charlie Craig without going through the normal bidding process and had assisted Charlie Craig in submitting fraudulent purchase orders in excess of what amounts were typical for the work performed and outside of the MSA. Complainant restated his previous allegations of protected activity as reflected in his communications to Uriarte and complaint to Respondent's anonymous call in line.

The various allegations of protected activity are best reviewed by identifying who received the communication and the substance of the communication.

#	Communication to	Substance
1	Eyler (with Luecke present)	Luecke was a former employee of Charlie Craig and was funneling work to that business, along with helping them prepare fraudulent purchase orders.
2	Luecke and Nyhus	Using unlicensed vendor Camp is a crime
3	Patel	
4	Luecke and other managers	He would refuse to use unlicensed vendors
5	Anonymous hotline	Unlicensed vendors and Luecke's conflict of interest
6	Luecke	He refused to use unlicensed vendors, violate company policies, and subject Respondent to civil and criminal liability by using unlicensed vendors, failing to follow required bid processes, and constructing projects in violation of FCC and FAA regulations
7	Klawinsky	Luecke was funneling work to Charlie Craig without going through the normal bidding process and had assisted Charlie Craig in submitting fraudulent purchase orders in excess of what amounts were typical for the work performed and outside of the Master Service Agreement
8	Uriarte	Financial misappropriation, possible investor fraud, investor fund fraud, AIR-21 violations, financial fraud, and Sarbanes-Oxley violations by Luecke and other Houston management, use of unlicensed vendors, vendor with Charlie Craig as officer suspected

In order to establish protected activity, Complainant must show that it is more likely than not that he communicated his reasonable belief that Respondent was engaging in conduct that constituted violations of those areas of law or regulation covered by the Act.<sup>34</sup> Respondent contests whether Complainant actually even engaged in some of the alleged communications and argues that none of them constituted a reasonable belief that it was engaging in misconduct covered by the Act. The first step is to determine if the weight of the evidence shows that it is more likely than not that Complainant engaged in the alleged communications.

<sup>34</sup> The act does not require Complainant to show that there were any violations in fact and the evidence in this case falls far short of establishing such violations.

## ***Did the Communications Occur?***

### Allegation 1

Complainant alleged that in the end of June 2012, he communicated his concerns about Luecke funneling work to Charlie Craig to Eyler, but “in the presence of Luecke.” However his testimony at hearing was that he had a five-minute conversation with Eyler at Eyler’s cubicle to say the reason they were getting outspent by Luecke was because of money going to Charlie Craig. Complainant testified that while Luecke was sitting in the next cubicle, he told Eyler it was illegal and needed to be fixed. Moreover, Complainant also testified that they had a number of discussions about Luecke spending money on Charlie Craig, but did not have discussions about Luecke owning Charlie Craig, conflicts of interests, or anything along that line.

Towery testified that Complainant communicated his findings to Eyler and that there was a big meeting in Navarre’s office. However, she also testified that nothing ever came of the meeting and she doesn’t know what the meeting was about. She also recalled Complainant objecting to Eyler about Luecke using firms that did not have a license.

However, Luecke denied ever hearing anything of the sort. Moreover, Eyler testified at hearing that he does not recall Complainant ever raising such concerns about that or any other impropriety. Complainant argues that Eyler only denies being able to recall, which would leave open the possibility that the communication was made but Eyler forgot about it. However, Eyler further testified that if Complainant had raised any such issues, he would have investigated them and informed his superiors. That makes Complainant’s suggestion unlikely and I find that he failed to establish that he actually made this communication by a preponderance of the evidence.<sup>35</sup>

### Allegation 2

Complainant alleged that he told Luecke and Nyhus that Respondent could be engaging in criminal actions by using unlicensed vendor Camp. However, his testimony at hearing failed to substantiate or even specifically address that allegation. Moreover, Luecke testified at hearing that she doesn’t recall Complainant ever saying he was refusing to use Camp because they were not licensed to perform real estate work or refusing to have his name listed with any purchase orders from them. She likewise denied recalling that Complainant ever objected to having his name associated with any vendor that was not properly licensed or Complainant or anyone else raising the failure to have a license as an issue. I find that Complainant failed to establish that he actually made this communication by a preponderance of the evidence.

### Allegation 3

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<sup>35</sup> It is significant to note that Eyler’s credibility was bolstered by the fact that he had no motive to protect Respondent and largely was supportive of Complainant’s performance in his testimony and in the performance reviews he completed. More importantly, even if Eyler had heard what Complainant alleges to have told him, there is no evidence that he ever acted on it or shared it with anyone else. As he had no role in Complainant’s termination, even if Complainant was able to establish the communication took place and qualified as protected activity, it could not have contributed to the adverse action.

Complainant alleged that he told Patel that Respondent could be engaging in criminal actions by using unlicensed vendor Camp. He testified at hearing that he complained to Patel when Patel introduced a new company and he found out the company wasn't even licensed in Texas. However, Patel testified at hearing that Complainant never came to him to object that Luecke was asking him to utilize unlicensed vendors in Texas, he was not aware that Complainant had made any objections about vendors being unlicensed, and Complainant never came to him to object to Luecke's use of an unlicensed vendor named Camp. Given my assessment of his credibility, the best that could be said for Complainant is that the evidence is in equipoise. Consequently, he failed to establish this communication occurred by a preponderance of the evidence.

#### Allegation 4

Complainant alleges that he told Luecke and other managers he refused to use unlicensed vendors. However, his testimony at hearing failed to substantiate or even specifically address that allegation. Moreover, Luecke testified that she doesn't recall Complainant ever saying he was refusing to use them because they were not licensed to perform real estate work or refusing to have his name listed with any purchase orders from them or that Complainant ever objected to having his name associated with any vendor that was not properly licensed. She is not aware of Complainant or anyone else raising the failure to have a license as an issue. She doesn't think Charlie Craig ever performed services in the State of Texas and has no idea why it would need to be licensed in Texas. There is no evidence of communications to other managers. I find that Complainant failed to establish that he actually made this communication by a preponderance of the evidence.

#### Allegation 5

Complainant alleges that he called Respondent's 1-800 hotline and complained about the use of unlicensed vendors and Luecke's conflict of interest. Complainant testified that he also made an anonymous call to the 1-800 compliance hotline about the same time he went to Uriarte. She testified that her manager told her there was an active investigation based on an anonymous compliance complaint that had been received. Accordingly, the evidence establishes that Complainant made this alleged communication.

#### Allegation 6

Complainant alleges that he told Luecke he was going to refuse to use unlicensed vendors, they were violating company policies and subjecting Respondent to civil and criminal liability by using unlicensed vendors, she was failing to follow required bid processes, and they were engaging in projects in violation of FCC and FAA regulations.

Complainant testified that Luecke was mad because they were resisting her efforts to give work to Charlie Craig and though they told her that they thought she had a conflict of interest, they did not tell her everything they knew and did not mention manipulating contracts. He described a time when Luecke walked up to his desk, took a notebook that had Charlie Craig information,

and walked away. Complainant also noted that on some occasions when he discussed his concerns with Cecelia Lopez, Luecke was present. While he added that they had a number of discussions about Luecke spending money on Charlie Craig, they did not mention Luecke owning Charlie Craig, conflicts of interests, or anything along that line.

Towery testified that sometime in November 2012 she saw Complainant going to Luecke's cubicle with purchase orders and environmental studies. Both Luecke and Complainant were angry, but she doesn't know what was said. She could not tell how many pages Complainant had, but did testify that the environmental paperwork had nothing to do with Sarbanes-Oxley, but would have to do with Respondent's FCC license. She testified that she can't recall anything specific, other than the East had not been doing its due diligence. On the other hand, Towery also testified that she never personally witnessed Complainant make any internal complaint about anything to do with Luecke or Charlie Craig or unlicensed vendors.

Luecke testified that Complainant never told her he was concerned they were or might be paying vendors for work that wasn't done or said he was refusing to use vendors or have his name placed on purchase orders with vendors because they were not licensed to perform real estate work. She added that she was not aware of Complainant or anyone else raising the failure to have a license as an issue. She further testified that she was unaware that Complainant or anyone else had ever made any complaints about her relationship to Charlie Craig or using Charlie Craig. She did not recall any instance in which Complainant approached Eyler and said something about the East spending West money on Charlie Craig. She stated that until she fired Complainant, she had never had any conversations with Uriarte about any complaints he may have made about her. She also testified that she was unaware that Complainant had ever made any complaints about bidding, licensing, or any other impropriety that she may have engaged in.

Given my assessment of Complainant and Towery's credibility, the best that could be said for Complainant is that the evidence is in equipoise. Consequently, he failed to establish the communication occurred by a preponderance of the evidence.

#### Allegation 7

Complainant alleges that he told Klawinsky that Luecke was funneling work to Charlie Craig without going through the normal bidding process and had assisted Charlie Craig in submitting fraudulent purchase orders in excess of what amounts were typical for the work performed and outside of the MSA. Complainant testified that he asked for help from Klawinsky, who then told Uriarte what the three of them had learned. He further testified that Uriarte then contacted him by email to have a meeting and he sent her a number of purchase orders and other documents and told her about their concerns.

Towery testified that Complainant also took the data to Klawinsky and assumes Klawinsky contacted Uriarte, because Uriarte called her in. She told Uriarte what she knew.

Uriarte testified that in November 2012, she received a complaint from Klawinsky about general workplace environment issues and the treatment of some employees. Klawinsky recommended that she speak with Complainant.

Neither party called Klawinsky to testify or offered a deposition transcript. The state of the evidence as a whole is sufficient to establish that it is more likely than not that Complainant made this alleged communication.

#### Allegation 8

Complainant alleges that he told Uriarte that Respondent was engaging in financial misappropriation, possible investor fraud, investor fund fraud, AIR-21 violations, financial fraud, Sarbanes-Oxley violations, use of unlicensed vendors, and using Charlie Craig. Complainant testified that Klawinsky approached Uriarte and told her what the three of them had learned. After Uriarte contacted him by email, he sent her a number of purchase orders and other documents and told her about their concerns. Uriarte told him she would look into it.

Uriarte, on the other hand, testified that during a telephone meeting on 19 Nov 12, Complainant was a little bit all over the place in expressing his concerns. The bulk of his complaints were actually related to favoritism. He talked a lot about conflict of interest and mentioned a number of managers and conflicts of interest. He told her he had filed a compliance complaint and specifically called out Luecke, alleging a conflict of interest because Luecke was a part owner of Charlie Craig and giving them too much money. While they were on the phone, Complainant had her pull up a website where it showed something related to Charlie Craig that had her name on the page. She thinks it was the Secretary of State website, but is not certain. Complainant also mentioned other companies that he thought were affiliated with Charlie Craig.

Emails offered into evidence show that on 16 Jan 13, Complainant sent Uriarte an official complaint of policy violation and other matters of concern regarding vendor ownership and relationships relating to Sarbanes-Oxley, Sherman Antitrust, and federal labor law. He also complained that Luecke favored employees who validated purchase orders to Charlie Craig, who he alleged that records online and government offices associated with Luecke. He added that Charlie Craig had purchase orders under \$50,000 to help hide them from Respondent's review processes.

On 17 Jan 13, Complainant sent an email to Uriarte complaining that he tried to protect Respondent by being a whistleblower and refusing to participate in Luecke's wrongdoing, which he reported on 19 Nov 12. He reported that in the past two weeks he had been asked several times to bring in CA Bass as a vendor and that Bass' owner was a former boss of Patel. Complainant alleges that he was being pushed to do this by Luecke because another employee could not do it, having recently been hired directly from Bass, which would create a conflict of interest. He informed them that he was protesting his dismissal as an illegal violation of the whistleblower provisions of the Sarbanes-Oxley act.

Uriarte also testified that she spoke to Complainant after he was terminated toward the end of January 2013 and that conversation was the first time Complainant mentioned anything about concerns about licensing. She also noted that Complainant never mentioned anything about the bidding process until after he had been terminated.



The evidence is sufficient to establish that it is more likely than not that Complainant communicated to Uriarte his concerns about conflict of interest as related to Luecke's use of Charlie Craig and whatever laws or regulations that conflict of interest may have involved. It is insufficient to carry Complainant's burden of proof as to his allegations that sometime before his termination he communicated concerns about violations of AIR-21 and use of unlicensed vendors.

Consequently, I find the evidence sufficient to show more likely than not that:

- (1) Complainant called Respondent's 1-800 hotline and anonymously complained about the use of unlicensed vendors and Luecke's conflict of interest.
- (2) Complainant communicated to Klawinsky concerns that Luecke was funneling work to Charlie Craig without going through the normal bidding process and had assisted Charlie Craig in submitting fraudulent purchase orders.
- (3) Complainant communicated to Uriarte concerns about conflict of interest in Luecke's use of Charlie Craig, violations of Sarbanes-Oxley in general and specifically because of adverse action taken against him following his 1-800 complaint, and financial irregularities because of failure to follow proper bidding processes.

#### ***Did the Communications Qualify as Protected Activity?***

Complainant used a number of general legal terms to describe the violations that constituted the subject of his protected communications. However, the complaints I found he is more likely than not to have made related his factual concerns that Luecke used Charlie Craig as a vendor while having an interest in Charlie Craig, assisted vendors in submitting falsified purchase orders, failed to follow proper established procedures, and used unlicensed vendors. Complainant must show that it is more likely than not that that activity constituted conduct covered by the act or reasonably believed it to be so.

#### ***Fraudulent Purchase Orders/Failure to Follow Bidding Processes***

Respondent's records establish that threshold for required bidding was \$30,000 as of 1 Jul 11; \$15,000 as of 1 Oct 11; and \$5,000 as of 1 Jan 11. Exceptions to the requirement for bidding included sole-source vendors and vendors providing services contracted as an explicit term and condition of an existing approved MSA.

Complainant testified that he discovered that the Charlie Craig projects were under the MSA, but not related to the scope of work. He did not believe Charlie Craig had an MSA that covered Louisiana or Florida and noticed that Charlie Craig was being paid \$5,000 for a leasing project, where in Houston a typical site acquisition company would charge \$2,500 for the same thing. He was suspicious, because on a given day there would be two or three purchase orders for \$49,500. He agreed that bidding requirements include exceptions for MSA holders and sole-source vendors if there is only one responsible supplier and explained that his conclusions about bidding were based on discussions he had with Eyler and an email from Diana Scudder, the budget manager for the area.

In contrast, Eyler said real estate projects were generally all under the \$5,000 threshold and he did not recall having to bid out a project while he was in the real estate group. He believed there might have been an exception for the bid requirement if the vendor had an MSA and noted that Respondent's contractors were all required to have an MSA, which Sourcing and Legal also would have helped draft.

Towery likewise testified that they really didn't have to bid anything, because pricing was standard. She was not aware of any legal requirement that real estate projects be bid. She described how Complainant would go through all the financials and try to figure out how the other region was outspending them by so much and still following the rules. She said the paperwork that Complainant produced indicated several issues, an example of which was a failure to do a required phase I study for a propane generator. She admitted that she did not independently verify any of his findings and could not recall anything specific, other than the East had not been doing its due diligence.

Luecke's testimony was largely consistent with Eyler's and Towery's. She said all of the vendors that she worked with in the real estate group were parties to the MSA and not subject to the requirement for bidding. She added that most real estate projects were under \$5,000. As far she knew, all of her real estate services work was purchased pursuant to the MSA. She agreed that sometimes a project would be split into multiple purchase orders to enable them to match the rollout time and might result in taking the entire contract price beneath the threshold. She noted that Respondent has a policy against paying vendors for work they have not accomplished. She conceded that that would occasionally take place inadvertently, but would be discovered in a subsequent audit and the responsible employee would be subject to corrective action. The vendor would also be cautioned.

Complainant's allegations of fraudulent purchase orders and violations of proper bidding processes are not substantiated by the weight of the probative evidence. Even his testimony is insufficient to establish any more than a supposition based on his frustration that the other region was more successful in spending money. The evidence as a whole shows that it is more likely than not that Respondent was not engaged in either of those activities. More importantly in terms of establishing protected activity, the evidence falls far short of establishing that Complainant had a reasonable belief that Respondent was engaged in that activity. Complainant's testimony is inconsistent with the testimony of virtually everyone else in the case, even those coworkers and supervisors he cites as support for his conclusions. Complainant's communications concerning bidding and fraudulent purchase orders do not constitute protected activity.

#### *Use of Unlicensed Vendors*

Complainant's proof is even less compelling as to his allegation of the use of unlicensed vendors. Complainant himself testified that Towery told him real estate licenses were not necessary for the kind of work they did. Towery testified that site acquisition firms do not require real estate licenses. Eyler similarly did not recall any requirement that a vendor doing site acquisition work have any specific license. He explained that vendors were approved by Sourcing, who ensured that vendors had the required licenses.

Luecke's testimony was consistent with Eyler and Towery. She said all vendors had to be approved by Sourcing, on whom she relied to determine whether or not a vendor had the appropriate licensure. She added that she did not believe Charlie Craig ever performed services in the State of Texas and had no idea why it would need to be licensed in Texas.

Once again, the evidence falls far short of establishing that it is more likely than not that Complainant reasonably believed Respondent was violating the law by using unlicensed vendors. Consequently, his communications in that regard failed to establish protected activity.

### *Luecke's Conflict of Interest*

While Complainant alleged a variety of problems, they all generally centered on his objection to Luecke's involvement with Charlie Craig. His allegation of conflict of interest forms the primary foundation and central theory of his case.

Luecke's testimony as to the actual facts of her relationship with Charlie Craig was never contradicted or impeached. I found it to be credible. She explained that she did work for Charlie Craig, which did contract work for Respondent in the Kentucky, Indiana, and Ohio markets as part of the MSA. Respondent asked her to temporarily fill in for her supervisor, who was an employee of Respondent. She did so, even though she was still a contractor. When her supervisor came back, Respondent offered and she accepted a position as an employee in the Gulf Coast region. Luecke noted that it wasn't uncommon for Respondent to hire contractors, since contractors were very familiar with the work.

Luecke testified credibly that she has never had any ownership interest in Charlie Craig and never received any compensation from them after she stopped working for them. She emphasized that she never received any money from them while she was working for Respondent and had no financial interest in the company while she was working for Respondent. She clarified her presence on the website by explaining it was mere happenstance resulting from the fact that her office was in Louisville and Charlie Craig was incorporated in Kentucky. She testified that she was not an officer, but only an employee and cleared her previous employment with Charlie Craig with Respondent before ever using Charlie Craig.

Consequently, the probative evidence shows that there was no conflict of interest. On the other hand, Complainant need not establish an actual conflict, only that it is more likely than not that a reasonable person in his position could have believed there was one. Thus, it is necessary to review how Complainant and Towery came to their conclusions.

Towery clearly brought predispositions to her relationship with Luecke. Towery testified that she was told by the person she replaced that she would need to stay away from Luecke and in 2009, another person showed her a website page with Luecke's photo as a principal of Charlie Craig. Towery therefore concluded that Luecke was a crook because Luecke was a manager for Respondent and a principal of Charlie Craig.

Complainant's conclusions appear to have been based on input from Towery and his knowledge that Luecke frequently used Charlie Craig as a vendor. He testified that his understanding was

that Luecke was a part owner of Charlie Craig and was based on what he found on the website in 2009.

At the same time, Towery allowed that the only evidence she had of Luecke's involvement in Charlie Craig was the website from 2009 and she does not know when the website was created or if it was up-to-date. She agreed that the website was taken down shortly after she saw it in August 2009 and she never asked Luecke about it. She conceded that she doesn't know how Luecke selected vendors and admitted that she doesn't know if Respondent was doing business with Charlie Craig before Luecke went to work for it.

It appears most likely that Complainant's complaints about Luecke's conflicts of interests were fueled largely by inputs from his coworker Towery and his refusal to believe that Luecke's region could be more successful than his without breaking the rules. The single most significant element relating to whether or not his complaint reflected a reasonable suspicion is the fact that he and Towery were relying on a webpage that had been deleted three years earlier. Almost as significant is the rational testimony from Luecke that it was common for Respondent to hire former contractors, as they understood Respondent's business.

Taken together, those two factors, along with the fact that neither Towery nor Complainant were new to the industry, weigh the evidence against a finding that it is more likely than not Complainant's communication reflected a reasonable concern about a conflict of interest because of Luecke's prior employment with Charlie Craig. Instead, the evidence reveals that Complainant's communication was a consequence of frustration and supposition rather than reasonable suspicion. Accordingly, his communications regarding conflict-of-interest fail to establish protected activity.

#### ***Reason for Adverse Action***

Even assuming that all of the alleged communications qualified as protected activity, Complainant would still retain the burden of establishing that they were more likely than not a contributing factor to his termination. Indeed, the parties expended a large portion of their litigation resources on this issue. Respondent submits that its decision to terminate Complainant had nothing to do with any of the alleged communications, whether they qualify as protected activity or not. Indeed, the three individuals primarily responsible for Complainant's termination, Patel, Navarre, and Luecke, all testified that they were unaware of the protected activity.

#### ***Respondent's Proffered Reason***

Respondent first argues that none of the decision-makers were aware of any of the alleged protected activity. Luecke specifically testified she did not recall Complainant ever complaining about using unlicensed vendors, about her relationship to Charlie Craig, or about any other thing he may have complained about regarding bidding, licensing, or any other impropriety. She noted that it was not until she had terminated him that she became aware of any complaints. Patel similarly testified that he was unaware of any complaints about unlicensed vendors, bidding procedures, or any other issues concerning Luecke. That testimony was consistent with Navarre's testimony that he too was unaware of any objections or concerns

expressed by Complainant about the workplace, license vendors, Luecke's relationship with Charlie Craig, or bidding procedures. He added that he was unaware of any conversations between Complainant and Urinate.

Respondent then explains that it fired Complainant because of his poor performance, offering testimony and documents in support of that argument. Complainant's 2008 performance report from Gary Critchlow noted that Complainant needed to work better with team managers and understand his roles and responsibilities, along with appreciating how the budget works to affect the group.

The next year, Critchlow reported that Complainant needed to pay more attention to detail, attend meetings on time, be prepared, be aware of the status of his projects, manage projects from end to end, escalate issues more quickly to get assistance, be clear in emails, stop over engineering projects, have a sense of urgency, not leave meetings early, and focus on understanding how budgets affect his job. Critchlow also noted that other managers reported a problem communicating with Complainant and although he had on a dozen occasions tried to discuss these issues with Complainant, Complainant would not accept the constructive criticism.

Eyler reported on Complainant's 2010 performance review that he looked forward to Complainant improving tracking and accuracy on the tracker. In 2011, Eyler again noted that Complainant would need to improve tracking ongoing capital expenses and commitments and that weeks would elapse before Complainant escalated issues to him for resolution. Complainant's 2012 midyear review included Eyler's observation that providing realistic tracking had been a challenge for Complainant with several missed objectives and that Complainant's success in FTTCS had been overshadowed by failure to deliver on a few key sites because of disjointed and unclear tracking. He again noted that Complainant failed to escalate problems timely and cautioned Complainant to stay focused.

Eyler's hearing testimony was consistent with his performance report for Complainant, in that he demonstrated a strong reticence to be critical or appear to be finding fault. He testified that as of January 2012, Complainant had no deficiencies in his performance and although he was certain there were items for coaching, they would have been nothing glaring. Eyler believed that Complainant did not require a PIP. At the same time, Eyler also testified that as of April 2012, he had concerns that Complainant and Towery were not performing effectively in such a way that allowed their region to spend their allocated budget.

Eyler believed that Complainant was generally meeting standards, even though there are always areas that an employee can work on. He did allow that if some of the problems that had started to arise were not turned around by the third or fourth quarter, they would have had more of a problem. He did not believe that Complainant was trending down or trending up, but likely mentioned to Luecke when she took over that getting the generators complete was going to be difficult for Complainant. Eyler wouldn't say that Complainant failed to keep him up to date, but would say he coached Complainant to try to take initiative and that sometimes Complainant tried to work through problems without getting help.

The credibility of Eyler's opinion about the quality of Complainant's performance is significantly diminished by the clear fact that he wanted to avoid anything that would harm Complainant, either in his testimony or in the performance reviews that he accomplished. In fact, even Towery testified that Eyler did not have the personality to rock the boat and would come out of meetings browbeaten and making the comment that he was getting beat up because he would not handle issues in his department. She told him she hoped she wasn't the problem and he said she was not the issue. At that point she understood that Complainant was the issue. Given Towery's relationship with Complainant, that testimony is highly credible and probative evidence that Respondent believed Complainant's performance was unsatisfactory.<sup>36</sup>

Complainant offered the testimony of Valetta Wilson, who noted that she never had any problem getting timely inputs from Complainant, who was good at keeping track of things and making it available to everyone on a shared drive. Nonetheless, her testimony was diminished by the fact that she had no idea what Complainant's goals were, did not know whether he was early, late, or on time with projects or anything about his specific projects.

On the other hand, Leiker testified that Complainant never got anything done, had poor communication and did not attend meetings. Leiker noted that Complainant was always lagging behind by months and his delay stopped projects from proceeding. Leiker explained that he had multiple discussions with Eyler about how Complainant was behind committing money, getting vendors in place, completing real estate tasks, along with not attending meetings or failing to give good updates at meetings. Leiker told both Eyler and Luecke that Complainant needed to be put on a PIP because he was putting the entire network in a bind. Eyler would simply reply that he was working on it. Leiker also described how Complainant had created a tracker with what could have been 100 columns but was not filled out accurately and had missing dates and vendors. Complainant's coworkers were laughing because the tracker was so unwieldy.

Leiker described how poorly Eyler's team performed in comparison to Luecke's, which was able to spend at almost double the pace. When he asked Eyler about it, Eyler would simply say he was working on it. When Eyler's team did improve, Complainant's numbers were not part of the trend. Eventually, Leiker designed a specific tracker for Complainant to use. He also noted that Complainant missed many meetings, including one specific important meeting on an LTE project, without providing any advance notice or information. By then, Leiker believed the problem warranted going directly to Luecke's boss, Patel.

Sandra Loughridge similarly testified that Complainant's open commits consistently ran beyond their due dates and caused problems for the rest of the staff. Complainant's peers commonly escalated the problems they were having with him to her. There were more complaints about Complainant than any other real estate specialist. She passed her concerns along to Luecke on multiple occasions.

Luecke testified credibly and at length about her concerns that Complainant was not performing to standards. She noted that even before she became Complainant supervisor, she was aware of many complaints about his performance as non-communicative, missing meetings, and failing to

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<sup>36</sup> Eyler's reluctance to hold Complainant accountable likely played a role in his region's poor performance and Respondent's ultimate decision to let him go and put Luecke in charge of the entire region.

provide updates. She was told by an implementation manager that he would rather not have a position at all, rather than have Complainant in it. That was consistent with her staff, which told her to refuse Navarre's offer of Complainant to help them out and explained they'd be better off with no one, rather than Complainant.

Once she became Complainant's supervisor, she got complaints from Leiker and Windham that he was not keeping information up-to-date. Although she did not get an opportunity to discuss his performance with Eyler, she did review his Performance Agreement and his performance to date. She explained that her review indicated that Complainant could not meet his performance objectives, even though some of the data was hard to interpret because of his failure to keep it current. She decided that a PIP was the best way to provide a structure for him to correct his shortcomings.

Luecke noted that even though they adjusted the PIP on a couple of occasions, he was still unable to meet his goals. She would ask for the same information multiple times and still have to wait. By the time the modified PIP expired, Complainant had still failed to correct his poor performance. After discussion with Patel, Navarre, and Gaur, Luecke determined that he should be terminated. She noted that failing to meet metrics was not the sole reason for his termination and she also considered that he was unaccountable, which lead to many complaints about him from other employees.

Patel similarly testified that Eyler's region was clearly lacking in comparison to Luecke's. He was aware that Complainant's substandard performance was playing a part in the region's poor performance. He had been getting regular feedback from other managers that they were not getting what they needed from Complainant. Consequently, he was not surprised to learn that Luecke wanted to place Complainant on a PIP.

Navarre likewise testified that he was independently aware of Complainant's under performance through their general operational meetings. When he asked why things were slow in Eyler's region, the answer was problems that were Complainant's responsibility. That information came from Patel and other managers and leaders in that business area. Navarre noted that the termination decision was ultimately his, but he based it on the recommendations of Luecke and Patel and the information he had indicating Complainant was failing to communicate and had under performed in terms of metrics.

Gaur, who advised the decision-makers from a human relations perspective, testified that she was unaware of any complaints made by Complainant and had no reason to believe Complainant was terminated for anything other than his performance. Uriarte similarly testified that she never mentioned any of Complainant's concerns to Luecke.

#### Pretext

Complainant responds with a vigorous argument that Respondent's explanation is entirely pretextual and intended to hide the actual reason for the PIP and termination, which was his allegations against it. It is important to note that pretext is simply part of the circumstantial evidence relating to the question of whether any protected activity contributed to adverse action.

Indeed, the general premise of pretext is that since the proffered justification for the adverse action is false, the real basis must lie elsewhere, arguably in the protected activity. Of course, pretext only exists if the proffered basis is known by the Respondent to be false and does not apply to a Respondent who mistakenly takes adverse action based on incorrect facts.<sup>37</sup> Of course, even if it appears that the proffered reason is no more than pretext, Respondent would avoid liability under the Act if the actual basis had nothing to do with protected activity but some other reason, even if in itself illegal.<sup>38</sup>

In order to support a circumstantial case that a proffered reason is pretextual, a complainant can submit direct evidence to contradict or rebut the proffered reason as false on its face. He can also rely on temporal nexus, procedural inconsistencies or irregularities, and inconsistent treatment of similarly situated employees.

In this instance, Complainant submits a number of arguments to support his allegation of pretext. First, he disputes Respondent's allegation that his performance was substandard. He also submits as a corollary that any failure to complete projects or meet goals were a consequence of matters beyond his control or goals that were unreasonable in the first place. Finally, he argues that inconsistencies and irregularities in Respondent's documentation demonstrate a departure from normal personnel evaluation and management processes. The vast majority of the evidence offered by Complainant in support of his argument of pretext is his own testimony.

Complainant did testify about his performance and addressed a number of specific metrics and objectives, explaining that he was unable to meet the goals because of various environmental and regulatory problems. Complainant never directly testified about the allegations of his failure to adequately communicate with his peers and supervisors. Other than pointing out one instance where he was unfairly accused of missing a meeting, he similarly did not testify about those allegations.

Complainant did testify at length about what he alleged was the unfair nature of Luecke's management after she became his supervisor. He argued that her implementation of a PIP so soon after she became his supervisor demonstrated her bias against him. However, Luecke testified credibly that she was able to reach her decision about a PIP based on her review of his projects and performance report, along with her pre-existing knowledge of his performance. Her testimony was consistent with the testimony of a number of other witnesses, which established that Complainant's poor performance was common knowledge.

Complainant also testified about his conversations with temporary HR manager Lopez and cited her recommendation that a less stringent corrective tool be used. However, the evidence clearly established that Respondent did not have the tool Lopez was suggesting.

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<sup>37</sup> Thus, a parallel analysis exists between a whistleblower believing his complaint and a respondent believing its proffered basis for the protected activity, although the former involves a component of objective reasonableness.

<sup>38</sup> For instance, in this case Complainant has also alleged he was mistreated on the basis of his gender and national origin. Of course, it would be possible for a respondent to take adverse action against a complainant for a number of reasons and, if protected activity played any role in the decision to take adverse action, the respondent remains liable under the act.



Complainant testified about his midyear review for 2012, citing it as a prime example of procedural irregularity and circumstantial evidence of Respondent's intent to retaliate. He testified that he did not have a midyear review in 2012 and never signed a midyear review for 2012. To a certain degree, Eyler's testimony was consistent with that of Complainant in that he did not recall if he did a 2012 midyear review. Eyler allowed that he may have done some work on it, but added that it didn't seem to be in his writing style and had inaccurate data. Eyler testified that he was certain he did not sign the document on 27 Jul 12.

However, Complainant testified at multiple occasions at deposition that he did have a 2012 midyear review. He attempted to resolve that inconsistency by explaining that at the deposition opposing counsel yelled at him and put him under duress. I found that explanation to be highly unpersuasive.<sup>39</sup> The most probative and credible evidence on the issue of the 2012 midyear performance review was the testimony of Uriarte, who explained the digital document process and effectively rebutted Complainant's suggestion of fraud by Luecke.

Ultimately, the clear weight of the evidence shows that Respondent fired Complainant solely because of his poor performance. Even if I were to assume Complainant had been able to carry his burden of proof as to all of his allegations of protected activity, he would still fall far short of establishing that it is more likely than not that any of those protected activities played a role in or contributed to the adverse actions taken against him.

Since Complainant failed to carry his burden of proof to establish the existence of any protected activity or to establish that the alleged protected activity contributed to the adverse action, his complaint is dismissed.

**ORDERED** this 10<sup>th</sup> day of April, 2019, at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this

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<sup>39</sup> Complainant never demonstrated during the hearing any signs of being intimidated or likely to be pressed into misstating fundamental facts. To the contrary, his conduct at hearing indicated that he was more than capable of and willing to respond in kind to any aggressive questioning.

decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support

of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded