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 OPENING BRIEF

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INTRODUCTION

David Lillie brought this action challenging his termination by ManTech pursuant to the False Claims Act (FCA) and the Defense Contractor Whistleblower Protection Act (DCWPA). The jury trial lasted 7 days before Judge Christina Snyder. The jury returned a verdict finding in favor of Lillie and awarding him $1,505,561. On motion by Defendant ManTech, the district court reversed the verdict and awarded ManTech Judgment as a Matter of Law (JMOL) and conditionally granted a new trial. The district court also denied Lillie's motions for attorney's fees and double backpay pursuant to the FCA.

The district court impermissibly weighed the evidence to reach conclusions about key facts, such has Lillie's reasonable beliefs, ManTech's knowledge and its motive for terminating Lillie's employment and marking him as ineligible for future employment. These issues properly belonged to the jury which issued a detailed verdict awarding Lillie $1,505,561 in total damages.

When Jet Propulsion Laboratory ("JPL") supervisor Chau Brown told Lillie to use Lockheed's work products "covertly," it was reasonable for Lillie to believe that he was being used in a "government cover-up" that would conceal a plan to submit to the government Lockheed's work as their own. No one had to use the word "fraud" for the jury to conclude that fraud would fairly describe what Lillie

was concerned about when he disclosed the instruction to his ManTech supervisor, Eric Berg.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over David Lillie's claims under the False Claims Act (pursuant to 31 U.S.C. § 3730(h)(2)) and the Defense Contractors Whistleblower Protection Act (pursuant to 10 U.S.C. § 2409(c)(4)). It also has jurisdiction over these claims pursuant to 28 U.S.C. § 1331.

The district court had supplemental jurisdiction over Lillie's claims under the California Labor Code pursuant to 28 U.S.C. § 1367.

On July 26, 2019, the district court entered its order granting judgment as a matter of law (JMOL) and ruling on other post-trial motions. ER7-48. This order disposed of all the parties' claims pending before the district court. Lillie's counsel filed his notice of appeal on July 30, 2019, well within the thirty (30) days allowed by Fed. R. App. P. 4. This Court therefore has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

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.

STATEMENT OF THE CASE

David Lillie ("Lillie") is an electrical engineer who was raised by a single mom and worked his way through college to earn his Bachelor of Science in Electrical Engineering ("BSEE") with an emphasis in microwave engineering from California Polytechnic University in Pomona. ER112-113 (Tr. 73:13-74:23). Lillie began his employment with Appellee ManTech International Corporation ("ManTech") on February 5, 2007 in the position of SRS Senior Engineer II Reliability Engineering Analyst on the Reliability Engineering Support Services (RESS) contract. ER269 (Tr. 65:12-15). Lillie's starting salary was $87,360.

ER269 (Tr. 65:12-15). In 2009, ManTech furloughed Lillie. ER218 (Tr. 60:16-17). ManTech rehired Lillie three additional times[1] between 2010 and 2014.

Beginning in 2004, prior to Lillie starting employment with ManTech, ManTech entered into a Reliability Engineering Support Services ("RESS") subcontract with Jet Propulsion Laboratory under which ManTech provided technical, engineering, database, and scientific support services in the areas of reliability, dynamics/thermal environments, natural space environments, electromagnetic compatibility, problem failure reporting, probabilistic risk, assessment, product assurance, and quality assurance as directed by JPL. ER267 (Tr. 63:12-19). The RESS Contract was a labor-hour subcontract under a prime subcontract between California Institute of Technology ("Cal Tech") and NASA. ER267 (Tr. 63:20-22).

JPL is a federally funded research and development center under the National Aeronautics and Space Administration ("NASA"). NASA contracts the management of the Jet Propulsion Laboratory to the California Institute of Technology (collectively referred to as "JPL"). ER272 (Tr. 63:6-11).

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[1] ManTech hired Lillie again in 2010 with an annual salary of $101,600.93. ER 269 (Tr. 65:12-15). After ManTech laid off Lillie in April 2011, ER 169 (Tr. 61:21-22), it brought him back in 2012. ER 169 (Tr. 61:23-24). Lillie received a raise in 2012 to $106,755.79. ER 276 (Tr. 67:16-18). On July 24, 2014, ManTech rehired Lillie, ER 276 (Tr. 67:19-20), with an annual salary of $113,276.80. ER 276 (Tr. 67:19-20).

When ManTech rehired Lillie in July 2014, ER276 (Tr. 67:19-20), he was a reliability engineer under the RESS II Contract, ER71-72 (Tr. 32:1-33:24), and assigned to work on the Mars InSight Mission ("Insight Mission"). ER73 (Tr. 34:17-19).

On July 31, 2014, Lillie attended the "kick-off" meeting ("Kick-Off Meeting") for the Jet Propulsion Laboratory InSight Mission, ER73 (Tr. 34:20-25), in order to find out to which InSight Mission task he had been assigned. ER73 (Tr. 34:23-25).

Approximately 20 people attended the standing room only Kick-Off Meeting in person, including attendees from JPL and Lockheed Martin. ER75-76 (Tr. 36:20-37:1). ER76-77 (Tr. 37:20-38:9-14). Lillie was the only ManTech employee who attended the Kick-Off Meeting. ER76 (Tr. 37:2-8).

Lillie recognized several JPL employees at the Kick-Off Meeting, including Linda Facto ("Facto"), the JPL InSight Mission Assurance Manager; Hui Yin Shaw ("Shaw"), the JPL Deputy InSight Mission Assurance Manager; Chau Brown ("Brown"), the JPL InSight Mission reliability lead; and Richard Fettig, of FREE, Inc. ER76-77 (Tr. 37:13-38:10).

The subject matter of the Kick-Off Meeting was the planned testing of the irreplaceable spacecraft that had been shipped to Vandenberg Air Force Base for launch. ER77 (Tr. 38:11-20). The plan was to perform environmental testing

outside of the range of what the Insight Mission lander ("Insight Lander") was designed to undergo, ER77 (Tr. 38:20-24), with the concern that the InSight Lander could be destroyed during the testing. ER77 (Tr. 38:23-24).

During the Kick-Off Meeting, Lillie was assigned the task of analyzing the high efficiency power supply ("HEPS") section of the Insight Lander and a couple of other smaller assemblies. ER78 (Tr. 39:12-25). Lillie was to perform a Worst Case Analysis ("WCA") on the HEPS, ER79 (Tr. 40:2-5), with the goal of proving with absolute certainty that the spacecraft would not be damaged in the testing. ER80 (Tr. 41:11-16).

Immediately following the Kick-Off Meeting, Lillie attended an impromptu meeting ("Impromptu Meeting") at that same JPL location. ER80 (Tr. 41:23-42:6). Facto asked Lillie, Brown, Shaw, and Fettig to attend the Impromptu Meeting. ER80-81 (Tr. 41:23-42:6).

Facto led that Impromptu meeting, ER81 (Tr. 42:16-17), advising Lillie and the other attendees that the contract between JPL and Lockheed Martin was very restrictive about contractors and subcontractors of JPL accessing Lockheed's proprietary information. ER83-84 (Tr. 44:18-45:3). Lillie understood Facto's warning to mean that Lillie, as an employee of ManTech, a third-party contractor, was not going to have access to any of Lockheed's proprietary information. ER87 (Tr. 48:19-23).

At the time of the InSight Mission Meeting, Lillie did not have a Non-Disclosure Agreement ("NDA") in place because the NDA he previously had with Lockheed Martin through ManTech expired on or about October 1, 2009, almost five (5) years before the InSight Mission work. That expired NDA, for work involving the Mars Juno Mission, was the only NDA Lillie ever had with Lockheed Martin, and it allowed Lillie to use proprietary information only for the Juno Mission. ER88-89 (Tr. 49:10-50:1).

In Lillie's previous work with JPL he had accessed proprietary information pursuant to the NDA in place between ManTech and Lockheed; however, that NDA expired on October 1, 2009. ER88-89 (Tr. 49:19-50:1).

There was no evidence presented at trial that from July 31, 2014, until Lillie's last day at work on December 22, 2014, was he informed by any JPL employee that there was an NDA between JPL and Lockheed for the MathCAD Files.

As part of Lillie's work on the Insight Mission he needed to use computerized data known as the MathCAD Files ("MathCAD Files") ER89 (Tr. 50:2-51). The MathCAD Files are computer programs that use spreadsheets to perform mathematical computations. The MathCAD Files would allow Lillie to perform his work faster because calculations were already in the software and

Lillie just needed to change the parameters for the work he was doing. ER90-91 (Tr. 51:2-52).

On August 4, 2014, Lillie emailed JPL employee Brown and requested a copy of the MathCAD Files. ER91, 314 (Tr. 52:3-8). Brown, Lillie's immediate supervisor, was JPL's reliability lead on the InSight Mission. ER85 (Tr. 46:12-17).

On August 6, 2014, Brown emailed JPL employee Ray Perez seeking a copy of the MathCAD Files, but she was unable to obtain a copy for Lillie. ER92-97, 295 (Tr. 53:3-58:4; Ex. 11). Perez was a JPL employee stationed at Lockheed's Colorado Springs location. ER104-106, 296 (Tr. 65:2-67; Ex. 12). On August 7, 2014, Lockheed's Wally Chase informed Brown by email that it was not possible for Lockheed to provide MathCAD Files to Brown (JPL) because the MathCAD files were Lockheed's proprietary information. ER99-101, ER288-289 (Tr. 60:23-62:15; Ex. 2, p. 1-2).

On August 11, 2014, Lillie contacted Perez for a copy of the MathCAD Files because Lillie needed them to complete his work on the InSight Mission due to their being embedded in the electronic WCA documents. ER105-106, ER296 (Tr. 66:23-67:22; Ex. 12). There was no evidence at trial that Ray Perez provided a copy of the MathCAD files.

On or about September 1, 2014, JPL employee Ernest Fierheller emailed Lillie to say he had added the MathCAD Files to JPL's "Teaks" server. ER106-107

(Tr. 67:8 – 68:21), ER290. Fierheller copied Brown on the email. ER106 (Tr. 67:18-19), ER290. Lillie could then use the MathCAD Files from Teaks. *Id*. Fierheller's email also said that the MathCAD Files he added to Teaks were from the Juno HEPS. ER290. Lillie understood this to mean that Fierheller had found a version of the MathCAD Files and put them on JPL's shared Teaks server. ER 107 (Tr. 68:17-21). Fierheller's email also stated that, "[t]hese files are from the 2009 version of the WCA." ER290. Lillie understood to this to mean that this version of the MathCAD Files was from Juno mission from 2009. ER108 (Tr. 69:2-6). Lillie used the MathCAD Files on Teaks to complete his work on the InSight Mission. ER108 (Tr. 69:7-14).

Fierheller's trial testimony supported Lillie's concern that Lillie was using a copy of the MathCAD Files that he did not lawfully have a right to use, that an NDA was not in place, and that Brown and JPL were fraudulently attempting to cover-up Lillie using the MathCAD Files. Fierheller testified at trial that the copy of the MathCAD files that he uploaded to the JPL Teaks system on about September 1, 2014, was a copy that Fierheller Engineering had obtained to do work on the Juno Contract with ManTech. ER91-94 (Tr. 52:5-54:1; 54:21-55:2). Fierheller Engineering's contract with ManTech began in 1999, ER186-187 (Tr.

52:25-53:4), and Fierheller Engineering ceased operating in 2011.[2] ER189 (Tr. 55:15-17).

Fierheller admitted that the copy of the MathCAD Files that he uploaded to JPL's Teaks system was brought from his home. ER189 (Tr. 55:21-23). Thus, JPL had Lillie using a copy of the MathCAD Files that Fierheller had brought from his home and was from work that Fierheller Engineering had contracted with ManTech to perform from approximately 1999 to 2011, when Fierheller Engineering ceased operating.

Fierheller could not remember if Brown asked him where he obtained a copy of the MathCAD Files, ER189 (Tr. 55:3-5), or if Lillie's name was on the NDA he had for the copy of the MathCAD Files. ER189 (Tr. 55:13-14). Fierheller did remember that Fierheller Engineering ceased operating in 2011, which is at least 3 years before Fierheller uploaded the subject MathCAD Files to the TEAKS drive. ER189 (Tr. 55:15-17). In addition, Brown testified that Fierheller did not tell her where he got the MathCAD Files from. ER178-180 (Tr. 33:22-35:11).

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[2] Thus, Fierheller Engineering ceased operating approximately three (3) years before Lillie was rehired by ManTech to work on the InSight Mission with JPL. Clearly, Lillie could not have been authorized to use the copy of the MathCAD Files that JPL provided him by way of a JPL employee and the former owner of Fierheller Engineering, Ernest Fierheller.

From approximately August 4, 2014 to approximately October 7, 2014, Lillie continually contacted Brown regarding her obtaining a copy of the MathCAD Files. Lillie was concerned that Fierheller had unlawfully provided the copy of the MathCAD Files so he repeatedly asked Brown whether he had the right to use them and Brown consistently failed to confirm that Lillie had a right to use the files. ER91 (Tr. 52:3-8), ER314; ER276-279 (Admitted Facts Nos. 23, 24, 25, 26, 27, and 30); ER288-290, ER292-297.

Lillie visited JPL's offices between approximately September 5 to October 7, 2014. ER112 (Tr. 73:13-18). During this visit Lillie was walking by Brown's office when Brown called Lillie into her office and requested that Lillie remove the references to the MathCAD Files from the Interoffice Memorandum ("IOM") that Lillie was working on. Lillie declined. ER112-113 (Tr. 73:13-74:23). Lillie rejected Brown's request because it was not proper procedure to delete the MathCAD Files references. ER113-114 (Tr. 74:24-75:11). Brown had never asked Lillie to delete references from interoffice memorandum on any prior occasion. ER114 (Tr. 75:12-15). When Lillie refused Brown's request to delete the MathCAD Files reference, Brown turned her back on Lillie and Lillie believed he was dismissed from her office so he returned to ManTech's Montrose office. ER115-116 (Tr. 76:16-77:4).

On October 7, 2014, following the meeting with Brown, Lillie reported to JPL Ethics Department that a JPL employee had involved him in an apparent government cover-up. ER116-117 (Tr. 77:16-78:18). Lillie specifically told JPL Ethics Department Employee Jane Anne Sanders that he had a security clearance and that he could not be part of a government cover-up. ER117 (Tr. 78:13-18).

Later on October 7, 2014, Lillie sent an email to Brown specifically asking whether JPL employee Linda Facto got approval for Lillie to use the MathCAD Files. Brown replied that she didn't know. ER122-124, 293 (Tr. 83:1- 85:4). Brown's response further indicated to Lillie that Brown was attempting to cover-up Lillie using the MathCAD files and that JPL was attempting to hide from any reader of the IOM who had used the MathCAD Files to complete the IOM. ER124-125 (Tr. 85:1- 86:10). Lillie forwarded Brown's October 7, 2014 email response to JPL Ethics. ER125 (Tr. 86:1-9).

On October 8, 2014, Lillie sent an email to Erik Berg, Lillie's direct supervisor at ManTech. ER125-126 (Tr. 86:13- 87:14), ER279-ER280 (Stip. 32), ER12, ER291. In this "Berg Email," Lillie told Berg that he was using Lockheed Martin proprietary documents that contractors, such as Lillie, were forbidden to use. *Id*. Lillie added that Brown told him to use the files "covertly[.]" ER12, ER128 (lines 2-7), ER280, ER291. Lillie said he had not received any responses saying he could use the MathCAD Files, and that he sent an email to Brown and

that her answer was "unacceptable". ER291. He included Brown's email, ER 294, with his October 8, 2014 email to Berg.

Berg responded to Lillie's October 8, 2014 email approximately 30 minutes later stating "Come see me please." However, when Lillie went to Berg's office Berg was not in his office and Lillie did not see Berg again until several days later. ER131-132 (Tr. 92:24-93:9).

Lillie testified that he signed the IOM on or about October 9, 2014 because Berg had already signed it, and as a result Lillie believed that Berg had gotten involved in the situation. ER128-130 (Tr. 89:25-91:3).

On December 22, 2014, JPL and ManTech furloughed Lillie. ER255 (Tr. p. 21). The next day, Lillie reported his concerns to U.S. Representatives Adam Schiff and Judy Chu. ER 256-258, ER299-302.

ManTech terminated Lillie on February 6, 2015. ER211 (Tr. 41:4-6). Berg was one of the three decision makers that took part in Lillie's termination. ER211 (Tr. 41:22-35:11). At the time, Lillie's annual salary was $113,276.80. ER276 (Stip. 22).

JPL employee Facto testified that JPL submitted a proposal to NASA, and "won" the right to receive funding from NASA to work on the Mars InSight Mission. JPL received funds from NASA to work on the Mars InSight Mission. ER196 (Tr. 5:13-23).

Facto confirmed that JPL's contract with ManTech was part of the Insight Mission and JPL used NASA funds to pay ManTech. ER197 (Tr. 6:11-18) ("The money would have flowed that way.").

Berg testified that he was ManTech's Director of West Coast Operations when ManTech was working with JPL on the Insight Mission. ER202 (Tr. 30:14-17). Berg testified that there was a contract between JPL and ManTech for work ManTech employees were performing on the InSight Mission. ER204 (Tr. 32:12-18). Berg further testified that JPL paid ManTech for work that ManTech employees performed for JPL on the InSight Mission. ER204 (Tr. 32:19-23). Berg testified that Lillie, as a ManTech employee, performed work for JPL on the InSight Mission. ER204-205 (Tr. 32:24-33:4).

Microwave RADAR work was available for the Lillie in January 2015 but he was not brought back to work on it. ER303. Moreover, ManTech had approximately 7,000 employees and offices worldwide. ER256.

ManTech initially recorded that Lillie was "eligible for rehire" in February 2015, but then changed that record to "ineligible" in April 2015 after JPL notified ManTech that Lillie had allegedly violated a non-disclosure agreement.[3] ER213

[3] A non-disclosure agreement or policy would not have to deprive protected activity of its protection. See, for example, *Niswander v. Cincinnati Insurance Co.*, 529 F.3d 714, 726 (6th Cir. 2008) (delivery of documents in discovery is protected

(Tr 43:17-24); ER223 (Tr. 60:15-24); ER227-228 (Tr. 64:13-65:11); ER263 (Tr. 30:18-23). Lillie testified that he returned the MathCAD files and other data at issue with his badge and VPN access key to JPL Ethics on April 13, 2015. ER143 (Tr. 26:3-16), ER149-150 (Tr. 33:6-34:19). Congresswoman Chu's office had arranged the meeting. *Id*.

Lillie was unable to secure new employment after ManTech terminated him. ER148-149 (Tr. 32:3-33:5). He testified that his insomnia caused constant muscle pain, and his financial problems caused marital stress. ER160-163 (Tr. 47:17-51:17).

Leslie Daugherty, a Kaiser Permanente Psychiatric Social Worker, licensed Marriage and Family Therapist, and Lillie's non-retained expert and treating clinician testified about Lillie's emotional distress. ER237-239 (Tr. 85:10-87:24). Daugherty testified that she diagnosed Lillie as having an anxiety disorder. ER239 (Tr. 87:1-9). Daugherty further testified that Lillie had reported to her that he had been ruminating about a "very difficult work related situation" that he had been

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if the employee reasonably believes the documents support the claim of a violation of law); *Quinlan v. Curtiss-Wright Corp*., 8 A.3d 209, 204 N.J. 239 (2010) (New Jersey Law Against Discrimination); *Department of Homeland Security v. MacLean*, 574 U.S. 383 (2015) (violation of a federal security regulation does not deprive disclosure of protection under the Whistleblower Protection Act). Federal Acquisition Regulations (FARs) limit the government's ability to use contractors who have non-disclosure agreements restraining whistleblower disclosures. 48 C.F.R. §§ 3.909-1 and 52.203-18.

experiencing for multiple years. ER244-245 (Tr. 93:15:94:6). Daugherty was unable, though, to testify to the cause of Lillie's anxiety. ER243 (Tr. 92:2-5).

At the end of Lillie's case, ManTech's counsel made a motion "for directed verdict" without any explanation of the alleged grounds. ER248 (Tr. 97:15-16). At the end of all evidence, ManTech's counsel renewed the motion, again with no statement of any alleged grounds. ER268 (Tr. 59:14-17). Both times, the district court reserved ruling on the motion. *Id.*

The jury concluded that ManTech fired Lillie in retaliation for his disclosures and entered a verdict for Lillie including $521,983 for backpay, $339,828 for future lost earning, $321,875 for past emotional distress and another $321,875 for future emotional distress, totaling $1,505,561. ER60. The jury rejected Lillie's claims arising from ManTech's furlough of Lillie. The jury returned special verdicts finding that Lille "had a good faith belief that ManTech was committing fraud or falsehood against the government to obtain the payment of money," and that "a reasonable employee in the same or similar circumstances would believe that ManTech was committing fraud or a falsehood against the government to obtain payment of money[.]" ER52-53 (Questions 2 and 3). No party claimed any errors in the court's instructions to the jury.

ManTech filed motions for judgment as a matter of law (JMOL) and for a new trial. Lillie opposed these motions. Lillie filed a motion for two times his back

pay and for attorney's fees pursuant to 31 U.S.C. § 3730(h)(2). On July 26, 2019, the district court granted both of ManTech's motions and denied Lillie's motions. ER7-48. Lillie filed this timely appeal. ER4-6.

SUMMARY OF THE ARGUMENT

The jury had more than enough evidence to find that Lillie had suffered illegal retaliation for his good faith and protected concerns. Brown's evasiveness about Lillie's questions justified Lillie's concerns that ManTech was involved in the illegal use of Lockheed's MathCAD files and was actively and deliberately concealing this illegality. The Berg Email references Lillie's concerns and ManTech's knowledge of Lillie's disclosure about those concerns. Berg's participation in ManTech's termination of Lillie just weeks after this disclosure permits the jury to find causation.

While JPL later concluded that Lillie had Lockheed's authorization to use the MathCAD files, that conclusion is both incorrect and immaterial, because the non-disclosure agreement (NDA) at issue had expired. Even if the NDA did authorize Lillie's use of Lockheed's proprietary information, that fact is immaterial to the issue of Lillie's reasonable belief that ManTech was engaged in a covert attempt to defraud the government about its unauthorized use of Lockheed's work product.

ManTech's motions do not meet the high standards required to set aside a jury's verdict. Further, ManTech failed to give Lillie the required notice of the alleged grounds while Lillie still had time to address them during the trial. Finally, the district court erred in failing to grant Lillie his statutory remedies of double backpay and attorney's fees.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING JMOL

A. Standard of Review

This court reviews the district court's grant or denial of a renewed motion for judgment as a matter of law de novo. *See* Dunlap v. Liberty Nat. Prod., Inc., No. 15-35395, 2017 WL 6614570, at *2 (9th Cir. Dec. 28, 2017); *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016), *cert. denied sub nom. City of Anaheim, Cal. v. Estate of Diaz*, 137 S. Ct. 2098 (2017); *Theme Promotions, Inc. v. News Am. Marketing FSI*, 546 F.3d 991, 999 (9th Cir. 2008); *Josephs v. Pacific Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006) (reviewing denial of motion); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1226 (9th Cir. 2001) (reviewing grant of motion). The test to be applied is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. *See* Estate of Diaz,

840 F.3d at 604; *Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013); *Martin v. California Dep't of Veterans Affairs*, 560 F.3d 1042, 1046 (9th Cir. 2009); *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *McLean v. Runyon*, 222 F.3d 1150, 1153 (9th Cir. 2000); *Gilbrook v. City of Westminster*, 177 F.3d 839, 864 (9th Cir. 1999).

A district court's interpretation of the FCA also is reviewed de novo. *See U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015); *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143 (9th Cir. 1998); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1213-14 (9th Cir. 1996); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995).

Although Lillie opposed ManTech's post-trial motions, on June 3, 2019, and objected to ManTech's motions at a June 17, 2019, hearing, the district court nevertheless granted the motions on July 26, 2019. ER7-48. That decision should be reversed.

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.

Rule 50(a)(1), F.R.Civ.P., 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), quoting *Lifshitz v. Walter Drake & Sons*, 806 F.2d 1426, 1429 (9th Cir.1986) (emphasis by the *Waters* panel).

ManTech's counsel utterly failed to comply with this Rule during the jury trial when each of its two motions were pro forma. ER248 (Tr. 97:15-16), ER268 (Tr. 59:14-17). The Advisory Committee Note to Rule 50 makes it clear that it falls to the trial court to inform the non-moving party of deficiencies in its proof and to afford that party an opportunity to correct any such deficiency.

Moreover, when a Rule 50 motion fails to identify the deficiencies in the non-moving party's proof, the trial court may not rule on the motion until it first apprises the non-moving party "of the materiality of the dispositive fact." *Waters*, 100 F.3d at 1441, quoting Fed.R.Civ.P. 50 advisory committee's note. In *Waters*, at p. 1442, this Court emphasized:

> By its language, Rule 50 applies in all cases, including those in which parties are represented by highly qualified counsel. Compliance with the Rule, including the fulfilling by the court of its obligations as explained in the Advisory Committee note, is mandatory.

The *Waters* holding "applies in all cases[.]" *Reed v. Lieurance*, 863 F.3d 1196, 1210 (9th Cir. 2017). Further, a "party cannot raise arguments in its post-trial

motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion." *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003). More significantly in this case, 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. v. W. Worldwide Servs.*, Inc., 897 F.3d 1008, 1016 (9th Cir. 2018).

ManTech and the district court both failed to comply with the basic requirements of Rule 50, and the grant of JMOL must be reversed.

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

Not only did appellees fail to comply with Rule 50, and not only did the district court fail its requirement to enforce the procedural requirements of Rule 50, the motion should not have been granted on its merits. Lillie offered sufficient evidence to justify the jury's verdict in his favor, precluding JMOL.

Lillie testified directly that JPL official Linda Facto told him and some coworkers that it was important to restrict contractors' access to Lockheed's proprietary information. ER82 (Tr. 43:20-25). There is no dispute that Lillie was working for a contractor (ManTech), and Lillie understood that this rule applied to him. ER82-83, ER87 (Tr. 48:19-23).

Months later, another JPL employee with authority over Lillie's work, Chau Brown, told Lillie to delete references to Lockheed's MathCAD files from his draft for the interoffice memo (IOM). ER113 (Tr. 74:14-21). Lillie, aware that this request was out of the ordinary, and concerned that it sought to conceal a violation of the rule Facto had explained, refused the request. ER114 (Tr. 75:9-23), ER122 (Tr. 83:7-12). Brown's responsive email was evasive. ER123-124. Brown told Lillie to use the files "covertly." ("Berg Email" ER279-280. Stip. 32). Lillie testified that he concluded Brown was trying to conceal the use of the proprietary files. ER124 (Tr. 85:5-10).

Lillie reported to the JPL Ethics Department his concern that Brown had tried to involve him in "an apparent government cover-up".[4] ER116-117 (Tr. 77:3-78:18). He sent the "Berg Email" to his supervisor at ManTech, Erik Berg. ER279-280 (Stip. 32).

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[4] ManTech argues that Lillie was motivated by a desire to protect his security clearance. However, Lillie's motive for making his disclosure is immaterial to its legal protection. Many important disclosures have come from whistleblowers who had a personal axe to grind. The Deep Throat of Watergate fame, Mark Felt, had been denied a promotion at the FBI. When Congress felt the need to clarify the federal sector Whistleblower Protection Act (WPA), it made clear that disclosures would be protected regardless "of the employee's or applicant's motive for making the disclosure[.]" 5 U.S.C. § 2302(f)(1)(C). The MSPB is in accord. *Parikh v. Dep't of Veterans Affairs*, 116 M.S.P.R. 197, 206 (2011) (a "vindictive motive" of the whistleblower is immaterial to whether the disclosure is protected.).

These facts are more than sufficient to support the jury's conclusion that Lillie had both a subjective and an objectively reasonable belief that JPL officials were engaged fraudulently concealing their unauthorized use of Lockheed's proprietary MathCAD files.

Since the Enron and WorldCom collapses twenty years ago, Congress has been increasingly concerned about the potential losses for investors, employees, consumers and creditors from institutional frauds. Congress enacted whistleblower protections in the Sarbanes-Oxley Act of 2002, 116 Stat. 745, 18 U.S.C. § 1514A, and the 2010 Dodd-Frank Act, 12 U.S.C. § 5567. It amended the statutes at issue in this case to strengthen their whistleblower protections. The Supreme Court noticed the remedial purpose:

> Congress concluded that this fraud had succeeded in large part due to a "corporate code of silence."' That code, Congress found, "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally."

Lawson v. FMR LLC, 571 U.S. 429, 435 (2014) (quoting S.Rep. No. 107-146, 4-5 (2002)). Congress also understood that "fear of retaliation was the primary deterrent to such reporting . . . " 571 U.S. at 448.

The protections of the FCA and DCWPA are not limited to instances in which there is an actual violation of one of the relevant provisions. The DCWPA protects the employee so long as he or she "reasonably believes" that the "information" the employee discloses "is evidence of the" wrongdoing. 10 U.S.C

§ 2409(a)(1). The FCA protects "lawful acts done by the employee … to stop 1 or more violations[.]" Courts have interpreted this text broadly to effectuate the Act's purpose and do not require the whistleblower to prove more than a reasonable belief. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (A plaintiff engages in protected activity "if she reasonably believed that [the defendant] was possibly committing fraud against the government, and she investigated the possible fraud."); *Fanslow v. Chi. Mfg. Ctr., Inc.*, 384 F.3d 469, 479 (7th Cir. 2004); *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 933 (8th Cir. 2002). Congress understood that employees would be unlikely to speak up or contact federal authorities if their protection were lost if their employers, in subsequent litigation, could persuade a court that no violation had actually occurred.

Hana Financial, Inc. v. Hana Bank, 135 S.Ct. 907 (2015), resolved a conflict about whether a key, commonly arising question should be determined by the trier of fact, or by a judge as a matter of law. The conflict in *Hana* was whether a judge or the jury should decide if a reasonable consumer would consider two marks the same, a central issue in certain trademark cases. 135 S.Ct. at 910. The Supreme Court emphasized that juries are best equipped to resolve disputes about what reasonable persons would do or perceive.

> [W]e have long recognized across a variety of doctrinal context that, when the relevant question is how an ordinary person . . . would make an

> assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer. See, *e.g.*, *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (recognizing that "'delicate assessments of the inferences a "reasonable [decisionmaker]" would draw . . . [are] peculiarly one[s] for the trier of fact'") . . . *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 [(1976)] ("observing the jury has a unique competence in applying the 'reasonable man' standard").

135 S.Ct. at 911.

The issues in the instant case are far less arcane than the trademark dispute in *Hana*: it is the role of the jury to interpret Facto's instructions based on a common sense assessment of what she said. It is also the jury's role to apply the common knowledge that it is wrong to take the work of another and passing it off as your own.

This is precisely the sort of case in which it matters whether the factual questions decided by the jury should instead be resolved by a judge. The idea that Lillie was "only inquiring (at most) about a possible breach of the [NDA]" ignores how even this initial step can be protected. *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir.1996) (protected activity includes endeavoring to obtain an employer's compliance); *Yesudian ex rel. United States v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998) (employees are protected while collecting information about a possible fraud "before they have put all the pieces of the puzzle together"); *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1188 (9th Cir. 2019) (whistleblower is protected for raising concerns and has no duty to investigate them).

In *Wadler*, the plaintiff contended that he had been dismissed because he reported to his employer activity that he believed violated one of the statutes covered by SOX. A jury returned a verdict in favor of *Wadler*, but on appeal the Ninth Circuit held that the jury had been improperly instructed. 916 F.3d at 1185-87. The employer contended that Wadler could not reasonably have believed that the activity at issue was unlawful. This Court did not decide whether the plaintiff could reasonably have believed that such a violation had occurred. Instead, it limited its inquiry to whether a reasonable jury could conclude that Wadler's belief was reasonable.

> Evidence is insufficient only "if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986). Conversely, if "reasonable minds could differ as to the import of the evidence," the evidence is sufficient. *Id*. at 250-51.

Id. at 1187. The Court held that the reasonableness of Walder's belief would have to be resolved at trial, not by the appellate court. "[A] jury permissibly could find that Wadler satisfied that minimal requirement [of a reasonable belief]." *Id*., at 1187-88; see *id*. at 1188 ("[A] reasonable jury could find that Wadler reasonably believed that Bio-Rad had falsified books and records"; "[A] reasonable jury . . . could find that a[n] [employee] in Wadler's position reasonably believed that Bio-Rad was falsifying books and records as part of its alleged . . . ."). A reasonable belief "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." *Wadler*, 916 F.3d at 1188, quoting *Harp v. Charter Communications, Inc*., 558 F.3d 722, 723 (7th Cir. 2009).

The Department of Labor's Administrative Review Board (ARB), which has primary administrative responsibility for enforcing 22 whistleblower laws, agrees that objective reasonableness is ordinarily a question for the trier of fact. In *Sylvester v. Parexel Int'l LLC*, 2011 WL 2517148 (ARB May 25, 2011), an administrative law judge had granted a motion to dismiss a retaliation claim, concluding that the complainants could not have reasonably believed that company officials were engaging in a fraudulent scheme. The ARB reversed, holding that the issue should be resolved after a hearing.

> Often the issue of "objective reasonableness" involves factual issues and cannot be decided in the absence of an adjudicatory hearing. *See, e.g* . . . *Livingston v. Wyeth Inc*., 520 F.3d 344, 361 (4th Cir. 2008) (Judge Michael, dissenting) ("The issue of objective reasonableness should be decided as a matter of law only when 'no reasonable person could have believed' that the facts amounted to a violation. . . . However, if reasonable minds could disagree about whether the employee's belief was objectively reasonable, the issue cannot be decided as a matter of law" [citations omitted])). We believe that such a mistake has been made in this case. . . . [The fraud] accusations may be objectively reasonable to employees with the same training and experience as [the Complainants]. Because a determination regarding the reasonableness of the Complainants' alleged protected activities requires an examination of facts, it was inappropriate for the ALJ to rule on that activity pursuant to the Motions to Dismiss.

2011 WL 2517148 at *12-*13.[5] *See also Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797 (6th Cir. 2015):

> Thus, the inquiry into whether an employee had a reasonable belief is necessarily fact-dependent, varying with the circumstances of the case. For this reason, "[t]he issue of objective reasonableness should be decided as a matter of law only when no reasonable person could have believed that the facts [known to the employee] amounted to a violation" or otherwise justified the employee's belief that illegal conduct was occurring. *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 361 (4th Cir.2008) (Michael, J., dissenting) . . . . If, on the other hand, "reasonable minds could disagree about whether the employee's belief was objectively reasonable, the issue cannot be decided as a matter of law." *Id.*

787 F.3d at 811-12. Also, *Beacom v. Oracle America, Inc.*, 825 F.3d 376 (8th Cir. 2016) (following *Rhinehimer*); *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013).

The instructions from JPL's Facto, and the ways JPL's Brown sought to evade those instructions and cover-up that evasion, permit the jury to conclude that Lillie had a reasonable belief that Brown was trying to involve him in a fraud to use Lockheed's work without attribution.

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[5] See *Williams v. Dallas Ind. School Dist.*, 2012 WL 6930342 at *10 n. 9 (ARB Dec. 28, 2012) (quoting Sylvester); *Prioleau v. Sikorsky Aircraft Corp.*, 2011 WL 6122422 at *6 (ARB Nov. 9, 2011) ("whether Prioleu's concerns credibly involved a reasonable belief of a SOX violation implicates factual questions about his understanding of the implications of the litigation hold conflict and the automatic retention policy. Therefore, questions of material fact exist about whether Prioleau engaged in protected activity").

1. While immaterial, the district court erred in finding that an earlier non-disclosure agreement (NDA) permitted Lillie to use Lockheed's MathCAD files.

The district court erred in finding that "a NDA that plaintiff had signed during an earlier period of employment permitted him to use the MathCAD files," apparently casting doubt on the validity of Lillie's reported concerns. ER14. First, as noted above, the ultimate determination of the merits of a whistleblower's concern are immaterial to whether that whistleblower had a reasonable belief.

Second, and in any event, the record contains ample documentary evidence that makes the district court's finding untenable. On its face, the NDA expired in 2009. ER308, ¶8. Lillie also testified that it expired in 2009 and allowed use only of proprietary information from the Juno Mission. ER155 (Tr. 39:6-22); ER88-89 (Tr. 49:10-50:1). While not dispositive because the accuracy of Lillie's belief is not material, the district court's finding of fact regarding the NDA is in conflict with the documentary record.

2. Determination of an objectively reasonable belief requires consideration of all the circumstances, including the whistleblower's knowledge, training and experience.

ManTech's Erik Berg investigated Lillie's concern about the unauthorized use of Lockheed's work product. He called JPL supervisor John Klohoker, who said Lillie's use of the Lockheed files was not a concern. ER206 (Tr. 34:2-24);

ER220 (Tr. 57:14-17). The district court said Berg concluded that Lillie's email was not a "complaint of fraudulent or illegal activity" and claimed that inquiries like Lillie's were "ordinary." ER15, citing ER220, ER222, ER45. This concluded his investigation.

The jury could question "how reasonable and thorough the inquiry had been." *See Martin v. Toledo Cardiology Consultants, Inc*., 548 F.3d 405, 415 (6th Cir. 2008). There is no requirement that the jury believe Klohoker's and Berg's testimony. "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 151 (2000).

Significantly, Berg did not report his investigation or his conclusions to Lillie; Berg did not hear Lillie's response to Klohoker's statement; and Lillie did not know what Berg had discovered in his investigation. The jury could properly consider ManTech's failure to provide specific training to Lillie on the proper access to the proprietary work of other companies, and conclude that this failure supported the conclusion that Lillie's disclosure was reasonable.

The district court improperly relied on Berg's understanding of Lillie's email, rather than on Lillie's purpose in sending it. ER45. The reasonable belief standard clearly requires an examination of the reasonableness of a whistleblower's beliefs, but *not* of whether the whistleblower actually

communicated the reasonableness of his beliefs to management. *See, e.g.*, *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006). Objective reasonableness "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." *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). Whistleblower protections were "intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009) (SOX case). Here, Facto's instructions at the Impromptu Meeting made Lillie's concerns about misuse of Lockheed's MathCAD files reasonable.

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

The jury heard testimony from Berg denying that Lillie's email to Berg played any role in his furlough and termination. ER220-222 (Tr. 57:20-58:1, 59:2-16). The jury was free to weigh his credibility, and it was absolutely free to disbelieve him. *Reeves*, cited above.

The district court failed to consider the DCWPA causation standards. The jury only needed to find that Lillie's protected activity was a "contributing factor."

10 U.S.C. § 2409(c)(6), incorporating 5 U.S.C. § 1221(e). Congress established a bifurcated "contributing factor"/"clear and convincing" framework for the first time in the Whistleblower Protection Act of 1989 (WPA). Under this framework, a federal sector whistleblower must demonstrate that protected activities were a "contributing factor" in the adverse employment action, 5 U.S.C. § 1221(e)(1). *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). In an oft-quoted explanatory statement, Congress characterized a "contributing factor" as:

> any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his [or her] protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action.

135 Cong. Rec. 5033 (1989). "Any" weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the "contributing factor" test. *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). Conversely, to prevent liability, the employer must show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2). By enacting this amendment to the WPA, Congress "substantially reduc[ed]" a whistleblower's burden and sent "a strong, clear signal to whistleblowers that Congress intends that they be protected from

any retaliation related to their whistleblowing." 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

This element is "broad and forgiving," requiring the plaintiff to point to "'any factor'" that "'tends to affect *in any way* the outcome of the decision.'" *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013) (emphasis in original) (quoting *Klopfenstein v. PCC Flow Techs.*, No. 04-149, 2006 WL 3246904, at *13 (Admin. Rev. Bd., U.S. Dep't of Labor May 31, 2006)). The contributing factor need not be "significant, motivating, substantial, or predominant." *Id*. (internal quotation marks omitted) (quoting *Klopfenstein*, 2006 WL 3246904, at *13). An employee may establish a prima facie case by circumstantial, as well as direct, evidence. 5 U.S.C. § 1221(e)(1) (setting out a knowledge/timing test for federal sector cases); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003); *United States v. Arzivu*, 534 U.S. 266 (2002); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)); *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012); *Lockheed*, *supra* ("Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.").

Here, the timing of Lillie's termination and the resistance to his concerns are more than sufficient to support the jury's finding that his protective activity contributed to the termination that followed. The jury did not have to believe the testimony of ManTech employees, who had a motive to avoid liability. Brown's self-serving desire to conceal Lillie's use of the MathCAD files is another indicator of a motive to cover up the violation, and in turn, permits an inference of causation separate from any temporal proximity. *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 38 (1st Cir. 2003) (temporal proximity or a pattern of antagonism can prove causation); *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (temporal proximity is unnecessary if there is a "pattern of antagonism" following protected activity)

Once the contributing factor test is met, ManTech's burden to show by "clear and convincing evidence" that it would have fired Lillie even without his protected activities. The 2012 Senate Report 112-155, p. 2, explained the purpose saying, "It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward." The Senate Report, pp. 1-2, expressed frustration at the narrow decisions that denied protection to whistleblowers:

> Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by

> the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA).

Courts have recognized that, "[T]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Handy–Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 540 (6th Cir.2012), quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004). "Clear and convincing evidence" is a "a high burden of proof" for the employer to bear. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). In *Whitmore* (p. 1377) the Federal Circuit explained policy reasons for holding agencies to such a high burden:

> The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment actions against a whistleblower carries its statutory burden to prove – by clear and convincing evidence – that the same adverse action would have been taken absent the whistleblowing. . . . Congress decided that we as a people are better off knowing than not knowing about [the matters disclosed by whistleblowers], even if it means that an insubordinate employee . . . becomes, via such disclosures, more difficult to discipline or terminate. Indeed, it is in the presence of such non-sympathetic employees that commitment to the clear and convincing evidence standard is most tested and is most in need of preservation.

It is not sufficient for the employer to show that it ***could*** have taken the same action. *Ready Mix Concrete v. NLRB*, 81 F.3d 1546, 1553 (10th Cir. 1996) (quoting *Presbyterian/St. Luke's Med. Center v. NLRB*, 723 F.2d 1468, 1480 (10th

Cir. 1983)). The WPA standard requires the employer to show that it "would have" taken the same action. 5 U.S.C. § 1221(e)(2). The distinction between "would" and "could" is both real and legally significant. See *Knight v. Comm'r*, 552 U.S. 181, 187-88, 192 (2008). The Supreme Court has observed that "proving that the same decision would have been justified ... is not the same as proving that the same decision would have been made." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360, 115 S. Ct. 879, 885, 130 L. Ed. 2d 852 (1995); quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion) (employer's legitimate reason for discharge in mixed motive case will not suffice "if that reason did not motivate it at the time of the decision").

"For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies … face a difficult time defending themselves." *Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (ERA nuclear whistleblower case). Here, the jury was not required to believe ManTech's exculpatory evidence. Its witnesses were biased, and their animus against Lillie's concerns provided a better explanation for the rush to fire Lillie.

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

A. Standard of Review

A jury's verdict of compensatory damages is reviewed for substantial evidence. *See* *In re Exxon Valdez*, 270 F.3d 1215, 1247-48 (9th Cir. 2001); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1108 (9th Cir. 2001). A reviewing court must uphold the jury's finding of the amount of damages unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork. *See* *Lambert v. Ackerley*, 180 F.3d 997, 1017 (9th Cir. 1999) (en banc); *see also* *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1060 (9th Cir. 2003) ("We will disturb a damage award only when it is clear that the evidence does not support it." (internal quotation marks and citation omitted)). But in antitrust cases, the plaintiff need only provide sufficient evidence to permit a just and reasonable estimate of the damages. *See* *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1360 (9th Cir. 1986). Under the Lanham Act, the district court has discretion to fashion relief, including monetary relief, based on the totality of circumstances, even if the plaintiff cannot show actual damages. *See* *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997); *see also* *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*,

149 F.3d 987, 996 (9th Cir. 1998) (court has "wide discretion" in copyright case). The same standards should apply here.

A district court's ruling on a motion for new trial pursuant to Rule 59(a) is reviewed for an abuse of discretion. In *Flores v. City of Westminster*, 873 F.3d 739, 748 (9th Cir. 2017), this Court stated, "[w]e will grant a new trial only if the verdict is against the clear weight of the evidence, and not simply because the evidence might have led us to arrive at a different verdict." This Court recognized that, "[c]ourts have a duty under the Seventh Amendment to harmonize a jury's special verdict answers, 'if such be possible under a fair reading of them.'" *Id*. at 756, quoting *Floyd v. Laws*, 929 F.2d 1390, 1396 (9th Cir. 1991).

In *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 844-46 (9th Cir. 2014), this Court first reversed JMOL on damages holding that there was sufficient evidence for the jury's award of damages. This Court also reinstated the jury's awards for reputational harm and loss of goodwill. However, it let stand the conditional grant of a new trial to prevent a miscarriage of justice because the district court's grounds were reasonable. Specifically, the district court noted that plaintiff's profits on other products also declined, even though the infringement at issue had no effect on the other products. The district court concluded that the jury had failed to consider the market effects. *Id*. at 846. The district court had also issued a supplemental instruction that the measures for

reputational harm and loss of goodwill were "essentially the same thing." Yet, the jury had issued awards for $750,000 for one and $300,000 for the other. This Court also had concerns about duplication of damages in the award. *Id*. at 847. This Court upheld the award to recover defendant's profits from the infringement under the Lanham Act, and remanded for a new trial on the other damage awards.

In *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (per curiam), this Court described the "abuse of discretion" standard as permitting reversal "only when the district court reaches a result that is illogical, implausible, or without support in the inferences that may be drawn from the record." It added a requirement that, "the district court did not apply the law erroneously." See also, *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009) (reversing a grant of a new trial because the verdict was not against the clear weight of the evidence); *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999) (reversing grant of a new trial and reinstating verdict from first jury trial). A conditional grant of a new trial is also reviewed for an abuse of discretion. *See Experience Hendrix L.L.C.*, 762 F.3d at 844-45; *Union Oil Co. v. Terrible Herbst, Inc.*, 331 F.3d 735, 742 (9th Cir. 2003); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1229 (9th Cir. 2001) (noting "stringent standard" when motion is based on sufficiency of the evidence).

B. The district court abused its discretion in the conditional grant of a new trial as the verdict is not against the clear weight of the evidence.

As explained above, Lillie's act of sending the Berg email is protected activity. The district court's order, improperly viewed the evidence from defendant's point of view, both in granting JMOL and in granting a new trial. ER14-15, ER45. Notably, the Berg email gave Berg (the recipient) sufficient notice of Lillie's claims that Berg felt it was necessary to investigate them. ER15, ER206-207 (Tr. 34:21-35:3). The district court was overly focused on whether the Berg email gave "notice of this protected activity," rather than whether it was itself protected.

The district court's analysis of the Berg email is conclusory and does not consider the inferences the jury could properly draw from Lillie's expression of concern. ER45, ER48. For example, even if the Berg email was not sufficiently clear, if Berg thought that Lillie was about to make disclosures to others about his concerns, that would be sufficient for Lillie to prevail. *Heffernan v. City of Paterson*, 578 U.S. ___, 136 S. Ct. 1412 (2016) (mistaken belief of protected activity still supports a retaliation claim).

The lower court's reliance on Berg's statement that "he did not interpret the email as one reporting illegal or fraudulent activity," is misplaced as the jury was not required to believe it. ER45. Instead, the jury was well within its rights to look

at the Berg email itself and conclude that Lillie's concerns were reasonable and Berg's effort to deny that it reported illegality was dishonest and an indicator of pretext.

Additionally, as noted above, the district court failed to consider the evidence under the "contributing factor"/"clear and convincing evidence" standards that strongly favor the whistleblower on issues of causation.

The manifest injustice in this case is not the jury's verdict but rather the decision to throw it out.

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

A. Standard of Review

The district court's legal conclusion that damages are available is reviewed de novo. *See* *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1197 (9th Cir. 2002); *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir. 1998). Whether the district court selected the correct legal standard in computing damages is also reviewed de novo. *See* *Mackie v. Rieser*, 296 F.3d 909, 916 (9th Cir. 2002); *Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Ry Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000); *Evanow v. M/V NEPTUNE*, 163 F.3d 1108, 1113-14 (9th Cir. 1998).

B. Modification of the district court's orders leads naturally to reconsideration of the statutory double backpay remedy.

The False Claims Act, 31 U.S.C. § 3730(h)(2), provides for an award of double backpay as a remedy. The district court denied Lillie's motion for this relief solely because it granted JMOL. ER48. If the JMOL is reversed, then this matter should be remanded to the district court with instructions to award an additional $521,983, plus interest, pursuant to 31 U.S.C. § 3730(h)(2).

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

A. Standard of Review

Whether the district court has the authority to award costs under the Act is reviewed de novo. *See id.*; *United States ex. rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1412 n.13 (9th Cir. 1995).

B. Modification of the district court's orders leads naturally to reconsideration of the statutory attorney's fees.

that the DCWPA, 10 U.S.C. § 2409, and the FCA, 31 U.S.C. § 3730(h)(2), also provide for an award of reasonable attorney's fees as a remedy. The district court denied Lillie's motion for this relief solely because it granted JMOL. ER48. If the JMOL is reversed, then this matter should be remanded to the district court with instructions to determine and award reasonable attorney's fees.

CONCLUSION

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. Lillie also asks for costs of this appeal.

Date: February 28, 2020

Respectfully submitted by:

/s/ Richard R. Renner

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STATEMENT OF RELATED CASES

Undersigned are not aware of any cases pending in the Ninth Circuit related to this case.

Date: February 28, 2020

Respectfully submitted by:

/s/ Richard R. Renner

Richard R. Renner
Attorney for Appellant David Lillie

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 9,768 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 the 365 ProPlus version of Microsoft Word, Times New Roman 14-point font.

Date: February 28, 2020

Respectfully submitted by:

/s/ Richard R. Renner

Richard R. Renner
Attorney for Appellant David Lillie

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 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: February 28, 2020

Respectfully submitted by:

/s/ Richard R. Renner

Richard R. Renner
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ADDENDUM

Table of Contents for the Addendum

Federal Rule of Civil Procedure 50

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

5 U.S.C. § 1221(e) [part of the Whistleblower Protection Act, WPA]

5 U.S. Code § 1221. Individual right of action in certain reprisal cases
(e)

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure

or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 2302(f) [part of the Whistleblower Protection Act, WPA]

(f)

(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty;

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the "disclosing employee"), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

10 U.S.C. § 2409 [Defense Contractor Whistleblower Protection Act, DCWPA]

10 U.S. Code § 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) Prohibition of Reprisals.—

(1) An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

(C) A substantial and specific danger to public health or safety.

(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress.

(B) An Inspector General.

(C) The Government Accountability Office.

(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(3) For the purposes of paragraph (1)—

(A) an employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.

(b) Investigation of Complaints.—

(1) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense, or the Inspector General of the National Aeronautics and Space Administration in the case of a complaint regarding the National Aeronautics and Space Administration. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

(2)

(A) Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

(c) Remedy and Enforcement Authority.—

(1) Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(2) If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action,

be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(5) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) Notification of Employees.—

The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) Exceptions.—

(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

(A) relates to an activity of an element of the intelligence community; or

(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

(f) Construction.—

Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(g) Definitions.—In this section:

(1) The term "agency" means an agency named in section 2303 of this title.

(2) The term "head of an agency" has the meaning provided by section 2302(1) of this title.

(3) The term "contract" means a contract awarded by the head of an agency.

(4) The term "contractor" means a person awarded a contract with an agency.

(5) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the Secretary of Defense.

(6) The term "abuse of authority" means the following:

(A) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.

(B) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.

(7) The term "grantee" means a person awarded a grant with an agency.

31 U.S.C. § 3730(h) [part of the False Claims Act, FCA]

31 U.S. CODE § 3730. CIVIL ACTIONS FOR FALSE CLAIMS

(h) Relief From Retaliatory Actions.—

(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 discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(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.

(3) Limitation on bringing civil action.—

A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.