OFFICE OF INSPECTOR GENERAL
Federal Housing Finance Agency
400 7th Street SW, Washington, DC 20219

(b)(6), **Complainant**	)	
v.	)	**FHFA-OIG**
Indigo IT,	)	**H-19-3098**
Respondent	)	

ORDER DENYING CONTRACTOR EMPLOYEE'S WHISTLEBLOWER CLAIM UNDER 41 U.S.C. § 4712

I. Summary

On May 21, 2019, (b)(6), a former employee of a Federal Housing Finance Agency (FHFA) Office of Inspector General (OIG) contractor, filed a whistleblower reprisal claim with FHFA-OIG. (b)(6) alleged that on (b)(6), the contractor, Indigo IT, terminated his employment in retaliation for protected disclosures he made regarding improper billings to FHFA-OIG.

Under 41 U.S.C. § 4712,[1] federal contractor employees are protected from reprisal for certain disclosures. After FHFA-OIG determined (b)(6) complaint stated a cognizable claim, was not frivolous, and had not been addressed in another proceeding, FHFA-OIG investigated (b)(6) allegations and completed a report of the findings. The report and relevant evidence have been submitted to me for final determination regarding whether there is sufficient basis to conclude that Indigo IT subjected (b)(6) to reprisal under § 4712.[2] For the reasons set forth below, I conclude that (b)(6) allegations do not support a finding of whistleblower reprisal by Indigo IT as a matter of law and I am denying relief.

[1] The related Federal Acquisition Regulation (FAR) provisions at FAR 3.908 also apply because the whistleblower rights clause at FAR 52.203.17 was incorporated into Indigo IT's contract with FHFA-OIG.

[2] Because this is an FHFA-OIG contract, the Inspector General is the agency head with the authority to grant or deny relief under § 4712(c). This complaint was lodged with FHFA-OIG while I was the Acting Inspector General. It was investigated at my direction and I retained authority to adjudicate it.

II. Statement of Facts

Indigo IT has provided information technology support services to FHFA-OIG since March 2016. (b)(6) was employed as (b)(6) for Indigo IT from (b)(6) until his termination on (b)(6) He (b)(6)

(b)(6)

On (b)(6), (b)(6) filed a whistleblower claim through FHFA-OIG's online hotline form. (b)(6) made two allegations of "Indigo IT fraudulent billing of FHFA OIG," specifically that (1) Indigo IT's Chief Technology Officer told an employee that he could charge for more hours than actually worked on Saturday, (b)(6) and (2) an Indigo IT consultant billed for hours that he did not work while drafting a report for FHFA-OIG. (b)(6) complaint stated that he brought up the "issue regarding time charging [by the consultant] and was terminated from my position later in the day." ((b)(6) Hotline Submission).

Consistent with FHFA-OIG's obligations under 41 U.S.C. § 4712(b), the Assistant Inspector General for Evaluations and an experienced FHFA-OIG attorney investigated (b)(6) (b)(6) reprisal claim. FHFA-OIG requested relevant documents and materials from (b)(6) Indigo IT, and FHFA-OIG employees, and conducted formal interviews of (b)(6) and four current or former Indigo IT employees who had knowledge of the issues presented. FHFA-OIG gathered evidence, including (b)(6) audio recording of the (b)(6) termination meeting, and completed a report of investigatory findings. I have carefully reviewed the facts in the report and the relevant evidence, which I now discuss below.

A. Alleged Overbilling for Saturday, (b)(6) Work

(b)(6) stated that he was called by an Indigo IT employee (hereafter Employee G) on Tuesday, (b)(6) about Indigo IT staff working for FHFA-OIG on Saturday, (b)(6) ((b)(6) Hotline Submission; (b)(6) Tr. Vol.1 at 26-27 & Exh.1). According to (b)(6) Employee G said that Indigo IT's Chief Technology Officer told him that he could bill for five hours even if the work did not take that long. ((b)(6) Hotline Submission; (b)(6) Tr. Vol.1 at 9, 30, 37). (b)(6) said that he instructed Employee G to only post hours actually worked. ((b)(6) Hotline Submission; (b)(6) Tr. Vol.1 at 9, 30-31). (b)(6) provided FHFA-OIG with his phone log, which showed an incoming call on (b)(6) at 7:34 AM from an FHFA-OIG number. ((b)(6) Exh.1). The FHFA-OIG phone directory lists the phone number as belonging to FHFA-OIG's Chief Information Officer. (Report of Investigation (ROI) at 4). The FHFA-OIG phone directory lists a different number for Employee G, which does not appear on (b)(6) phone log. (ROI at 7).

i. Communication between (b)(6) and the CEO

On (b)(6), (b)(6) and Indigo IT's CEO had an impromptu in-person meeting during which the CEO expressed dissatisfaction with (b)(6) performance and concerns about his management style and communication with others. ((b)(6) Tr. Vol.1 at 22, 28; (b)(6) Correction Sheet at 3; (b)(6) Tr. Vol. 2 at 6-12; (b)(6) Tr. at 9-10, 18-22, 75-79). The CEO told FHFA-OIG that, at that meeting, she notified (b)(6) that he would be placed on a performance improvement plan (PIP) to address those issues. ((b)(6) Tr. at 9-10, 17, and Exh. A at 2). (b)(6) stated that, at that meeting, he notified the CEO about the Chief Technology Officer's guidance to Employee G that five hours could be billed for Saturday work even if it did not take that long. ((b)(6) Tr. Vol.1 at 23, 40-41; (b)(6) Tr. Vol.2 at 10; (b)(6) Correction Sheet at 1-2, 5-6). (b)(6) recalled telling the CEO again on Thursday, (b)(6) about the Chief Technology Officer's statement regarding overbilling. ((b)(6) Correction Sheet at 2). According to the CEO, (b)(6) never brought any instances of billing improprieties to her attention during their (b)(6), meeting and she did not recall having any discussions with (b)(6) on (b)(6). ((b)(6) Tr. at 25-26, 32).[3]

At his FHFA-OIG interview, (b)(6) said he also told the CEO about the Chief Technology Officer's statement on (b)(6) during the meeting in which he was terminated. ((b)(6) Tr. Vol.1 at 9, 21, 41-42). (b)(6) subsequently advised that his notes did not reflect communication on (b)(6) about the Saturday billing issue. ((b)(6) Correction Sheet at 2).[4] In the audio recording of the (b)(6) termination meeting provided by (b)(6), there was no discussion about overbilling concerns. ((b)(6) Recording). When interviewed by FHFA-OIG, the CEO stated (b)(6) did not make any disclosures about billing irregularities or

[3] In response to FHFA-OIG's first request for Indigo IT documents, the CEO stated that the only contract billing related issue that (b)(6) brought to her attention was in (b)(6). According to the emails she provided, on (b)(6), (b)(6) advised her of FHFA-OIG's concerns regarding an Indigo IT employee complaining about being asked to work or bill extra hours. (Indigo IT's 10-18-19 FHFA-OIG (b)(6) Investigation Email and attachments). (b)(6) investigated the matter and worked with the then-Human Resources (HR) Director on a timekeeping compliance memo that was issued to all employees and subcontractors on the FHFA-OIG contract. (Id.). Employees were required to attest that they read, understood, and will comply with Indigo IT's timekeeping policy and procedure by signing the memo. (Id.). (b)(6) confirmed in his interview that he discussed the matter with the CEO and they decided that he would conduct the investigation. ((b)(6) Tr. Vol.2 at 21-23). He stated that he did not see anything during his investigation that suggested any wrongdoing. (Id. at 22).

[4] FHFA-OIG requested, but did not receive, any notes from (b)(6) reflecting his termination discussion on (b)(6) (b)(6). (ROI at 4 n.1).

fraud at the termination meeting. ((b)(6) Tr. at 43-44).[5]

ii. Relevant Evidence Regarding the Saturday, (b)(6), Work

The Saturday work was discussed in an email from the Chief Technology Officer to (b)(6) on (b)(6) In addition to talking about a potential promotion for an Indigo IT employee working at FHFA-OIG, the Chief Technology Officer indicated he had learned on Wednesday, (b)(6), that FHFA-OIG had work to complete on Saturday, (b)(6), and "was offering to pay someone to help out (5 hours)." ((b)(6) Evidence 515). The Chief Technology Officer wrote that one employee had already volunteered, and noted, "If he puts in 5 hours on Saturday ((b)(6) then he can be smart about leaving early a couple of times provided the helpdesk isn't busy, things seem calm and stable, and the other 2 guys are there." (Id.). On (b)(6), (b)(6) and the Chief Technology Officer continued their email exchange. (b)(6) (b)(6) replied that he had asked his assistant to prepare a form about promoting the employee and he would discuss it with the CEO. (Id.; (b)(6) Tr. Vol.1 at 3). The Chief Technology Officer responded that he would get (b)(6) a final list of people participating in the Saturday work, and the two men discussed affording time off to employees who volunteered to work. ((b)(6) Evidence 515; (b)(6) Email Exch.).

On Tuesday, (b)(6), after he was terminated, (b)(6) accessed the timesheets of the two Indigo IT employees whom he believed had worked at FHFA-OIG on Saturday, (b)(6). ((b)(6) Tr. Vol.1 at 36-38, 40 & Exhs. 3, 4). This included the timesheet of Employee G, who allegedly received the Chief Technology Officer's instruction about overbilling. (Id.). On each timesheet, the employee had recorded five hours of work for (b)(6). (Id.).

iii. Interviews of Key Indigo IT Employees

FHFA-OIG interviewed Employee G, who stated that the Chief Technology Officer never directed or authorized him to bill five hours for the Saturday work ((b)(6) Tr. at 22), and they had not had any conversations regarding the work prior to that Saturday. (Id. at 18, 21). Employee G said that he never consulted anyone at Indigo IT in advance as to how to bill his time for that day, and at the time, he believed he would be entitled to compensatory time off for the hours that he worked on Saturday. (Id. at 18-19).

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[5] Indigo IT's HR Director was present at the (b)(6) termination meeting. FHFA-OIG received two pages of typed notes that the HR Director said she pulled together when asked to prepare a PIP for (b)(6) ((b)(6) Tr. at 11, 16; (b)(6) Tr. Exh. F). The HR Director's notes included a paragraph about the (b)(6) termination meeting, which does not reflect discussion of overbilling issues. The notes generally were consistent with (b)(6) audio recording of the (b)(6) meeting, though a phrase written by the HR Director did not appear on the audio exactly as quoted. ((b)(6) Recording; ROI at 13 n.4).

Employee G also stated he had no recollection of ever communicating with (b)(6) either verbally or via email, regarding the Saturday work. (Id. at 20, 30). He categorically denied that he called (b)(6) prior to Saturday, (b)(6), to inform him that he had been directed to bill for five hours even though the work would take only three. (Id. at 21). Employee G said that he and two other Indigo IT employees, along with one FHFA-OIG employee, worked onsite at FHFA-OIG on Saturday, (b)(6) The work took about three hours to complete. (Id. at 11). He said that, after the work had been completed, the FHFA-OIG employee informed him that he could submit a bill for five hours, and he then recorded five hours on his timesheet. (Id. at 21, 26). According to Employee G, no one from Indigo IT authorized him to bill five hours for Saturday; he did it solely on the direction of the FHFA-OIG employee with whom he worked that day. (Id. at 27). Employee G stated that, on or after Tuesday, (b)(6), he spoke with the Chief Technology Officer, who directed him to bill for only the actual time he had worked. (Id. at 21, 29). Employee G amended his timesheet on the morning of Wednesday, (b)(6) (b)(6) recording three hours of Saturday work, rather than five. (Id. at 32-33; (b)(6) Timesheet).

When interviewed by FHFA-OIG, the Chief Technology Officer categorically denied that he ever told any Indigo IT staff that they could bill FHFA-OIG for five hours even if they did not work that many hours. ((b)(6) Tr. at 42). According to the Chief Technology Officer, on (b)(6) (b)(6)—which he later corrected to (b)(6)—he became aware that three Indigo IT employees had recorded five hours on their timesheets for Saturday, (b)(6), although they only worked three hours. (Id. at 32-35, 42; (b)(6) Correction Sheet at 3). He said that he directed those employees to correct their timesheets to only bill for the time worked. ((b)(6) Tr. at 34-36, 42).[6]

The (b)(6) invoice from Indigo IT shows that FHFA-OIG was billed for two Indigo IT employees (including Employee G) each working three hours on Saturday, (b)(6). ((b)(6) Indigo Invoice at PDF 3 & 4). FHFA-OIG was not charged at all for a third employee who worked that day because FHFA-OIG considered his billing rate excessive for the nature of the work performed. (Id. at PDF 5; ROI at 8).

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[6] The Chief Technology Officer provided a chronology of events, which FHFA-OIG investigators determined contained two significant inaccuracies. FHFA-OIG determined that (1) he learned about the Saturday work on (b)(6) (b)(6) a week earlier than his chronology indicated; and (2) although his chronology showed that on (b)(6) (b)(6) he became aware that Indigo IT employees had billed five hours for Saturday work and directed them to correct their timesheets, he later corrected the date to (b)(6). (ROI at 7-8, (b)(6) Correction Sheet at 3).

The Chief Technology Officer also told FHFA-OIG that on (b)(6) or (b)(6), he spoke with (b)(6) about the plan to have two or three people work for up to five hours on Saturday May 18, 2019. ((b)(6) Transcript at 21-22). (b)(6) stated that he did not have contact with the Chief Technology Officer after (b)(6). Thus, it is unclear whether the two men communicated by phone after (b)(6) though both agreed that they did not have a conversation about billing for Saturday work.

B. Alleged Fraudulent Billing by an Indigo IT Consultant

(b)(6) reported that an FHFA-OIG Deputy Inspector General (IG) "requested a meeting with Indigo IT to note their frustration with a report being produced by Indigo IT." ((b)(6) Hotline Submission). According to (b)(6), an Indigo IT consultant "wrote the paper, but it wasn't at the standards required by the agency. Later the report was provided to the [Chief Technology Officer] to rewrite and interview the same persons, that [the consultant] supposedly interviewed." (Id.). (b)(6) reported that, clearly, based on feedback provided, "work was not being produced for the hours spent." (Id.)

During his FHFA-OIG interview, (b)(6) estimated that the consultant may have billed 300 hours, but the report looked like maybe 80 hours of work, so he did not know where the other 200 or 220 hours of work went. ((b)(6) Tr. Vol.1 at 48-49, 51). (b)(6) stated that he "absolutely" raised that as a concern because the consultant was high priced, though the total amount was "small" compared to the rest of the Indigo IT contract. (Id. at 51). (b)(6) also said that he had read the statement of work for the report, but he did not know the consultant's expertise, background, or exactly what the consultant was working on, so he was not able to say whether it was quality material or not. (Id. at 56).

At his FHFA-OIG interview, (b)(6) stated that he concluded from a discussion with the Chief Technology Officer during the week of (b)(6), (Id. at 51-53) that the consultant was billing for time in which he did not work. (Id. at 45-47, 51). According to (b)(6), the Chief Technology Officer said he met with and re-interviewed representatives of other agencies, who allegedly informed him that the consultant "wasn't doing anything" when he came to interview them. (Id. at 45, 47-49). (b)(6) also believed the consultant had billed for time he did not work due to the inferior quality of the draft report. (Id. at 47-48).

i. (b)(6) Verbal Communication to the CEO

(b)(6) stated that he informed the CEO during their (b)(6), meeting of his concerns regarding the consultant's billing. (Id. at 46, 53, 57-58, 72, 79). As noted above, according to the CEO, (b)(6) never brought any instances of billing improprieties to her attention during their (b)(6), meeting ((b)(6) Tr. at 25-26). The CEO stated that (b)(6) never told her that the consultant had billed FHFA-OIG for time in which he did not work. (Id. at 51).

ii. (b)(6) Written Communication to the CEO

(b)(6) reported that he informed the CEO in writing about his concerns regarding the consultant's billing in an Indigo IT Organizational Status Report for the period ending (b)(6) (b)(6). ((b)(6) Tr. Vol.1 at 46, 53, 57, 65, 72). The Status Report was prepared in advance of a

management meeting scheduled for Tuesday, (b)(6). ((b)(6) Timesheets – Retaliation Email, Attachment "OSR Email (b)(6)"). (b)(6) stated that he prepared the Status Report's "Service Delivery" section about FHFA-OIG, which had a series of bulleted information, including a bullet about the consultant's "document submitted for draft." ((b)(6) Tr. Vol.1 at 65-67; (b)(6) OSR at 8-9). A sub-bullet stated that the FHFA-OIG Deputy IG does not like the draft, the Chief Technology Officer is rewriting it, and the Deputy IG says not to charge for more time. ((b)(6) OSR at 8-9). Another sub-bullet stated, "Some concerns on [the consultant's] time, regarding what he actually did." (Id.) Indigo IT records indicate that this Organizational Status Report was sent via email to the CEO on Monday, (b)(6), the day before Indigo IT terminated (b)(6). ((b)(6) Timesheets– Retaliation Email, Attachment "OSR Email (b)(6)"). At her FHFA-OIG interview, the CEO stated that she did not print or review the (b)(6), Organizational Status Report because the meeting had been cancelled and she was preparing for (b)(6) termination. ((b)(6) Tr. at 57).

iii. Other Relevant Evidence Regarding the Consultant's Report

On (b)(6), (b)(6) emailed the Chief Technology Officer, the CEO, and another Indigo IT employee, informing them he had just received a call from an FHFA-OIG official who wanted to meet with Indigo IT the next day to discuss the consultant's document. ((b)(6) OIG Report Meeting- MOHR report). (b)(6) wrote, "Indications are that it's a regurgitation of what they told [the consultant] and doesn't provide empirical data that can be used to justify the findings." (Id.)

During his interview, (b)(6) stated that the FHFA-OIG Deputy IG did not want to be charged for any more work on the report, and after the (b)(6) meeting between Indigo IT and FHFA-OIG, the Chief Technology Officer worked on rewriting the report for free. ((b)(6) Tr. Vol.1 at 45, 52). According to (b)(6), the CEO was aware that the Chief Technology Officer was revising the report but not billing for it, as it was done at the direction of Indigo IT's Chief Growth Officer and Co-Founder (who is also the CEO's husband). (Id. at 59).

The Chief Technology Officer said on (b)(6), after learning FHFA-OIG was unhappy with the consultant's report, the Chief Technology Officer undertook to "adjust" it. ((b)(6) Tr. at 61 & Exh. B at 2-3). He said he never met in-person with representatives of other agencies when revising the consultant's report; all his communications with those agencies were via email and centered around hard data that the Deputy IG had requested in his revisions to the report. ((b)(6) Tr. at 62-63). He told FHFA-OIG that he did not recall having any discussions with (b)(6) regarding the process of adjusting the report (Id. at 61), and did not recall any conversations with (b)(6) regarding the information he received from the other federal agencies. (Id. at 64). He categorically denied telling (b)(6) that the consultant had billed

FHFA-OIG for time in which he did not work; he stated that he never had any discussions with (b)(6) regarding the accuracy of the consultant's billing for the report. (Id. at 65). He also stated that (b)(6) never indicated to him that he, (b)(6), thought the consultant had billed for time in which he did not work. (Id.).

FHFA-OIG records show that, on (b)(6), the Deputy IG provided Indigo IT with an annotated version of the consultant's draft report, highlighting the deficiencies. (DIG Memo to File 2.0). FHFA-OIG records reflect that Indigo IT did not charge FHFA-OIG for the work done by the Chief Technology Officer. (Id.). Ultimately, FHFA-OIG was satisfied with the final report and concluded that a fair outcome was achieved. (Id.).

C. (b)(6) Employment at Indigo IT

i. (b)(6) Tenure as (b)(6)

(b)(6) was employed by Indigo IT as (b)(6) for (b)(6) (b)(6). At his FHFA-OIG interview, (b)(6) stated that he had been concerned about being fired since his third week of employment there. ((b)(6) Tr. Vol.2 at 3-4). (b)(6) said that he "really wanted to leave," that the relationship "was not a good fit," and that his goal was to "stick it out for a year." (Id. at 4).

(b)(6) stated that he received bonuses for his performance during his tenure with Indigo IT. ((b)(6) Timesheets - Retaliation Email). His compensation at Indigo IT included bonus incentives, and under the bonus incentive plan, he would receive an incentive payment whenever he achieved a specified goal.[7] ((b)(6) Tr. Vol.2 at 27, (b)(6) Bonus Incentive Plan).

When interviewed by FHFA-OIG, the Indigo IT Human Resources (HR) Director stated that (b)(6) "was not a good match to the culture" that the company was working to establish with project managers onsite and with its clients. ((b)(6) Tr. at 3). She stated that as complaints came in from Indigo IT employees, the CEO would speak with her about them. (Id.). She said that the CEO expressed her frustration with (b)(6) lack of responsiveness and his "seemingly lack of understanding" of the severity of the complaints that individuals were making about his behavior and attitude. (Id. at 3-4). The HR Director stated that Indigo IT employees also complained to her about (b)(6) and she advised the CEO to talk with those individuals so she could understand and address their concerns. (Id. at 4).

The CEO informed FHFA-OIG that, around (b)(6) when her former business partner was transitioning out of the company, she and (b)(6) had discussed "a [Vice President (VP)] role for him [(b)(6)], as he proved himself…." ((b)(6) Tr. at 13). She stated

[7] For example, email communication provided by (b)(6) shows that the CEO consulted him on bonus allocations for him and other Indigo IT employees in (b)(6) for achieving the goal of "CMMI Re-certification." ((b)(6) (b)(6) Email Exch (Staffing of CMMI) and (b)(6) Bonus Incentive Plan, Goal 4).

that after the buyout was complete, she and her husband, the Chief Growth Officer and Co-Founder, "had a strategic uh, plan for growth that we were sharing with the team. And after the buyout, because of the growth plan that we had, we wanted to give some new title changes to some folks." (Id. at 14). She stated that they had anticipated potentially giving a new title to (b)(6) (b)(6) at that time. However, the week before they made the announcement that some managers were being promoted to directors, she and the former director of human resources met with (b)(6) (b)(6) and told him he would not be getting the VP title yet and that "he needed to prove himself some more…." (Id. at 15).

ii. The Days Before (b)(6) Termination

The CEO stated that, at the Tuesday, (b)(6), meeting with (b)(6), she relayed her concerns about his management style and communication with others, and notified him that he would be placed on a performance improvement plan (PIP). (Id. at 9-10, 17-22, 75-79 & Exh. A at 2). The CEO stated that, after the meeting, she directed the HR Director to begin preparing a formal PIP for (b)(6). (Id. at 9-11, 22 & Exh. A at 2). The CEO stated that she had another meeting later that day with a project manager who reported to (b)(6). (Id. at 9-10, 22 & Exh. A at 2). She told FHFA-OIG that as a result of this meeting she concluded that the project manager would resign unless she terminated (b)(6). (Id. at 9-10). According to the CEO, "the [PIP] wasn't gonna get me to where I felt that we needed to go and that it was just better to make a clean break." (Id. at 10). The CEO stated that she notified the HR Director the next day that "it's not going to be a pip. I think we just need to move to a termination." (Id. at 22).[8]

According to a chronology the CEO prepared and submitted to FHFA-OIG, she made the final decision to terminate (b)(6) on Thursday, (b)(6). (Id. at 10-17, 22, 28-30 & Exh. A at 2). The CEO stated that she notified several individuals that day, including the Chief Technology Officer and the HR Director, that (b)(6) would be terminated. (Id. at 30). The statements from the Chief Technology Officer and the HR Director corroborate this point. The Chief Technology Officer stated that he received a phone call from either the CEO or her husband on the evening of Thursday, (b)(6), informing him that (b)(6) would be terminated. ((b)(6) Tr. at 81-82). The Chief Technology Officer stated that he understood (b)((b)(6) was being terminated because of his abrasive management style. (Id. at 68-74). Likewise,

[8] The HR Director told FHFA-OIG that the CEO and (b)(6) had a conversation the week before his termination, but she did not recall the exact date. ((b)(6) Tr. at 5). She stated that the CEO's intention was to try to talk to (b)((b)(6 about modifying his approach when he spoke to other people and the CEO did not want to hire somebody and give up on them right away. (Id.). She said the CEO may have mentioned the possibility of termination before (b)(, but it was not talked about seriously until (b)(. (Id.) She confirmed that the CEO had a conversation with one of the project managers around the time she met with (b)(6) and that the CEO was appalled by (b)(6) behavior during a meeting with that project manager. The HR Director stated that it was one thing that led the CEO to conclude that (b)(6) was not going to be open to altering his behavior. (Id. at 7).

the HR Director states that the CEO had asked her to prepare a PIP for (b)(6) until the CEO decided the next day to move forward with termination. ((b)(6) Tr. at 10).

The CEO stated she held an internal meeting on the morning of Friday, (b)(6) , to develop a communications and transition plan following (b)(6) termination. ((b)((b)(6) Tr. at 33, 74 & Exh. A at 2). The Chief Technology Officer stated that he attended the meeting on (b)(6) with several other Indigo IT employees to discuss how to divide (b)(6) responsibilities. ((b)(6) Tr. at 84-86). He said there was no discussion at the Friday meeting about any allegations (b)(6) may have made about fraudulent billing to FHFA-OIG. (Id. at 91-92). He further stated he had no reason to believe that (b)(6) had been terminated because he made disclosures to Indigo IT about fraudulent or irregular billing practices towards FHFA-OIG. (Id. at 92).

Both (b)(6) and the CEO told FHFA-OIG that on (b)(6) (the day before his termination), (b)(6) sent an email to the CEO stating: "(b)(6) – I've filed formal complaints against Indigo in the last week. I hope we can work things out." ((b)(6) Formal Complaints Email; (b)(6) Tr. at 38 and Exh. C). (b)(6) acknowledged at his FHFA-OIG interview that he did not file any complaints regarding FHFA-OIG matters prior to his termination on (b)(6) . ((b)(6) Tr. Vol.2 at 14-15). (b)(6) also acknowledged that he sent that email to the CEO because he thought it would prevent her from firing him. (Id. at 19-20).

After receiving the (b)(6) email from (b)(6) the CEO stated that she went to Indigo IT's HR Director and then contacted the company's HR counsel because she thought (b)((b)(6) was attempting "to set up a premise for retaliatory um, termination." ((b)(6) Tr. at 38). According to the CEO, the attorney asked her whether she had proof that the decision to terminate (b)(6) had been made beforehand. (Id. at 38). The CEO stated that due to the internal meeting that occurred the previous Friday, her attorney advised that "you're cleared on the retaliatory issue." (Id. at 39). The attorney further advised her not to respond to (b)(6) email and to proceed with her plan to terminate (b)(6) the next day.[9] (Id.).

iii. The (b)(6) Termination Meeting

(b)(6) provided FHFA-OIG with a copy of an audio recording of his (b)(6) meeting with the CEO and HR Director. (ROI at 13). In the 4-minute, 23-second recording, the CEO tells (b)(6) that, after their meeting the previous week, she decided to let him go. (b)(

[9] The CEO provided an itemized invoice from her attorney, which stated that the attorney discussed "employment issues" with Indigo IT on (b)(6) . ((b)(6) RE_ (b)(6) Reprisal Matter -- follow up question). At FHFA-OIG's request, the attorney provided a letter confirming that on (b)(6) , he had discussed with the CEO (b)((b)(6) proposed termination and (b)(6) email stating that he had filed complaints against Indigo IT. ((b)(6) (b)(6) Letter to (b)(6)

(b)(6) responds that there are two lawsuits against the company and declines to provide details when asked. He says, "three weeks in you hounded me on this stuff, so that's fine…you'll go through lawsuits…I already initiated last week." The CEO tells (b)(6) that the company does not typically provide severance to someone on the job for less than a year but asks if he were interested in discussing severance. (b)(6) responds that if severance is reasonable, he'll move on; if not, then "we'll move on with the other lawsuits." When the CEO tells (b)(6) that they would offer one-month severance, he responds that "one month's not going to get it." She asks, "So what are you looking for?" (b)(6) responds with six months. The CEO then states, "I just want to be clear that this decision was made before you sent this email to me that you had filed formal complaints" and "we weren't aware of any complaints prior to you making that decision." (b)(6) does not dispute the CEO's statements. When she says they had lots of counseling sessions, he responds, "if that's what you want to call it" and says, "we just talked about it a month ago you were going to make me vice president and all of sudden this went downhill." (b)(6) says there was nothing wrong that he did to "this woman" and mentions putting everything in an email about it. He concludes by saying he tried to help the company out but in many cases, they did not listen to him. ((b)(6) Recording).

III. Legal Standard

Section 4712(a) of Chapter 41 states:

> An employee of a 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 gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

As relevant here, the "person or body described in paragraph (2)" includes "[a] management official or other employee of the contractor . . . who has the responsibility to investigate, discover, or address misconduct."[10] To establish retaliation under § 4712, a whistleblower must show that (1) he was an employee of a government contractor, (2) he disclosed information to an appropriate "person or body" that he reasonably believed was evidence of gross mismanagement of a Federal contract, a gross waste of Federal funds, or a violation of law, rule, or regulation

[10] 41 U.S.C. § 4712(a)(2)(G).

related to a Federal contract[11] and (3) his disclosure was a contributing factor in the action taken against him.[12] Section 4712(c)(6) incorporates the legal burdens of proof enumerated in 5 U.S.C. § 1221(e), which likewise provides that once an employee demonstrates that a protected disclosure was made, he may establish that the disclosure was a contributing factor in the personnel action taken against him through circumstantial evidence, such as evidence that—(A) the official taking the personnel action knew of the disclosure; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. Once the employee establishes that the protected disclosure was a "contributing factor" in the employment action taken, the burden shifts to the contractor employer to demonstrate "by clear and convincing evidence that it would have taken the same personnel action" without such disclosure.[13]

IV. Analysis

In sum, the record does not show by a preponderance of evidence that (b)(6) made a protected disclosure under § 4712 and was subjected to reprisal by Indigo IT.[14] After carefully

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[11] (b)(6) does not allege an "abuse of authority," which, under § 4712, means "an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency." § 4712(g)(1). See also FAR 3.908-2. In the context of a similar whistleblower protection statute, the D.C. Circuit cited an employee's disclosures about significant failures of a new, costly software project concealed by her supervisors as an example that a jury could reasonably view as an abuse of authority. Williams v. Johnson, 776 F.3d 865, 871 (D.C. Cir. 2015).

Nor does (b)(6) complaint allege "a substantial and specific danger to public health or safety." See, e.g., Coleman v. District of Columbia, 794 F.3d 49 (D.C. Cir. 2015) (citing as an example a disclosure relating to alleged life-endangering problems with a fire department's response to a fire).

[12] See § 4712(a); see also Omwenga v. UN Found., No. 15-CV-786, 2019 U.S. Dist. LEXIS 169174, at *35 (D.D.C. Sept. 30, 2019)) (*inter alia*, denying summary judgment for plaintiff's § 4712 claim that she was discharged for reporting alleged gross mismanagement), Armstrong v. Arcanum Grp. Inc., No. 16-CV-1015, 2017 U.S. Dist. LEXIS 156346, at *16 (D. Colo. Sept. 25, 2017), aff'd, 897 F.3d 1283 (10th Cir. 2018) (granting summary judgment to the employer on plaintiff's retaliation claims under the False Claims Act and § 4712).

[13] See Omwenga, 2019 U.S. Dist. LEXIS 169174, at *35-36 (citing Armstrong, 2017 U.S. Dist. LEXIS 156346, at *16); see also Pritchard v. Metro Wash. Airports Auth., 2019 U.S. Dist. LEXIS 191525, at *36-37 (E.D. Va. Nov. 4, 2019) (citing 5 U.S.C. § 1221(e)(2)), appeal filed, No. 19-2386 (4th Cir. Dec. 5, 2019) (granting summary judgment to employer on all claims, finding, *inter alia*, insufficient evidence to establish a protected § 4712 disclosure); Armstrong v. Arcanum Grp. Inc., 897 F.3d 1283, 1287 (10th Cir. 2018) (affirming summary judgment for the employer in a False Claims Act and § 4712 action, finding plaintiff did not produce sufficient evidence that her supervisor knew of her complaints before terminating her).

[14] FHFA-OIG records reflect nine requests to (b)(6) for evidence, along with several phone calls, email exchanges, and an in-person interview. (b)(6) informed FHFA-OIG that he retained all of his Indigo IT emails after his termination (b)(6) Tr. Vol.1 at 16). FHFA-OIG did not receive contemporaneous emails or other documents from (b)(6) evidencing or referring to any protected disclosures regarding billing for work performed on Saturday (b)(6), or the consultant's billing, other than the (b)(6), Organizational Status Report (ROI at 6). FHFA-OIG did not locate additional documents during its investigation to corroborate (b)(6) claims (Id.). Testimony is useful, though after-the-fact recollections may be imprecise and perspectives change. In this case, key parts of (b)(6) allegations are not supported by other Indigo IT employees' statements.

considering the FHFA-OIG report and relevant evidence with respect to each element, I find the record insufficient to substantiate (b)(6) allegations for the reasons explained below.

A. Disclosure by (b)(6) to the CEO

(b)(6) satisfies the first element of § 4712—at the time of the alleged whistleblower disclosures, he was an employee of Indigo IT, and Indigo IT was a federal government contractor. Regarding the second element, the CEO of Indigo IT qualifies as a "management official . . . who has the responsibility to investigate, discover, or address misconduct," so she would be an appropriate person to whom a disclosure may be made.

i. (b)(6) Verbal Communication to the CEO

A "disclosure" necessarily involves communication, so the next assessment is whether he disclosed information to the CEO or other appropriate "person or body" that he reasonably believed was evidence of gross mismanagement of a Federal contract, a gross waste of Federal funds, or a violation of law, rule, or regulation related to a Federal contract. It is uncontested that (b)(6) and the CEO had a meeting on Tuesday, (b)(6) during which they discussed the CEO's concerns about (b)(6) performance and management style. (b)(6) asserts that he informed the CEO at that meeting about his concerns regarding the consultant's billing and the Chief Technology Officer's statement regarding overbilling for Saturday work. (b)(6) stated that he informed the CEO about the Chief Technology Officer's statement again on Thursday, (b)(6). The CEO denies that (b)(6) brought any instances of billing improprieties to her attention during the (b)(6) meeting, and she does not recall any discussions with (b)(6) on (b)(6).[15] In fact, the CEO denies that (b)(6) ever raised either concern to her.

Given the parties' contradictory statements about the substance of their conversation on (b)(6), and the occurrence of a conversation on (b)(6), we look to the record for additional evidence that may support (b)(6) claim. An email exchange between (b)(6) and the Chief Technology Officer from (b)(6) undermines (b)(6) claims that he was concerned about employees' overbilling for the Saturday work or in conflict with the Chief Technology Officer. The five emails reflect routine communication and agreement between two supervisory employees. They discussed a potential promotion for an employee and the Saturday, (b)(6) work. (b)(6) email on Thursday, (b)(6), at 12:33 PM says that he asked his assistant to prepare a form about promoting the employee and he would discuss it with the

[15] The record does not support any other verbal disclosures. Although (b)(6) initially said that he informed the CEO about the Chief Technology Officer's statement at the (b)(6) termination meeting, he later told FHFA-OIG that his notes did not reflect such communication. The audio recording he provided of the termination meeting does not contain any such discussion, nor is there other evidence on the record to support the claim.

CEO. After the Chief Technology Officer responds with more information about the Saturday work, (b)(6) 12:52 PM email thanks the Chief Technology Officer and discusses how to compensate the employees who volunteered. Neither of (b)(6) emails suggests concern about any statements the Chief Technology Officer has made or indicates alarm about overbilling. The email exchange does not support (b)(6) claims that, two days before the emails, and on the same day as that exchange, (b)(6) verbally informed the CEO of concerns about billing.

Statements from Employee G, who worked on Saturday, (b)(6) do not support (b)(6) assertion about overbilling. (b)(6) phone log shows an incoming call on (b)(6) (b)(6), from an FHFA-OIG number, which he asserts is proof that Employee G called him to discuss Saturday billing concerns. However, the phone number did not belong to Employee G, and he denied that such a call took place. Employee G stated that he never consulted anyone at Indigo IT in advance—not (b)(6) nor the Chief Technology Officer—as to how to bill his time for Saturday, (b)(6); he originally recorded five hours on his timesheet upon the direction of an FHFA-OIG employee who worked alongside the Indigo contractors that day. Employee G's statements render inconclusive the (b)(6) timesheet snapshots provided by (b)(6) which showed five hours of Saturday work billed by Employee G and another Indigo IT employee. Further, the actual Indigo IT (b)(6) invoice reflects only three hours of work billed by each employee for Saturday, (b)(6)

(b)(6) allegations also were refuted by the Chief Technology Officer, who denied telling any Indigo IT employee that five hours of work could be billed for (b)(6) regardless of hours actually worked and denied having any discussions with (b)(6) regarding the accuracy of the consultant's billing. The record fails to establish by a preponderance of evidence that (b)(6) (b)(6) made verbal disclosures to the CEO. (b)(6) asserts he made the protected disclosure to the CEO, yet the evidence in the record either contradicts him on this point or is unpersuasive.

Most significantly, even if (b)(6) and the CEO met on both (b)(6) and (b)(6) (b)(6) the timing does not support (b)(6) claims that he communicated a disclosure protected under the law. At that time, the Saturday, (b)(6) work had not been performed. Nobody knew how long the work would actually take; the FHFA-OIG employee estimated that it might take five hours. Even if the Chief Technology Officer had said that Indigo IT employees could bill five hours regardless of time worked, there was no fraud for (b)(6) to disclose to the CEO on (b)(6) because the work had not been done and FHFA-OIG had not been billed.

Timing is also problematic regarding (b)(6) allegedly making a protected disclosure about the consultant's billing. FHFA-OIG's Deputy IG raised concerns about the consultant's report in (b)(6) and Indigo IT was on notice about it since at least (b)(6). The record

does not show that (b)(6) or anyone else at Indigo IT, or FHFA-OIG) had discovered evidence of fraud in the subsequent weeks. Even if (b)(6) expressed concerns about the consultant's billing on (b)(6) and (b)(6) the record does not reflect any wrongdoing he could have communicated as a protected disclosure.

Lastly, (b)(6) and the CEO both acknowledged that in early (b)(6), (b)(6) brought to the CEO's attention FHFA-OIG concerns about a potential contract-related billing issue. According to both (b)(6) and the CEO, they agreed that (b)(6) would investigate, and his investigation did not find anything that suggested wrongdoing. Ultimately, to reinforce Indigo IT's timekeeping policy and procedure, a compliance memo was issued to all staff on the FHFA-OIG contract. That matter is relevant to the current allegations insofar as it demonstrates the way in which a similar issue was handled only two months earlier. Though certainly not dispositive about later events, it does not support (b)(6) allegations that in (b)(6), he raised contract-related billing concerns to the CEO and she responded in a retaliatory way.

ii. (b)(6) Written Communication to the CEO

(b)(6) asserted that he provided written disclosure to the CEO about the consultant's alleged fraudulent billing. In Indigo IT's (b)(6) Organizational Status Report, emailed to the CEO on (b)(6), (b)(6) included the statement, "Some concerns on [the consultant's] time, regarding what he actually did." The CEO acknowledged receipt of the email but said she did not print or review the Status Report because the (b)(6) management meeting had been cancelled and she was preparing for (b)(6) termination. Regardless of whether she read it, the evidence in the record reflects that the CEO decided to terminate (b)(6) no later than (b)(6) and as discussed herein, the information in the Status Report does not constitute a protected disclosure under § 4712.

B. (b)(6) Allegations Do Not Constitute Protected Disclosures Under § 4712

A contractor employee is protected for making any disclosure that the employee reasonably believes is evidence of gross mismanagement of a Federal contract, a gross waste of Federal funds, or a violation of law, rule, or regulation related to a Federal contract. The term "reasonable belief" includes "both a subjective and an objective component," which means "an employee must actually believe in the unlawfulness of the employer's actions and that belief must be objectively reasonable."[16]

[16] Craine v. NSF, 687 Fed. Appx. 682, 691 (10th Cir. 2017) (quoting Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor, (717 F.3d 1121, 1132 (10th Cir. 2013)).

i. Disclosure of Gross Mismanagement of a Federal Contract

Given the limited caselaw applying § 4712, it is instructive to draw from analogous whistleblower statutes and caselaw.[17] "Gross management" is "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."[18] The disclosure must indicate "more than de minimis wrongdoing or negligence;" as relevant here, it must reveal "serious errors by the [contractor] that a conclusion the [contractor] erred is not debatable among reasonable people" and the "matter must also be significant."[19]

On its face, the sub-bullet in the (b)(6) Organizational Status Report ("Some concerns on [the consultant's] time, regarding what he actually did.") does not reflect a serious error by Indigo such that reasonable people would all conclude that the company erred. Indeed, on its face, the language (b)(6) used is not significant. The word "time" is used, not "billing," and there is no reference to a timesheet or fraud. The information (b)(6) put in the sub-bullet is reasonably interpreted as a management concern—shared by Indigo IT employees and FHFA-OIG's Deputy IG—about the quality and results of the report. At most, this more reasonably reflects negligence, not a serious error or fraud.

Even assuming that (b)(6) had established timely verbal communication to the CEO about the alleged four hours of overbilling for Saturday work, that disclosure would not rise to the level of gross mismanagement of a Federal contract. Nor would the allegations of the consultant's overbilling. During his FHFA-OIG interview, (b)(6) asserted, without documentary support, that the report looked like it took about 80 hours to prepare, and he estimated the consultant may have billed 300 hours for the work. At the same time, (b)(6) stated that he was not able to say whether the consultant's report was quality material or not. He acknowledged that the dollar amount associated with the consultant billing issue was, in his view, "small" in comparison to the remainder of the contract. Accordingly, (b)(6) —and a reasonable person in (b)(6) shoes—would find that the Saturday timesheet issue represented

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[17] The U.S. Supreme Court has found it appropriate to interpret in a similar manner statutory provisions that share a "common purpose" to "promote citizen enforcement of important federal policies." Pa. v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 559-560 (1986); see also Bd. of Trs. of the Hotel & Rest. Emps. Local 25 v. JPR, Inc., 136 F.3d 794, 801 (D.C. Cir. 1998). Whistleblower protections are such laws because they encourage individuals to identify and report wrongdoing.

[18] See, e.g., Kavanaugh v. M.S.P.B., 176 F. App'x 133, 135 (Fed. Cir. Apr. 10, 2006) (interpreting the Federal Whistleblower Protection Act (WPA)); see also District of Columbia v. Poindexter, 104 A. 3d 848 (D.C. 2014) (citing Embree v. Dep't of Treasury, 70 M.S.P.R. 79, 85 (1996)) and interpreting D.C.'s WPA.

[19] See, e.g., Poindexter, 104 A. 3d at 855 (internal citations omitted) (finding that a complaint regarding employees' backdated sign-in sheets was not, even if accurate, a report of "gross mismanagement," "gross misuse or waste of public funds," "abuse of authority" or a "violation of law, rule or regulation" sufficient to constitute a protected disclosure under D.C.'s WPA).

an even smaller amount. The combined dollar amounts, while not negligible, when viewed objectively, would relate to no more than a minor percentage of the overall dollar value of the related contracts. Moreover, while (b)(6) provided no evidence of fraudulent billing by the consultant, he noted that Indigo IT had revised the report for free. Thus, the time spent by the Chief Technology Officer would offset the consultant's hours billed for an inferior product. In sum, the evidence in the record does not show that Indigo IT's actions created a substantial risk of significant adverse impact upon FHFA-OIG's ability to provide effective oversight of FHFA. Thus, even if taken in a light most favorable to (b)(6) there is not a preponderance of evidence that (b)(6) could reasonably believe the content of his disclosures related to gross mismanagement of a Federal contract.[20]

ii. Disclosure of a Gross Waste of Federal Funds

(b)(6) has not shown by a preponderance of evidence that he disclosed a gross waste of Federal funds in connection with FHFA-OIG's contract with Indigo IT. A "gross waste of funds" is "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government."[21] As (b)(6) himself acknowledged during his interview, the billing issue was, in his view, "small" in comparison to the remainder of the contract, and it is clear that the Saturday timesheet issue represented an even smaller amount. At best, the evidence in the record shows a "debatable expenditure" of a poorly-drafted report that had to be revised to meet FHFA-OIG's standards. Even if taken in a light most favorable to (b)(6) (b)(6) the facts do not support a conclusion that he, or an objective person in his shoes, reasonably believed he was disclosing a gross waste of Federal funds.

iii. Disclosure of a Violation of Law, Rule, or Regulation Related to a Federal Contract

FHFA-OIG follows the FAR for the award and management of its contracts, and overbilling by a contractor for services rendered generally constitutes a violation of the FAR. FAR payment clauses and the Contractor Code of Business Ethics and Conduct clause[22] require that, if the contractor becomes aware that the Government has overpaid on a contract financing

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[20] See, e.g., Williams v. Johnson, 776 F.3d 865, 870-71 (D.C. Cir. 2015) (citing disclosures in Poindexter and other cases as insufficient to qualify as "gross mismanagement" because, in each case, "the employee's disclosure was minor relative to the scope of the agency's work.").

[21] See Van Ee v. EPA, 64 M.S.P.R. 693, 698 (1994) (in which the Merit Systems Protection Board found that an employee's disclosure of an unnecessary $400,000 research study, which the EPA conducted instead of following a legislative mandate, constituted evidence of a "gross waste of funds" under the Federal WPA).

[22] See, e.g., FAR 52.212-4(i)(5) and FAR 52.203-13. A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments as defined in 32.001.

or invoice payment, the contractor shall remit the overpayment amount to the Government. However, by (b)(6) own admission, he did not have a reasonable belief that he was reporting a violation of these FAR clauses with respect to the Saturday overbilling. (b)(6) alleges that he reported the Chief Technology Officer's statements to the CEO (on (b)(6) and (b)(6)). At that time, (b)(6) knew that Indigo IT had not billed FHFA-OIG yet for the Saturday work, and that FHFA-OIG had not paid for it. Last, the CEO denies that he ever spoke to her about that issue. Therefore, there is insufficient evidence to conclude that (b)(6) reasonably believed that he was reporting a violation of the FAR.

Likewise, for the reasons discussed above, I also find that the record does not support (b)((b)(6) conclusory statements that the consultant billed for work that he did not perform, and it is unclear whether the CEO was informed of this allegation. Without additional support, it is not objectively reasonable to conclude that (b)(6) believed he was reporting a violation of the FAR.

C. The Evidence is Insufficient to Show that Reprisal was a Contributing Factor in (b)(6) Termination

The facts detailed above reflect that (b)(6) has not demonstrated by a preponderance of evidence that he made a protected disclosure, therefore it cannot be concluded that reprisal was a factor in his termination. Moreover, by his own admission, (b)(6) was concerned about being fired since his third week of employment and did not believe he was a good fit at Indigo IT. He also stated that, at the (b)(6) meeting, the CEO conveyed her dissatisfaction with his performance. The record shows that during his tenure at Indigo IT (b)(6) received at least one bonus under his bonus incentive plan and, around late (b)(6), after working at Indigo IT for approximately six months, he was considered for a VP role as part of the company's transitional growth plan. The record also reflects that his management style and interpersonal interactions created some conflict, and the CEO held off promoting (b)(6) because she felt he needed to prove himself more. As noted above, the consultant's poorly-drafted report was raised as an issue by FHFA-OIG on (b)(6), and management from both FHFA-OIG and Indigo IT were aware of the problem by (b)(6), at the latest. Nothing in the record suggests that evidence of fraudulent billing was discovered by FHFA-OIG—or hidden by Indigo IT—during the subsequent three weeks. The above events all occurred between (b)(6) and (b)(6), before (b)(6) alleges making any protected disclosures. The CEO cited (b)(6 (b)(6) management style and performance issues as the reason for her decision to terminate (b)(6) (b)(6) and evidence supports this assertion. The HR Director corroborated the CEO's testimony, including the timeframe for the CEO's final decision to terminate (b)(6) after meeting with a project manager. Both the Chief Technology Officer and the HR Director confirmed that they

attended a Friday, (b)(6) internal meeting about a transition plan following (b)(6) termination, and both have asserted that the basis of the termination was not based on retaliation. Indeed, the record reflects that the CEO made her decision on (b)(6) and took action to implement it the next day.

(b)(6) audio recording of his termination meeting of (b)(6) does not reveal any protected disclosures, nor does it show a connection between the adverse employment action and his alleged disclosures on (b)(6) or in the (b)(6) Organizational Status Report. The recording objectively bolsters the CEO's assertion that her decision to terminate (b)(6) was made before he sent his (b)(6) email about filing formal complaints and before she could have seen the Organizational Status Report.

For these reasons, there are insufficient facts to demonstrate by a preponderance of evidence that (b)(6) made a protected disclosure as defined under § 4712, therefore it cannot be concluded that reprisal was a factor in his termination.

D. (b)(6) Written Response to the FHFA-OIG Report

Pursuant to FAR provision 3.908-5(c), (b)(6) and the CEO were each afforded an opportunity to submit a written response to the FHFA-OIG report. In his (b)(6) response, (b)(6) reiterated that he had told the CEO that the consultant billed Indigo IT and FHFA-OIG for work he did not perform, and the Chief Technology Officer directed Indigo IT staff to bill for work that they had not planned to work. He also stated, without further explanation, that he had told the CEO about "other by Indigo IT staff."

In his reply, (b)(6) asserted that he had alleged False Claims Act (FCA) violations. To violate the FCA, a person (in this case, Indigo IT management) must have submitted, or caused the submission of, a false claim with knowledge of the falsity.[23] The FCA, like 41 U.S.C. § 4712, has an antiretaliation provision to protect employees from discrimination because of lawful acts done in furtherance of efforts to stop violations of the FCA (protected activity).[24] Based on the facts in the record, (b)(6) fails to state a plausible claim for relief under the FCA. As discussed above, FHFA-OIG was billed properly for the Saturday (b)(6) work. Further, a poor quality draft report, without additional support, does not indicate fraudulent billing. The record does not show evidence of fraud; it does not satisfy a prima facie FCA violation, and certainly would not meet the knowledge requirement. Accordingly, (b)(6) has not shown any "protected activity" that could provide a basis for a retaliation claim. The FCA is inapposite here.

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[23] See 31 U.S.C. § 3729(a)(1); Hicks v. District of Columbia, 183 F. Supp. 3d 159, 160-61 (D.C. Cir. 2016).

[24] See 31 U.S.C. § 3730(h)(1); Hicks, 183 F. Supp. 3d at 161-162.

In his (b)(6) response, (b)(6) restated that he had met with the CEO on Thursday, (b)(6), and asserted that he had given FHFA-OIG a copy of his notes in regards to that meeting. I reviewed the record and determined that (b)(6) was referencing a JPEG image he emailed FHFA-OIG on (b)(6) which showed undated, handwritten notes of various words and phrases, including "5 hrs Saturday" and the consultant's name with two question marks. (b)(6) notes do not add sufficient weight to the evidence to prove by a preponderance that he made a protected disclosure. They do not establish that he or a reasonable person viewing the situation from his perspective would believe the alleged overbilling was evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

I have reviewed (b)(6) (b)(6) response and given it due consideration. While it restates his position, it does not provide additional facts or sufficient evidence to substantiate his claims in this matter.

V. Conclusion

For the foregoing reasons, I find the record insufficient to establish by a preponderance of evidence that Indigo IT subjected (b)(6) to reprisal prohibited under 41 U.S.C. § 4712.

Pursuant to § 4712(c), (b)(6) request for relief is DENIED.

It is so Ordered.

(b)(6)

Leonard J. DePasquale, Chief Counsel

(b)(6)

Date