No. 13-60323

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HALLIBURTON, INCORPORATED,
Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for Review of the Final Decision and Order of the
Administrative Review Board of the United States Department of Labor

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Attorney for the Secretary of Labor

STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in oral argument to answer any questions the Court might have, he believes that oral argument is not necessary because the issues presented on appeal may be resolved based on the parties' briefs.

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF JURISDICTION

This case arises under the employee protection provision of section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A ("section 806"). Pursuant to section 806, Anthony Menendez filed a complaint against his former employer Halliburton with the Secretary of Labor, which was resolved by the Department of Labor's Administrative Review Board ("ARB" or "Board") in a final order issued on March 15, 2013. Halliburton filed a timely petition for review in this Court on

May 14, 2013. *See* 29 C.F.R. 1980.112 (60-day time limit for filing judicial petition for review). Because the alleged underlying violation of section 806 took place in Houston, Texas, this court possesses jurisdiction to review the decision pursuant to 18 U.S.C. 1514A and 49 U.S.C. 42121(b)(4)(A).

STATEMENT OF THE ISSUES

1. Whether the ARB properly determined that Halliburton's disclosure to Menendez's close colleagues that he had essentially accused them of accounting fraud to the SEC was an adverse action under section 806.

2. Whether the ARB correctly held that Menendez's whistleblowing was a contributing factor in the disclosure of his identity regardless of whether Halliburton acted with retaliatory motive.

3. Whether the ARB undertook the correct analysis in determining that Halliburton failed to establish by clear and convincing evidence that it would have taken the same action in the absence of Menendez's protected whistleblowing.

4. Whether the ARB correctly held that section 806 allows for non-pecuniary compensatory damages and whether it properly assessed $30,000 in damages based on Menendez's emotional distress and harm to professional reputation.

STATEMENT OF THE CASE

A. Statutory and Legal Background.

Section 806 of Sarbanes-Oxley provides whistleblower protection to employees of publicly-traded companies. It provides in relevant part that no such company:

> may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee-- (1) to provide information, cause information to be provided, or otherwise assist in an investigation

> regarding any conduct which the employee reasonably believes constitutes a violation of [certain fraud statutes or] any rule or regulation of the Securities and Exchange Commission … when the information or assistance is provided to or the investigation is conducted by-- (A) a Federal regulatory or law enforcement agency; … or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. 1514A(a).

Primary authority for investigating, adjudicating, and deciding cases arising under this provision rests with the Secretary. 18 U.S.C. 1514A(b)(1)(A). In order for the Secretary to find retaliation in violation of section 806, an employee must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew that he had engaged in protected activity; (3) he suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse action. *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008) (noting section 806's incorporation of the burdens of proof in 49 U.S.C. 42121(b)(2)(B)(iii)). If the employee establishes these four elements, the employer can escape liability by showing by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Id*. (noting section 806's incorporation of 49 U.S.C. 42121(b)(2)(B)(iv)).

In the case of meritorious claims, section 806 provides for remedies as follows:

> (c) Remedies.--
> (1) In general.--An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
> (2) Compensatory damages.--Relief for any action under paragraph (1) shall include--
> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
> (B) the amount of back pay, with interest; and
> (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

18 U.S.C. 1514A(c).

B. Factual Background.

Menendez was hired by Halliburton, a global energy products and services company, in March 2005 as Director of Technical Accounting Research & Training in its Finance and Accounting organization in its Houston office. ARB1 at 2.[1] In that high-ranking position, he monitored accounting issues and gave advice and training to field accountants. *Id.* at 2-3. He reported directly to Mark McCollum, the Chief Accounting Officer. *Id.* at 2.

In July 2005, Menendez raised concerns that Halliburton's accounting practices related to revenue recognition were not in conformance with accounting standards, an issue which potentially affected the validity of Halliburton's financial statements. *Id.* at 3; ALJ1 at 3. Other Halliburton accountants had previously

[1] In its citations, this brief abbreviates the ALJ's September 18, 2008 Decision and Order as ALJ1, the Board's September 13, 2011 Decision and Order of Remand as ARB1, the ALJ's December 8, 2011 Decision and Order on Remand as ALJ2, and the Board's March 15, 2013 Final Decision and Order as ARB2.

taken a contrary view. ALJ1 at 3. Menendez circulated a memorandum on the revenue recognition issue to colleagues within his department, including his direct supervisor McCollum. ARB1 at 3; ALJ1 at 3. McCollum met with Menendez and suggested that, although the memorandum was good, Menendez was not a team player and needed to work more closely with colleagues to resolve any concerns over accounting practices. ARB1 at 3. Menendez also discussed the issue with J.R. Sult, the Vice President and Controller for Halliburton's energy services group. *Id.* Sult ordered another study of the revenue-recognition practice, but ultimately Halliburton disagreed with Menendez's conclusion. *Id.*

Later, in October 2005, Menendez sought another meeting with McCollum regarding the revenue recognition practice, but McCollum declined to meet with Menendez over his concerns. *Id.* at 4. Menendez then contacted Charles Muchmore, the Vice President of Financial Controls, who urged Menendez to go to Halliburton's Audit Committee if he felt strongly enough about his concerns. *Id.*

On November 5, 2005, Menendez then filed a confidential complaint with the Securities and Exchange Commission ("SEC") alleging that the company was engaged in "questionable" accounting practices. *Id.*; ALJ1 at 4. Following his SEC complaint, Menendez continued to engage his superiors at Halliburton on the

revenue reporting issue. ALJ1 at 4. The company maintained its contention that its practices were in accordance with accounting standards. *Id.*

The SEC contacted Halliburton about the matter, keeping Menendez's identity secret. ARB1 at 4. Thereafter, on February 4, 2006, after he had learned the SEC had contacted Halliburton, Menendez emailed the Audit Committee at Halliburton to make the same complaint. *Id.* But Menendez first read company policies on whistleblower confidentiality as well as provisions of Sarbanes-Oxley calling for confidential treatment of internal complaints related to securities law, and identified himself in the email to the Audit Committee with the understanding that his identity would not be disclosed more broadly. *Id.* at 4 n.21.[2] The Assistant General Counsel, who had received the complaint on behalf of the Audit Committee, promptly forwarded Menendez's email with Menendez's contact information to Bert Cornelison, the General Counsel, and to Chris Gaut, the Chief Financial Officer. *Id.* at 5; ALJ1 at 4. Gaut then forwarded it to other company officials. ARB1 at 5.

On February 8, after Cornelison received a notification from the SEC that it was opening an investigation into its confidential complaint, Cornelison sent an

[2] Halliburton's policy established confidentiality as the default option for audit committee complaints, stating: "Your confidentiality shall be maintained unless disclosure is: Required or advisable in connection with any governmental investigation or report; In the interests of the Company, consistent with the goals of the Company's Code of Business Conduct; Required or advisable in the Company's legal defense." ARB1 at 5 n.27.

email to Menendez's boss, McCollum, and to Gaut, advising them of the SEC investigation and the document-retention requirement in effect while the investigation was pending. *Id.* Surmising that Menendez was the one who went to the SEC, Cornelison stated in the email that Menendez was the SEC complainant. ARB1 at 5-6. Then McCollum forwarded the email to 15 members of Menendez's work group, including Menendez himself. *Id.* The email alerted them to the investigation and let them know that Menendez had complained to the SEC about the legality of their very own accounting practices. *Id.*

Menendez was horrified when he saw the email, describing that day as one of the worst in his life. *Id.* at 6. Colleagues immediately began to treat him differently. *Id.* A close friend and colleague stated he would not set foot in Menendez's office. *Id.* at 26. Another friend displayed reticence about being seen at lunch together. ALJ1 at 33. Colleagues in general avoided him and he was kept out of the loop on official office matters, thus diminishing his authority and stature there. ARB1 at 26. The reaction from colleagues was similar to what one might expect, given that it had been revealed to them that Menendez had just "essentially accused [them] of accounting fraud and was working with the SEC to investigate them." ALJ1 at 12. Menendez missed work frequently after the revelation and, in early March, requested paid administrative leave, "given the current environment and circumstances involving the SEC investigation." ARB1 at 6. Later that

month, Menendez was removed from a teaching position at an accounting summit because he had a controversial view on revenue recognition and because he was deemed to be too unreliable based on his recent work attendance. *Id.* at 7. On March 30, he was given up to six months of paid administrative leave. *Id.*

On September 19, 2006, the SEC concluded that no enforcement action against Halliburton was being recommended. *Id.* Subsequently, on October 17, 2006, Menendez resigned from Halliburton, stating in his resignation letter that he could not "professionally and ethically" return to Halliburton while they persisted in violations of securities laws. *Id.* at 8. He had accepted a consultant position at a law firm during his leave of absence. *Id.* at 8.

C. Procedural Background.

On May 8, 2006, Menendez filed a complaint with the Occupational Safety and Health Administration of the Department of Labor pursuant to section 806, alleging that Halliburton retaliated against him because of his protected complaints to the SEC and Halliburton's Audit Committee concerning securities law violations. ARB1 at 8. He alleged that the retaliatory actions included disclosure of his identity to colleagues and related workplace isolation and loss of job duties.[3] *Id.* at 9. The Assistant Secretary for Occupational Safety and Health dismissed the

[3] Menendez alleged constructive discharge as well; however, the Board upheld the dismissal of this aspect of Menendez's retaliation claim, and it has not been appealed to this Court. Therefore constructive discharge is not addressed in this brief.

complaint and Menendez sought a hearing before an administrative law judge. ARB1 at 8. Following a hearing, Administrative Law Judge Patrick Rosenow ("ALJ") issued a Decision and Order dismissing the complaint. ALJ1 at 19.

The ALJ concluded that, although Menendez's reports to the SEC and the Audit committee were protected conduct, the disclosure of his identity was not an adverse action because none of the workplace harm he suffered as a result of having his identity disclosed was materially adverse. *Id.* at 10, 11-19. In assessing the conduct, the ALJ looked to whether there were tangible consequences from the disclosure and whether the isolation and scorn he suffered were humiliating and pervasive. *Id.* at 12, 13, 17. He further reasoned there was no adverse action because there was no practical impact from the disclosure of Menendez's identity; colleagues would have deduced Menendez was the source of the SEC complaint even absent explicit identification. *Id.* at 12. In addition, the ALJ concluded that any workplace harm stemmed from Menendez's voluntary absences following the revelation of his identity, and not from his protected whistleblowing. *Id.* at 13, 16. Finally, the ALJ noted that Menendez lacked an actionable claim for retaliation because Halliburton demonstrated that it did not possess retaliatory motive. *Id.* at 12.

Menendez appealed and Halliburton cross-appealed to the Board. The ARB reversed and remanded. ARB1 at 8. It upheld the ALJ's finding of protected

conduct, but found that he erred with respect to adverse action and causation. *Id.* at 32. The Board accepted the ALJ's factfinding but held that, as a matter of law, the disclosure of Menendez's identity related to terms and conditions of employment and was materially adverse. *Id.* at 22-23, 25. Specifically, it noted that confidentiality was a term or condition of employment based on the legal requirements of Sarbanes-Oxley section 301, which requires publicly-traded companies to establish procedures for receiving confidential complaints regarding possible violations of accounting and auditing standards, and company policies providing for confidentiality of securities law whistleblowing. *Id.* And, it held that having one's identity revealed to colleagues as the person who accused them of unlawful fraudulent conduct was materially adverse because it was the sort of action that would dissuade a reasonable employee from whistleblowing. *Id.*

The Board buttressed this conclusion by looking to the workplace consequences that Menendez suffered as evidence of a typical, negative workplace reaction. *Id.* at 26-27. The ARB noted that "the facts of this case exemplify the very reason why Congress mandated that publically-traded firms set up confidential avenues to report wrongdoing." *Id*. at 26.

The ARB accepted, as based on substantial evidence, the ALJ's conclusions that the post-disclosure isolation and removal of duties that Menendez suffered were not individually actionable adverse actions. *Id.* at 25. However, the ARB

held that the post-disclosure isolation and removal of duties that Menendez suffered were "ostensibly" harmful and constituted "indicia" of the type of harm that typically flows from the disclosure of a whistleblower's identity under these circumstances.[4] *Id.* at 26-27. Although the exact severity of the harm will vary from case to case, as a general matter these are the kinds of repercussion that will, taken as a whole, dissuade employees from whistleblowing. *Id.* at 24, 26.

The Board also held that the ALJ erred by conflating the separate elements of "adverse action" and "contributing factor," and improperly imposing a requirement of "retaliatory motive" in order to find adverse action. *Id.* at 29-30. Thus, the Board instructed the ALJ on remand to determine whether Menendez's protected activity was a contributing factor in the adverse action of breaching Menendez's confidentiality, and if so, whether Halliburton could prove its affirmative defense. In issuing that instruction, the Board noted that under the "contributing factor" standard "proof of a 'retaliatory motive' is not necessary to a determination of causation." *Id.* at 3 (citing *Marano v. Dept. of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993)). Thus, the ARB explained that "McCollum's breach of confidentiality, however well meaning, nonetheless demonstrates a lack of

[4] The Board further pointed out that the fallout from the disclosure could not be discounted because it was precipitated by the employee's absence from work, as one's absence is itself a foreseeable result of the disclosure of one's identity as a whistleblower; the disclosure and its fallout are "inextricably connected." ARB1 at 26.

understanding of its foreseeable consequences and does not absolve Halliburton of responsibility." *Id*. at 31-32 & 31 n.173.

On remand, the ALJ accepted the Board's finding that the disclosure of Menendez's identity was an adverse act and focused on causation. ALJ2 at 7. He found that Halliburton had made out its affirmative defense by showing, by clear and convincing evidence, a legitimate business reason for the adverse action. *Id.* Specifically, the ALJ noted that Halliburton did not intend negative consequences for Menendez and that it thought that by revealing Menendez's identity, it would show him that it was seeking to address his concerns. *Id.* But the ALJ issued an alternative award on damages in case the Board reversed him on causation. *Id.* at 10. He found that reputational harm was limited to the Halliburton workplace, that there was no economic loss, and that there were no long-term or quantifiable emotional effects, and thus issued a nominal award of $1,000. *Id.* He also recognized that the Board viewed his factual findings as establishing loss of professional opportunities and advancement potential and noted that had he found those damages he would have awarded a total of $30,000 in damages. *Id.* at 11.

Menendez appealed again, and the ARB reversed the ALJ, issuing an award in Menendez's favor. ARB2 at 23-24. It held that, because his protected conduct contributed to the disclosure of Menendez's identity, and Halliburton could posit no legitimate business reason *extrinsic* to the protected conduct that independently

motivated the disclosure, Halliburton had not made out its affirmative defense. *Id.* at 16-17. As an example of what might constitute such an extrinsic basis in this case, it hypothesized a court order requiring disclosure. *Id.* at 16. Further, based on established precedent, it held that section 806 allowed non-pecuniary compensatory damages. *Id.* at 18-19. In assessing the amount of harm, the ARB observed that financial or other quantifiable loss was not required for an emotional distress award and that Menendez plainly suffered the emotional effects of isolation and ostracization at his workplace, and that the mere fact that Menendez's reputational harm was focused within the Halliburton workplace did not diminish its severity, given that this was a major company which Menendez was committed to working at. *Id.* at 20-22. Thus it adopted the ALJ's alternative finding of $30,000 in emotional distress and reputational harm damages, based on this amount's consistency with the Board's own past non-pecuniary compensatory damages cases. *Id.* at 22-23. This appeal followed.

SUMMARY OF ARGUMENT

The Board correctly concluded that Halliburton violated section 806's whistleblower protections when it disclosed Menendez' identity to his coworkers as an SEC whistleblower. In so concluding, the Board accepted all the ALJ's findings as to the underlying facts of the case, but determined, contrary to the ALJ,

that those facts supported the legal conclusion that Halliburton had subjected Menendez to an unlawful adverse action because of his protected whistleblowing.

It is undisputed that the Board was correct when it held that Menendez engaged in protected conduct both by confidentially informing the SEC that he believed Halliburton was engaged in unlawful accounting practices and by alerting Halliburton's internal Audit Committee of his belief pursuant to its procedures for receiving confidential whistleblower complaints.

The Board rightly determined that Halliburton's disclosure of Menendez's identity as an SEC whistleblower was an adverse action as a matter of law. The Board looked at the two requirements for establishing adverse action under section 806: proving that the action is materially adverse and that it is discrimination in the terms and conditions of employment. The Board followed the well-established test for gauging whether there was material adversity: it looked at whether the employer's action would dissuade a reasonable employee under the circumstances from engaging in protected whistleblowing. In making this determination, it relied on its own expertise and on congressional findings to conclude that would-be whistleblowers will naturally be keenly fearful of having their identity revealed to those colleagues and superiors who are implicated by their whistleblowing.

The Board also properly concluded that the disclosure of Menendez's identity was sufficiently related to his terms and conditions of employment at

Halliburton. It persuasively reasoned that section 806 broadly covers a wide range of potential adverse actions in employment and explicitly proscribes activity that is not a tangible employment action. Moreover, there is a statutory requirement under section 301 of Sarbanes-Oxley that employers subject to Sarbanes-Oxley maintain internal confidential reporting procedures and a written confidentiality policy. Halliburton's policy established confidentiality as the default option for complaints to the audit committee by stating that a whistleblower's identity would be revealed only under limited circumstances. As a result, Menendez had a reasonable expectation that confidentiality was a workplace policy at Halliburton, and Halliburton violated that term and condition of his employment when it disclosed his identity as an SEC whistleblower.

The Board further properly determined that Menendez's whistleblowing was a contributing factor to Halliburton's disclosure of his identity irrespective of whether Halliburton intended to harm him through the disclosure, and that Halliburton had not shown by clear and convincing evidence that it had a legitimate reason extrinsic to Menendez's protected activity for disclosing his identify, as was necessary for Halliburton to establish its affirmative defense. The Board's interpretations of both the "contributing factor" standard and the employer's affirmative defense are consistent with Section 806's plain language and hew to the policies underlying its protections. As the Board properly

recognized, section 806's burdens of proof are based on the congressional determination that regardless of the employer's motives, "personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." ARB1 at 31 n.173 (quoting S. Rep. 413, 100th Cong. 2d Sess. 16 (1988) (explaining 'contributing factor" standard in the context of the Whistleblower Protection Act)).

Finally, the Board gave effect to the plain meaning of section 806's remedies provision by holding that it includes non-pecuniary compensatory damages. The Board's interpretation of section 806's remedies provision is not only consistent with the Secretary's longstanding interpretation of section 806 and more than a dozen analogous whistleblower statutes, but is also consistent with the courts' interpretation of almost identical statutory language under the False Claims Act. Finally, the Board properly considered the isolation and loss of professional reputation Menendez suffered, as evidenced by the scorn of his colleagues and diminution of responsibilities, in adopting the ALJ's reasonable alternate award of $30,000 in emotional distress and reputational damages.

ARGUMENT

I. STANDARD OF REVIEW.

Judicial review of the ARB's Order is governed by the standards set forth in in the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). *See* 18 U.S.C.

1514A(b)(2)(A); *Allen*, 514 F.3d at 476. This Court must affirm the agency's decision if it is supported by substantial evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A), (E); *see Allen*, 514 F.3d at 476. The Board's factual findings are subject to substantial evidence review. Under this standard, factual conclusions must be supported by more than a mere scintilla of evidence, and the ARB's findings must be upheld if, considering all the evidence, a reasonable person could have reached the same conclusion as the ARB. *See id.* The ARB's legal determinations are generally reviewed *de novo*, granting deference to the ARB's reasonable interpretations of section 806. *Lockheed Martin Corp. v. Administrative Rev. Bd.*, 717 F.3d 1121, 1131 (10th Cir. 2013) (according *Chevron* deference to ARB's permissible interpretation of section 806); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) (same); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (same).

Halliburton argues that the ARB failed to accord proper deference to the ALJ's factual findings related to the alleged violation of section 806, and thus the ARB's decision must be reversed because it is not based on substantial evidence. Pet. Br. at 16-28, *relying on Stone & Webster Constr. v. U.S. Dept. of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012) . Halliburton points out, correctly, that the ARB must accept the ALJ's factual findings so long as they are supported by substantial

evidence, 29 C.F.R. 1980.110(b), and claims that, because the ALJ's findings were supported by the record, the Board erred when it engaged in its own independent factfinding. Pet. Br. at 14.

Halliburton's assertion that the ARB engaged in its own improper factfinding is incorrect. The ARB accepted the ALJ's findings as to all the primary facts. While the Board disagreed in some instances with the ALJ as to the ultimate legal conclusions to be drawn from these facts, it did not disturb ALJ's findings with respect to the subsidiary facts underlying its legal conclusions. Indeed, the Board is entitled to reach a different judgment and owes no deference to the ALJ on conclusions of law. *See Roadway Exp., Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991) (in transportation whistleblower case, Secretary of Labor was free to reach different legal conclusions than ALJ based on her application of law to the facts of the case). Thus, notwithstanding that the ARB disagreed with the ALJ as to the legal significance of some of the ALJ's factfinding, the ARB's decision as a whole is based on substantial evidence and should be affirmed.

II. THE BOARD CORRECTLY APPLIED THE PROPER STANDARD FOR DETERMINING WHETHER HALLIBURTON'S DISCLOSURE WAS AN ADVERSE ACTION.

Section 806 provides that no publicly-traded company or other covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of

employment because of [protected conduct]." 18 U.S.C. 1514A(a). As the Board properly recognized, this statutory language leads to two relevant inquiries for determining whether the employer's conduct constitutes an adverse action: (1) whether the action is sufficiently unfavorable for it to qualify as discrimination or adverse action; and (2) whether the action involves a change to terms and conditions of employment within the statute's broad conception of what constitutes such "terms and conditions." ARB1 at 17. Based on a thorough analysis of both requirements, the Board determined that disclosure of Menendez's identity as an SEC whistleblower was an adverse action.

A. The Board reasonably concluded that the breach of Menendez's confidentiality was, as a matter of law, the kind of action that would deter a reasonable employee from engaging in protected conduct, and thus was sufficiently severe to qualify as an adverse action.

This Court has previously noted that the standard set forth in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006), for determining whether an action constitutes an adverse action may be readily applied to determine what constitutes adverse action in cases under section 806. *See Allen*, 514 F.3d at 476 n.2 ("[W]e find that the *Burlington* definition of 'unfavorable personnel action' [as one that well might have dissuaded a reasonable worker from engaging in the protected activity] applies to [Sarbanes-Oxley] whistleblower claims."). In *Burlington Northern*, the Supreme Court examined what would constitute discrimination or adverse action under Title VII's anti-retaliation

provision and concluded that the provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant… mean[ing] that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker [from engaging in the statutorily protected conduct]." 548 U.S. at 57.

Based on this standard, the ARB determined that the uncontested fact that Halliburton breached Menendez's confidentiality by disclosing to his superiors and colleagues that he had questioned the propriety of their own accounting practices – *essentially revealing to them that he had accused them of accounting fraud and reported them to the SEC* – was conduct that would deter a reasonable employee from engaging in whistleblowing. ARB1 at 26. In reaching this conclusion, the Board relied on the broad findings of Congress concerning the importance of confidentiality and on its own expert judgment concerning the importance of confidentiality to whistleblowers. It concluded that revealing one's identity under these circumstances is exactly the sort of action that could "well dissuade," *see Burlington Northern*, 548 U.S. at 57, a reasonable employee from engaging in whistleblowing. ARB1 at 20, 25. In light of the obvious and well-documented concerns of whistleblowers about keeping their identities secret, and Congress's specific legislative finding that confidentiality is important to encourage whistleblowers to come forward, a breach of confidentiality to one's superiors and

peers in a matter where one has called the very conduct of one's colleagues into question is, as a matter of law, a materially adverse action. *See id.* at 23.

In so concluding, the Board expounded basic principles consistent with the basic protection of whistleblowers with which the Board is charged: "Employee whistleblowers are one of the most effective sources of information concerning questionable accounting and auditing matters as well as fraud and corporate crime. Since employees are more willing to identify misconduct if they can do so anonymously, it stands to reason that anonymous and/or confidential reporting mechanisms encourage internal reporting of corporate misconduct." ARB1 at 22 (footnotes omitted). Indeed, the Board noted that, with respect to Sarbanes-Oxley section 301, a separate provision requiring employers to set up confidential procedures for reporting suspected securities law violations, Congress expressed the belief that preserving confidentiality helped overcome "a corporate culture which squashed dissent" and "protect[ed] those [whistleblower] employees who are simply acting in the best interests of their companies and their companies' investors." 148 Cong. Rec. S6300-01, 2002 WL 1398761 at *S6301 (daily ed. June 28, 2002) (remarks by Senator Stabenow), *quoted in* ARB1 at 23. These overarching and generalizable propositions about the needs and concerns of whistleblowers provided ample basis for a finding of material harm here.

1. The ARB gave proper consideration to the context of Halliburton's disclosure.

Halliburton suggests that such "matter of law" liability would violate *Burlington Northern*'s admonition that "context matters" (Pet. Br. at 45, quoting 548 U.S. at 69) and further that the ARB failed to give effect to the ALJ's finding that the disclosure of Menendez's identity had "no practical impact" because colleagues would have deduced that he was the whistleblower even had he not been named in the email. Pet. Br. at 18. But the Board did note the relevance of the particular facts here – it was not simply that Menendez's identity was disclosed, but also that it was disclosed to colleagues implicated in his whistleblowing to the SEC, which had prompted an SEC investigation into those colleagues' conduct. ARB1 at 24.

Moreover, patently, there are limits to the Supreme Court's admonition. Context does not matter to a discharge or suspension for example. There will be examples where as a matter of common sense and experience, an employer's act can be deemed to be of a sort that will deter future whistleblowers, and this situation is one of them. Having one's identity revealed to colleagues whose conduct one has criticized to the SEC is precisely the sort of thing a would-be whistleblower will typically be fearful of.

Further, the Board properly held that regardless of the correctness of the ALJ's finding that colleagues would have known anyway that Menendez was the

source of the whistleblowing, this fact was legally irrelevant.[5] In so holding, the Board placed the proper emphasis on whether the employer's action *in itself* was likely to deter a reasonable whistleblower and not whether other intervening occurrences would lead to the same workplace consequences. ARB1 at 25. In employment cases, the fact that the same workplace consequences would have occurred even if the employer had not engaged in retaliatory conduct – for example, some gross misconduct by the employee would ultimately have been unearthed – does not diminish the wrongfulness of the employer's actions. *Cf. Wallace v. Dunn Const. Co., Inc.*, 62 F.3d 374, 379 (11th Cir. 1995) (en banc) (in pay discrimination and retaliatory discharge case, fact that employee's falsehoods on application provided independent basis for discharge that would have ultimately led to her firing was no defense given that employment statutes aim to deter discriminatory conduct under all circumstances).

Additionally, as the ARB recognized, even in the context where coworkers might surmise a whistleblower's identity, permitting an employer to indiscriminately expose a confidential whistleblower's identity would likely chill potential future whistleblowers from providing information and undermine section 301's requirement that whistleblowers have a confidential means for reporting

[5] Although irrelevant to its legal holding, the ARB did point out that the ALJ's finding that colleagues would have deduced Menendez's identity as the whistleblower was "speculative," given the evidence before the Board. ARB1 at 25.

accounting and auditing irregularities to their employer. ARB1 at 24. The crux of the adverse effect in a case such as this is to have oneself publicly identified *by one's employer* despite having used a legally-mandated confidential reporting mechanism and having an expectation of confidentiality. The shock of such a public outing and betrayal of confidence – seeing one's name in writing identifying one as the accuser of one's own colleagues – is itself highly damaging notwithstanding the fact that colleagues might independently deduce one's role as a whistleblower. *Cf. Burlington Northern*, 548 U.S. at 73 ("[A]n indefinite suspension without pay could well act as a deterrent [to an employee's engaging in protected conduct], even if the suspended employee eventually received backpay.").

As further evidence of the disclosure's potential chilling effect, the Board pointed to the workplace aftermath of the disclosure of Menendez's identity as evidence of typical workplace fallout that will result from a disclosure of one's identity. ARB1 at 27. While its conclusion that the breach of confidentiality was materially unfavorable did not turn on these specific facts, these facts nonetheless validated the Board's conclusion that such a disclosure is an adverse action. The Board pointed out that the kinds of negative consequences which ultimately stemmed from the disclosure – such as Menendez's isolation from his colleagues – were a typical and foreseeable result of the disclosure of one's identity as a

whistleblower. Although the exact severity of such consequences might vary from case to case, employees will, as a general matter, be dissuaded from whistleblowing by the prospect of being scorned by colleagues and losing their professional reputation. *See id.* (facts concerning workplace isolation and loss of professional opportunity constitute "indicia of harm").

2. The ARB did not improperly lower the standard for determining that an adverse action had occurred.

Halliburton contends that the Board did not apply the *Burlington Northern* standard for determining whether the disclosure was an adverse action and instead applied a more lenient standard and simply looked to whether the action was more than trivial. Pet. Br. at 32. Although, the Board suggested it read section 806's language to authorize a lower threshold for the severity of the unfavorable action, ARB1 at 16, this statement is inconsequential, because the Board went on to explicitly apply the *Burlington Northern* standard to the facts of this case. Prefacing its discussion of whether the facts of this case amounted to an adverse action, the Board stated that the ALJ erred by not consistently looking at whether "the conduct would deter a reasonable employee from engaging in protected activity." ARB1 at 20. Then, in its concluding statement of its analysis of whether the disclosure of Menendez's identity was an adverse action, it stated "[c]learly, a reasonable employee in Menendez's position would be deterred from filing a confidential disclosure regarding misconduct if there existed the prospect that his

identity would be revealed to the very people implicated in the alleged misconduct." *Id.* at 25.

Moreover, the Board cited approvingly to its own precedent in *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 18 (ARB Sept. 30, 2008), which held that *Burlington Northern* was controlling for assessing whether the employer's conduct was sufficiently severe to trigger statutory protection. ARB1 at 17. Indeed, the Board's statement that the action need only be "more than trivial," – a standard that Halliburton alleges to be broader than that of *Burlington Northern* – may be viewed as simply a paraphrase of *Burlington Northern*. Notably, *Burlington Northern* stated that it was seeking "to separate significant from *trivial* harms." 548 U.S. at 68 (emphasis added). Most importantly however, in evaluating the severity of the adverse action in this case, regardless of its discussion of how section 806 might lend itself to a broader standard, the ARB explicitly applied the *Burlington Northern* standard to the facts here.[6]

[6] The Board has previously suggested that *any* differential treatment, regardless of how severe, qualifies as an adverse action. *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12-15 (ARB Dec. 29, 2010). But it neither explicitly stated nor actually applied such a standard here.

B. The Board correctly held that section 806's reference to terms and conditions of employment does not limit its prohibitions to tangible employment actions.

The Board correctly held that section 806's broad language plainly encompasses more than just those employer actions effecting a formal or monetary change to an employee's status (like a pay cut, suspension or discharge), and thus the breach of confidentiality in this case was discrimination in a term and condition of Menendez's employment. ARB1 at 16. A plain reading of section 806 makes clear, as the Board concluded, that it applies to "a broad spectrum" of working conditions, and is not limited to tangible employment actions. For example, section 806 explicitly prohibits "harass[ing]," "threat[ening]," or "in any other manner discriminat[ing]." *Id.*; 18 U.S.C. 1514A(a); c*f.* 29 C.F.R. 1979.102(b) (implementing identical language in aviation whistleblower statute and providing that conduct affecting terms and conditions of employment includes "intimidat[ing], threaten[ing], restrain[ing], coerc[ing], [and] blacklist[ing]," employees). Moreover, the Board's reasonable interpretation of this core coverage provision of section 806 is entitled to deference. *See Lockheed*, 717 F.3d 1121.

These broad references to actions that are not tangible employment actions contrast with other employment discrimination provisions that use narrower language to generally limit terms and conditions of employment to those matters involving an employee's economic standing or formal status. For example, Title

VII's discrimination provision covers the following types of employer actions: "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e–2(a); *see* ARB1 at 16. By its express reference to only certain kinds of actions, such as compensation, hiring and discharging, this provision of Title VII narrowed actionable conduct by an employer to that which affects one's formal or monetary standing, or to unpleasant workplace conditions so pervasive as to effect a constructive change in one's formal work conditions (such as a hostile environment). *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998). The contrast between section 806 and the anti-discrimination provision in Title VII suggests that section 806 was intended to prohibit a broader range of conduct. *Cf. Burlington Northern*, 548 U.S. at 63 ("We normally presume that, where words differ as [the words of Title VII's discrimination and retaliation provisions] differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Halliburton argues that the Board interpreted the scope of covered adverse actions under section 806 more broadly than warranted by the statute. Pet. Br. at 37. It points to the Board's suggestion that the language, "in the terms and conditions of employment," places no significant limitation on the scope of

covered adverse actions. ARB1 at 18. However, the Board simultaneously suggested that it was seeking to address "the entire spectrum of disparate treatment of men and women *in employment*." *Id.* (emphasis added).

Moreover, and most importantly, in its application of law to fact, the Board actually considered whether the conduct here affected terms and conditions of employment. ARB1 at 22-23 (considering whether legal requirement of confidential procedures created policy and expectation of confidentiality that would constitute a term or condition of employment).

Viewed in light of section 806's broad conception of "terms and conditions of employment," Halliburton's conduct here unquestionably falls within the ambit of this provision. The adverse action against Menendez was perpetrated by Halliburton officials, who emailed other Halliburton employees, including, ultimately, Menendez's work colleagues – telling them that Menendez had questioned their workplace accounting practices to the SEC, which had commenced an investigation. Considering that section 806 prohibits harassment, threats, and other discrimination in addition to tangible employment actions, company officials' identifying Menendez to his colleagues and superiors as the source of the complaint to the SEC surely affected Menendez's "terms and conditions of employment" within the broad meaning of that phrase in section 806.

C. The Board properly looked to section 301 of Sarbanes-Oxley to evaluate whether Menendez suffered discrimination in his terms and conditions of employment.

The right to confidentiality of an audit committee complaint was, by dint of section 301, a term and condition of Menendez's employment within the meaning of Section 806, and the ARB's finding on that matter should be upheld. ARB1 at 21 (concluding that section 301 established a term and condition within the meaning of section 806, and that Halliburton's conduct violated this term and Menendez's attendant expectation of confidentiality). Section 301 requires that publicly-traded companies such as Halliburton establish procedures for:

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

15 U.S.C. 78j-1(m)(4). Halliburton had its own written workplace policy providing for whistleblower confidentiality as the default option, with disclosure only in limited circumstances. *See* ARB1 at 5 n.27.

Formal terms and conditions of employment often take the form of stated policies which employees reasonably expect to be followed – in this case, confidentiality is a policy superimposed by law that affects workplace conditions and thus gives rise to a reasonable expectation of employer adherence. *Cf.* 5 U.S.C. 7103(a)(14) (defining terms and conditions under the Federal Labor-Management Relations Act to include "personnel policies, practices, and matters,

whether established by rule, regulation or otherwise, affecting working conditions"); *Phelps Dodge Min. Co. v. N.L.R.B.*, 22 F.3d 1493, 1496 (10th Cir. 1994) (defining terms and conditions in National Labor Relations Act context as including workplace perquisites to which one has a reasonable expectation). An employer's compliance with a statutory requirement regarding workplace policies thus constitutes a term and condition of employment even under a narrow and formalistic view of what constitutes terms and conditions.

Contrary to Halliburton's suggestion, the fact that section 301 is a separate provision, administered by a different agency (the Securities and Exchange Commission), and that it merely requires that companies set up confidential reporting procedures, does not undermine this analysis. ARB1 at 40-42. Section 301 plainly requires that Halliburton establish a confidentiality policy, and thus Menendez reasonably expected that his confidentiality would be respected when he made a complaint pursuant to that policy. While the primary goal of section 301 might not be to establish employee rights, it is entirely conceivable that a workplace rule designed for purposes other than establishing employee rights, nonetheless establishes reasonable expectations of conduct. Thus, the Board correctly held that confidentiality was a term or condition of employment based on the legislative requirement here.

Halliburton also appears to argue that the Board improperly based its finding that the disclosure of Menendez's identity was materially adverse, on the section 301 requirement that there be confidential reporting procedures. Pet. Br. at 43. The Board did suggest that section 301 established employees' "right" to confidentiality and that such a right should be enforceable under section 806. ARB1 at 23. But ultimately, it decided that there was an adverse action here by looking to whether the conduct would deter a reasonable whistleblower, and in undertaking this analysis it relied on legislative findings and its own expertise. *Id.* at 25.

Notably, the Board pointed to the section 301's congressional sponsor's statement of the concerns underlying section 301 (that lack of confidentiality will squash dissent), and went on to apply this broad legislative finding to the materiality analysis in the instant context, concluding that failure to protect employees from breach of confidentiality under 806 would deter whistleblowers: "Since the purpose of confidentiality [as expressed by Congress] is to encourage employees to come forward with information about [Sarbanes-Oxley] violations, permitting an employer to indiscriminately expose the identity of an employee who presents information concerning questionable accounting of auditing matters would most assuredly chill whistleblower-protected activity…." ARB1 at 23. The Board also stated that it merely sought "[t]o further this legislative intent " by

analyzing section 806 in light of broad congressional concerns about importance of confidentiality. *Id.* Thus the Board was simply giving effect to legislative findings concerning confidentiality, which are readily applicable in the section 806 context.

Further, the ARB also exercised its own judgment as to the materiality of a breach of confidentiality under the specific facts of this case, noting that it "stands to reason" that violating confidentiality under circumstances where one's own colleagues who are implicated in one's whistleblowing report would deter a reasonable whistleblower. ARB1 at 23. Thus, notwithstanding any suggestion that section 301 created a right of confidentiality applicable in the section 806 context, the Board ultimately provided ample basis in legislative findings and in its own expert assessment of the facts of this case to conclude that there was a materially adverse act here.

III. RETALIATORY MOTIVE IS NOT REQUIRED TO DEMONSTRATE THAT PROTECTED CONDUCT IS A CONTRIBUTING FACTOR TO AN ADVERSE ACTION IN WHISTLEBLOWER CASES.

The Board correctly held that Menendez did not need to prove that Halliburton acted with retaliatory motive when it disclosed his identity. In other words, Menendez need only show, under section 806, that his protected whistleblower complaint was a contributing factor in Halliburton's decision to disclose his identity and thus, "McCollum's breach of confidentiality, however well meaning, nonetheless demonstrates a lack of understanding of its foreseeable

consequences and does not absolve Halliburton of responsibility." ARB1 at 31-32 & 31 n.173; *See* 18 U.S.C. 1514A(b)(2)(A), incorporating 49 U.S.C. 42121(b)(2)(B)(iii)'s requirement that the employee show protected activity was a contributing factor to the adverse action). As this Court noted in *Allen*, "[a] contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'" 514 F.3d at 476 n.3 (quoting *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Case No. 04–149, 2006 WL 3246904, at *13 (ARB May 31, 2006) (quoting *Marano*, 2 F.3d at 1140)). The "contributing factor" standard was specifically intended to overrule case law that required a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action. *See Araujo v. New Jersey Transit*, 708 F.3d 152, 159 (3d Cir. 2013); *Marano*, 2 F.3d at 1140 (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)). This definition, on its face, admits no retaliatory motive requirement: a contributing factor is "any factor" affecting a decision. *Id.* at 1140-41; *see also Araujo*, 708 F.3d at 158-59; *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive."). While in some cases, protected activity may "combin[e] with," another factor, such as retaliatory animus, to lead to the outcome, all that an employee must show is that the

protected conduct was a single factor influencing the outcome. *See Allen*, 514 F.3d at 476 n.3.

Decisions from the Federal Circuit and the Third Circuit regarding the application of the "contributing factor" standard under analogous whistleblower statutes squarely demonstrate that an employee need not prove retaliatory motive. For example, in *Marano v. U.S. Department of Justice*, 2 F.3d at 1138, the foundational case interpreting the Whistleblower Protection Act's ("WPA") identical "contributing factor" standard of proof, Marano, a DEA agent reported his supervisors' misconduct. His report triggered an investigation of the functioning of his DEA office, and the results of the investigation prompted the DEA to overhaul the office and transfer Marano to a different position as part of the overhaul. *Id.* at 1138-39. The decision to transfer Marano was not based on retaliatory animus. *Id.* at 1139-40. The Federal Circuit found that Marano's whistleblowing nevertheless was a contributing factor in the decision to transfer him and held that "a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Id.*at 1140 (emphasis in original). Rather, it was enough that the content of Marano's disclosure caused the DEA to overhaul the office and transfer Marano. *Id*. at 1143.

In reaching this decision, the Federal Circuit recognized that the contributing factor standard focuses on actions that would dissuade whistleblowing, regardless of whether there was improper motive – rather than on conduct *intended* to retaliate against whistleblowing: "As long as employees fear being subjected to adverse actions for having disclosed improper governmental practices, an obvious disincentive exists to discourage such disclosures." 2 F.3d at 1142. In fact, in adopting the "contributing factor" standard, Congress had made clear that "[r]egardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988) (accompanying S. 508), *quoted in* 2 F.3d at 1141. Thus, the "contributing factor" standard is met whenever a protected disclosure plays a role in the decision to take action against an employee, regardless of whether the employer harbored retaliatory animus.

The Third Circuit's recent decision in *Araujo v. New Jersey Transit* reaffirmed this principle. In that case, the Third Circuit reversed a decision granting summary judgment to the employer in a case under the Federal Railroad Safety Act's ("FRSA") whistleblower provision, which like section 806, adopts the "contributing factor" standard of proof in 49 U.S.C. 42121(b)(2)(B)(iii). 708 F.3d at 160. Araujo alleged that he was subject to disparate discipline after engaging in the protected conduct of reporting a workplace injury. The Third Circuit

recognized that he did not proffer any evidence that New Jersey Transit expressed animus toward his protected injury report. *Id*. at 163. He relied entirely on circumstantial evidence such as the temporal proximity between his injury report and the discipline and the disparate application of the work rule for which he was disciplined, and presented no "evidence about [his employer's] motive." *Id*. at 160-61. Nonetheless, the Third Circuit found this evidence sufficient for Araujo to survive a motion for summary judgment under the "contributing factor" standard, which the court noted did not require any showing of retaliatory motive. *Id*. at 161-62. On this point, the Third Circuit found the legislative history of FRSA telling because Congress specifically recognized that incentives other than retaliatory animus might motivate a railroad manager to take action against an employee who reports an injury. For example, a company or its supervisors may have a financial motive to deter whistleblowers. This may not involve hostility to the act of whistleblowing but nonetheless discourages protected conduct. *See Araujo*, 708 F.3d at 161 n.7 ("[W]e believe that this reduced burden is appropriate in [railway whistleblower] cases. We note, for example, that the legislative history shows that Congress was concerned that some railroad supervisors intimidated employees from reporting injuries to the [railroad employer], in part, because their compensation depended on low numbers of … reportable injuries within their supervisory area.").

The legislative history of section 806, like the legislative history of the WPA and FRSA, suggests that Congress was concerned with prohibiting conduct that deters whistleblowing whether that conduct was motivated by retaliatory animus or not. In particular, Congress was concerned with ending a "corporate code of silence" that "not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity." Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, 2002 WL 863249 at *5 (May 6, 2002). Congress chose to do so by giving securities whistleblowers the same strong protections available to government whistleblowers under the WPA and aviation whistleblowers under 49 U.S.C. 42121. *Id.* at *5, *10, *13 (noting that government whistleblowers are protected but corporate whistleblowers are not, and noting section 806's incorporation of the "contributing factor" standard in 49 U.S.C. 42121).

The court of appeals and Board decisions that Halliburton cites do not demand a contrary conclusion. For example, in *Lockheed Martin Corp. v. Administrative Review Bd.*, the court considered whether a supervisor, upset at a whistleblower's complaint that she had committed fraud, gave "biased" reports that "poisoned" the actions of other company officials, who disciplined the whistleblower. 717 F.3d 1121, 1136 (10th Cir. 2013). Although the court implied that there may have been retaliatory intent in that case, it nowhere suggested it was

required, nor did retaliatory animus enter into its analysis of whether the contributing factor test was satisfied. *Id.* Indeed, animus is often present in whistleblower actions; this does not mean a showing of retaliatory motive is required. In fact, the *Lockheed* court noted that the contributing factor standard was lenient and less onerous than causation standards in other discrimination statutes, thus warranting its finding of a causal connection in spite of a lengthy lapse of time between protected conduct and adverse action. *Id.* at 1137.

In *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 727 (7th Cir. 2009), the court looked to the absence of animosity in evaluating the employer's affirmative defense that it terminated employee in connection with a neutral reduction-in-force measure. The fact that the employer had no negative feelings toward the protected conduct helped to bolster its argument that it was driven entirely by its neutral lay-off measure. But again, this does not establish that retaliatory motive is required as part of the contributing factor analysis.

Similarly, none of the Board decisions that Halliburton cites stand for the proposition that retaliatory animus is needed. Pet. Br. at 47-48. These cases, as a group, either happened to involve a showing of retaliatory intent or stand for the straightforward proposition that where the employee seeks to prove retaliatory intent, that intent may be proved through either direct or circumstantial evidence. To the extent that these cases suggest that retaliatory motive is required, the Board

has since clarified its approach to bring it more in line with the plain language of the statute, along with underlying policies. *See Hoffman v. Netjets Aviation, Inc.*, ARB Case No. 09-021, 2011 WL 1247208 at n.96 (ARB Mar. 24, 2011) ("retaliatory animus is not a necessary condition to a finding of causation"). Thus, the statutory language of section 806, its legislative history and purposes, and the applicable case law all support the Board's finding that Menendez did not need to prove retaliatory animus to show his whistleblowing was a contributing factor in the decision to disclose his identity.

IV. EMPLOYERS ARE NOT SUBJECT TO AN IMPOSSIBLE REBUTTAL STANDARD IF RETALIATORY MOTIVE IS NOT A REQUIREMENT OF A CONTRIBUTING FACTOR SHOWING.

Halliburton claims that without the retaliatory motive requirement, it is metaphysically impossible for an employer to meet its affirmative defense – to show by clear and convincing evidence that it would have committed the same action in the absence of the protected conduct, *see* 49 U.S.C. 42121(b)(2)(B)(iv) – in cases where the protected conduct triggered a chain of events leading to the adverse action. Pet. Br. at 50-51. Here, for example, the disclosure of Menendez's identity as a whistleblower was caused by and literally would not have happened in the absence of Menendez's whistleblowing. As a further example of the effects of this position, Halliburton points to cases where serious misconduct is only made known to an employer in connection with the employee's whistleblowing.

Halliburton argues that removing the requirement of retaliatory animus leads to grave injustices in such cases.

The employer's rebuttal standard, which must be proven by clear and convincing evidence, is deliberately a high hurdle: "[f]or employers, this is a tough standard, and not by accident." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (interpreting Energy Reorganization Act, 42 U.S.C. 5851, a statute that uses the same burden-shifting framework). However, the standard is not the perverse and impossible one that Halliburton suggests. It is true that the traditional formulation of an employer's affirmative defense is not readily applied to cases where, in a literal sense, the adverse action would not have occurred but for the protected conduct. To ensure that employers with legitimate motives unrelated to whistleblowing are not unfairly punished in such cases, an employer's affirmative defense need not show that the adverse action literally would have occurred in the absence of the protected conduct, but just that there was some valid motivation extrinsic to the protected conduct. ARB2 at 17 (noting that none of the legitimate business reasons for the disclosure that the ALJ cited addressed whether the legitimate business reason would have occurred for reasons extrinsic to the activity itself). So, in Halliburton's hypothetical of a complainant whose whistleblowing report discloses that he or she is engaged in significant misconduct, to make out an affirmative defense the employer must simply show

that there was a legitimate reason extrinsic to the protected conduct – such as the misconduct standing alone – that motivated the adverse action. In this hypothetical, the question would be whether the misconduct was an independent motivating factor sufficient to justify the discipline. *See, e.g.*, *Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, 2012 WL 694496 at *8 (ARB Feb. 29, 2012) ("intemperate or insubordinate (unauthorized) behavior" in connection with making a whistleblower protest may justify discipline under some circumstances).

The Board's approach to affirmative defense in this case is similar to the approach taken by the Federal Circuit. In *Kalil v. Dept. of Agriculture*, 479 F.3d 821 (Fed. Cir. 2007), Kalil, deputy administrator of a government farm loan program, engaged in protected activity when he had an ex-parte conversation with a judge's clerk in which he accused the government of fraud in a case involving his program. He was suspended for improper interference with the litigation, release of a report without prior approval, disrespectful treatment of his supervisor, and refusal to follow instructions. *Id.* at 823. The Federal Circuit upheld discipline as based on the manner in which Kalil made his protected whistleblower complaint even though his employer would not have learned of any misconduct or undertaken the disciplinary action in the absence of the protected conduct. *Id.* at 824-25. The court noted that the employer's burden for its affirmative defense was to show "whether the same agency action would have taken place without the

whistleblowing disclosures." *Id.* at 824. But the court nonetheless rejected the argument that when the adverse action is intertwined with the protected disclosure, an employer can never establish its defense. *Id.* at 824-25. It instead held that the "outrageous" "character of [the otherwise protected] disclosure itself supplies clear and convincing evidence" to support discipline. *Id.* at 825. Thus, the employer made out its affirmative defense, even though a literal showing that the action would have occurred absent the protected conduct was impossible. The court looked to the outrageous manner in which the whistleblower's protected disclosures were made – a factor extrinsic to the protected conduct itself – and found that this satisfied the affirmative defense.

Here, the question is whether there is clear and convincing evidence of a legitimate justification for disclosing Menendez's identity that would have occurred for reasons extrinsic to Menendez's whistleblowing. As the Board noted, a court order would provide such a basis because the employer would have been extrinsically motivated by a desire to comply with a judicial mandate and to avoid the consequences of disobedience. ARB2 at 16. Halliburton cited nothing of the sort in supporting its disclosure. Rather, it noted that colleagues were already aware of Menendez's whistleblowing, that McCollum wanted Menendez to know his concerns were being taken seriously, and that disclosing Menendez's identity would make it marginally easier to identify documents for retention. ARB2 at 17.

These justifications do not amount to clear and convincing evidence of an extrinsic basis for the disclosure of Menendez's identity and therefore Halliburton's affirmative defense fails.

V. SECTION 806 PROVIDES FOR NON-PECUNIARY COMPENSATORY DAMAGES, AND THE BOARD PROPERLY AWARDED MENENDEZ $30,000 IN SUCH DAMAGES.

A. Section 806's plain language permits an award of non-pecuniary compensatory damages.

Halliburton contends that the damages provision of section 806, 18 U.S.C. 1514A(c), precludes an award of non-pecuniary compensatory damages, such as damages for emotional distress and reputational injury. Pet. Br. at 52. But the Board properly concluded that the language of the provision contemplates a broad remedy, noting that appellate courts have interpreted materially identical language to cover non-pecuniary compensatory damages. Further, the Board's reasonable interpretation of the scope of section 806 damages is entitled to deference. *Lockheed Martin Corp.*, 717 F.3d at 1131.

Although no court of appeals has explicitly addressed the question of the scope of section 806 remedies, the Board relied on two circuits that have examined the highly similar remedies provision of the False Claims Act whistleblower provision, which is designed to protect employees who report fraud committed against the federal government. ARB2 at 18-19. The False Claims Act ("FCA") states:

> (1) In general.--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is … discriminated against in the terms and conditions of employment because of [protected conduct].
>
> (2) Relief.--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. 3730(h). The FCA whistleblower provision is thus nearly identical to section 806 with respect to remedies. Like section 806, it is an employment-related statute that purports to allow "all relief necessary" to make the employee whole. As section 806 does, it explicitly allows compensation for special damages, and lists only a few specific examples of such special damages.

The Seventh Circuit undertook a plain language analysis to determine whether emotional distress damages fell within scope of this provision, taking into consideration the historic meaning of "special damages":

> "*Special*, as contradistinguished from *general* damage, is that which is the natural, but not the necessary, consequence of the act complained of." *Roberts v. Graham*, 73 U.S. (6 Wall.) 578, 579, 18 L.Ed. 791 (1867) (emphasis in original). Whether a particular kind of injury gives rise to "special" damages thus depends on the tort committed. The usual consequences of a wrong are "general" damages, and unusual consequences are "special." *LINC Finance Corp. v. Onwuteaka*, 129 F.3d 917, 922 (7th Cir.1997).

Neal v. Honeywell, Inc., 191 F.3d 827, 832 (7th Cir. 1999). The court then went on to apply this historic tort-based concept of special damages to a contemporary employment statute: "[The FCA] provides for reinstatement and back pay, the usual remedies in wrongful-discharge cases. Perhaps this even implies that back pay is the 'general damages' remedy. If loss of income from employment is the usual consequence, then emotional distress must be the unusual one, and hence compensable as special damages." *Id.*

In other words, in its historic meaning, special damages encompass all unusual consequences of an injury. In a tort involving bodily injury, one might expect emotional distress to be a natural upshot of the underlying wrongdoing, so it would not be included in special damages. *See id.* ("if the tortfeasor cut off his victim's finger, emotional distress would be an ordinary consequence"). But in an employment statute where the statutory language contemplates that the normal damages are back pay, and also specifies the availability of special damages, those special damages are naturally construed to encompass unusual consequences like emotional distress and other non-pecuniary compensatory damages. The Eighth Circuit reached the same conclusion as to the scope of special damages in the FCA: "Damages for emotional distress caused by an employer's retaliatory conduct plainly fall within this category of 'special damages.'" *Hammond v. Northland Counseling Center, Inc.*, 218 F.3d 886, 893 (8th Cir. 2000).

These cases make clear that the inclusion of examples of special damages – such as attorney's fees, witness fees, and litigation costs – do not place a limit on the category, so long as the additional type of damages sought is consistent with the plain meaning of "special damages." The fact that special damages "include" litigation-related costs is merely to give an illustration of what can constitute special damages. *See Neal*, 191 F.3d at 832 ("'Costs and reasonable attorneys' fees' are a component of 'special damages.'"); *Mahony v. KeySpan Corp.*, Case No. 04 CV 554 SJ, 2007 WL 805813 at *7 (E.D.N.Y. 2007) (section 806 list of special damages is not "an exhaustive list"); *cf. United States v. Canada*, 110 F.3d 260, 263 (5th Cir. 1997) (stating that the term "includes" indicates a non-exhaustive list).

Contrary to Halliburton's argument that the inclusion of some specific examples of special damages suggests limits on the concept, Pet. Br. at 53, the broad language of the opening paragraph of the section 806 remedies section, stating that a prevailing employee "shall be entitled to all relief necessary to make the employee whole," compels a broad reading. As the Eighth Circuit noted in the analogous FCA context, "[p]roviding compensation for such harms [as emotional distress] comports with the statute's requirement that a whistleblowing employee 'be entitled to all relief necessary to make the employee whole.'" *Hammond*, 218 F.3d at 893 (quoting 31 U.S.C. 3730(h)); *see Vieques Air Link, Inc. v. U.S. Dept. of*

Labor, 437 F.3d 102, 110 (1st Cir. 2006) (although not squarely confronting scope of damages under "special damages" provision of aviation whistleblower law, upholding ARB award of mental anguish damages).

Moreover, such an interpretation corresponds to the types of employer conduct that may constitute an adverse action. Section 806 explicitly covers threats and harassment. *See* 18 U.S.C. 1514A(a). Such wrongs will often only result in non-pecuniary harm, such as emotional distress. Thus, a harmonious reading of the remedies provision includes non-pecuniary compensatory damages.

Finally, as the Board also noted, Congress drafted section 806 against the backdrop of several ARB interpretations of special damages as including non-pecuniary compensatory damages in the context of other whistleblower statutes administered by the Secretary of Labor. *See* ARB2, at 19 n.106 (listing pre-section 806 ARB decisions concerning scope of other whistleblower provisions containing special damages); *White v. Mercury Marine*, 129 F.3d 1428, 1434-35 (11th Cir. 1997) (Congress presumed to know prior authoritative judicial interpretations of language it uses in statutes).

Halliburton cites several district court decisions holding that non-pecuniary compensatory damages are not available. *See* Pet Br. at 53-54 and cases cited therein. But, as one district court noted, these cases "reject a plain reading" of section 806, which authorizes compensation for "*any* special damages." *Rutherford*

v. Jones Lang Lasalle America, Inc., Case No. 12–14422, 2013 WL 4431269 at *3 (E.D. Mich. 2013) (emphasis added in original). Instead, these contrary decisions generally have looked to the list of examples of special damages as exhaustive, when the plain language indicates this list is not exhaustive of the types of special damages available. One case cited by Halliburton, *Murray v. TXU Corp.*, Case No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444 at *3 (N.D. Tex. 2005), analogizes section 806 to the pre-1991 Title VII remedies provision, which had been widely interpreted as excluding non-pecuniary compensatory relief. Yet the Title VII remedies section was plainly and significantly different than that of section 806, and explicitly limited the remedy to equitable relief. Section 806 has no such limitation. Given that these contrary district court decisions do not follow the plain language of section 806 and rely on inapt analogies, this Court should reject them and instead rely on the Board's reading, which follows the courts of appeals' FCA jurisprudence and hews most closely to the text of section 806.

B. <u>The record supports an award of $30,000 in emotional distress and reputational damages.</u>

Halliburton argues that the ARB erroneously disregarded the ALJ's finding that only $1,000 in damages was warranted and inappropriately substituted its own assessment of the facts in adopting the ALJ's alternative $30,000 award. Pet. Br. at 55. The ALJ found that Menendez suffered isolation at work; good friends stopped associating with him, and colleagues ceased interacting with him on both a

personal and work-related level. ARB2 at 21. And he was cut out of the loop on communications concerning issues facing his office. *Id.* These conditions prompted him to take a leave of absence, which in turn led to the further diminution of responsibility and loss of a teaching role. *Id.* The ALJ concluded, however, that although Menendez "sustained distress related to isolation at the workplace because of the Respondent's adverse action…., the record does not disclose any significant material impact outside of his work," nor that there were any quantifiable or long-term emotional problems, nor any financial loss. ALJ2 at 10.

The Board accepted these facts. However, the Board concluded that, although the damage to professional reputation may have been confined to the Halliburton workplace, this did not make the damage – particularly to someone who loved and was committed to his job and with respect to his reputation at as large and influential company as Halliburton – any less profound. ARB2 at 22. Further, it found that there is no requirement for financial loss to sustain emotional distress and here, while not quantifiable, Menendez's disconsolation due to his ostracism and marginalization at work was plain. *Id.* Thus, looking to well-established principles concerning the proper amount of damages in whistleblower cases, it adopted the ALJ's alternate finding as consistent with other cases involving non-pecuniary emotional and reputational harm. *See id.* at 23 n.116.

CONCLUSION

For the foregoing reasons, the Secretary urges that the decision of the Board be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 5th day of December 2013, I electronically filed this Response Brief for the Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Fifth Circuit Rule 32, the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 11,760 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally-spaced typeface, Times New Roman, in 14-point font. This brief was prepared using Microsoft Word 2010.

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