

No. 19-55891

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DAVID LILLIE,
Plaintiff-Appellant,

v.

MANTECH INT'L CORP.
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:17-cv-02538-CAS-SS
District Judge Christina A. Snyder

APPELLANT'S REPLY BRIEF

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INTRODUCTION

David Lillie, the appellant, presented ample evidence supporting the jury's verdict that ManTech unlawfully fired him in reprisal for his concern that his superiors asked him to "covertly" hide how they had him use Lockheed's proprietary MathCAD files and pass off the work as his own. ManTech reargues its evidence ignoring how the jury acted reasonably in rejecting its claims and awarding damages to Lillie for his illegal termination. ManTech also ignores Lillie's evidence about the reasonableness of his belief in light of the "impromptu meeting" where he was instructed on the need to respect Lockheed's proprietary interest in its prior work, and the plain meaning of the Berg Email as a concern about passing off Lockheed's work "covertly."

ManTech also relies on cases applying an outdated version of the False Claims Act (FCA) – before the 2009 amendment expanded the scope of protection to include "efforts to stop 1 or more violations[.]" 31 U.S.C. § 3730(h)(1). Congress adopted this amendment precisely to protect whistleblowers like Lillie who raise a concern about a potential fraud and are successful in deterring it.

ISSUES PRESENTED

- I.** Whether the district court erred in granting judgment as a matter of law dismissing Lillie's whistleblower retaliation claims after the jury returned a verdict based on reasonable conclusions from the evidence.
- II.** Whether the district court erred in conditionally granting the defendant's motion for a new trial.
- III.** Whether the district court erred in denying Lillie double backpay pursuant to 31 U.S.C. § 3730(h)(2).
- IV.** Whether the district court erred in denying Lillie his attorney's fees for want of being a prevailing party.

Except for California Labor Code § 1102.5(b) (which is at p. 31 in the Addendum), all applicable statutes are contained in Lillie's Opening Brief or its addendum, or in the body of this reply brief.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING JMOL.

A. ManTech relies on a version of the facts that the jury had good reason to reject.

ManTech's brief omits discussion of how David Lillie's training supported the jury's finding of his reasonable belief. Training is a necessary consideration in determining whether a belief is reasonable. *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1188 (9th Cir. 2019). Yet, ManTech ignores the July 31, 2014, impromptu meeting in which Facto advised Lillie, Brown, Shaw, and Fettig that the contract between JPL and Lockheed Martin was very restrictive regarding access to Lockheed's proprietary information by contractors JPL. ER 80-84. Lillie understood Facto's warning to mean that Lillie, as an employee of third-party contractor ManTech, did not have access to any of Lockheed's proprietary information. ER87. With this evidence of Lillie's training, and the content of the Berg Email (ER 291), it is clear that the jury had a lawful basis to conclude that Lillie was rightfully concerned that he was being asked to participate in a fraudulent passing-off of Lockheed's work as that of ManTech. This evidence fully supports the jury's finding that Lillie had both a subjective and an objectively reasonable belief that the plan to cover-up the use of Lockheed's MathCAD files was an attempt to pass off Lockheed's work as that of ManTech without attribution. Ignoring Lillie's evidence supporting his belief in light of his training,

ManTech argues simply that the Court do the same: rely solely on its evidence and disregard Lillie's. ManTech Br., pp. 3-4. It implies that because Lockheed's Wally Chase did not state that the files were proprietary, Lillie had no basis to believe that they were. The jury was not required to – and did not, as reflected by its verdict in favor of Lillie -- accept ManTech's argument. Because the evidence, including Lillie's testimony about his training and the Berg Email, supported a finding that the files were Lockheed's propriety work product, it was improper for the district court to disturb the jury's verdict.

ManTech insists that Chase's email requires a finding that the MathCAD files were not proprietary. ManTech, however, ignores Chase's follow-up email at ER 288, saying "This power supply is a Lockheed Martin Patent topology that is not common to industry" and "[w]e ... spen[t] months" "working with JPL for updates." Lillie testified that he understood this statement to be a reference to Lockheed's proprietary interests. ER 99, lines 18-22, and ER 100, line 20, to ER 101, line 12. ManTech's argument for a different interpretation did not persuade the jury.

ManTech next argues that Ernest Fierheller got the MathCAD files "from prior work contracting with ManTech." ManTech's brief, pp. 3-4, but cites to pages in the record that fail to support that assertion. In fact, Fierheller could not recall when he got the files. ER 187:5-8, ER 188:5-7, 13-15. He could not recall

Brown asking where he got them. ER 189:3-5. He also could not recall Lillie's name being on any non-disclosure agreement (NDA). ER 189:13-14.

ManTech argues that Lillie did not raise his concern about misuse of Lockheed's files on September 1, 2014, but waited until October 7, ManTech Br., 4, 5, but provides no legal authority for any requirement that a whistleblower raise the protected concern by any particular deadline. Congress has adopted no temporal limit on protection for raising concerns, and any such limit would be contrary to the remedial purpose of encouraging employees to raise compliance concerns at any time. Indeed, when Congress considered the specific issue of a time limit on protected activity in connection with the 2012 Whistleblower Protection Enhancement Act ("WPEA"), it stated its intention to make "clear, once and for all, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." S. REP. NO. 112-155, at 5, 2012 U.S.C.C.A.N. 589, 593 (2012). Congress expressly ruled out imposing any such limits. *See* 5 U.S.C. § 2302(f)(1)(G) ("A disclosure shall not be excluded from subsection (b)(8) because— ... (G) of the amount of time which has passed since the occurrence of the events described in the disclosure.").

ManTech's reference to Brown's query about deleting the references to the MathCAD files ignores that a jury could rightfully infer that Brown knew there was something wrong with the use of Lockheed's MathCAD files. ManTech's Br.,

4. In fact, ManTech's footnoted claim that Lillie's counsel "mischaracterized this testimony," epitomizes its view that its interpretation of the evidence is superior to the jury's, that it should determine how to weigh the evidence and what inferences to draw. Additionally, Lillie's concern about passing-off Lockheed's work as that of ManTech is protected regardless of what Brown asked about it. Brown's testimony that "we are marking all of the Mathcad files proprietary, so I do not think it will be an issue" adds weight to the jury's finding that Lillie believed that he raised a legitimate compliance issue. ManTech Br., 4-5; ER 294.

The jury did not have to credit JPL's ethics manager Lani De Benedictis's characterization of Lillie's report as "advice" and not a "complaint." ManTech Br. 5; citing SER 281. The jury could reasonably infer that De Benedictis was motivated to downplay the seriousness of Lillie's concern to avoid responsibility for failing to address it. While the jury could have inferred knowledge of Lillie's report to JPL Ethics, it hardly matters when there is no dispute that Lillie disclosed his concern directly to ManTech through the October 8, 2014, Berg Email. ER 291.

As to the Berg Email, ManTech's brief presses for its preferred view of the evidence, underlining the words it wants to emphasize ("most likely not" and "hearsay"). ManTech Br., 6. The jury, however, was free to interpret Brown's direction to "go ahead and use the files 'covertly'," and conclude both that Brown was mindful of the passing-off violation and trying to conceal it and that

ManTech's Berg was aware of this concern at least since October 8, 2014.

ManTech's argument that this email makes "no mention of Brown asking whether references to the MathCad files could be deleted," is merely playing semantics about what "covertly" really means. ManTech Br., 7. The jury could reasonably conclude that "covertly" meant Lillie was asked to participate in a fraudulent cover-up. Further, the jury could reach the same conclusion whether it believed Brown said "covertly" or "quietly," as they can have the same meaning.

Similarly, the jury could reasonably reject ManTech's argument that "Lillie did not state that he was concerned about potential fraud against the government or other unlawful activity." ManTech Br., 7; also p. 31. The jury was free accept Lillie's testimony that Brown told him "to go ahead and use the files 'covertly'" as authorizing him to pass off Lockheed's work as his own. The law does not require Lillie to use the word "fraud" or any other magic words to receive protection. The law protects "efforts to stop 1 or more violations[.]" 31 U.S.C. § 3730(h)(1). Any words used in such efforts are protected. Accord, *Sitar v. Indiana Dep't of Transp.*, 344 F.3d 720, 727 (7th Cir. 2003) (It is not necessary for an employee to "use the magic words 'sex' or 'gender discrimination' to bring her speech within Title VII's retaliation protections[.]"). See also, *U.S. ex rel. Elms v. Accenture LLP*, 341 F. App'x 869, 874 (4th Cir. 2009) (Finding sufficient allegations that Elms was fired shortly after disclosing that Avanade was "short-changing the government."). By

looking at the meaning of what Lillie said, and the context of his training and the contractual environment, it is easier to see why the jury could conclude that Lillie did subjectively, and with reasonable objectivity, believe he was raising concerns about a violation of the government contracting requirements.

ManTech relies on Berg's trial testimony that Lillie's email was "routine" and he did not consider it to be a complaint about fraudulent or illegal activity, ManTech Br., 7, suggesting that Berg either had no notice of Lillie's concern, or had no animus against it. The jury did not have to agree with either suggestion. The jury was free to consider that Berg still investigated the concern, even if it was just "a quick phone call," in order "to verify there were no – no issues and then proceed as normal." ER 222. It is the jury's job to determine credibility and motives, and a jury did not have to believe that Berg bore no animus. A jury could instead conclude that Berg was worried enough to find the easiest way to justify rejecting Lillie's concern. In the context of ManTech's subsequent treatment of Lillie – Berg ducking out of the office after asking Lillie to come see him, ManTech then furloughing him when he could have done other work, and then marking him as ineligible for rehire – the jury had sufficient evidence from which to conclude that ManTech terminated Lillie in reprisal for his raising a compliance concern.

Berg got a conclusory statement from JPL's Klohoker that "there were no concerns about our accessing the – this data and using it[.]" ER 207. Having the

answer he wanted, Berg apparently concluded his investigation – without ever checking with anyone from *Lockheed*, whose proprietary rights were at issue. Significantly, Berg did not testify that he told Lillie about Klohoker’s statement. Berg’s inquiry, therefore, had no effect on the reasonableness of Lillie’s belief that he had been drawn into a cover-up of ManTech’s plan to pass off Lockheed’s work without permission.

ManTech then emphasizes how Lillie signed off on the memorandum on the “very next day.” ManTech Br., 8. That Lillie later believed the issue was resolved does not deprive ManTech of knowledge that Lillie raised his concern the day before and threatened to hold up his approval until it was resolved. Compare Further Excerpts of the Record (FER) 13 (Tr. 17:8)(“I was led to believe it was resolved” on October 9) with ER 291 (October 8 Berg Email, last sentence). The jury had all the evidence that was necessary to support its finding that Lillie’s merely raising a concern that ManTech was improperly using Lockheed’s proprietary information was enough to provoke the end of Lillie’s career at ManTech.

ManTech relies on Exhibit 18, SER 256, to argue that JPL announced that no additional work materialized, and this is why it had no further work for Lillie. This email with the subject “Re: David Lillie” is dated January 21, 2015, and

reports that James Hale and David Lillie attended a meeting with Klohoker on December 16, 2014. In the email,¹ Klohoker says:

David said that they, he and James, had done as much as they could and that there [sic] were waiting for responses from other parties before they could go any further. Based upon that statement, I told James and David to do as much as they could through the end of the week, Dec. 19th, and then stop work until I could reassess the situation in January 2015.

Lillie testified differently about this meeting. FER 3-4 (Tr. 19:8-20:22). Lillie recalls that he attended the meeting alone with Klohoker who asked him to drive from ManTech to JPL for what turned out to be “a very short meeting.” *Id.* at 20:14. Klohoker asked, “am I being treated well. Is anybody mistreating me[?]” 19:20-21. Then, on the following Friday, Lillie was sent home on an involuntary furlough. 20:21-22. Given the inconsistency in these accounts, the jury had a credibility decision to make. The verdict shows that it believed Lillie and not Ex. 18. This function of weighing the evidence and deciding credibility belonged to the jury, and not to the judge. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014).

As to ManTech’s reliance on JPL’s role in the furlough and termination, that role does not exclude the reasonable inference that Lillie’s protected activities contributed to the outcome. While ManTech disclaims any knowledge of Lillie’s report to JPL’s ethics officer, JPL certainly had knowledge of it. Moreover, record

¹ ManTech’s counsel has consented to use of this quote in the public record. This quote contains none of the information sought to be sealed.

evidence shows that JPL and ManTech had other work available for Lillie, such as the Failure Modes Effects and Criticality Analysis (FMECA). ER 144-46; 284-85 (Stipulations 45-47); 303-04 (Ex. 17). The jury was also free to disbelieve ManTech's claim that it learned Lillie had taken confidential data² and reclassified him as ineligible for rehire for that reason. ManTech vociferously denies knowledge of Lillie's disclosures to JPL Ethics and members of Congress as of Lillie's February 6, 2015, termination (see, e.g. ManTech Br., p. 5-6, 22 n. 9), but is silent about the state of its knowledge in April 2015, when it reclassified Lillie as ineligible for rehire. There is no evidence that ManTech conducted any investigation of its concern about Lillie's possession of confidential data, or even picked up the phone to interview him about it. The jury did not have to believe ManTech's claim about the reason for this reclassification.

² ManTech also ignores Lillie's claim that the confidentiality agreement cannot detract from the legal protection for his retention of evidence for use in this case. ManTech's brief does not discuss the cases raised in Lillie's brief, pp. 14-15 n. 3.

B. ManTech failed to give Lillie notice of the grounds for its motion during the trial, when Lillie could have addressed them with additional evidence.

ManTech claims that it and the district court “fully complied with Fed. R. Civ. P. 50.” ManTech Br., 50. Rule 50(a)(1) requires that, “[t]he motion [for JMOL] must specify the judgment sought and the law and facts that entitle the movant to the judgment.” One of the requirements of the Rule is “to call the claimed deficiency in the evidence to the attention of the court *and to opposing counsel* at a time when the opposing party is still in a position to correct the deficit.” *Waters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996) (emphasis in original). Rather than explain how Lillie’s evidence supposedly failed to support any required element of his claims, ManTech instead points to counsel’s post-trial cooperation in scheduling briefing on ManTech’s motion. ManTech’s argument fails to consider that by the time counsel submitted their briefs, the trial was already over. Any objection by Lillie at that time to ManTech’s and the district court’s failure to identify the alleged shortcomings during the trial would have been pointless, because the jury had already rendered its verdict and been discharged. Just as in *Waters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996), Lillie did not receive any notice during the trial of the claims that his evidence was in any way inadequate. Moreover, ManTech’s motion for a directed verdict failed to provide notice of the grounds ManTech would assert post-trial.

In one case cited by ManTech, this Court affirmed a jury's verdict against West, finding that "instead of simply copying OTR's design, West used tires from an anticipated OTR order and passed those tires off as his own." *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1108, 1014-15 (9th Cir. 2018). This Court appreciated that a jury could correctly determine that an attempt to pass off someone else's work as your own is wrongful and affirmed the jury's verdict on the merits. The Court's analysis of the waiver issue, relied upon by ManTech, was thus immaterial, and it failed to consider that a post-trial objection would be futile as the opportunity to introduce responsive evidence was gone.

Further, arguments not raised pre-verdict are waived for purposes of appeal. *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1345 (9th Cir. 1985); *OTR Wheel Eng'g, Inc., supra*, 897 F.3d at 1016. Lillie certainly raised this concern in his appellate brief, p. 19-21.

Finally, ManTech asked this Court to find plain error even if it failed to comply with the correct showing for its motion. ManTech Br., 53, n. 28. If plain error is to be applied, it can also be applied on behalf of Lillie on this issue.

X. The jury had sufficient evidence to find that Lillie had a reasonable belief for his protected activity.

ManTech argues that any fraud claim would have lacked merit under the False Claims Act (FCA). ManTech Br, p. 15. This argument is superfluous as

Brown backed off her attempt to conceal the use of Lockheed's MathCAD files after Lillie objected. ER 294. Lillie's concern exposed the scheme to cover-up ManTech's use of Lockheed's work. This case exemplifies exactly what Congress intended – when employees speak up and raise compliance concerns, they deter violations.

As previously explained, Lillie's FCA retaliation claim requires only that Lillie had a reasonable belief that he intended his actions to stop one or more violations. The materiality of the violation would be significant only if Lillie had the training, knowledge and experience to understand and assess materiality. In this case, his primary training on compliance consisted of the Impromptu Meeting which emphasized the importance of protecting Lockheed's proprietary interests. ER 80-81. This Court addressed the reasonable belief requirement, including the employee's training, as follows:

The objective reasonableness component, ... “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same *training* and experience as the aggrieved employee.” “The reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities.” [Emphasis added, citations omitted.]

Wadler v. Bio-Rad Labs., Inc., 916 F.3d 1176, 1188 (9th Cir. 2019). The jury was aware of Lillie's training; ManTech's failure to consider that evidence is a failure to consider all the evidence available to the jury.

ManTech correctly quotes the current version of the FCA anti-retaliation provision at 31 U.S.C. § 3730(h)(1), as amended by the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, § 4(d), 123 Stat. 1617, 1625. ManTech Br., p.16. However, ManTech relies on cases that pre-date the 2009 amendment that added “other efforts to stop 1 or more violations” to the scope of protection. ManTech Br., pp. 16-21, 23-25, 27, 29-30. That is why the old cases required “conduct that was in furtherance of an FCA action,” that a party “must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action,” or that the “employer must be aware ‘that the employee is investigating fraud[.]’” (Quoting ManTech Br., 16, 17, 29.) Those decisions relied upon a prior version of 31 U.S.C. § 3730(h) that did not protect “other efforts to stop 1 or more violations[.]”

In *Singletary v. Howard University*, 939 F.3d 287, 295-96 (D.C. Cir. 2019), the court emphasized that the 2009 amendment eliminated the requirement that the protected activity be in furtherance of an FCA action. The court looked to “Section 3730(h)(1)’s second prong, which, unlike the first, is not tied to the prospect of a False Claims Act proceeding,” and noted that other circuits had recognized the significant expansion in protection wrought by the 2009 amendment:

Instead, the plain statutory text focuses on the whistleblower’s “efforts to stop” violations of the statute before they happen or recur. See *United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 201 (4th Cir. 2018) (“The apparent purpose of

the [second prong] is to untether these * * * protected efforts from the need to show that [a False Claims Act] action is in the offing. Indeed, we and other circuits have recognized that the amended language broadens the scope of protected activity.”); *United States ex rel. Chorches v. American Med. Response, Inc.*, 865 F.3d 71, 97 (2d Cir. 2017) (the second prong “broaden[s] the universe of protected conduct under [Section] 3730(h), at least with respect to ‘efforts to stop’ [False Claims Act] violations”).

The *Singletary* court specifically found that “the focus of the second prong is preventative—stopping ‘violations’—while the first prong is reactive to an (alleged) actual violation of the statute.” Citing, *Carlson v. DynCorp Int’l LLC*, 657 F. App’x 168, 171 (4th Cir. 2016) (“It would be nonsensical to say that these efforts only become protected activity if a lawsuit under the [False Claims Act] becomes a distinct possibility—the second prong is explicitly untethered from any such action.”).

In *Chorches*, the court recognized that the added protection in the 2009 amendment encompasses a plaintiff’s “refusal to engage in the fraudulent scheme, which ... reasonably could be expected to prevent the submission of a false claim to the government[.]” 865 F.3d at 96. This principle matches Lillie’s statement in the Berg Email that, “This issue needs to be resolved * before I can sign and release IOM 5131-14-194.” ER 291.

ManTech inexplicably ignores the impact of the 2009 amendments on recent interpretations of the FCA. *See, e.g.:*

[T]he False Claims Act’s whistleblower provision mirrors other federal whistleblower protection laws. Whether expressly called for in the statutory text, or the product of judicial or administrative interpretation, many whistleblower protection provisions cover employees who report or oppose what they reasonably believe to be unlawful conduct. That is because “a layperson should not be burdened with the ‘sometimes impossible task’ of correctly anticipating how a given court will interpret a particular statute.” To summarize, Singletary can establish that she engaged in protected activity under Section 3730(h)’s second prong if she plausibly alleges facts showing that she took lawful measures to stop or avert what she reasonably believed would be a violation of the False Claims Act. [Footnotes and citations omitted.]

Singletary, 939 F.3d at 296-97. This Court has experience recognizing “reasonable belief” as a basis for protected activity under Title VII. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002) (“It is unnecessary that the employment practice actually be unlawful; opposition thereto is protected when it is “based on a ‘reasonable belief’ that the employer has engaged in an unlawful employment practice”), quoting *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir.1994) (emphasis in original, citation omitted); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695-96 (9th Cir. 1978); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). This Court also has considered the reasonable belief requirement of the Sarbanes-Oxley Act (SOX) to be a “minimal threshold requirement.” *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009). See also, *Wadler*, quoted at p. 16 above. This body of law arising from a variety of anti-retaliation statutes supports the jury’s broad authority to determine whether

beliefs are “reasonable.” *See Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418 (2015) (a recent U.S. Supreme Court decision that ManTech’s brief does not address). *See Lillie’s Br.*, pp. 24-25.

ManTech claims that Lillie failed to engage in any conduct that “would impact the submission of the claim for payment to the government[.]” *ManTech Br.*, 16. That argument ignores Lillie’s claim that he was asked to pass off Lockheed’s work in ManTech’s government-funded work product without Lockheed’s permission, which undermines ManTech’s further suggestion of a lack of “nexus.” *ManTech Br.*, p. 17.

ManTech argues that its supervisor, Berg, did not understand Lillie’s email to be a complaint about fraud, and that Lillie’s reference to “hearsay” meant that the claim of a violation “seemed very doubtful[.]” *ManTech Br.*, 32. Through its verdict, however, the jury determined that Lillie’s email was protected and Berg received it, even if he claimed he did not recognize it as protected activity. The Supreme Court just made clear that, “it’s irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.” *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020), p. 14 of the slip opinion. The Court rejected a defense when, “the employers may mean that they don’t perceive themselves as motivated by a desire to discriminate[.]” *Id.* at 17.

ManTech's brief advances a number of theories why Lillie's words could be interpreted as expressing concerns about *anything* other than defrauding the government. ManTech Br., pp. 22-24. It argues that the Berg Email does not contain the word "fraud," ignoring that it did say "covertly." ER 291. It argues that only JPL's contract with Lockheed was at issue, ignoring that all of these contracts were funded by NASA, and Lillie was concerned that he was being swept into a cover-up of ManTech's usurpation of Lockheed's propriety work while on the taxpayer's dime. ManTech notes that in the Berg Email itself, Lillie expressed the probability that ManTech's use of the Lockheed files was "most likely not" a violation. ManTech Br., 6, 31-32. Even if there was only a small chance that it was a violation, however, Lillie's email made clear that he would refuse to sign off on his work unless that chance was resolved. ER 291, last line. The jury rightly concluded that Lillie's action was an effort to stop a violation. ER 52-53.

ManTech emphasizes a concern that Lillie's disclosure had not "connected '*defendant's*' receipt of government benefits to *JPL's* compliance with its contract obligations." ManTech Br., p. 25; p. 28, n. 13. While there is no requirement that the potential FCA violation that is the subject of the protected activity be a violation by the whistleblower's employer, the content and context of Lillie's disclosure raised a concern that both ManTech (Berg's employer) and JPL (Brown and Facto's employer) were going to pocket taxpayer funds after passing off

Lockheed's work as that of ManTech, without attribution. There is no evidence that Lillie was trained about the scope of certification or NDA requirements such that he could assess if Brown's request to cover up his use of Lockheed's files was a violation. Lillie had Facto's instructions at the Impromptu Meeting, which elevated his concerns when Brown asked him to conceal his references to Lockheed's files.

ManTech continues to assert that Lillie was authorized by a prior NDA to access the Lockheed files, but the evidence on this point was contested. Compare ManTech Br. 25, n. 11, with Lillie's Br. 7, 29 and ER88-89 (Tr. 49:10-50:1). Brown told Lillie that she didn't know if JPL got approval for Lillie to use Lockheed's MathCAD Files. ER122-124, 293 (Tr. 83:1- 85:4). On its face, Lillie's NDA expired in 2009. ER308, ¶8. ManTech's brief, on this issue as on so many others, fails to acknowledge that the jury heard and saw competing evidence before it ruled in Lillie's favor.

ManTech argues that Lillie's October 9, 2014 signature on the memorandum somehow deprived ManTech of knowledge that his October 8, 2014 email to Berg raised a concern about a violation. ManTech Br., 32. In connection with this argument, ManTech ignores that Brown reversed herself and decided to include the references to Lockheed's files; ManTech made this point separate from its explanation of Lillie's October 9, 2014, signature. *Compare* ManTech Br. p. 5 with

p. 32. That Brown acceded to Lillie's position does not erase the stand he took on October 8 in the Berg Email. The critical question is whether the Berg Email was protected, and the jury had sufficient evidence to find both that Lillie engaged in protected activity and that activity caused his termination.

D. The jury had sufficient evidence to find that Lillie's disclosures caused his termination.

ManTech's claim that Lillie failed to show it had knowledge of his protected activity (ManTech Br., pp. 5-7, 22 n. 9, 29-30, 32, 43-44, 48) is puzzling as there is no dispute that Berg received the Berg Email. The district court rejected the jury's determination that the Berg Email was protected. If this Court restores the jury's verdict on protected activity, that decision would also resolve the issue of Berg's, and therefore ManTech's, knowledge of that protected activity. The district court was overly focused on whether the Berg Email gave "notice of this protected activity," rather than whether it was itself protected. Lillie had no duty to explain his reasonable belief to ManTech. *Knox v. U.S. Dept. of Labor*, 434 F.3d 721 (4th Cir. 2006); *Wadler*, quoted at p. 16 above; Lillie's Br. 30-31.

Neither party challenged the jury's instructions on the causation standard. The "but for" standard is what a jury uses to determine if the evidence showed that the protected activity caused the adverse action. The causation standard does not change the methods of showing causation or the scope of evidence that can be

used. *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243 (4th Cir. 2015); *Kwan v. Andelax Group, PLLC*, 737 F.3d 834, 845 (2nd Cir. 2013) (“[T]he but-for causation standard does not alter the plaintiff’s ability to demonstrate causation at the prima facie stage on summary judgment or at trial indirectly through temporal proximity.”); *Wright v. St. Vincent Hospital*, 730 F.3d 732, 739 (8th Cir. 2013) (court considered circumstantial evidence of discriminatory motive before affirming decision from a bench trial); *Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025, 1032 (8th Cir. 2013) (affirming judgment after jury heard statements about “troublemakers” being gone and antagonists being involved in the adverse decisions). Here, the jurors heard the live testimony of the witnesses and could draw their own conclusions about credibility and motives. Lillie’s story about how he was furloughed in December, fired in February and barred from reemployment in April, provided the jury with a pattern of antagonism that supports finding causation. Berg’s and Brown’s attempts to explain what happened support a finding of pretext, which is legally sufficient for a finding of causation. Lillie’s Br., 34.

ManTech argues that it furloughed Lillie in December 2014 because JPL stopped work, “just as it had several times in the past when work dried up.” This case was different, though, because there was other work available (although it was offered to Lillie on only a part-time basis), and because ManTech added onto this

furlough by affirmatively firing Lillie in February 2015 and then barring him from future employment in April 2015. The jury was free to reject ManTech's argument that any part of this pattern of antagonism was routine.

As to Lillie's claim under the Defense Contractors Whistleblower Protection Act (DCWPA), 10 U.S.C. § 2409, ManTech quotes its language, but fails to grasp that the scope of protection is even wider than the FCA's. ManTech Br., 38-39. The statute protects any disclosure of evidence of "a violation of law, rule or regulation," or "an abuse of authority." In light of Lillie's testimony about his training, and Brown's evasiveness on the use of Lockheed's proprietary files, the jury could reasonably conclude that Lillie's concern was reasonable and protected under the DCWPA.

An important difference between retaliation claims under the DCWPA and the FCA is that, under the former, a plaintiff must only establish that retaliation for a protected disclosure "was a contributing factor" to any adverse personnel action taken against the plaintiff. 10 U.S.C. § 2409(c)(6) (incorporating by reference 5 U.S.C. § 1221(e)(1)); *United States ex rel. Cody v. ManTech Int'l, Corp.*, 746 F. App'x 166, 178 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1304 (2019).³ "A contributing factor is any factor, which alone or in combination with other factors,

³ ManTech's brief cited to an order of the district court in the *Cody* case without citing this subsequent appellate decision reversing it in part, on other grounds. ManTech Br., 39-40.

tends to affect in any way the outcome of the decision.” *Feldman v. Law Enf’t Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (internal quotation marks omitted).

If Lillie succeeded in presenting sufficient evidence of a violation for his FCA claim, then he necessarily presented enough evidence for his DCWPA claim since the FCA is a “law” and that evidence would be evidence of a violation of the FCA. The DCWPA goes farther, though, in protecting disclosures of evidence of a violation of any law or rule. The jury could find that Facto’s instructions at the Impromptu Meeting were not only the basis for a reasonable belief about an FCA violation, but also a “rule” that Brown violated by asking Lillie to delete his references to Lockheed’s files. ManTech’s contention that Lillie’s concern was not sufficiently connected to a fraud against the government is irrelevant to Lillie’s DCWPA claim. Even if Facto’s instructions addressed only contractual obligations (which they did not), it was still presented to Lillie as a “rule” that can support the jury’s finding of DCWPA liability. Our legal system enforces contracts and provides remedies for violations. As the contracts at issue in this case all arise from government funding, Lillie and the jury had a reasonable basis to conclude that Facto’s instructions related to the government’s contracts.

While the parties disagree about how much temporal proximity is sufficient to show causation, neither Congress nor the courts has set a measurable definition.

In some circumstances, nine or ten months can permit an inference of causation for an adverse action occurring at the employer's first opportunity. *Price v. Thompson*, 380 F.3d 209, 213 (4th Cir. 2004). Here, the initial furlough was two months after the Berg Email, the termination two months after that, and the reclassification as ineligible to hire two more months after the termination. The jurors also heard ManTech witnesses whom they could have found were less than credible, and a reason for the reclassification (holding confidential information) that is not entirely unrelated to the litigation he has now pursued. This pattern uses information in addition to temporal proximity that can support the jury's finding. Most certainly, the jury did not have to find that ManTech's evidence was "clear and convincing" that it would have taken the same actions without the protected activity.

In *Cody*, ManTech offered no corroboration for its officials' testimony, such as internal documents reflecting that such a decision had, in fact, been made, and the jury was not obliged to accept this explanation. 746 F. App'x at 182. "They could have, but they did not." *Id.*

Finally, the California Labor Code Section 1102.5(b), incorporates the "reasonable belief" standard, here called "reasonable cause." See Addendum. Key to the assessment of the reasonable belief is the training that the employee received. Facto's Impromptu Meeting provided Lillie with sufficient cause to believe that Brown's instruction to cover-up his use of Lockheed's files was

drawing him into an unlawful attempt to pass off Lockheed's work without attribution. A whistleblower need not cite to a specific statute that is violated if the jury finds that the whistleblower reasonably relied on the training he received on the job about what is kosher and what is not. The California law is even more expansive in its protection than the FCA and DCWPA in that it protects employees if "the employer believes that the employee disclosed or may disclose information[.]" The jury could reasonably have found that the April 2015 reclassification of Lillie as being ineligible for rehire revealed a perception that Lillie had information he intended to disclose in litigation or otherwise. However, the violations at issue in the FCA and DCWPA are themselves sufficient for this claim as well.

II. THE DISTRICT COURT ERRED IN CONDITIONALLY GRANTING MANTECH'S MOTION FOR A NEW TRIAL.

ManTech's argument here is largely derivative and conclusory. By ignoring key portions of Lillie's evidence, such as his testimony about his training and the bottom line of the Berg Email, it concludes that "plaintiff's claims ... are not supported by any evidence at all[.]" ManTech Br. 54. Additionally, the district court failed to consider the evidence under the DCWPA's "contributing factor"/"clear and convincing evidence" standards that strongly favor the whistleblower on issues of causation.

By ignoring evidence favorable to Lillie, and improperly weighing the remaining evidence in ManTech's favor, the district court intruded on the province of the jury and thereby abused its discretion.

III. THE DISTRICT COURT ERRED IN OVERRULING LILLIE'S MOTION FOR TWO TIMES BACK PAY UNDER THE FCA.

The parties apparently agree that if Lillie prevails on either of his assignments above, then his post-trial motions were not moot and this matter should be remanded for the district court's determinations on the merits.

ManTech's Br., 55, n. 29.

IV. THE DISTRICT COURT ERRED IN OVERRULING LILLIE'S MOTION FOR ATTORNEY'S FEES.

See Section III, *supra*.

CONCLUSION

No party has asked for oral argument in this case. With the submission of this reply, this case is ripe for decision.

David Lillie asks that the judgment of the district court be reversed, the judgment on the jury's verdict be reinstated, and the case remanded for the award of double backpay pursuant to 31 U.S.C. § 3730(h), statutory interest, and an

award of reasonable attorney's fees.⁴ Lillie also asks for reconsideration of this Court's May 20, 2020, Order granting Appellee's motion to seal Vol. II of the SER⁵ and for costs of this appeal.

Date: June 17, 2020

Respectfully submitted by:

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⁴ This Court could assist the proceedings on remand by explicitly directing the district court to also adjudicate Lillie's claims for attorneys' fees and expenses incurred in this appeal.

⁵ This order provided that it was "[s]ubject to reconsideration by the panel assigned to decide the merits[.]" Dkt. Entry 41. Lillie's opposition noted that Appellee had relied on conclusory assertions and failed to show good cause for sealing any portion of the record. Dkt. Entry 37.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionately spaced typeface using OpenOffice Writer, Times New Roman 14-point font.

Date: June 17, 2020

Respectfully submitted by:

/s/ Richard R. Renner

Richard R. Renner

Attorney for Appellant David Lillie

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 17, 2020

Respectfully submitted by:

/s/ Richard R. Renner

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ADDENDUM

California Labor Code Section 1102.5(b):

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.