Nos. 16-9523, 16-9529, & 16-9534

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CYPRESS SEMICONDUCTOR CORP.,
Petitioner,
v.
U.S. DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD,
Respondent,
and
TIMOTHY C. Dietz,
Respondent-Intervenor.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board, before Honorable Luis A. Corchado, Anuj C. Desai, and Joanne Royce, Administrative Appeals Judges, ARB No. 15-017

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases-continued: Page

Cases--continued: Page

Federal Statutes: Page

Federal Statutes--continued: Page

State Statutes:

Code of Federal Regulations:

Other Authorities:

Other Authorities--continued: Page

STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Local Rule 28.2(C)(1), the following are prior or related appeals:

- *Dietz v. Cypress Semiconductor Corp.*, Nos. 16-1209 & 12-1249 (10th Cir).
- *In re Timothy C. Dietz*, No. 16-1205 (10th Cir.).

GLOSSARY

Pursuant to 10th Circuit Local Rule 28.2(C)(6), the following is a glossary of acronyms and other terms used in this brief:

"AIR 21" means the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121.

"ALJ" means the Administrative Law Judge.

"APA" means the Administrative Procedure Act, 5 U.S.C. 551 *et seq*.

"AR" means Administrative Record.

"ARB" or **"Board"** means the Administrative Review Board.

"Cypress" means Petitioner Cypress Semiconductor Corporation.

"DBP" means Cypress's Design Bonus Plan.

"Department" means the Respondent United States Department of Labor.

"OSHA" means the Occupational Safety and Health Administration.

"RDO" means Recommended Decision and Order.

"Secretary" means the Secretary of Labor.

"SOX" means the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A.

"Specification" or **"Spec"** is the term for Cypress's corporate policies.

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

On behalf of Respondent Department of Labor, Administrative Review Board, the Secretary of Labor ("Secretary") submits this response to the brief of Petitioner Cypress Semiconductor, Corp. ("Cypress").

JURISDICTIONAL STATEMENT

This case arises under the employee protection provision the Sarbanes-Oxley Act ("Sarbanes-Oxley," "SOX," or "Act"), Section 806, 18 U.S.C. 1514A, and its

implementing regulations, 29 C.F.R. Part 1980. The Secretary had jurisdiction over this case based on a complaint alleging a SOX violation filed by Intervenor Timothy Dietz ("Dietz") with the Occupational Safety and Health Administration ("OSHA"), which receives and investigates complaints on the Secretary's behalf. See 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103.

The Secretary has delegated to the Department of Labor's Administrative Review Board ("Board" or "ARB") the authority to issue final decisions on his behalf. See Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378-69,380, 2012 WL 5561513 (Nov. 16, 2012); see also 29 C.F.R. 1980.110(a). On March 30, 2016, the Board issued a Final Decision and Order, affirming the decision of the Administrative Law Judge ("ALJ") that Cypress retaliated against Dietz in violation of SOX. On April 29, 2016, Cypress filed with this Court a timely Petition for Review of the ARB's Final Decision and Order. On May 12, 2016, the Board issued a second Final Decision and Order, affirming the ALJ's award of attorney's fees and costs to Dietz. AR2532.[1] Cypress filed with this Court a timely petition for review of that Decision and Order on May 23, 2016. And on June 21, 2016, the Board issued a Final Decision and Order, awarding Dietz additional attorney's fees and costs for work his attorneys performed while

[1] "AR" refers to the administrative record that the Secretary filed on July 18, 2016.

the case was pending before the Board. AR2506. Cypress timely petitioned this Court for review of that Decision on June 30, 2016.

This Court has consolidated these three petitions. Because the alleged violation occurred in Colorado Springs, Colorado, this Court has jurisdiction to review the Board's decisions. See 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(4)[2]; see also 29 C.F.R. 1980.112(a).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ALJ's conclusion, as affirmed by the Board, that Dietz engaged in SOX-protected activity based on his reports of conduct he reasonably believed violated the mail and wire fraud statutes.

2. Whether substantial evidence supports the determination of the ALJ, as affirmed by the Board, that Dietz was constructively discharged.

3. Whether the Board properly addressed Cypress's awareness of Dietz's protected activity when it affirmed the ALJ's finding that Dietz's whistleblowing caused his constructive discharge.

[2] Proceedings under SOX are governed by the procedures set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121(b). See 49 U.S.C. 20109(d)(2).

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

Sarbanes-Oxley protects an employee who provides information to his employer or the federal government regarding conduct that he reasonably believes constitutes a violation of any of the identified laws, rules, or regulations. See 18 U.S.C. 1514A(a). Employers may not terminate or otherwise discriminate against an employee because of such protected activity. See id. An employee who believes that she has been retaliated against in violation of SOX Section 806 may file a complaint alleging such retaliation with the Secretary of Labor. 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103. On August 14, 2013, Dietz filed such a complaint with OSHA, alleging that he was constructively discharged in retaliation for reporting concerns with the legality of Cypress' bonus plan to his supervisor. AR0002. OSHA investigated and issued findings dismissing Dietz's complaint on September 9, 2013. AR0002-AR0004. Dietz filed timely objections to OSHA's Findings and requested a hearing before the Department's Office of Administrative Law Judges ("OALJ") on the merits of his claim, which was held before ALJ Linda S. Chapman on July 7-10, 2013. AR0018, AR2159.

On December 1, 2014, ALJ Chapman issued a Recommended Decision and Order ("RDO") in which she concluded that Dietz engaged in protected activity; Cypress knew of the protected activity; Dietz suffered adverse employment actions

when Cypress issued a disciplinary memorandum to Dietz and then constructively discharged him; Dietz's protected activity was a contributing factor in Cypress's adverse actions, and Cypress failed to show by clear and convincing evidence that it would have taken the same actions against Dietz absent his protected activity. AR 2220-2238. Cypress filed a timely petition for review of the ALJ's RDO with the ARB. AR2338. On March 30, 2016, the ARB issued a Final Decision and Order affirming the ALJ's decision. AR2380-2401. Cypress filed a timely Petition for Review with this Court on April 29, 2016.

B. Statement of Facts[3]

1. Dietz's Prior Work Experience

Prior to his employment with Cypress, Dietz served in the United States Marines for 24 years, retiring at the rank of Captain. AR0545. Following his retirement from the Marines, Dietz worked as a Senior Software Engineer at Intel from 2000 to 2004. AR0553. Dietz started attending law school in the evening while at Intel and left the company in 2004 to focus on school. Id. In 2006, Dietz graduated from law school and was hired by Nadeau Law, a firm in Maine. AR0554. Dietz became a member of the Maine Bar that fall and subsequently

[3] Unless otherwise indicated, this statement of facts is based on the facts as determined by the ALJ in her RDO. The ALJ found Dietz "to be a fully credible witness" and described him as "forthright, and professional and courteous even in the face of aggressive and often hostile questioning." AR2231, n.37.

became a member of the California, New Hampshire, and Colorado Bars. AR0555. Dietz left Nadeau Law in 2008 and returned to Intel as a software engineer. Id. In May 2012, Dietz was hired as a program manager by Ramtron Electronics in Colorado Springs, Colorado. AR0577, AR0581.

2. Dietz is hired by Cypress

Four months after it hired Dietz, Ramtron announced that it was being acquired by Cypress, a corporation headquartered in San Jose, California. AR0585. Cypress required Ramtron employees to reapply for their positions. Dietz did so and, following several interviews, was offered a position as a program manager in November 2012. AR0581-AR0582.

3. Cypress's Design Bonus Plan

Cypress has a comprehensive series of corporate policies known as Specifications or "Specs," ranging from its Global Whistleblower Policy Spec, which explains how the company will respond to allegations of corporate misconduct, to its Design Governing Spec, which dictates the day-to-day responsibilities of employees when developing new products. See AR0599, AR0962. According to James Nulty, Cypress's Senior Vice President for Quality and Dietz's supervisor, "Cypress has a culture that says follow the [S]pec or change it . . . you don't decline following [S]pecs." AR0466.

One of the key components of Cypress' Design Governing Spec is the Design Bonus Plan ("DBP"), which was developed by Cypress's Chief Executive Officer and Founder, T.R. Rodgers, Ph.D. See AR0449. Pursuant to the DBP, engineers working on product development teams must contribute ten percent of their base salary, plus a portion of their bonus, to Cypress at the beginning of each quarter. AR1204. Covered engineers may not opt out of the DBP. AR1211. If a team is at or ahead of schedule at the end of the quarter, every DBP-covered engineer on the team receives a "bonus" that is larger than the amount she contributed at the beginning of the quarter. However, if the team is behind schedule, every DBP-covered team member receives less than the amount she contributed. AR0456. If an employee is not on Cypress's payroll when bonuses are paid out, the employee forfeits her contribution to the DBP. AR1093. As a program manager, Dietz was not subject to the DBP. However, his team included engineers who were subject to it. AR0620-AR0621.

Cypress designed the DBP to ensure that the company better met its deadlines, a key determinant of its profitability. AR1205. Cypress's top managers believed that employees would take the DBP very seriously, as it required employees to "pay-in" and put "skin in the game," see AR1205, and regarded the DBP as "critical for the company's success." Id.

However, Cypress did not disclose the DBP to the former Ramtron employees until after they had begun working for the company. Cypress made no mention of the DBP in its offer letters to the Ramtron employees, which were delivered to the employees in Colorado Springs but asked the employees to respond via email. AR0656, AR1215, AR1591. Cypress also made no mention of the DBP during the Ramtron employees' orientation in November 2012. See AR0587, AR1602. As part of this orientation, Cypress required the employees to review over a dozen Specs on its intranet, but not the DBP. See id.

4. Dietz' tenure at Cypress through April 2013

Following their orientation, Dietz and a team of former Ramtron employees started developing a list of broken Ramtron products to fix using Cypress's methodology. AR0603. Dietz received his 90-day performance evaluation from Nulty in February 2013. AR609. Nulty rated Dietz as "Meets expectations" in one evaluation category (Problem Solving) and "Exceeds some expectations" or "Exceeds all expectations" in every other category. AR1397-AR1399; AR0610-AR0611. Nulty stated that Dietz was "off to a great start," "works positively with others," and "does what's best for Cypress." AR1398, AR1444. In April 2013, Nulty ranked Dietz as the seventh-best performer of the eight managers under his supervision. AR0616. The other seven managers had all worked for Cypress for

at least a year; Dietz thus outperformed a longer-term employee. Id. Dietz received 80% of his target bonus for the first quarter of 2013. AR607; AR1394.

Dietz and his team started working on their first project subject to the DBP on March 29, 2013. AR0842. Cypress exempted the engineers on Dietz's team from contributing the requisite ten percent of their salary for the first 18 weeks of the project; thereafter, the engineers were to begin making the contribution. AR0843. Around March 29—and possibly as early as January—several engineers on Dietz's team expressed concern to him that they might lose income as a result of the DBP. AR0628. They looked to Dietz for information about the DBP. AR0622.

In response, Dietz asked David Still, the Design Center Manager for the Cypress Colorado Design Center, numerous questions about the DBP. AR0479. Dietz also reviewed the information on the DBP on Cypress's intranet and conducted some legal research. AR029-AR0630. He concluded that Cypress' compulsory deductions from employees' pay were improper under California and Colorado law. Id. Dietz also felt Cypress had improperly omitted the DBP from the Ramtron employees' offer letters. He was concerned that Cypress had fraudulently induced them to accept employment with Cypress at their stated salaries, when its true intention was to pay them less. AR0657. Dietz informed Still during one of their conversations that he felt the DBP was illegal because

Cypress did not disclose it to the Ramtron employees in their offer letters. AR0479.

5. Dietz's April 12 whistleblower complaint and April 22 conversation with Cypress's General Counsel

Dietz drafted an email to his supervisor, Nulty, on April 11, 2013, which explicitly invoked the Whistleblower Policy. Dietz identified the particular statutes that he believed Cypress was violating, including Sections 202 of the California Labor Code and Sections 8-4-105 and 8-4-109 of the Colorado Code, and recommended that Cypress cease making the DBP deductions or permit employees to opt out of them. AR0645-AR0646, AR2556-AR2560. Before sending the email, Dietz shared it with Diane Ratliff, a human resources ("HR") officer, to ensure that the tone was appropriate. AR0640. He was concerned about how Cypress would respond to his contention that the DBP is illegal. Id. Dietz sent the email to Nulty on April 12, 2013. AR0642, AR2556.

In response to Dietz's April 12 email, Cypress's San Jose-based General Counsel, Victoria Valenzuela, had a phone conversation with Dietz on April 22, 2013. AR0649. Dietz asked Valenzuela how the DBP deductions were legal and expressed a particular concern with Cypress's failure to disclose the DBP deductions to the former Ramtron employees prior to their employment with Cypress. AR1307. Valenzuela indicated that she had not read the statutes cited in his email, but informed Dietz that Cypress had obtained a legal opinion regarding

the DBP. AR0650. Valenzuela suggested that Cypress provide additional training on the DBP, a suggestion with which Dietz agreed. AR0652.

However, Dietz's conversation with Valenzuela did not resolve his concerns. See AR0655. Cypress's Whistleblower Policy requires Cypress to "promptly and thoroughly investigate[]" complaints and "document the results of the investigation in a written memorandum," which is provided to "those individuals with a need to know of the results." AR1752-AR1754. Based on his reading of the Whistleblower Policy, Dietz expected some follow up from Valenzuela, but she did not contact him again. See AR0663, AR0905.

6. Cypress removes personnel from Dietz's project twice

In mid to late April 2013, Test Engineering Manager John Groat removed an engineer, Eric Dale, from Dietz's project without notifying him. AR0667-AR0668. Cypress's Design Governing Spec requires managers to obtain a waiver from a director-level executive to transfer an employee to another project, but Groat failed to obtain one. AR1033. However, Dietz wanted to do what was best for Cypress. AR0667. Accordingly, Dietz asked Groat to request a waiver and then submitted a memo stating that he approved of the waiver. Id. Nulty commended him for "working to do the right thing." AR3004.

On May 22, 2013, the Wednesday before Memorial Day, Dietz discovered that the design and test engineers on his team had failed to complete certain tasks

on time. Dietz estimated that these delays risked extending the project's "critical path"—the shortest period of time in which it could be completed—by three weeks. AR0672, AR0725. Dietz asked the design and test engineers to come up with a plan to fix the delays. AR0673-AR0674. Dietz also flagged the three-week schedule "slip" in Cypress's Program Manager ("PM") system. AR0805. The design team responded and corrected their problem. Groat's test engineering team did not. AR0674. Dietz could not find Groat and Dale on Thursday or Friday. Id. Dietz overheard a comment that Dale had been working on a different project, but could not confirm the rumor. AR0675.

Upon arriving at work on the Tuesday after Memorial Day, May 28, Dietz sought out and found Groat. AR0675. Groat informed Dietz that he had transferred Dale to a different project with the approval of Rainer Hoehler, Cypress' Business Unit Manager. Id. It was the second time in two months Groat had removed Dale from Dietz's project and concealed it from him. Dietz then informed Brian Todoroff, the Director of Program Management, that Groat had pulled Dale off of his project, which Todoroff relayed to Nulty. AR0676.

7. The May 29th Meeting

The following day, Dietz met with Groat, Hoehler, and Nulty, who attended the meeting by phone from San Jose. AR0678. The meeting was called by Todoroff to ensure that Dietz's project had adequate test engineering resources.

AR0677. Nulty asked Dietz to explain how the design and testing delays he identified caused the critical path on his project to slip three weeks. AR0683. However, this was not possible. Reviewing the critical path requires access to Microsoft Project File and answering Nulty's question would have required a WebEx connection with San Jose, which must be set up in advance. AR0680-AR0681. Because the critical path was not on the meeting agenda, Dietz did not have a computer with Microsoft Project File and there was no Webex connection. AR0681. Dietz offered to arrange a subsequent meeting, but Nulty rejected this suggestion. AR0683.

After the meeting, Dietz and Groat rearranged some tasks and eliminated the three week slip. AR0684. While Dietz was meeting with Groat, he received an email from Nulty alleging that Dietz had performance issues that Nulty would be documenting in a formal memorandum. AR0687.

8. Nulty's June 4 disciplinary memo

Dietz received Nulty's memo on June 4, 2013, which Nulty prepared with the assistance of Todoroff and two individuals from HR, Kim Kubiak and Erica Gustofson. AR1401, AR1048, AR1052. Nulty alleged that Dietz (1) had allowed his project to go "stale"—which he defined as "not updating the PM system for ten days"—resulting in Dietz being locked out of Cypress's PM system; (2) failed to timely notify senior management of Grout's removal of Dale from his project; and

(3) could not adequately explain the reason for the three week schedule slip during the May 29 meeting. AR1401. Nulty directed Dietz to prepare his own memo on "'[w]hat you did wrong and what you should have done,'" which was to be signed by Nulty and Tom Surrette, Cypress's Vice President of HR. Id. Nulty stated that both his June 4 memo and Dietz's responsive memo would "be held in [his] personnel file," apparently indefinitely, and "[a]ny future infractions will result in further disciplinary action, up to and including termination." Id.

Although Nulty testified that the June 4 memo was a routine coaching exercise, Cypress identified only two memos that were ostensibly analogous to the June 4 memo, AR1846-AR1847. Both were drafted after Dietz's conversation with Valenzuela and on the same day. Id. And unlike the June 4 memo, both followed a formal investigation, stated that they did not identify violations that "would have been grounds for termination," and specified that they would be held in the employee's personnel file for only one year. Id. Moreover, the June 4 memo contained language from Specs that did not apply to Dietz as a program manager. See AR2229. Cypress does have a standard "performance improvement" tool known as a Performance Gap ("PGAP") procedure, but declined to use it. AR918. Dietz would have preferred that Cypress use the PGAP procedure because it permits an employee to respond to allegations of performance issues. Id.

Dietz was shocked by the memo. He felt all three allegations were baseless. AR0714. Dietz was never automatically locked out of the PM system for not making an update every ten days, and his project was not on Cypress's May 29 Stale Schedule Report. AR0690, AR0724-AR0727. Upon learning that Groat had pulled Dale off his project, Dietz immediately notified senior management. AR0676. And it was impossible for Dietz to explain his project's critical path at the May 29 meeting. AR0680-AR0681.

Dietz interpreted the memo as threatening, not coaching. AR0736. Based on his professional experience, he believed that having a memo in his personnel file in which he admitted to such infractions would be "career ending" and disqualify him from future employment in the IT industry. AR0737. Dietz concluded that Nulty's memo must have been retaliatory. AR0746.

9. Dietz's June 5 response

Dietz sent a responsive memo on June 5, disputing the allegations against him and asserting that the June 4 memo constituted retaliation for his whistleblower complaint. AR1409-AR1414. In light of his belief that he was being retaliated against, Dietz informed Cypress of his intent to resign, effective July 1, 2013. AR1409. In notifying Cypress of his intent to resign, however, Dietz believed that he was activating Cypress's "turnaround" policy. AR0782-AR0783. The turnaround policy is set forth in an article by Dr. Rodgers entitled, "What to

Do When a Valued Employee Quits"; Cypress also has a Spec based on it. AR1351. Pursuant to the policy, the supervisor of a resigning employee is required to meet with the employee "within five minutes" and notify both his or her supervisor and Dr. Rodgers "within an hour" of the employee's resignation AR0782, AR0784. Dietz had read Dr. Rodgers' article. AR0572. He had also seen the turnaround policy in practice. Earlier in his tenure at Cypress, another manager, Jared Eliason, attempted to resign. In response, Dietz witnessed an immediate flurry of activity designed to encourage Eliason to stay. AR0575. Dietz expected Nulty to react similarly to his memo. See AR0577.

10. Dietz's June 7 resignation

Neither Nulty nor anyone else at Cypress contacted Dietz regarding his response for over twenty-four hours. AR0748. At some point on June 6, Nulty sent Dietz a notice for a meeting the following day with Ratliff, Hoehler, and him, with no agenda. AR0747-AR0749. In Dietz's experience, it was rare to receive a meeting invitation without an agenda at Cypress. AR0748-AR0749. Concerned about the purpose of the meeting, Dietz asked Ratliff if she knew what it was about; she said she did not. AR0750. He also tried to but failed to reach Nulty on his phone. AR0750-AR0751. Based on Nulty's failure to comply with the turnaround policy, the absence of a meeting agenda, the meeting attendees—his supervisor, an individual from HR, and Hoehler—and Dietz's inability to obtain

any information about the meeting, Dietz concluded that its purpose was to terminate his employment. AR0754. Rather than attend a meeting at which he expected to be fired, Dietz tendered his resignation effective immediately the morning of June 7. AR0755-AR0756.

Dietz filed a complaint with OSHA on August 14, 2013, alleging that he was constructively discharged in violation of SOX. AR0002.

C. The ALJ's Decision and Order

Based on four days of hearing testimony and over 100 record exhibits, the ALJ issued her RDO on December 1, 2014. The ALJ concluded that Cypress violated the whistleblower protections contained in SOX. See AR2219-AR2238.

First, the ALJ found that Dietz engaged in protected activity under SOX when he reported to Nulty and Valenzuela that Cypress was unlawfully deducting a portion of its employees' pay under its DBP program and had unlawfully concealed the DBP program from the former Ramtron employees. AR2222. The ALJ noted that an employee engages in protected activity under SOX when he provides his employer with information regarding conduct that a reasonable person would regard as a violation of the federal wire and mail fraud statutes (18 U.S.C. 1341 and 1343), among other laws. See AR2220-AR2221 (citing 18 U.S.C. 1514A(a)(l), 29 C.F.R. 1980.102(a), (b)(l)).

According to the ALJ, Dietz "clearly believed that [Cypress] was carrying out a fraudulent scheme . . . that necessarily implicated interstate mail, wires, and banks," as he "raised his concerns about the DBP to his supervisor, Nulty, as well as [Cypress's] legal department;" "made his complaints under the auspices of the Respondent's own Code of Business Conduct and Ethics, and Global Whistleblower Policy;" and expressed concern to Still and Valenzuela about the legality of the DBP and Cypress's concealment of the DBP, specifically. AR2222, AR2223, AR2226. The ALJ also found that Dietz's belief was "objectively reasonable." AR2227. The ALJ concluded that "[none of] the information provided to the Ramtron employees put them on notice that their salaries would be subject to mandatory deductions." AR2225. The ALJ found that the DBP "was . . . designed for the purpose of increasing earnings by the Respondent" and "force[d] [Cypress's] employees to gamble their own money ("skin in the game") . . . in a fashion that is unpredictable and incomprehensible to the average employee." Id. The ALJ also concluded that "there [was] no question that the use of the mails and wires . . . was implicated in [Cypress's] administration of the DBP," as Cypress conducted training over the internet" and "communicated over the telephone [,] internet . . . [and] mail" regarding the DBP, AR2222, n.20, and found that Cypress "did . . . [not] mention the DBP during its new employee orientation for former Ramtron employees." AR2225. Additionally, the ALJ found that Dietz reported

conduct that amounted to mail and wire fraud in his April 12 memo to Nulty and his April 22 conversation with Valenzuela. The ALJ noted that "it [was] not dispositive" that Dietz did not use the "magic word[]" "fraud" as SOX only requires complainants to "identify a specific type of conduct [they] believe[] to be illegal." AR2222 (citing Gladitsch v. Neo@Ogilvy, No. 11 CIV. 919 DAB, 2012 WL 1003513 at * 4-8 (S.D.N.Y. Mar. 21, 2012)).

Second, the ALJ found that Nulty's June 4 memo was an adverse action. AR2229. The ALJ dismissed Cypress's allegation that the memo was a standard coaching tool, instead finding that Cypress "pieced together the memorandum with language plucked from inapplicable specifications" so as to "put Dietz on notice that he had been charged with 'infractions,' that he needed to plead guilty, and that he would be on probation indefinitely." Id. The ALJ credited Dietz's testimony that the memo was "career ending." AR2230.

The ALJ also concluded that Dietz's June 7 resignation constituted a constructive discharge. The ALJ stated that "a constructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." AR2230. The ALJ found that "it was objectively reasonable for Dietz to conclude that he faced imminent discharge and a stain on his career that would adversely affect his future employment" at the June 7 meeting, based on Hoehler and Groat's repeated

undercutting of his project; Cypress's failure to answer Dietz's questions regarding the legality of the DBP, "which was inconsistent with [its] own policies for handling whistleblower complaints;" Nulty's "career ending" June 4 memo; and Cypress's failure to respond to Dietz's June 5 memo, "followed by Nulty summoning him to a meeting with no stated agenda, attended by his supervisor, a manager, and an HR representative." AR2231-AR2232. "Viewing the totality of the evidence," the ALJ found, Dietz reasonably "conclude[d] that quitting was his only option." AR2232.

Third, the ALJ found that Dietz's whistleblower complaint was a contributing factor in Cypress's adverse actions. The ALJ stated that SOX complainants "may demonstrate [an employer's] motivation through circumstantial evidence of discriminatory intent" such as "temporal proximity, evidence of pretext, inconsistent application of the employer's policies, and shifting explanations for the [employer's] actions." AR2232 (citing Mackowiak v. Univ. Nuclear Sys., Inc., 735 F.2d 1159, 1162 (9th Cir. 1984)). The ALJ noted that a little more than a month after his whistleblower complaint, Dietz was "directed to fall on his sword for delaying reporting of" Groat's removal of Dale from his project for the second time. AR2234. However, "there [was] no indication whatsoever that Groat or Hoehler . . . ever suffered any kind of discipline or

'coaching' in connection with these incidents." Id. According to the ALJ, this evidence "support[s] a finding of discriminatory motive." Id.

The ALJ further concluded "not only that . . . Nulty's June 4, 2013 memorandum was prextextual, but that [Cypress's] stated reasons for this memorandum are false." Id. The ALJ specifically found that "[t]here [was] simply no evidence to support Nulty's claim that Dietz was automatically locked out of the PM system because he allowed his project status to go stale"; " Nulty's claim that Dietz did not properly escalate" Hoehler's second removal of Dale from his project was "not credible;" and in criticizing Dietz for not properly explaining the schedule slip at the May 29 meeting, Nulty had faulted Dietz "for failing to perform a task that was not possible." AR2235-AR2236. The ALJ also found it "significant" that Cypress had failed to "follow the requirements of its own Global Whistleblower Policy with respect to Mr. Dietz's query." AR2237. Since "[t]hat Policy requires . . . [Cypress to] conduct a prompt and thorough investigation," the ALJ concluded that "it was certainly reasonable for Mr. Dietz to expect some type of acknowledgement that his complaints were in fact being investigated." Id. However, Cypress did not provide such acknowledgement. Id. Accordingly, the ALJ concluded that Cypress failed to "meet its burden to show by clear and convincing evidence that it would not have issued the June 4, 2013 memorandum

that was the catalyst for Dietz's . . . constructive discharge, in the absence of Dietz's protected activity." AR2238.

The ALJ ordered that Dietz be awarded back pay with interest; reinstatement or, in the event Cypress found reinstatement impractical or impossible, front pay; reimbursement of all medical expenses incurred due to termination of his medical benefits; immediate vesting of the stock and stock options he would have received but for his termination; and attorneys' fees and costs. AR2240.

D. The Board's Affirmance

On March 30, 2016, the ARB issued a Final Decision and Order affirming the ALJ's RDO. AR2380. The ARB found that substantial evidence supported the ALJ's determination that Dietz engaged in SOX-protected activity based on mail and wire fraud. AR2388. The Board held that the ALJ "rightly pointed out" that Dietz was not required to utter the "magic word[]" "fraud" and that it was sufficient that Dietz "did in fact believe—and reasonably so—that Cypress used at least e-mail, a website, and interstate video conferencing technology in executing and administering the [DBP]." AR2386. The Board acknowledged that Dietz's allegation that Cypress violated state wage laws was "by itself, insufficient to constitute protected activity under SOX." AR2388. However, the Board found that "it is undisputed that, on April 22, 2013, Dietz told Cypress's General Counsel . . . that he thought Cypress had knowingly concealed material facts about the

[DBP] from the former Ramtron employees." AR2389. According to the ARB, "[t]his constitut[ed] protected activity." AR2390.

Second, the ARB found that substantial evidence supported the ALJ's finding that Dietz's June 7 resignation constituted a constructive discharge.[4] AR2392. Preliminarily, the ARB held that the ALJ applied the proper legal standard for determining constructive discharge. Id. The Board agreed with the ALJ that "constructive discharge is a question of fact" and can be established if "a 'reasonable person' would find the [employee's] conditions intolerable." AR2390-AR2391. However, the Board added that "'[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns, the employer's conduct may [also] amount to a constructive discharge.'" AR2391 (quoting EEOC v. Univ. of Chi. Hosps., 276 F.3d 326, 332 (7th Cir. 2002) (interpreting constructive discharge under Title VII)). The Board noted that the ALJ appropriately recognized that Dietz could establish constructive discharge by showing that "it was objectively reasonably for [him] to conclude that he faced imminent discharge," although the ALJ "did not cite to authority" to this effect. AR2392.

The Board then held that "the full context of facts here supports the ALJ's conclusion that Cypress constructively discharged Dietz on June 7, 2013." Id. "As

[4] In the proceedings before the ARB, Cypress did not contest the ALJ's finding that the June 4 memo was adverse action in itself. AR2392, n. 54.

of that date," the ARB reasoned, the evidence demonstrates that Dietz "was effectively faced 'with a choice between resigning and being fired.'" Id. In so holding, the ARB concluded that substantial evidence supports the ALJ's implicit determination that Dietz's June 5 responsive memo was not a genuine resignation. AR2394. In light of "the full context" of Dietz's June 5 email—including most notably Cypress's turnaround policy—the Board found that the ALJ "must have believed" that Dietz was effectively "hedging his bets" by submitting his June 5 letter. Id. "Cypress's response the next day," however, "told Dietz that he did not need to hedge any more: he was *definitely* going to be fired, and it was going to happen the following day." AR2395. (emphasis in original). The Board also noted that prior to June 7, Cypress had repeatedly interfered with his project and had subjected him to the June 4 "career ending memo." AR2393, AR2394, AR2395. The Board concluded that "Although Cypress did not say the magic words, 'Unless you resign, you'll be fired' out loud, a reasonable person in Dietz's position would have understood Cypress's actions to send just that message." AR2396.

Third, the ARB found that substantial evidence supported the ALJ's finding that Dietz's protected activity not only contributed to—but was "the *only* reason for"—Cypress's constructive discharge of Dietz. AR2396 (emphasis in original). According to the ARB, the ALJ "based this conclusion on a wide array of circumstantial evidence connecting Dietz's protected activity and the adverse

personnel actions, including temporal proximity, evidence of pretext, inconsistent application of Cypress's policies, and inconsistent explanations for the adverse personnel actions." Id. And while the ARB found that the ALJ's discussion of whether Cypress would have taken the same adverse actions absent Dietz's protected activity was rather "muddled,"[5] the ARB deemed this harmless error. AR2398. The ARB noted that "the ALJ didn't believe *any* of Cypress's stated reasons for the adverse actions, and she said so." AR24000 (emphasis in original). Accordingly, Cypress simply could not "prevail on its argument that it would have otherwise taken the same actions." Id.

SUMMARY OF ARGUMENT

This Court should affirm the ALJ's decision, as affirmed by the Board. Ample evidence in the record shows that Dietz engaged in SOX-protected activity. He had a subjectively and objectively reasonable belief that Cypress's failure to disclose the DBP and its administration of the DBP involved wire and mail fraud and he reported the conduct to which he objected to his supervisor and Cypress's General Counsel. That he did not use the words "fraud," "wire," or "mail" in his communications with Cypress officials is immaterial to his claim.

The evidence also demonstrates that Dietz was constructively discharged, as Cypress's actions caused Dietz to reasonably conclude that he was being made to

[5]The ALJ suggested that Cypress needed to show that "the adverse actions were motivated by legitimate, nondiscriminatory reasons." AR2238.

choose between termination and resignation under conditions in which his choice was not truly voluntary. Almost immediately after he raised concerns regarding the DBP to Valenzuela, Cypress officials removed an engineer from Dietz's project, without his permission and in violation of its own policies. They did it again a month later. Dietz then received a disciplinary memo from Nulty that falsely accused him of performance deficiencies and demanded that he admit to them, which was to remain in his personnel file indefinitely. Had Dietz admitted to the alleged infractions, it would have precluded him from obtaining future employment in the IT industry. When Dietz contested the allegations and indicated that he might resign, Cypress officials did not follow the company's turnaround policy, but were silent for over 24 hours. Dietz was then invited to a meeting with his supervisor, an HR representative, and another manager, with no agenda. Rather than attend a meeting at which he reasonably expected to be fired under conditions which would end his career, Dietz was forced to resign effective immediately.

Finally, the Board properly addressed Cypress's awareness of Dietz's protected activity when it affirmed the ALJ's finding that Dietz's whistleblowing caused his constructive discharge. Neither the statute nor the Secretary's regulations require tribunals to list employer knowledge as a separate element. Rather, the Board permissibly focused on whether Dietz's protected activity

contributed to the constructive discharge. The ALJ explicitly found that Cypress was aware of Dietz's protected activity. And the ARB implicitly found the same when it affirmed the ALJ's conclusion that Dietz's protected activity was the *only* reason for Cypress's adverse actions and when it noted that it was undisputed that Dietz told Valenzuela that he believed Cypress had knowingly concealed material facts from the former Ramtron employees.

STANDARD OF REVIEW

Judicial review of the ARB's final decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). See Lockheed Martin Corp. v. Admin. Review Bd., 717 F.3d 1121, 1131 (10th Cir. 2013); Hall v. U.S. Dep't of Labor, 476 F.3d 847, 850 (10th Cir. 2007); Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1102 (10th Cir. 1999).[6] Under this deferential standard, this Court must affirm the agency's decision if it is supported by substantial evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A), (E). "The Board's decision is entitled to a presumption of regularity, and the challenger bears the burden of persuasion." Lockheed Martin, 717 F.3d at 1129 (quoting San Juan Citizens Alliance v. Stiles, 654 F.3d 1038, 1045 (10th Cir. 2011)) (internal quotation marks and citation

[6] AIR 21's rules and procedures, which govern Sarbanes-Oxley retaliation claims, provide that the Secretary's final decisions are reviewed in accordance with the APA. See 49 U.S.C. 42121(b)(4)(A).

omitted). The ALJ's factual determinations, as affirmed by the Board, may be set aside only if they are "unsupported by substantial evidence." 5 U.S.C. 706(2)(E). "Substantial evidence is such relevant evidence a reasonable person would deem adequate to support the ultimate conclusion." Lockheed Martin, 717 F.3d at 1129 (quoting Hall, 476 F.3d at 854) (internal quotation marks omitted). The substantial-evidence standard "requires more than a scintilla but less than a preponderance of the evidence." Id. The standard "does not allow a court to displace the agency's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Trimmer, 174 F.3d at 1102 (internal quotation marks and citation omitted). Credibility findings in particular are "entitled to great deference." Id.

The Board's legal determinations are reviewed de novo, and its interpretation of any ambiguity in SOX's whistleblower provision should be upheld as long as it is reasonable. Lockheed Martin, 717 F.3d at 1129, 1131-32 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)); TransAm Trucking, Inc. v. Admin. Review Bd. No. 15-9504, 2016 WL 4183865, at *4 (10th Cir. Aug. 8, 2016) (granting Chevron deference to ARB's interpretation of Surface Transportation Assistance Act (STAA) whistleblower provision); Trimmer, 174 F.3d at 1102 (granting Chevron deference to ARB's interpretation of Energy Reorganization Act of 1974 (ERA) whistleblower

provision); see also United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (courts should grant Chevron deference to an agency's statutory interpretations when made through formal adjudication).

ARGUMENT

Substantial evidence supports the ALJ's determination, as affirmed by the Board, that Cypress violated the SOX whistleblower provision. As required under SOX, Dietz demonstrated that he engaged in protected activity, he was constructively discharged, and his protected activity was a contributing factor in his constructive discharge. 49 U.S.C. 42121(b)(2)(B); 29 C.F.R. 1980.109(a); see also Lockheed Martin, 717 F.3d 1121, 1129 (citing Harp v. Charter Commc'ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009)).

I. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION, AS AFFIRMED BY THE BOARD, THAT DIETZ ENGAGED IN PROTECTED ACTIVITY

Dietz was required to show by a preponderance of the evidence that he engaged in protected activity. See 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. 1980.109(a). An employee engages in protected activity under Section 806(a)(1) of SOX when he provides information to his employer, Congress, or the federal government regarding conduct that he reasonably believes violates, among other laws, the federal mail fraud statute, 18 U.S.C. 1341, and the federal wire fraud statute, 18 U.S.C. 1343. 18 U.S.C. 1514A(a)(1); see also 29 C.F.R. 1980.102(b).

As the ALJ correctly stated, an employee fulfills the reasonable belief standard when (a) he subjectively believes his employer violated one of the enumerated laws in SOX and (b) his belief is objectively reasonable. See AR2227; Lockheed Martin, 717 F.3d at 1132 (citing Sylvester v. Parexel Int'l LLC, No. 07–123, 2011 WL 2165854 at *15–16 (ARB May 25, 2011)).

A. Dietz Subjectively Believed that the Conduct he Reported Constituted Wire and Mail Fraud

Substantial evidence supports the ALJ's finding, as affirmed by the ARB, that Dietz subjectively believed that the conduct he reported to Nulty and Valenzuela violated the mail and wire fraud statutes. An employee's belief is subjectively reasonable if he "actually . . . believed that the conduct he complained of constituted a violation of relevant law." See Sylvester, 2011 WL 2165854, at *11 (citing Harp, 558 F.3d at 723)). Dietz reported to both Still, the Manager of the Colorado Design Center, and Valenzuela, Cypress's General Counsel, that Cypress had unlawfully concealed the DBP from the former Ramtron employees by omitting any reference to the DBP from their offer letters. AR0479, AR1307. He explicitly invoked Cypress's whistleblower policy in his April 12 complaint to Nulty. AR2556. Dietz—whom the ALJ found to be a "fully credible witness"—also testified that he was concerned that Cypress had fraudulently induced the former Ramtron employees to accept their positions with Cypress by omitting reference to it in their offer letters. AR0657. The ALJ found that Dietz "clearly

believed that [Cypress] was carrying out a fraudulent scheme" through its administration of the DBP, a "scheme that necessarily implicated interstate mail [and] wires," since Cypress conducted training over the internet" and "communicated over the telephone [,] internet . . . [and] mail" regarding the DBP. AR2227. Dietz's actions and his hearing testimony show that the ALJ was correct. See, e.g. Gilbert v. Bauer's Worldwide Transp., ARB No. 11-019, 2012 WL 6066517, at *5 (ARB Nov. 28, 2012) (employee who repeatedly raised concerns and then filed a formal complaint with a regulatory agency satisfied subjective component of reasonable belief standard).

Cypress contends that Dietz lacked a subjective belief that Cypress was violating the law, since he allegedly did not actually believe that Cypress used the mail or wires to deliver offer letters to the Ramtron employees. Cypress Br. at 51. Rather, Cypress contends that Surrette and its HR reps delivered all of the Ramtron employees' offer letters by hand. Id. Preliminarily, the Supreme Court has made clear that "use of the mails [or wires] need not be an essential element of the [fraudulent] scheme;" a defendant may be convicted of mail or wire fraud if its use of the mails or wires is a mere "incident to an essential part of the scheme or step in [the] plot." Schmuck v. United States, 489 U.S. 705, 710-11 (1989). As discussed below, there is more than enough evidence in the record to support an objectively reasonable belief that Cypress's concealment of the DBP from the

Ramtron employees and subsequent administration thereof involved the use of the wires or the mails. In any event, the ALJ found, and the ARB affirmed, that Dietz "clearly believed" that Cypress's actions constituted mail and wire fraud. AR2222. Cypress's contention that it delivered offer letters to all of the Ramtron employees it hired in Colorado without using the mail, a telephone, or email, while maintaining its headquarters in California, does not undermine the substantial evidence supporting the finding that Dietz actually believed Cypress was violating the law.

B. Dietz had an Objectively Reasonable Belief that the Conduct he Reported Constituted Mail and Wire Fraud

Substantial evidence also supports the ALJ's finding, as affirmed by the ARB, that Dietz had an objectively reasonably belief that the conduct he reported to Nulty and Valenzuela violated the federal mail and wire fraud statutes. An employee's belief is objectively reasonable if it is "reasonable for an individual in [the employee's] circumstances having his training and experience." Sylvester, 2011 WL 2165854, at *11 (internal quotations omitted); see also Lockheed Martin, 717 F.3d at 1132 (quoting Harp, 558 F.3d at 723) ("'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.'"). As the ALJ rightly recognized, Dietz was not required to establish an actual violation of the mail or wire fraud statutes or use the word "fraud" in his

communications with Cypress officials. AR2222; see Allen v. Admin. Review Bd., 514 F.3d 468, 477 (5th Cir. 2008) ("reasonable but mistaken belief" is protected); Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009) (same); Sylvester, ARB No. 07-123, 2011 WL 2165854, at *31 (ARB May 25, 2011) ("To be protected under Section 806, an employee's communication to the employer need only identify the conduct with specificity."). Under SOX, an employee's entitlement to "relief . . . turns on the reasonableness of the employee's belief that the conduct violated one of the enumerated provisions." Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 221 (2d Cir. 2014); Wiest v. Lynch, 710 F.3d 121, 131 (3d Cir. 2013).

The ALJ correctly found, and the ARB correctly affirmed, that Dietz identified conduct that he reasonably believed was wire and mail fraud. AR2222, AR2389; see Lockheed Martin, 717 F.3d at 1132 (affirming objective reasonableness of employee's belief that employer was engaged in fraud where employer's representative "recognized that some of the actions [the employee] complained of could be considered fraudulent and illegal"). A defendant engages in wire or mail fraud if it forms "a scheme to defraud by means of a material deception; with the intent to defraud; while using the mails . . . and/or wires in furtherance of that scheme; that did result or would have resulted in the loss of money or property." See Kyle Boynton & Anna Majestro, Mail and Wire Fraud,

53 Am. Crim. L. Rev. 1505, 1507 (2016). Intent to defraud may be inferred where "a defendant profited or converted money to his own use," Lockheed Martin, 717 F.3d at 1133, or from the defendant's concealment or misrepresentations, Kathleen Flavin & Kathleen Corrigan, Eleventh Survey of White Collar Crime: Mail Fraud and Wire Fraud, 33 Am. Crim. L. Rev. 861, 869-70 (1996). As noted above, "[i]t is sufficient for the mailing [or wires] to be incident to an essential part of the scheme or a step in the plot." Schmuck, 489 U.S. at 710-11.

i. Dietz reasonably believed that the DBP was a scheme to deprive Cypress employees of income via misrepresentation that involved the use of the mail and wires.

Based on Dietz's testimony, which the ALJ found credible, the ARB concluded that Dietz believed that by omitting any reference to the DBP from the Ramtron employees' offer letters, Cypress had intentionally concealed that it would be deducting at least ten percent of their pay, which the ARB deemed a "material fact." See AR2388. The ALJ found and the ARB affirmed that Dietz believed that the DBP was a confusing scheme to unlawfully deprive employees of income that was rightfully theirs under Colorado and California Law, see AR2389, AR2222. The ALJ found and the ARB affirmed that Dietz believed—correctly—that Cypress used the telephone, wires, and Internet to administer the DBP. AR2386, AR2222. The ALJ also specifically found that Dietz believed that Cypress used the Internet to carry out its employee orientation, during which it did

not disclose the DBP to the Ramtron employees, AR2222. Moreover, the ARB found that Dietz "had to have also believed that Cypress used either the mails . . . or . . . electronic communication to send the former Ramtron employees their offer letters" since "Cypress's corporate headquarters were in California and the former Ramtron employees were in Colorado." AR2387, n.30. Such beliefs, taken together, are sufficient to support a reasonable conclusion that Cypress was engaged in mail and wire fraud.

ii. Dietz's beliefs were based on his experience as a manager and his training as an attorney.

Dietz's beliefs were based on his experience "as a manager of employees, including former Ramtron employees," who reported to him that Cypress had not disclosed the DBP in their offer letters and were struggling to understand the DBP. AR2390. His beliefs were also based on his training as an attorney, as well as the California and Colorado statutes he discovered that, at least on their face, prohibit employers from deducting from employees' pay in all but the most exceptional circumstances. See, e.g. C.R.S. 8-4-105 (prohibiting Colorado employers from making deductions from employees' pay except in specific, enumerated circumstances); C.R.S. 8-4-109 (requiring Colorado employers to immediately pay employees all wages earned when they quit or are terminated); Ca. Lab. Code 202 (requiring California employers to pay at will employees who quit all of the wages they are due within 72 hours). Even if his belief was mistaken, substantial

evidence demonstrates that Dietz reasonably believed that Cypress was engaged in mail and wire fraud.

C. Cypress's Arguments that Dietz's Belief was Not Reasonable are Unavailing

Cypress makes two arguments that Dietz lacked an objectively reasonable belief that Cypress was engaged in wire or mail fraud; both are unavailing.

i. Dietz adequately alleged that the DBP was a scheme to deprive Cypress employees of income.

First, Cypress argues that, like the employee in Nielson v. AECOM Technology Corporation, Dietz did not plausibly allege that Cypress had a "'scheme to steal money or property'" from its employees, and thus did not have a reasonable belief that Cypress engaged in wire or mail fraud. Cypress Br. at 49 (quoting Nielson, 762 F.3d at 222). Cypress alleges that it "did not *take* 'money' or 'property[,]' . . . it *paid* [the Ramtron employees] money"; "paid them at the salary stated on their job offer letters . . . until at least August 2013"; "gave Ramtron employees the option to quit during their first year" without forfeiting their benefits; and explained the DBP to the Ramtron employees "during [their] first month at Cypress." Id. (emphasis in original).

However, Nielson is distinguishable. There, the employee did not allege that his employer was taking money or property at all; he alleged that it was doctoring safety reports. 762 F.3d at 217. Dietz believed that Cypress was using

the DBP to take unlawful deductions from employees' pay. AR2222. Cypress's contention that it could not have "take[n] money" from its employees because it paid them wages completely ignores the ALJ's finding that Dietz "raised serious and considered concerns" under state law about whether Cypress *was* taking money that rightfully belonged to its employees by deducting ten percent of their pay for the DBP. AR2227.

That Cypress did not intend to take deductions from the Ramtron employees' pay until some point in the future does not undermine the reasonableness of Dietz's belief that the deductions were unlawful. As the Board stated in Sylvester, an employee states a SOX whistleblower claim if "he was retaliated against for reporting his reasonable belief that a violation was taking shape." Sylvester, 2011 WL 2165854, at *29 (internal citations omitted); see also Welch v. Chao, 536 F.3d 269, 277 (4th Cir. 2008) (rejecting requirement that an employee allege an actual violation of one of the statutes listed in SOX Section 806). According to the Board, "Section 806 lends itself to no other construction[,] given [that] . . . the criminal fraud provisions . . . merely require a scheme to violate those laws." Sylvester, 2011 WL 2165854, at *29 n.43. Finally, Cypress's disclosure of the DBP to the Ramtron employees *after* they became Cypress employees does not change the fact that it failed to disclose it in their offer letters

or the Ramtron employees' orientation, and therefore may have fraudulently induced the Ramtron employees to take positions at Cypress.

ii. Dietz identified a sufficient connection between the DBP and the mail and wires.

Cypress next contends that Dietz did not "reasonably believe that Cypress's alleged criminal fraud involved the use of interstate mails or wires" because the record purportedly demonstrates that Cypress delivered its offer letters to the former Ramtron employees without the use of the mail or wires. Cypress Br. at 50-51. However, as alluded to above, this contention rests on overly narrow view of the mail and wire fraud statutes. In Schmuck v. United States, for instance—which the ARB appropriately highlighted in its decision, AR2387, n.30—the Supreme Court affirmed a mail fraud conviction where the defendant rolled back the odometers on used cars and sold the cars to dealerships, which then unknowingly sold the cars to consumers, since the dealerships finalized their sales by mailing title applications to the State. 489 U.S. at 707. According to one commentator cited by the ARB, "[t]he mailings underpinning the prosecution bore no relation to the odometer tampering at the root of the fraud." Peter J. Henning, Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute, 36 B.C. L. Rev. 435, 458 (1995). The connection to the mails and wires that Dietz identified here—Cypress conducted a training on and communicated regarding the DBP using the mails and wires and perhaps most

importantly, failed to disclose the DBP during its online employee orientation—is more than sufficient to satisfy a reasonable belief that Cypress used of the mail and wires to administer the DBP and to conceal it from the Ramtron employees. In any event, the ARB appropriately concluded that Dietz had to have believed that Cypress used the mail or wires to deliver the offer letters, as its headquarters are in California and the Ramtron employees were in Colorado. AR2387, n.30. Such a belief is of course reasonable.

Cypress's attempt to cast doubt on the reasonableness of Dietz's belief that it violated the law is without merit. For the reasons discussed above, substantial evidence supports the finding that Dietz's belief was subjectively and objectively reasonable. Dietz thus engaged in SOX-protected activity.

II. THE ALJ AND THE BOARD PROPERLY DETERMINED THAT CYPRESS CONSTRUCTIVELY DISCHARGED DIETZ

In finding that Cypress constructively discharged Dietz, the ARB applied the proper legal standard for finding constructive discharge in the Tenth Circuit and properly found that substantial evidence supported the ALJ's factual findings underpinning her conclusion that Dietz suffered a constructive discharge. [7] However, even if, as Cypress contends, the ARB articulated a less stringent standard for constructive discharge than this Court has applied under other

[7] The ALJ found that Nulty's June 4, 2013 disciplinary memo constituted adverse action—a finding that Cypress did not contest before the ARB. AR2392, n.54.

employment laws, its interpretation of SOX to permit a finding of constructive discharge on the facts of this case is entitled to deference.

A. The ARB Applied the Proper Legal Standard

As the Board appropriately recognized, "the standard ordinarily used to determine what constitutes a constructive discharge is whether the employer has created 'working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign.'" AR2390 (citing Strickland v. UPS, 555 F.3d 1224, 1228 (10th Cir. 2009)); see also AR2230 (ALJ stating same standard). "[C]onstructive discharge is a question of fact and the standard is objective." AR2390 (citing Strickland, 555 F.3d at 1228). Additionally, constructive discharge is assessed based on the totality of the circumstances. See Potts v. Davis Cty., 551 F.3d 1188, 1194 (10th Cir. 2009) ("We assess the voluntariness of [plaintiff's] resignation under the totality of the circumstances.").

In this Circuit, an employee's working conditions are objectively intolerable if the employee reasonably concludes that his employer is forcing him to choose between resignation and termination such that the employee's decision to leave is involuntary. See Exum v. U.S. Olympic Comm., 389 F.3d 1130, 1135 (10th Cir. 2004); Yearous v. Niobrara Cty. Mem'l Hosp. By & Through Bd. of Trustees, 128 F.3d 1351, 1356 (10th Cir. 1997); Spulak v. K Mart Corp., 894 F.2d 1150, 1154 (10th Cir. 1990). In Spulak v. K Mart Corporation, this Court held that a jury

could find constructive discharge based on evidence that the employee "was singled out for unduly harsh and discriminatory treatment, and that he was given an ultimatum either to retire or be fired." 894 F.2d at 1154. In Exum v. U.S. Olympic Committee, in contrast, the Court held that an employee who resigned when told to comply with an unethical order did so voluntarily and thus was not constructively discharged, as "he could have chosen to comply . . . or, alternatively, refused to comply and faced the possible consequences." 389 F.3d at 1136. When determining whether an employee's choice between resignation and termination is voluntary, the Court looks to factors such as "'(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice [s]he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [s]he was permitted to select the effective date of resignation.'" Yearous, 128 F.3d at 1356 (quoting Parker v. Bd. of Regents of Tulsa Jr. Coll., 981 F.2d 1159, 1162 (10th Cir. 1992)).

Here, the ARB affirmed the ALJ's constructive discharge determination based on findings showing that Dietz's June 7 resignation was objectively involuntary. The Board began its analysis by stating that an employee may demonstrate constructive discharge by showing that "'[his] employer act[ed] in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resign[ed].'" AR2391 (citing EEOC v. Univ. of

Chi. Hosps., 276 F.3d 326, 332 (7th Cir. 2002); and Burks v. Okla. Publ'g Co., 81 F.3d 975, 978 (10th Cir. 1996)). And the Board concluded that substantial evidence supported the ALJ's determination that Dietz was faced with a choice "'between resigning and being fired.'" AR2396 (citing Burks, 81 F.3d at .978).

However, this was only the beginning of the Board's analysis. The Board also based its constructive discharge determination on findings by the ALJ, which it found supported by substantial evidence, AR2392 n.51, that Dietz's decision to resign on June 7 followed a pattern of disparate treatment analogous to the pattern of treatment in Spulak. Specifically, the Board noted that "the ALJ found the following facts" (among others): (a) "in the few weeks between his whistleblower complaint and June 4, 2013, Cypress was acting in ways that undercut Dietz's ability to do his job, and in ways that violated Cypress's own policies"; (b) "on May 29, 2013, Dietz received an undeservedly unfavorable performance review"; and (c) "on June 4, 2013, Dietz received an undeserved disciplinary memorandum." AR2392. The Board also emphasized findings by the ALJ, supported by substantial evidence, showing that Dietz's resignation was involuntary under Yearous. "According to the ALJ," the Board noted, Cypress's actions on June 6 "told Dietz" that (d) "he was *definitely* going to be fired," and thus he had no choice but to resign; (e) "it was going to happen the following day, June 7th;" and (f) it was going to happen "under circumstances under which being

fired would be a stain on his work record so indelible that he could never get another job in his field." AR2395 (emphasis in original). The ARB thus applied a standard that is at least as stringent as Spulak, Exum, and Yearous.

Cypress takes issue with the ARB's statement, lifted from EEOC v. University of Chicago Hospitals, that "[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns, the employer's conduct may amount to constructive discharge," AR2391 (quoting 276 F.3d at 332). Cypress Br. at 32. Cypress alleges that the Board advanced a "legal standard [that] conflicts with binding precedent" such as Spulak and Yearous. Id. at 32, 35. However, to the extent the ARB suggests that an employee may prove constructive discharge by showing only that she was forced to choose between quitting and being fired, this suggestion should be considered *dicta*. The ARB based its constructive discharge finding on much more. See AR2393-AR2395.

B. Substantial Evidence Supports the ALJ's Determination that Dietz was Constructively Discharged on June 7

Substantial evidence supports the ALJ's finding, as affirmed by the ARB, that Dietz was constructively discharged on June 7. The ALJ's detailed analysis of the record evidence demonstrates that the ALJ's factual findings and credibility determinations, as affirmed by the Board, were supported by substantial evidence. Strickland, 555 F.3d at 1228 ("whether a constructive discharge occurred is a

question of fact"). The ALJ concluded that "it was objectively reasonable for Dietz to conclude that he faced imminent discharge and a stain on his career that would adversely affect his future employment" at the June 7 meeting. AR2231. In so determining, the ALJ properly evaluated the totality of the circumstances. See Potts, 551 F.3d at 1194.

i. Groat and Hoehler undercut Dietz's project immediately after his whistleblower complaint, and again a month later.

Dietz had a positive experience and received favorable reviews from his supervisor during his first several months at Cypress. AR2233. Shortly after his conversation with Valenzuela about the DBP, however, Groat and Hoehler began undercutting his ability to perform his work. Id. In late April, Groat removed an engineer from Dietz's project without his knowledge or approval and in violation of the Design Governing Spec. Within a month, Groat did it again, at Hoehler's insistence, leading to delays in the completion of project tasks. Id. After Groat's second removal of resources from Dietz's project, Nulty directed Dietz "to fall on his sword" for allegedly failing to timely report Groat's actions, which he had concealed from Dietz. AR2234. However, there is no indication Groat or Hoehler were ever disciplined. Id.

ii. Nulty subjected Dietz to a career ending disciplinary memo based on false allegations.

Dietz then received Nulty's June 4 memo, which accused Dietz of several performance deficiencies, which Nulty classified as "infractions," and required Dietz to prepare a memo admitting "what [he] did wrong," which was to remain in his personnel file indefinitely. AR2230. Based on a careful examination of the record and an evaluation of the testimony and the credibility of the parties, the ALJ concluded that all of the alleged performance deficiencies were baseless; dismissed Cypress's contention that the memo was a standard coaching tool; credited Dietz's belief that the memo was disciplinary; and credited Dietz's testimony, based on his extensive experience, that it would have been "career ending" for him to prepare the responsive memo sought by Nulty. AR2229-AR2230. The ARB affirmed the ALJ's assessment of the June 4 memo, agreeing with the ALJ's that "Dietz actually had no performance issues at all" and characterizing the memo as having "language that would serve as an automatic disqualification for any other job Dietz might seek in the industry." AR2392, AR2393.

iii. Cypress failed to follow its turnaround policy, thereby communicating to Dietz that he was about to be fired.

Dietz responded the next day with a memo contesting Nulty's allegations and accusing Cypress of retaliation. AR2231. And while on its face, Dietz's June 5 memo indicated Dietz's intent to resign effective July 1, the ALJ found, and the

ARB affirmed, that the "full context" of the memo demonstrated that it was actually a last-ditch effort to save his job by activating Cypress's turnaround policy. AR2394, see Potts, 551 F.3d at 1194 (constructive discharge must be determined based on totality of the circumstances). Cypress's turnaround policy required Nulty to reach out to Dietz within minutes of his June 5 memo. AR0782. The ALJ credited Dietz's testimony that, based on Cypress's culture and the fact that he had seen the turnaround policy in action just months earlier, he expected Nulty to comply with it. AR2231. However, Cypress did not comply with the policy. Id. Rather than making an immediate effort to prevent Dietz from resigning, as it had with Eliason, AR0575, Cypress sent Dietz a notice to attend a meeting with his supervisor, an HR representative, and Hoehler, with no agenda—which the ALJ found to be unusual—and no explanation of what the meeting was to be about. Id. Based on the circumstances of the June 7 meeting, as well as all events leading up to it, the ALJ found, and the ARB affirmed, that Dietz reasonably concluded that Cypress was communicating to him that he was definitely going to be fired on June 7. AR2231, AR2395. As he had no other choice, Mr. Dietz resigned effective immediately. AR2231.

Substantial evidence thus supports the ALJ's conclusion, as affirmed by the ARB, that Cypress "singled [Dietz] out for unduly harsh and discriminatory treatment," like the plaintiff in Spulak, and caused Dietz to reasonably conclude

that he was definitely going to be fired on June 7, unlike the plaintiff in Exum. See 894 F.2d at 1154; 389 F.3d at 1135. Dietz's June 7 resignation was therefore objectively involuntary under Tenth Circuit precedent. Accordingly, the ALJ properly found, and the ARB properly affirmed, that Dietz was constructively discharged on June 7.

C. Cypress's Arguments that it Did Not constructively Discharge Dietz Lack Merit

Cypress makes several arguments that Dietz was not constructively discharged on June 7, all of which are without merit.

i. Dietz attempted to exercise Cypress's turnaround policy on June 5.

Cypress first contends that Dietz could not have been constructively discharged on June 7, because he had already resigned on June 5. Cypress Br. at 27. In support of this contention, Cypress cites to the Supreme Court's recent decision in Green v. Brennan, which holds that an employee resigns—and thereby "triggers the limitations period for a constructive-discharge claim"—when he gives his employer "definite notice" of his intent to resign. 136 S. Ct. 1769, 1782 (2016).[8] Whether an employee has given "definite notice" is a factual issue, however. Id. In fact, the Supreme Court remanded the issue of when exactly the employee in Green resigned to the Court of Appeals. Id. Here, the ALJ found and

[8] The parties do not dispute that Dietz timely filed his claim with OSHA on August 14, 2013. See AR0002.

the ARB affirmed that in light of its "full context," Dietz's June 5 memo was not an unequivocal resignation, but an attempt to "hedg[e] his bets" by activating Cypress's turnaround policy. AR2231, AR2394. This finding is supported by substantial evidence.

ii. Cypress's conduct prior to Nulty's June 4 memo contributed to Dietz's constructive discharge.

Continuing with its efforts to re-litigate the ALJ's findings of fact, Cypress attempts to minimize the significance of its conduct toward Dietz in the lead-up to June 7. Cypress Br. at 36-38. In particular, Cypress dismisses the June 4 memo as "a single negative write-up for improperly forecasting a three-week schedule slip." Id. at 38. As noted above, however, the ALJ concluded that the allegations in the memo were entirely baseless and found that it was "disciplinary," "pieced together . . . from inapplicable specifications," and "career ending." AR2229-AR2230. Cypress further contends that the only evidence of intolerable conditions Dietz "could point to" was the June 4 memo and "the failure of Cypress management to include an agenda with the [June 7] meeting." Cypress Br. at 38. In so alleging, Cypress ignores the two occasions in which Groat and Hoehler removed personnel from Dietz's project without his knowledge, in violation of Cypress policy, and with apparent impunity.

iii. Cypress's silence from June 5 through June 7, combined with its prior conduct, communicated to Dietz that he was about to be fired.

Cypress next contends that this case is entirely distinguishable from Spulak and another similar case, Acrey v. American Sheep Industry Association, 981 F.2d 1569, 1574 (10th Cir. 1992) (finding constructive discharge where employee was "evaluated negatively," "asked to quit . . . [due to] her age," and "told . . . that if [she] didn't [she] would be fired"), because Cypress did not explicitly threaten Dietz with termination. According to Cypress, it could not have constructively discharged Dietz because, per the hearing testimony of its managers, it had no secret plan to fire him at the June 7 meeting.[9] Cypress Br. at 42. However, the proper inquiry in a constructive discharge case is whether *the employee* reasonably believed his conditions were intolerable. Spulak, 894 F.2d at 1154 (citing Derr v. Gulf Oil, 796 F.2d 340, 344 (10th Cir. 1986)). Whether the employer explicitly threatens an employee with termination is not a dispositive factor in the Yearous voluntariness analysis. 128 F.3d at 1356. And Courts have understandably found constructive discharge where, as here, there was no explicit threat of discharge but the employee reasonably concluded that the "'handwriting [was] on the wall' and the axe was about to fall." EEOC v. Univ. of Chi. Hosps., 276 F.3d at 332 (employee's conditions were intolerable where the employer hired an individual

[9] The ALJ and ARB found that the testimony of Cypress's representatives was inconsistent regarding the purpose of the meeting. AR2395.

with the same job title as the employee, had stated that "this is the last straw," and packed up her office while she was on vacation, but never explicitly said that it would fire the employee if she did not resign). Indeed, explicitly informing an employee that he will be fired likely constitutes an *actual* discharge. See, e.g. Chertkova v. Conn. Gen Life Ins. Co., 92 F.3d 81, 88 (2d Cir. 1996) ("An actual discharge . . . occurs when the employer uses language or engages in conduct that 'would logically lead a prudent person to believe his tenure has been terminated.'")

Contrary to Cypress's contention, this case is in fact analogous to Spulak. In Spulak, this Court affirmed the trial court's constructive discharge determination based on the employee's belief that he was being presented with an ultimatum to retire or be fired, even though the employee learned after his resignation that the actual reprimand prepared by his supervisor did not threaten him with termination. 894 F.2d at 1153. According to the Spulak Court, "[the employee's] theory of the case was that he submitted his resignation without knowing that the written reprimand only advised him that he would be fired in the future if he committed further infractions." Id. Like Spulak, Dietz reasonably believed he was being presented with an ultimatum on June 7.

The ALJ based her finding to this effect in significant part on Cypress's silence from June 5 through June 7, including Cypress' notable failure to follow the turnaround process and unusual failure to present Dietz with an agenda for, or

any explanation of the purpose of, the June 7 meeting. AR2231-AR2232. As Nulty testified, "Cypress has a culture that says follow the [S]pec or change it." AR0466. Accordingly, the ALJ concluded, Dietz reasonably regarded Cypress's failure to follow its established policies as evidence that he was about to be terminated. AR2232. The ALJ's findings on these matters are supported by substantial evidence and fully support her conclusion, affirmed by the Board, that Dietz was constructively discharged.

D. Even if the ARB Articulated a New Standard for Constructive Discharge, its Interpretation is Entitled to Deference and its Constructive Discharge Finding is Supported by Substantial Evidence

The ARB and the ALJ based their constructive discharge determination on factual findings sufficient to show that Dietz's resignation was involuntary—i.e. Dietz reasonably concluded based on the totality of the evidence that he was about to be fired under circumstances that "would be a stain on his work record so indelible that he could never get another job in his field." AR2393. However, if the Court believes, as Cypress suggests, that the ARB departed from this standard when it stated that an employee is constructively discharged when he reasonably believes his employer is about to terminate him and then resigns, the Secretary submits that the ARB's interpretation is a reasonable construction of the ambiguous term "discharge" in Section 806 and should be afforded Chevron deference.

Congress explicitly delegated to the Secretary of Labor authority to interpret SOX Section 806 by formal adjudication, and the Secretary, in turn, delegated this authority to the ARB, 18 U.S.C. 1514A(b); Secretary's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912, 2012 WL 194561 (Jan. 25, 2012). As this Court held in Lockheed Martin v. Administrative Review Board, the ARB's interpretations of ambiguous terms of SOX Section 806 are thus entitled to Chevron deference. 717 F.3d at 1131 (citing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); and Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1102 (10th Cir. 1999)); see also TransAm Trucking, Inc. v. Admin. Review Bd., No. 15-9504, 2016 WL 4183865, at *4 (10th Cir. Aug. 8, 2016).

The term discharge is ambiguous. SOX does not define the term and it is not discussed in the legislative history. See 18 U.S.C. 1514A(a)(1), (b)(1); 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002). In TransAm Trucking, Inc. v. Administrative Review Board, this Court concluded that the term "operate" in the Surface Transportation Assistance Act (STAA) whistleblower provision is ambiguous since it is also undefined in the statute. See 2016 WL 4183865, at *4 (interpreting 49 U.S.C. 31105(a)(1)(B)(ii)). Moreover, the Second Circuit implicitly held that discharge is ambiguous in a recent unpublished decision, Unified Turbines, Inc. v. U.S. Department of Labor, 581 F. App'x 16, 18 (2d Cir. 2014), in which it granted deference to the ARB's interpretation of "the term

'discharge' in the whistleblower retaliation context to include situations in which an employee has not actually resigned, but 'an employer . . . decides to interpret an employee's actions as a quit or resignation.'" Id. (quoting Klosterman v. E.J. Davies, Inc., ARB No. 08–035, 2010 WL 3878518, at *5 (ARB Sept. 30, 2010)). In granting deference to the ARB, the Second Circuit noted that "the ARB has a significant expertise in handling whistleblower claims and has consistently deployed this definition of discharge, which furthers the statute's purpose of protecting employees from retaliation." Id. (internal citations omitted).

The ARB's interpretation of discharge is reasonable, as it is consistent with the purpose of Section 806 to "protect whistleblowers who report fraud," S. Rep. No. 107-146 (2002). See TransAm Trucking, 2016 WL 4183865, at *4 (according Chevron deference to ARB's interpretation of ambiguous term "operate" in STAA because it furthered the protective purpose of the statute). This Court should thus defer to the ARB's interpretation that an employee may state a constructive discharge claim under Section 806(a) when the employee reasonably believes his employer is about to terminate him and the employee then resigns.

III. THE BOARD PROPERLY ADDRESSED CYPRESS'S AWARENESS OF DIETZ'S PROTECTED ACTIVITY WHEN IT AFFIRMED THE ALJ'S FINDIN THAT DIETZ'S WHISTLEBLOWING CAUSED HIS CONSTRUCTIVE DISCHARGE

The ALJ's finding, affirmed by the Board, that Dietz showed that his complaints were a contributing factor in his adverse actions is supported by

substantial evidence. The contributing factor test is "broad and forgiving." Feldman v. Law Enf't Assocs. Corp., 752 F.3d 339, 348 (4th Cir. 2014). As the ALJ appropriately recognized, an employee "may demonstrate [an employer's] motivation through circumstantial evidence of discriminatory intent" such as "temporal proximity, evidence of pretext, inconsistent application of the employer's policies, and shifting explanations for the [employer's] actions." AR2233 (citing Mackowiak v. Univ. Nuclear Sys., Inc., 735 F.2d 1159, 1162 (9th Cir. 1984).

Here, the ALJ concluded that "[t]here is no dispute that the Respondent was aware of Mr. Dietz's concerns about the legality of the DBP." AR2227. The ALJ then found that a causal relationship between Dietz's protected activity and Cypress's adverse actions was supported by her findings that Cypress began undercutting his work just after he made his whistleblower report to Valenzuela; Groat and Hoehler were never disciplined for interfering with Dietz's project; Nulty's June 4 memo followed shortly after his conversation with Valenzuela; "the stated reasons for [the June 4] memorandum [were] false;" and Cypress failed to follow its own whistleblower policy in response to Dietz's complaint. AR2232-AR2238. Indeed, in affirming the ALJ's decision, the ARB concluded that "the ALJ effectively found as fact that the *only* reason for the unfavorable personnel actions was Dietz's protected activity." AR2396 (emphasis in original). The

ALJ's findings, as affirmed by the ARB, are based on a meticulous examination of the record. They thus are supported by substantial evidence.[10]

Cypress alleges that its conduct "could not constitute retaliation," because it was purportedly unaware of Dietz's protected activity. Cypress Br. at 54. Cypress further alleges "[t]he ARB did not address Cypress's argument that Dietz had not satisfied this employer-knowledge requirement" and in fact "*eliminated* employer knowledge as an element of the cause of action under Section 1514A," in contravention of an OSHA regulation, 29 C.F.R. 1980.104(e)(2)(ii). Cypress Br. at 54-55. Cypress is correct that the ARB listed three elements of a SOX retaliation claim—protected activity, adverse action, and causation—while courts have identified a SOX claim as having a fourth element, employer knowledge. See Lockheed Martin, 717 F.3d at 1129; Wiest v. Lynch, 710 F.3d 121, 129 (3d Cir. 2013). This four-prong formulation tracks the requirements for OSHA to initiate an investigation, 29 C.F.R. 1980.104(e). However, 29 C.F.R. 1980.109(a), which governs ALJ decisions, uses a three element formulation of the standard for finding retaliation, and the plain language of Section 806(a)(1)—the provision at issue

[10] Cypress does not contest the ALJ's finding, as affirmed by the ARB, that it failed to show by clear and convincing evidence that it would have taken the same adverse actions towards Dietz if he had not engaged in protected activity, 18 U.S.C. 1514A(b)(2)(C); 49 U.S.C. 49121(b)(2)(B)(iv). See AR2238, AR2396. Apart from noting that Dietz's attorney fee award should be reversed if this Court reverses the ARB's finding of liability, Cypress also does not contest the remedies that the ALJ awarded and the Board affirmed in this case. See AR2240, AR2532, AR2504.

here—does not include any separate employer knowledge requirement. See 18 U.S.C. 1514A(a)(1) (making it unlawful for a covered employer to "[1] discriminate against an employee . . . [2] because . . . the employee . . . [3] provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of" the enumerated laws and statutes.).[11] The Board's recitation of the elements of a SOX whistleblower claim should be affirmed, as it is fully consistent with the plain language of the statute.

It was also unnecessary for the ARB to list employer awareness of the employee's protected activity as a separate element. The employer's knowledge of the employee's protected activity is often implicitly recognized as part of a tribunal's conclusion that an employee's protected activity contributed to an employer's adverse action. See Folger v. Simplexgrinnell, LLC, ARB No. 15-021, 2016 WL 866116, at *1 n.3 (ARB Feb. 18, 2016). That was the case here. The ALJ explicitly found that Cypress was aware of Dietz's protected activity. The ARB could not have affirmed "[t]he ALJ's effective conclusion that "the *only* reason for the unfavorable personnel actions was Dietz's protected activity" if it did not believe Cypress was aware of Dietz's protected activity. The ARB effectively

[11] Section 806(a)(2), in contrast—which protects employees who participate in "proceedings relating to an alleged violation of" the enumerated statutes—does have an explicit employer knowledge requirement. See id.

said as much itself when it noted that, "on April 22, 2013, Dietz told Cypress's General Counsel, Victoria Valenzuela, that he thought Cypress had knowingly concealed material facts about the bonus plan from the former Ramtron employees." AR2389.

Cypress finally argues that Dietz "fail[ed] to communicate to Cypress anything resembling a violation of the federal mail or wire fraud statutes." Cypress Br. at 54. It analogizes Dietz's case to that of employee in Villanueva v. Department of Labor, 743 F.3d 103 (5th Cir. 2014), who failed to state a SOX retaliation claim because he alleged a violation of Colombian tax law, not a violation of one of the enumerated fraud statutes. Id. Cypress further contends that its alleged ignorance of Dietz's protected activity is supported by the fact that "neither Valenzuela or anyone else reported Dietz's complaints to" its Audit Committee, to which its "corporate policies require allegations of fraud to be reported. Id. However, Cypress's purported ignorance of Dietz's protected activity is flatly contradicted by the testimony of Valenzuela and Still, both of whom testified that Dietz reported to them that Cypress had unlawfully concealed the DBP from the Ramtron employees. AR0479, AR1307. And unlike the employee in Villanueva, Dietz clearly accused Cypress of a misrepresentation of material facts. Based on these facts, which are supported by substantial evidence,

the ALJ and the Board correctly concluded that Cypress was aware of Dietz's protected activity.

CONCLUSION

For the foregoing reasons, this Court should affirm the Board's Final Decision and Order and deny Cypress's Petition for Review.

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STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary because the Board's affirmance of the ALJ's decisions in favor of Mr. Dietz is clearly supported by substantial evidence and can be reviewed by this Court based on the parties' briefs and the materials in the Administrative Record.

CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 13,346 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The 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 was prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font in text and footnotes.

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ANTI-VIRUS CERTIFICATION FORM

I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, was performed on the PDF version of this brief and no viruses were found.

Dated: October 3, 2016

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CERTIFICATE OF DIGITAL AND HARD COPY SUBMISSIONS

I hereby certify as follows:

1. All required privacy redactions have been made per 10th Cir. R. 25.5, and

2. The seven hard copies of the Brief for the Secretary of Labor being submitted to the Court are exact copies of the version submitted electronically via the Court's CM/ECF system.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, a true and correct copy of the foregoing Brief for the Secretary of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, and that service on counsel of record will be accomplished by this system, including the following:

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