No. 14-2415

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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DELTEK, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD,

Respondent,

and

DINAH R. GUNTHER,

Intervenor.

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

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# BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

**Cases:**

**Cases (continued):**

**Cases (continued):**

**Cases (continued):**



**Statutes:**

**Statutes (continued):**



**Regulations:**



**Additional Authorities:**

No. 14-2415

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**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 Deltek, Inc. ("Deltek").

## JURISDICTIONAL STATEMENT

This case arises under the employee protection provision of the Sarbanes-Oxley Act ("Sarbanes-Oxley"), 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 Sarbanes-Oxley violation filed by Intervenor Dinah Gunther ("Mrs. Gunther") 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 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, 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012); see also 29 C.F.R. 1980.110(a). On November 26, 2014, the Board issued a Final Decision and Order affirming a finding that Deltek retaliated against Mrs. Gunther in violation of Sarbanes-Oxley. See Joint Appendix ("JA") 14-18.[1] On December 30, 2014, Deltek filed with this Court a timely Petition for Review. See 29 C.F.R. 1980.112(a); see also 49 U.S.C. 42121(b)(4)(A).[2] Because the Sarbanes-Oxley violation occurred in Virginia, this Court has jurisdiction to review the Board's decision. See 29 C.F.R. 1980.112(a); see also 49 U.S.C. 42121(b)(4)(A).

[1] The Board issued a subsequent Order on January 16, 2015 in response to a motion by Mrs. Gunther. See JA 19-22. Neither party sought review of that Order, and the Board's proceedings are concluded.

[2] Per 18 U.S.C. 1514A(b)(2)(A), Sarbanes-Oxley proceedings are governed by the rules and procedures of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121(b).

## STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the finding that Mrs. Gunther reasonably believed that the complained-of conduct constituted a violation of a law, rule, or regulation identified in Sarbanes-Oxley and thus engaged in protected activity.

2. Whether substantial evidence supports the finding that her protected activity was a contributing factor in her employment termination.

3. Whether Deltek showed by clear and convincing evidence that it would have terminated her employment even in the absence of protected activity.

4. Whether Deltek showed by clear and convincing evidence that it would have terminated her employment because of after-acquired evidence.

5. Whether substantial evidence supports the front pay award.

## STATEMENT OF THE CASE

### 1. Sarbanes-Oxley's Employee Protections

Sarbanes-Oxley protects an employee who provides information to her employer or the federal government regarding conduct that she 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. Mrs. Gunther filed a complaint with OSHA alleging that Deltek's termination of her employment and other conduct was unlawful retaliation in violation of Sarbanes-Oxley. See JA 1539-1543, 1694-1711, 1866-1882.

2. Statement of Facts

In October 2008, Deltek hired Mrs. Gunther as a financial analyst in its Information Technology ("IT") group, reporting to Kay Robinson ("Robinson"). See JA 1361-62. Robinson reported to Lee Evans ("Evans"), who headed the IT group. See Administrative Law Judge Hearing Transcript ("Tr.") 2123, 2157, 2172.[3] Evans reported to Richard Lowrey ("Lowrey"), the executive who was Deltek's point of contact for the IT group. See Tr. 2121-22.

Soon after her employment began, Mrs. Gunther became concerned that the IT group was "[d]isorganized," there were "no clear roles, ... no clear processes," and there was no "clear process and procedure for invoice tracking." Tr. 823. For example, Mrs. Gunther reviewed invoices for which there was inadequate supporting documentation, and she raised the issue with Robinson. See Tr. 830-35. Robinson brushed aside her concerns. See Tr. 835.

[3] Excerpts from the Administrative Law Judge Hearing Transcript are in volumes VI and VII of the Joint Appendix and are separately numbered from the first five volumes.

Mrs. Gunther learned that financial information generated by her group would be used in Deltek's financial statements filed with the Securities and Exchange Commission ("SEC"). See Tr. 838-39. Mrs. Gunther was concerned about the integrity of that information. See Tr. 839-840. For example, she was concerned that the costs charged to Deltek by Verizon far exceeded what Deltek was budgeting for those costs. See Tr. 850-51. Mrs. Gunther raised those concerns with both Robinson and Evans, and they dismissed her concerns. See Tr. 850-54.

Mrs. Gunther was concerned that Evans and Robinson were not forthright with Lowrey regarding the costs that Deltek owed to Verizon. See Tr. 857-58. Mrs. Gunther raised her concerns at a January 2009 budget forecasting meeting attended by Lowrey, Evans, Robinson, and Bruce Showalter ("Showalter"). See Tr. 850, 854, 857-58; JA 29. After the meeting, Robinson was "extremely upset" with Mrs. Gunther, told Mrs. Gunther not to participate in those meetings any more, and denied her request for information about Verizon invoicing. Tr. 857-58. In addition, Robinson "became increasingly public about her feelings towards [Mrs. Gunther]," "became hostile in staff meetings," denied Mrs. Gunther training, disinvited her from meetings, and directed profanity at her. Tr. 860, 862-63, 866-67; JA 29. Mrs. Gunther believed that "the job duties that [she] was [subsequently] given had less visibility." Tr. 863.

In February 2009, Robinson told Mrs. Gunther that she would thereafter report to Showalter – formerly her co-worker. See Tr. 983. Mrs. Gunther believed that she had been demoted because of the concerns that she had raised during the January meeting with Lowrey and her concerns regarding the Verizon invoicing. See id. (the reassignment was meant "to limit my exposure to the finance department").

Telecommunications was Deltek's largest expense, and Deltek assigned Christopher Reynolds ("Reynolds"), a former Verizon employee, to review Verizon invoices and be responsible for the Verizon relationship. See Tr. 419-426, 2166. There was no formal process to dispute an invoice, and Reynolds developed a framework to evaluate potential disputes. See Tr. 425-27, 2166. Reynolds worked with Verizon to resolve any billing disputes; however, others in Deltek's IT group raised disputes with Verizon without Reynolds' knowledge. See Tr. 427-28, 434-39.

Reynolds believed that the billing disputes raised by others, especially Showalter, were harming Deltek's relationship with Verizon. See Tr. 438-440. Reynolds reviewed disputes raised by Deltek with Verizon and concluded that there were disputes that were not valid. See Tr. 569-571. Of six billing disputes raised by Showalter and others and denied by Verizon, Reynolds testified that five did not warrant a dispute and only one possibly warranted a dispute. See Tr. 439-446; JA 138-143.

Reynolds discussed the disputed invoices with Mrs. Gunther, and they reviewed them together in April 2009. See Tr. 566-573, 1413-14. Based on their discussions and that review, Mrs. Gunther believed that Deltek engaged in a pattern of abusing the process of disputing Verizon invoices. See Tr. 1413-14; see also Tr. 569-570. Although Deltek received credits on many occasions when it raised invoice disputes with Verizon, its records showed that about $232,000 in disputes had been rejected by Verizon as of April 2009. See JA 292-93.

According to Reynolds in emails to Showalter, Mrs. Gunther was "a god send working with [him] in making sense" of the Verizon invoices. JA 1454. Reynolds added that Mrs. Gunther brought "an extreme amount of clarity to the situation" and "has found that Verizon's AR allocation and Deltek's interpretation of AP allocation are clearly not in alignment." Id. Reynolds stated that if Deltek failed to understand how Verizon viewed the invoices, "Deltek may put itself at risk in not meeting certain terms of the contract." JA 1456. Reynolds and Mrs. Gunther sought "an accurate understanding of Deltek's running exposure [to Verizon]," and believed that "urgent action is necessary in restoring these accounts to solid footing." JA 1454. Showalter responded that "we don't care how much Verizon thinks we owe them, we only care how much we think we owe them based on contract prices and services and equipment that has

actually been delivered." JA 1456 (emphasis in original). Reynolds responded that Showalter was "missing the point," and he added, "I've been in this business 22 years and have run multi-million dollar programs, so I have a pretty good understand[ing] when I see potential red flags." Id.[4]

a. Mrs. Gunther's Complaint and Resulting Leave of Absence

On April 20, 2009, Mrs. Gunther submitted a letter complaint to Deltek's Audit Committee (through Deltek's General Counsel, David Schwiesow ("Schwiesow")), sent a copy of the complaint to the SEC, and submitted the complaint on Deltek's online EthicsPoint program. See JA 170-71; Tr. 145, 259, 331-32. Mrs. Gunther submitted her complaint "in accordance with the Deltek, Inc. Code of Business Conduct and Ethics and the Sarbanes-Oxley Act of 2002," and she asserted that she believed that Showalter, Robinson, and Evans had "engaged in a pattern of illegal and unethical business practices." JA 170. Mrs. Gunther identified the following "potentially illegal and unethical activities":

> (1) a "systematic, coordinated effort ... to hide a large budget variance" from Deltek's management and auditors and the SEC;
> (2) a "deliberate campaign ... to manufacture grounds for disputing legitimate invoices from Verizon ... to avoid timely payment of all fees properly due;" and

[4] In April 2009, Verizon threatened to suspend Deltek's services for nonpayment; however, Evans contacted Verizon to avert any suspension. See Tr. 2176-2180; JA 333-341.

> (3) a "systematic coordinated effort ... to obfuscate true financial conditions within the IT department by failing to maintain adequate financial controls, circumventing established corporate processes and by thwarting [her] ongoing efforts to follow appropriate document control procedures."

Id.

Mrs. Gunther's complaint identified numerous activities to support her claim and stated that, as a result of raising these concerns, she had been "harshly punished, including demotion and isolation," and "forced to endure ongoing harassment, professional slander, personal insult and public humiliation." JA 171. She identified "a pervasive atmosphere of fear and intimidation within our organization that ... keeps employees from asking appropriate questions and reporting potential problems with financial information." Id. She recounted how Evans would state "in a serious tone" at the beginning of meetings that the meetings were a "'H(uman) R(esources) Free Zone,'" and that she had been told by co-workers that Evans and Robinson "'would love to fire'" her. Id. Reynolds submitted a similar letter complaint to Deltek's Audit Committee, and he recounted that Evans would sometimes state regarding Verizon invoices, "'I'll sign, but maybe we ought to dispute it, just for fun or old times sake.'" JA 259.

Schwiesow met with Mrs. Gunther soon after her complaint, thanked her for raising the issues, and told her: "you won't be

retaliated against, if that does happen, if there's anything that you see that [or] anything that happens that you feel is retaliatory, you come to me right away." Tr. 336-39. Schwiesow asked Mrs. Gunther to gather information related to her complaint. See Tr. 969-970. Following that meeting and Schwiesow's request to her to gather information, Mrs. Gunther heard and witnessed the shredding of documents in the office and was concerned because she had assumed that Schwiesow would secure documents. See Tr. 971-73. Schwiesow testified that the shredded documents were copies of originals. See Tr. 377-78.

Schwiesow oversaw the investigation into Mrs. Gunther's complaint and was assisted by Salman Ahmad ("Ahmad") from the General Counsel's office and Holly Kortright ("Kortright"), Director of Human Resources. See Tr. 271-72.[5] Schwiesow informed Showalter, Robinson, and Evans of Mrs. Gunther's complaint and told them not to retaliate against her. See Tr. 336-39.

[5] Deltek prepared a report at the investigation's conclusion. See JA 1720-1779. The report did not confirm many of Mrs. Gunther's allegations, although the report noted delays in processing Verizon invoices and inadequate information to determine whether some invoices were properly accounted. See JA 1721-22, 1771-72. The report concluded that "[t]here is a need for a more professional environment within the IT Department, and managerial training to reduce the frequent use of shouting, profanity, insensitive remarks and other unpleasant actions (such as door slamming)," but that there had been no retaliation against Mrs. Gunther. JA 1722; see also Tr. 339-340.

The day after Mrs. Gunther's complaint, but before Robinson learned of it, Robinson brought cupcakes to a staff meeting. See Tr. 337, 980. Robinson said that the cupcakes were in Mrs. Gunther's honor, which Mrs. Gunther interpreted as insinuating that she took the cake for making a complaint. See Tr. 980-81; see also Tr. 611-12. Reynolds described Robinson's comment toward Mrs. Gunther as "an attempt of calling somebody out and put them in a position for whatever reason, from a negative tone." Tr. 611.

The following day, Mrs. Gunther attended a meeting at which Evans talked about a scene from the movie Pulp Fiction involving kidnapping and torture. See Tr. 974-76. Robinson and Showalter were laughing, and Evans looked at Mrs. Gunther while he was talking about the torture scene. See Tr. 976. Mrs. Gunther "took that as a threat" and "didn't feel very safe," and Evans' comments had a particular effect on her because of a prior personal experience. Tr. 976-77.

In early May, Kortright met with Mrs. Gunther and said that she was meeting with everyone in the IT group to ensure that they were being professional during the investigation into Mrs. Gunther's complaint. See Tr. 1002. Kortright told Mrs. Gunther that she needed to conduct herself professionally and be responsive to emails. See Tr. 1002-03. Mrs. Gunther asked if anyone had complained about her, and Kortright responded that

she was meeting with everyone in the IT group. See Tr. 1002. Mrs. Gunther had not been unprofessional or unresponsive, and she believed that someone was complaining to Human Resources about her. See Tr. 1002-04.

Shortly thereafter, Robinson sent Mrs. Gunther an email accusing her of missing a training session and causing Deltek to incur a fee. See JA 1712-14. Mrs. Gunther responded that she had informed Showalter the day before the training that she was "sick from work related stress that resulted from these very types of tactics that [Robinson], primarily, has been using to harass me for months," and explained how the training was free. Id.; see also Tr. 1021-22. Mrs. Gunther told Kortright that "this is yet another blatant attempt by [Robinson] to intimidate and bully me in retaliation for my reports about questionable accounting practices within the IT organization." JA 1712-14; see also Tr. 1021-22 ("And the reason for [Robinson's] sending me these e-mails and several e-mails over and over again and then copying [Evans] was to harass me further.").

Mrs. Gunther then met with Kortright, who offered Mrs. Gunther a paid, temporary leave of absence while the investigation was ongoing as a result of her stress and medical issues. See Tr. 113-14, 1023-24. Mrs. Gunther accepted the offer provided that her employment would not be affected in any way and her pay and benefits would continue in full during the

leave. See JA 1715. Mrs. Gunther outlined these terms in an email to Kortright, and included the right to end the leave and return to work on 24 hours of notice prior to any determination by Deltek that the leave had ended. See id. Kortright responded that she agreed and approved the leave. See id.

b. Deltek's Termination of Mrs. Gunther's Employment

In September 2009, Deltek and Mrs. Gunther's attorneys engaged in settlement negotiations; the options included Mrs. Gunther's returning to work or taking a settlement offer. See Tr. 1051-52. At that time, Mrs. Gunther received a COBRA notice — meaning that Deltek had terminated her health insurance. See JA 1814. Mrs. Gunther was surprised because she did not expect her benefits to be terminated. See Tr. 1039. In addition, Deltek stopped paying Mrs. Gunther as of September 15, 2009; after initially depositing a subsequent paycheck in her account, Deltek reversed the deposit. See Tr. 1042-47.

During the settlement negotiations, Deltek and Mrs. Gunther's counsel agreed on a payment amount, but the draft agreement prepared by Deltek several weeks later did not reflect certain terms that were non-negotiable for Mrs. Gunther. See Tr. 1053-57. On October 23, 2009 (a Friday), Mrs. Gunther told her counsel that she rejected the draft agreement, settlement discussions were over, and she would return to work on October

26 (the following Monday) after notifying Human Resources. See JA 1830; Tr. 1058.

On October 24 at 5:31 p.m., Mrs. Gunther emailed Kortright that she "will be reporting to the office at 9:00 AM on Monday, October 26, 2009 for work assignments." JA 1835. In her email, Mrs. Gunther raised the issue of the outstanding pay and benefits due her. See id. On October 26 at 12:18 a.m., Schwiesow responded:

> Mrs. Gunther, you are represented by legal counsel with respect to matters relating to your employment by Deltek. Therefore, we can have no direct conversations with you regarding these matters. If you come to Deltek, we will be unable to discuss your employment with you at this time.

Id. From Mrs. Gunther's perspective:

> I had no choice at that time. For the amount of money that I had spent on the attorney's fees, and no agreement had been reached and I was unpaid, the only logical step that I had was to go back to work.

Tr. 1057.

On October 26, Mrs. Gunther went to Deltek followed by her husband ("Mr. Gunther") in a separate vehicle. See Tr. 716-18. Mrs. Gunther went to Kortright's office, and Valerie Parker ("Parker"), Kortright's assistant, informed her that Kortright was delayed. See Tr. 722-23. Parker asked Mrs. Gunther if she would like to wait in a conference room. See Tr. 723. Mrs. Gunther did not think that Kortright would be long, so she waited near Parker's desk and remained standing because there

was no chair there. See id. Parker told Kortright that Mrs. Gunther "kept staring" at Parker while waiting, and Parker "was scared." Tr. 81-83.

Mrs. Gunther met with Kortright and Ahmad and told them that she was ready to work. See JA 2183-2195.[6] Ahmad repeatedly told Mrs. Gunther that ethical rules prohibited him from speaking to her about her employment because she was represented by counsel. See id. Mrs. Gunther repeatedly asked whether she was still employed by Deltek, and Ahmad responded that she was still employed but on leave and not permitted to work that day. See id. Ahmad added that a new Chief Information Officer was starting at Deltek that day and that it would be disruptive for Mrs. Gunther to return to work that day. See id. Mrs. Gunther asked about Deltek's failure to pay her, and Ahmad responded that she should raise the issue with her counsel and that his understanding was that they were reaching a settlement. See id. Ahmad said that he would look into the pay issue and told her that she needed to leave. See id. According to Kortright, Mrs. Gunther used a "strong tone," and Ahmad "was very clear and very calm in his reply." Tr. 73-74. Once outside, Mrs. Gunther met Mr. Gunther, whose car was parked by the Deltek building and who

[6] Mrs. Gunther recorded the meeting, and JA 2183-2195 is a transcript of that meeting.

asked her questions that she answered while he videotaped her. See Tr. 76-80.

Kortright testified that she terminated Mrs. Gunther's employment based on her behavior that day when she returned to work and that she did not consult with Evans, Robinson, or Showalter. See Tr. 179, 213. Kortright stated that progressive discipline was not an option and that termination was the only option "[b]ased on the egregious nature of the behavior and concern over the safety of the rest of the employees at the company." Tr. 179-180. In her termination letter to Mrs. Gunther, Kortright wrote:

> You were confrontational with Mr. Ahmad, and persisted in challenging him, despite Mr. Ahmad's repeated explanation that he could not discuss these matters with you without the presence of your counsel. Mr. Ahmad escorted you out of the building, and saw that you had arranged for [Mr. Gunther] to wait for you outside Deltek's front door in a Hummer SUV, with a large video camera. The SUV was parked in such a way that it was difficult for others to drive past it. When you got closer to the SUV, you began speaking to the camera on Deltek's premises, while other employees were walking and attempting to drive past. Your actions and demeanor were disruptive and very concerning.

JA 184-85. Kortright concluded that Mrs. Gunther's desire to return to work "was not genuine" and terminated her employment effective October 27, 2009. Id.

3. Procedural History

Mrs. Gunther had filed in May 2009 a complaint with OSHA alleging retaliation by Deltek, Evans, Robinson, and Showalter

in violation of Sarbanes-Oxley. See JA 1694-1711. Following her termination, Mrs. Gunther amended her complaint to claim that the termination was additional unlawful retaliation. See JA 1866-1882. On July 6, 2010, OSHA issued findings that there was not reasonable cause to believe that Deltek or the individual respondents violated Sarbanes-Oxley. See JA 107-111. In August 2010, Mrs. Gunther timely filed a notice of objections to OSHA's findings and a request for an ALJ hearing. See JA 24. The ALJ conducted a 12-day evidentiary hearing. See JA 25.

a. ALJ's Finding that Sarbanes-Oxley Was Violated

On July 31, 2012, the ALJ issued a Decision and Order Granting Claim in Part and Dismissing Individual Respondents ("ALJ Liability Order"). See JA 23-57. The ALJ found that: Mrs. Gunther's employment termination was unlawful retaliation in violation of Sarbanes-Oxley; her other alleged adverse employment actions were not actionable; and the individual respondents were not liable. See JA 24.[7]

The ALJ stated that Mrs. Gunther must show by a preponderance of the evidence that: (1) she engaged in protected activity; (2) Deltek was aware of her protected activity; (3) she suffered an unfavorable personnel action; and (4) her protected activity was a contributing factor in the unfavorable

[7] The dismissal of the individual respondents is not at issue on appeal.

action. See JA 43; see also 29 C.F.R. 1980.109(a). The ALJ further stated that, if Mrs. Gunther makes that showing, Deltek may avoid liability by demonstrating by clear and convincing evidence that it would have terminated her employment in the absence of the protected activity. See JA 44 (citing 29 C.F.R. 1980.109(b)).

The ALJ found that Mrs. Gunther's complaint to Deltek's audit committee and the SEC and her complaint to OSHA were protected activity. See JA 44, 47. The ALJ noted that Mrs. Gunther must show that: (1) she had a subjective belief (i.e., she actually believed) that the complained-of conduct violated any of the laws, rules, or regulations identified in Sarbanes-Oxley; and (2) her belief was objectively reasonable, evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience. See JA 44-46.

The ALJ found that "[i]t is clear that [Mrs. Gunther] had a subjective belief that there were accounting irregularities that involved fraud, and specifically that her superiors were trying to hide budget shortfalls by disputing invoices without a basis for doing so." JA 47. "[S]he reasonably questioned the lack of supporting documentation for some bills and both Robinson and Showalter advised her that there were problems with the Verizon invoices, providing some support for her concerns." Id. The

ALJ found that Mrs. Gunther's belief was "in some ways misguided and unreasonable." Id. For example, Robinson's dismissiveness toward Mrs. Gunther's concerns was a reflection of Showalter's having the situation with the Verizon invoices under control as opposed to an attempt to keep her from uncovering fraudulent activity, and her exclusion from meetings with Lowrey did not mean that Lowrey was not fully informed about the budget situation. See id. Nevertheless, Mrs. Gunther's testimony and other evidence showed that "she subjectively believed that Respondents had violated the law and engaged in fraudulent activity that could have had an effect upon Deltek's financial position, as reported to shareholders." JA 47-48.

The ALJ found the issue of whether Mrs. Gunther's belief was objectively reasonable "a much closer one." JA 48. Had Mrs. Gunther "been acting solely upon her own limited background," the ALJ would have been "inclined" to find that her belief was not objectively reasonable. Id. Mrs. Gunther, however, had "extensive dealings" with Reynolds, who had "extensive experience in Verizon's invoicing" and who "was a credible, convincing witness at the hearing." Id.[8] "Reynolds spoke authoritatively on the subject based upon his extensive

[8] The ALJ noted that Reynolds' credibility was "somewhat undermined" by his working at home while he was receiving disability benefits and his reluctance to admit that he and Mrs. Gunther worked on their complaints together. JA 48.

experience," "expressed his concerns" to Mrs. Gunther, and submitted a complaint that was almost identical to her complaint. Id. Even accepting the evidence that Deltek prevailed in 80% of its billing disputes with Verizon, there remained the possibility that some disputes raised by Deltek were not supported. See id. "In view of her dealings with Reynolds," the ALJ found that Mrs. Gunther "had an objectively reasonable basis for her belief that there was a violation when she filed her SEC complaint." Id.

The ALJ next determined that Deltek was aware of Mrs. Gunther's protected activity. See JA 48-49. The ALJ also found that her employment termination was "clearly an adverse action." JA 49. The ALJ found that other actions, although "perhaps demeaning" and "certainly appear[ing] to be inappropriate," were not adverse actions under Sarbanes-Oxley. JA 49-51.[9]

"Based upon a review of all of the evidence," the ALJ found that Mrs. Gunther's complaints were a contributing factor in her employment termination:

> Her termination resulted after a return from a leave of absence that was precipitated by an investigation into the matters raised by the SEC complaint, and she was terminated after the failure of settlement negotiations relating to the OSHA complaint, which encompassed her claim of retaliation based upon her filing of the SEC complaint. Had neither complaint been filed, she would not have been

[9] The findings regarding Deltek's knowledge of Mrs. Gunther's protected activity and which actions constituted adverse actions are not at issue on appeal.

> offered the medical leave or entered into the settlement negotiations, she would not have returned to work on the day that she did, and she would not have been terminated based upon her actions at the time she returned. Accordingly, [Mrs. Gunther's] termination was causally related to the protected activities.

JA 52.

The ALJ further found that Deltek failed to demonstrate by clear and convincing evidence, or even a preponderance of the evidence, that it would have terminated Mrs. Gunther's employment absent her protected activity. See JA 54. The ALJ determined that Deltek's explanation for her termination was pretextual. See JA 52-54. The ALJ listened "more than once" to the recording of the October 26, 2009 meeting between Mrs. Gunther, Kortright, and Ahmad and rejected Kortright's characterization of Mrs. Gunther's actions:

> At all times, [Mrs. Gunther] was calm, quiet, and (although she repeated herself) polite. Although the inference could be drawn from her actions and the use of a recorder and video camera that she did not expect to be permitted to return to work and wanted to document it, that does not mean that she did not have the desire to work or that she was acting in bad faith.

JA 52 (internal footnote omitted); see also JA 40 ("Based upon my listening to the recording, I find there was no basis for asserting that [Mrs. Gunther] was confrontational and she did not use what I would characterize as a 'strong tone.'").

The ALJ added that "Ahmad appropriately told her to leave and escorted her from the building; however, that does not mean

that Deltek had a basis for terminating her employment due to her premature return alone, nor has it made such an argument." JA 52. Moreover, there was "no testimony or other evidence" that Mr. Gunther's Hummer SUV actually blocked others from passing. JA 52-53. Kortright's testimony that Parker, her assistant, was scared by Mrs. Gunther was not persuasive given that "Parker did not testify" and thus it was "unclear what she meant by the remark." JA 53. There was "no basis for [Kortright] to draw the inference that other employees were in actual danger," and "no evidence" that Mrs. Gunther took inappropriate or threatening actions toward Deltek employees. Id. In sum, Kortright's statements in the termination letter "were not supported by the tape; indeed, they were contradicted by the tape." Id.

The ALJ thus concluded that Deltek violated Sarbanes-Oxley and was liable to Mrs. Gunther. See JA 54-55.

b. ALJ's Award of Damages

On June 5, 2013, the ALJ issued a Supplemental Decision and Order Awarding Damages, and the next day, the ALJ issued an Erratum to Decision and Order Awarding Damages correcting several scrivener's errors (collectively, "ALJ Damages Order"). See JA 58-100. The ALJ addressed Deltek's argument that the after-acquired evidence doctrine barred Mrs. Gunther's recovery of damages because she engaged in misconduct prior to her

employment termination (unknown to Deltek at the time) and after her termination that would have separately justified her termination. See JA 65-71.

The ALJ determined that there was "no merit" to the argument that Mrs. Gunther's surreptitiously recording meetings was an independent ground for terminating her employment. JA 66. Deltek relied on Schwiesow's testimony that an employee would be terminated for making secret recordings; however, taping is not illegal, and he admitted that Deltek does not have a specific policy against taping. See id.; Tr. 379. The ALJ found that Mrs. Gunther's tapings "were all made in furtherance of her whistleblower claims," revealed that Deltek's reasons for terminating her employment were pretextual, and therefore constituted protected activity. JA 66. The ALJ concluded that "it would be inappropriate to cut off Deltek's liability on this basis." Id.

For similar reasons, the ALJ rejected Deltek's argument that Mrs. Gunther's taking of confidential documents in these circumstances barred her from recovering damages. See JA 66-70. The documents identified by Deltek were "directly relevant" to her Sarbanes-Oxley complaint, she "was reasonably concerned about their potential destruction," and she forwarded them to her personal email account that she shared with her husband. See JA 66-68. Mrs. Gunther stated that she forwarded them to

the personal email account as a matter of necessity, and that neither Mr. Gunther nor anyone else looked at the materials. See JA 69.

The ALJ found that "her forwarding of documents in furtherance of her whistleblower activities to be protected activity that cannot form the basis for an adverse action, notwithstanding the breach of any confidentiality agreement." JA 67. The ALJ emphasized that Mrs. Gunther did not indiscriminately or for ulterior purposes gather documents, and that she reasonably forwarded to her personal email account only documents relevant to her complaints. See JA 67-68. Accordingly, Mrs. Gunther "cannot be terminated on these grounds because her collection, retention, and forwarding of the documents constitute protected activity." JA 70. The ALJ noted that, "[i]f a company were able to avoid liability by pointing to a confidentiality agreement when a whistleblower took documents with the express purpose of preventing their destruction, [Sarbanes-Oxley's] whistleblower protection provisions would be ineffectual." Id.

The ALJ also rejected Deltek's argument that instant messages sent by Mrs. Gunther to a colleague making fun of Robinson and griping about her job would have resulted in her employment termination had Deltek known about them at the time. See JA 70. The ALJ found the messages to be "trivial in

nature," and concluded that Deltek "failed to show that these petty instant messages" rose to the level of being sufficiently severe that they would have resulted in termination. Id.

Finally, the ALJ rejected Deltek's argument that two post-termination letters barred Mrs. Gunther from recovering damages. See JA 70-71. First, Mrs. Gunther sent Kortright a letter in response to the termination letter asserting that specific statements made by Kortright were false and demanding that Kortright retract them and pay damages. See JA 266-67. The ALJ reviewed the letter and concluded that it was neither "threatening or aggressive." JA 71. Moreover, the ALJ had already determined that Kortright's termination letter mischaracterized Mrs. Gunther's conduct and agreed with the substance of Mrs. Gunther's letter challenging the termination letter. See id.[10]

Second, the ALJ rejected Deltek's argument that a letter sent by Mr. Gunther to Deltek's CEO (see JA 268-69) was a basis for barring damages to Mrs. Gunther. See JA 71. That letter was a response to Kortright's termination letter, demanded that Deltek stop harassing Mrs. Gunther, and complained of harassing phone calls, surveillance of their home, and hacking of their

[10] Deltek asserted that the letter was troubling because it was addressed to Kortright at her home address and used her married name; the ALJ, however, found the use of Kortright's home address and married name "too trivial to constitute a basis for dismissal." JA 71.

computer network. See JA 268-69. Mr. Gunther added: "Beams of bright light will shine down on every corporate misdeed I know about, and I will find them all. Neither you, nor any Deltek official will ever make a public appearance without being challenged for trying to crush brave whistleblowers." JA 269. Mrs. Gunther testified that Mr. Gunther sent the letter himself and that she did not recall whether she knew that he was sending it. See Tr. 1507. The ALJ reviewed the letter and found its tone "inappropriate," "perhaps paranoid," and "vaguely threatening," and concluded that Deltek would "not have been justified in terminating [Mrs. Gunther] based on a letter her husband sent on his own, after [her] termination, the gravamen of which simply was to ask Deltek to refrain from harassing his wife." JA 71.

The ALJ awarded Mrs. Gunther back pay less her post-termination earnings, tuition reimbursement, $10,000 for mental anguish and stress, and attorneys' fees and litigation costs. See JA 71-94. The ALJ rejected the other types of damages that she sought. See JA 72-73, 75-76, 83-89. Regarding front pay,[11] the ALJ noted that reinstatement was the preferred remedy but Mrs. Gunther and Deltek advocated against reinstatement. See JA 80-81. The ALJ rejected Mrs. Gunther's claim for ten years of

[11] The only aspect of the damages award at issue on appeal is the front pay.

front pay. See JA 81. The ALJ noted that Mrs. Gunther was able to obtain a financial analyst position with Deltek despite not having an undergraduate degree in accounting (which was generally required for such a position). See JA 81-82. The ALJ found that Mrs. Gunther was unlikely to obtain an equivalent position without that degree and that, for her to be made whole as Sarbanes-Oxley requires and given her work experience and education, she should be allowed to pursue her studies full-time. See JA 82. Accordingly, the ALJ awarded her four years of front pay (about $300,000), which along with the tuition reimbursement, would allow her to obtain a degree and thus a position similar to the one that she held with Deltek. See id.

c. The Board's Affirmance

On November 26, 2014, the Board issued a Final Decision and Order affirming the ALJ Liability Order and affirming with slight modifications the ALJ Damages Order. See JA 14-18. The Board stated that it "reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo." JA 15 (citing 29 C.F.R. 1980.110(b)). The Board ruled that substantial evidence fully supports the ALJ's determinations that Mrs. Gunther engaged in protected activity and that her protected activity contributed to her employment termination. See id. Regarding causation, the Board noted that: her employment termination followed a leave of absence that resulted

from an investigation into the issues raised by her SEC complaint; Deltek terminated her employment after failing to reach a settlement agreement regarding her OSHA complaint; and her OSHA complaint asserted that she was suffering unlawful retaliation as a result of her SEC complaint. See id. The Board further ruled that the ALJ's finding that Deltek failed to show by clear and convincing evidence that it would have terminated her employment even absent her protected activity was "substantially supported by the record and ... in accordance with law." JA 15-16.

The Board concluded that "[s]ubstantial evidence fully supports" the damages awarded, including front pay. JA 16. The Board noted that the ALJ addressed each ground on which Deltek argued that the after-acquired evidence doctrine bars Mrs. Gunther from recovering damages. See id. The Board concluded that "[s]ubstantial evidence supports the facts found by the ALJ supporting" the determination that the doctrine did not bar recovery, and that the ALJ's legal conclusions were "in accordance with law." Id.

## STANDARD OF REVIEW

The Administrative Procedure Act ("APA") governs this Court's review of the Board's decision. See Welch v. Chao, 536

F.3d 269, 275-76 (4th Cir. 2008).[12] Under the APA, this Court must affirm the Board's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or is "unsupported by substantial evidence." 5 U.S.C. 706(2)(A), (E). This is a deferential standard of review:

> An agency's decision is arbitrary and capricious under the APA if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Defenders of Wildlife v. North Carolina Dep't of Transp., 762 F.3d 374, 396 (4th Cir. 2014) (quoting Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

Although questions of law are reviewed de novo, this Court gives deference to the Board's interpretation of Sarbanes-Oxley. See Jones v. Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 672 (4th Cir. 2015) ("where Congress has explicitly empowered the Department to enforce § 1514A by formal adjudication, we afford deference to the Department's interpretation"); Welch, 536 F.3d at 276 (citing Chevron U.S.A.,

[12] 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).

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)); Platone v. U.S. Dep't of Labor, 548 F.3d 322, 326 (4th Cir. 2008).

Additionally, the APA "compels this Court to uphold the ARB's findings of fact if they are supported by substantial evidence." Platone, 548 F.3d at 326; see also Welch, 536 F.3d at 276. Substantial evidence is more than a scintilla but less than a preponderance, and is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Platone, 548 F.3d at 326 (quoting Consol. Edison Co. of New York, Inc., v. NLRB, 305 U.S. 197, 229 (1938)). Noting that the Board applies a substantial evidence standard when reviewing an ALJ's factual findings, this Court "also accord[s] a degree of deference to the factual findings of the ALJ." Id. "As in all agency cases, [this Court] must be careful not to substitute [its] judgment for that of the ALJ." Harman Mining Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 678 F.3d 305, 310 (4th Cir. 2012).

## SUMMARY OF ARGUMENT

Substantial evidence supports the ALJ's determination, affirmed by the Board, that Mrs. Gunther complained of conduct that she reasonably believed constituted a violation of a law, rule, or regulation identified in Sarbanes-Oxley and that her complaints were a contributing factor in her employment

termination. Mrs. Gunther showed that she actually believed that Deltek was engaging in unlawful conduct, thus satisfying the subjective component of the reasonable belief standard. And she showed that her belief was objectively reasonable evaluated based on the knowledge available to a reasonable person in the same factual circumstances as her. She reasonably relied on Reynolds' apparent expertise in Verizon billing matters to form an objectively reasonable belief that Deltek was engaging in fraudulent conduct. Moreover, she satisfied the "forgiving" contributing factor standard. Her complaint led to a leave of absence, and when the settlement negotiations while she was on leave fell apart, she returned to work and was ostensibly terminated for her conduct on the day that she returned.

To prevail in face of Mrs. Gunther's showings, Deltek must show by clear and convincing evidence that it would have terminated her employment in the absence of her protected activity. Deltek failed to meet this higher burden or even show by a preponderance of the evidence that it would have terminated her employment because of her conduct on the day that she returned from leave. The ALJ's review of the evidence showed that Kortright's characterizations of Mrs. Gunther's conduct were contradicted by the evidence, and that Deltek's asserted reason for terminating her was pretextual. Deltek also failed to meet the clear and convincing evidence standard when arguing

that it would have terminated her employment because of after-acquired evidence. The argument failed because of a lack of evidence and because Mrs. Gunther's surreptitious recording of meetings and taking of Deltek documents were protected activities undertaken in furtherance of her Sarbanes-Oxley claim and thus could not bar her recovery of damages.

Finally, substantial evidence supports the front pay award. She is entitled to "make-whole" relief under Sarbanes-Oxley, and the evidence showed that she would need a college degree to obtain the same position as she had with Deltek. A four-year front pay award would allow Mrs. Gunther that opportunity and make her whole.

## ARGUMENT

### 1. Substantial Evidence Supports the Finding that Mrs. Gunther Engaged in Protected Activity.

Mrs. Gunther was required to show by a preponderance of the evidence that she engaged in protected activity. See 29 C.F.R. 1980.109(a); 49 U.S.C. 42121(b)(2)(B). There is no dispute that Mrs. Gunther submitted complaints to Deltek, the SEC, and OSHA that could constitute protected activity. See JA 170-71, 1539-1543, 1694-1711, 1866-1882. For Sarbanes-Oxley's protections to apply, Mrs. Gunther must have "reasonably believe[d]" that the complained-of conduct constituted a violation of any of the

laws, rules, or regulations identified in the statute. See 18 U.S.C. 1514A(a)(1).[13]

The ALJ correctly stated that the "reasonable belief" standard includes both a subjective component and an objective component. See JA 44-46 (citing Sylvester, 2011 WL 2165854, at *11-12); see also Welch, 536 F.3d at 275 ("employee must show ... both 'a subjective belief and an objectively reasonable belief' that the conduct he complained of constituted a violation of relevant law") (quoting Livingston v. Wyeth, Inc., 520 F.3d 344, 352 (4th Cir. 2008)).

Moreover, the focus is whether the belief was actually held and objectively reasonable, not whether it was correct. "To encourage disclosure, Congress chose statutory language which

[13] In Sylvester v. Paraxel Int'l LLC, No. 07-123, 2011 WL 2165854, at *14-15 (ARB May 25, 2011), the Board rejected the contention that the employee's complaint must "definitively and specifically relate" to one of the laws, rules, or regulations identified in Sarbanes-Oxley to constitute protected activity. Prior to Sylvester and in reliance on Board decisions that preceded Sylvester, this Court applied the "definitively and specifically relate" requirement when determining whether complaints constituted protected activity. See Welch, 536 F.3d at 276-77. Since Sylvester, this Court has recognized that Welch's application of the "definitively and specifically relate" requirement needs to be re-examined in light of Sylvester. See Feldman v. Law Enforcement Assocs. Corp., 752 F.3d 339, 344 n.5 (4th Cir. 2014) (because retaliation claim failed on other grounds, "we need not clarify here where *Welch* stands since *Sylvester* was decided"). This appeal does not require this Court to reach that issue because Deltek challenges the finding that Mrs. Gunther engaged in protected activity only on the ground that she did not reasonably believe that the complained-of conduct constituted a violation of the law.

ensures that 'an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories [in Sarbanes-Oxley] is protected.'" Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009) (alteration added) (quoting Allen v. Admin. Review Bd., U.S. Dep't of Labor, 514 F.3d 468, 477 (5th Cir. 2008)); see also Menendez v. Halliburton, Inc., Nos. 09-002 & 09-003, 2011 WL 4915750, at *8 (ARB Sept. 13, 2011) ("The Board has ruled that an employee's reasonable but mistaken belief in employer misconduct may constitute protected activity."), aff'd sub nom. Halliburton, Inc. v. Admin. Review Bd., U.S. Dep't of Labor, 771 F.3d 254 (5th Cir. 2014).

a. "To satisfy the subjective component of the 'reasonable belief' test, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law." Sylvester, 2011 WL 2165854, at *11 (citing Harp v. Charter Commc'ns, 558 F.3d 722, 723 (7th Cir. 2009)); see also Welch, 536 F.3d at 277 n.4 ("employee must show ... that he actually believed the conduct complained of constituted a violation of pertinent law"). "The legislative history of Sarbanes–Oxley makes clear that its protections were 'intended to include all good faith and reasonable reporting of fraud, and [that] there should be no presumption that reporting is otherwise, absent specific evidence.'" Van Asdale, 577 F.3d at

1002 (alteration in original) (quoting 148 Cong. Rec. S7418–01, S7420 (daily ed. Jul. 26, 2002) (statement of Sen. Leahy)).

Substantial evidence supports the ALJ's finding, affirmed by the Board, that Mrs. Gunther actually believed that the complained-of conduct violated the law. The ALJ found that Mrs. Gunther did not delay in raising her concerns that certain Deltek conduct was unlawful. See JA 47. Mrs. Gunther raised her concerns informally to her supervisors, and she continued to raise concerns even after her supervisors dismissed them and treated her adversely. See Tr. 830-35, 838-840, 850-54, 857-58, 860, 862-63, 866-67. She then raised her concerns formally by submitting a letter complaint to Deltek's audit committee and to the SEC and by submitting a complaint on Deltek's online EthicsPoint program. See JA 170-71; Tr. 145, 259, 331-32. She submitted her complaint "in accordance with the Deltek, Inc. Code of Business Conduct and Ethics and the Sarbanes-Oxley Act of 2002," and she identified several "potentially illegal and unethical activities." See JA 170. Mrs. Gunther's actions, her multiple informal complaints, and the nature and substance of her formal complaint (see JA 170-71), made in the face of perceived ongoing harassment and retaliation, show that she actually believed that Deltek was violating the law. See Gilbert v. Bauer's Worldwide Transp., No. 11-019, 2012 WL 6066517, at *5 (ARB Nov. 28, 2012) (employee who repeatedly

raised concerns for months and then filed a complaint with a regulatory agency satisfied subjective component of reasonable belief standard).

Deltek makes two arguments that Mrs. Gunther lacked a subjective belief that Deltek was violating the law. First, Deltek accuses Mrs. Gunther of having ulterior motives in making her complaints. Deltek cites derogatory instant messages (see JA 213-231) from Mrs. Gunther as demonstrating a lack of respect for Deltek and Robinson — leading Deltek to conclude that her real motive was "to extort money from Deltek under the guise of Sarbanes-Oxley whistleblowing." Deltek Br., 42-45; see also id. at 46 (suggesting that Mrs. Gunther was scheming "to hit the lawsuit lottery"). However, even assuming that the messages demonstrate a lack of respect, the messages make clear that any lack of respect arises from the perceived unlawful conduct witnessed by Mrs. Gunther and the perceived retaliatory treatment that she experienced. The messages contain no admissions that Mrs. Gunther did not believe that Deltek's conduct was unlawful,[14] and they do not undermine the substantial

[14] Cf. Gale v. Dep't of Labor, 384 Fed. App'x 926, 929-930 (11th Cir. 2010) (employee's admissions, particularly admission that he did not believe that his employer was engaging in illegal or fraudulent activities, were substantial evidence in support of finding that he did not actually believe that his employer was violating the law).

evidence that she actually believed that Deltek's conduct was unlawful.

Second, Deltek argues that Mrs. Gunther could not have in good faith believed that Deltek was engaging in unlawful conduct because Deltek was not engaging in unlawful conduct. See Deltek Br., 43-45. As an initial matter, the focus is whether Mrs. Gunther's belief was reasonable, and her reasonable belief is protected even if mistaken. See pgs. 33-34, supra (citing cases). In any event, the ALJ recognized that Mrs. Gunther's beliefs "were in some ways misguided and unreasonable." JA 47. The ALJ accounted for this, weighed this against Mrs. Gunther's testimony and the evidence in the record, and found it "clear" that she actually believed that Deltek was violating the law. JA 47-48. Deltek's argument simply does not undermine the substantial evidence discussed above supporting the finding that Mrs. Gunther actually believed, whether mistaken or not, that Deltek was violating the law.

b. "The second element of the 'reasonable belief' standard, the objective component, 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" Sylvester, 2011 WL 2165854, at *12 (quoting Harp, 558 F.3d at 723); see also Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor, 717 F.3d 1121, 1132

(10th Cir. 2013). An employee's "factual circumstances" include what others at the employer told the employee, and an employee's belief can become objectively reasonable based on what the others told her. See Mahony v. Keyspan Corp., No. 04 CV 554 SJ, 2007 WL 805813, at *1-2, 6 (E.D.N.Y. Mar. 12, 2007) (it was reasonable for employee, who had taken only a few accounting courses, to trust the judgment and expertise of his company's director of accounting research in forming his belief that unlawful conduct was occurring); Parexel Int'l Corp. v. Feliciano, No. 04-cv-3798, 2008 WL 5101642, at *3 (E.D. Pa. Dec. 3, 2008) (evidence supporting finding that belief of employee, who was not a legal expert, was objectively reasonable included what employer's representative told him about illegality of the conduct at issue).

The ALJ suggested that, had Mrs. Gunther "been acting solely upon her own limited background," her belief that Deltek was engaging in unlawful conduct may not have been objectively reasonable. JA 48. However, the ALJ found that her "extensive dealings" with Reynolds made her belief objectively reasonable. Id. Substantial evidence supports this finding. Reynolds "had extensive experience in Verizon's invoicing." Id. Reynolds was employed by Verizon prior to Deltek and said that he had twenty-two years in the business and had run multi-million dollar programs. See JA 1456; Tr. 419-423. His role at Deltek was "to

manage the partner relationship with Verizon and the contract and other telecommunications providers that worked under the Verizon umbrella." Tr. 422-25; see also Tr. 2166. His role included reviewing Verizon invoices, and he developed a framework to evaluate potential billing disputes and worked with Verizon to resolve any disputes. See Tr. 425-28; 434-36; 2166. Reynolds concluded based on his review of the invoices that there were disputes raised by Deltek that were not correct or valid. See Tr. 569-571. He raised his concerns with his supervisors, see JA 1454-1460, and he submitted a formal complaint to Deltek's audit committee and the SEC that was similar to Mrs. Gunther's complaint, see JA 259. The ALJ found Reynolds to be a "credible" and "convincing" witness on these issues even if his credibility was "somewhat undermined" by other issues. JA 48.[15]

Reynolds discussed his concerns regarding the disputed invoices with Mrs. Gunther, and they reviewed them together. See Tr. 566-573, 1413-14. Moreover, Mrs. Gunther contributed to the analysis of the invoices. Reynolds said that she was "a god send" when it came to "making sense" of the invoices, brought

[15] SSA Cooper, LLC v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 565 Fed. App'x 253, 255 (4th Cir. 2014) (per curiam) (This Court "will not disregard the ALJ's factual findings merely because other inferences might have been more reasonable, and deference is accorded to the ALJ's inferences and credibility assessments.") (citing Ceres Marine Terminals, Inc. v. Green, 656 F.3d 235, 239 (4th Cir. 2011)).

"an extreme amount of clarity to the situation," and found that what Deltek expected to pay and what Verizon expected to be paid were "clearly not in alignment." JA 1454. Mrs. Gunther's belief that Deltek engaged in a pattern of abusing the process of disputing Verizon invoices was based on her work and discussions with Reynolds, see Tr. 1413-14, and the ALJ found that, given "her dealings with Reynolds," her belief was objectively reasonable, see JA 48.

Deltek argues that, because Mrs. Gunther was new to Deltek and "had little relevant work experience and no relevant training," her belief could not have been objectively reasonable. Deltek Br., 47 (citing Day v. Staples, 555 F.3d 42 (1st Cir. 2009), aff'g, 573 F. Supp.2d 333 (D. Mass. 2008)). In Day, however, unlike here, there was no argument by the employee that his interactions with a colleague with expertise bolstered the reasonableness of his belief that the company's conduct was unlawful. Thus, the employee in Day was in a different situation than Mrs. Gunther here, yet it is the "same factual circumstances" and "same training and experience" as Mrs. Gunther that matter. See Sylvester, 2011 WL 2165854, at *12. If anything, Day supports the ALJ's finding. The district court in Day approvingly cited Mahony (where an employee with very limited accounting experience reasonably trusted the judgment and expertise of his company's director of accounting research

to ground his belief that the company was fraudulently reporting financial information) as an example of an employee whose belief was objectively reasonable. See Day, 573 F. Supp.2d at 346 (citing Mahony, 2007 WL 805813, at *1). Thus, the district court in Day indicated that an employee in Mrs. Gunther's circumstances, as compared to the circumstances of the employee in Day, could form an objectively reasonable belief.

Deltek further argues that there was not substantial evidence that Deltek was engaged in a "massive fraud." See Deltek Br., 47-49.[16] Although Mrs. Gunther used that term to characterize Deltek's conduct, the inquiry for purposes of Sarbanes-Oxley is whether she had an objectively reasonable belief that Deltek violated any of the identified laws, rules, or regulations — whether or not the violation was massive. See 18 U.S.C. 1514A(a)(1). Moreover, Deltek's effort to dismiss the conduct raised by Mrs. Gunther as a billing discrepancy, see Deltek Br., 49 (citing Platone, 548 F.3d at 327), is unpersuasive. In Platone, the billing discrepancy was insufficient because the employee did not show that the discrepancy "definitively and specifically" related to the laws identified in Sarbanes-Oxley. 548 F.3d at 327. However, the

[16] Deltek also asserts that it was "mystifying" for the ALJ to credit Reynolds' testimony, but as Deltek correctly recognizes, determining the credibility of witnesses is the ALJ's "province." Deltek Br., 48; see also footnote 15, supra.

Board has since rejected the "definitively and specifically" standard, see footnote 13, supra, and Mrs. Gunther specifically related the Verizon billing issues to the laws identified in Sarbanes-Oxley, see JA 170-71. For the reasons discussed above, substantial evidence supports the finding that Mrs. Gunther's belief was objectively reasonable.

2. Substantial Evidence Supports the Finding that Mrs. Gunther's Protected Activity Contributed to Her Employment Termination.

Mrs. Gunther was required to show by a preponderance of the evidence that her protected activity was "a contributing factor" in her employment termination. 29 C.F.R. 1980.109(a); 49 U.S.C. 42121(b)(2)(B). A contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. See Feldman, 752 F.3d at 348 (citing cases). The contributing factor standard is "'broad and forgiving.'" Id. (quoting Lockheed Martin, 717 F.3d at 1136). The standard "'is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a significant, motivating, substantial, or predominant factor in a personnel action.'" Id. (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). The standard "is much more protective of plaintiff-employees than the *McDonnell Douglas* framework"

applied in Title VII and other cases. Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152, 158 (3d Cir. 2013).

The ALJ's finding, affirmed by the Board, that Mrs. Gunther showed that her complaints were a contributing factor in her employment termination is supported by substantial evidence. Indeed, the ALJ described in detail how her complaint to Deltek's audit committee and the SEC and her complaint to OSHA were causally connected to her employment termination. See JA 52. As a result of the SEC complaint and Deltek's investigation, Mrs. Gunther experienced harassment in the workplace, developed stress, and reached an agreement with Deltek to take a temporary leave of absence during the investigation of her complaint (she could return to work upon 24 hours of notice). See id.; see also pgs. 11-13, supra. Subsequent settlement negotiations began and failed, Deltek stopped paying her, she returned to work consistent with her leave agreement, and her employment was terminated ostensibly for her conduct on the day that she returned. See JA 52; see also pgs. 13-16, supra. As the ALJ succinctly explained, "[h]ad neither complaint been filed, she would not have been offered the medical leave or entered into the settlement negotiations, she would not have returned to work on the day that she did, and she would not have been terminated based upon her actions at the time she returned." JA 52. Applying the "forgiving"

contributing factor standard, there is substantial evidence that her protected activity caused, at least in some way, her employment termination.

Deltek argues that Mrs. Gunther's return to work "was not the inevitable product of actions by Deltek ... but was calculatedly orchestrated" by her. Deltek's Br., 28. This argument misses the point because the applicable standard is whether her protected activity contributed to her employment termination. In any event, the evidence showed that Mrs. Gunther returned to work because she had ended the settlement negotiations (which she had every right to do whether wise or not) and Deltek had stopped paying her. She returned after giving 24 hours of notice as provided in her leave agreement with Deltek (see JA 1715), and the ALJ found that she genuinely wanted to return to work: "Although the inference could be drawn from her actions and the use of a recorder and video camera that she did not expect to be permitted to return to work and wanted to document it, that does not mean that she did not have the desire to work or that she was acting in bad faith." JA 52.

Deltek further argues that Mrs. Gunther's conduct on the day that she returned to work was an "intervening event" that severed any causal connection between her protected activity and employment termination. See Deltek's Br., 29-30 (relying on Feldman). However, neither the record evidence nor Feldman

support this argument. First, contrary to Deltek's argument, it was not Mrs. Gunther who triggered the timing of her termination. The ALJ rejected the assertion that Mrs. Gunther did not want to return to work and was acting in bad faith when she returned. See JA 52. Indeed, Mrs. Gunther testified that she returned to work because she had ended settlement negotiations and Deltek was no longer paying her. See Tr. 1057. Second, in Feldman, there was a gap of "roughly twenty months" between the employee's "most significant protected activity" and his employment termination, 352 F.3d at 348-49, as opposed to five to six months for Mrs. Gunther. Moreover, the employee in Feldman admitted that he had thrown his employer's directors "under the bus" in a meeting with shareholders rather than (as the employee was supposed to) convince the shareholders not to sue the employer. Id. at 349. The Feldman employee's serious misconduct was not connected to "his long-past protected activities" and thus "undoubtedly constitute[d] a legitimate intervening event." Id. However, as explained supra, the ALJ found that Mrs. Gunther's protected activities contributed to Deltek's ostensible basis for terminating her employment; no event unconnected to her protected activity intervened and caused her termination.

For these reasons, substantial evidence supports the finding that Mrs. Gunther's protected activity was a contributing factor in her employment termination.

3. Deltek Failed to Show by Clear and Convincing Evidence that It Would Have Terminated Mrs. Gunther's Employment in the Absence of Protected Activity.

Once Mrs. Gunther showed that her protected activity was a contributing factor in her employment termination, Deltek was required to show by clear and convincing evidence that it would have terminated her employment even in the absence of her protected activity. 29 C.F.R. 1980.109(b); 49 U.S.C. 42121(b)(2)(B); Feldman, 752 F.3d at 345. "To meet the burden, the employer must show that 'the truth of its factual contentions are highly probable.'" Araujo, 708 F.3d at 159 (quoting Colorado v. New Mexico, 467 U.S. 310, 316 (1984)); see also Speegle v. Stone & Webster Constr., Inc., No. 13-074, 2014 WL 1870933, at *6 (ARB Apr. 25, 2014) ("The burden of proof under the 'clear and convincing' standard is more rigorous than the 'preponderance of the evidence' standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.").

Substantial evidence supports the ALJ's finding that Deltek's asserted basis for terminating Mrs. Gunther's employment was pretextual, and Deltek thus fell far short of meeting its burden. Deltek argues that Kortright's letter to

Mrs. Gunther sets forth "quite clearly" the reasons for terminating her employment. Deltek Br., 32.[17] However, Deltek must do more than clearly articulate a non-retaliatory basis for terminating her employment; it must prove by clear and convincing evidence that the articulated basis would have been the actual basis for her termination absent the protected whistleblowing. Substantial evidence supports the ALJ's ruling, affirmed by the Board, that Deltek failed to provide such evidence.

First, Kortright's termination letter asserted that Mrs. Gunther was "confrontational with Mr. Ahmad" and "persisted in challenging him." JA 184. This characterization is contrary to the ALJ's factual and credibility findings. See JA 52. The ALJ listened to the recording of the meeting "more than once," disagreed with Kortright's characterization, and found that, "[a]t all times, [Mrs. Gunther] was calm, quiet, and (although she repeated herself) polite." Id. In sum, "[t]he statements Kortright made in the termination letter were not supported by the tape; indeed, they were contradicted by the tape." JA 53. Second, Kortright asserted in her letter that Mr. Gunther and his Hummer SUV were parked in a way that made it difficult for

[17] Deltek did not argue that it terminated Mrs. Gunther's employment because she returned to work; instead, it asserted that it terminated her employment because of her behavior on the day that she returned. See JA 52; see also Tr. 179-180.

others to walk or drive past. See JA 184. However, the ALJ found that "[t]here was no testimony or other evidence that the Hummer was *actually* blocking traffic or that any personnel were hampered in their efforts to walk or drive past [Mrs. Gunther] and the Hummer." JA 52-53 (emphasis added). Third, Kortright asserted that Mrs. Gunther did not act "in good faith" and that her desire to return to work "was not genuine." JA 185. The ALJ found, however, that the evidence did not support that conclusion and that Mrs. Gunther's expectation that she would not be permitted to return to work and her recording of her return did "not mean that she did not have the desire to work or ... was acting in bad faith." JA 52.

Fourth, Kortright testified that Mrs. Gunther's conduct made her concerned "over the safety of the rest of the employees at the company." Tr. 179-180. However, the only testimony in support of this assertion was Parker's remark to Kortright that she was scared; the ALJ noted that Parker did not testify and that it was unclear what Parker meant by the remark. See JA 53. Moreover, there was no evidence that "other employees were in actual danger" or that Mrs. Gunther ever took any inappropriate or threatening actions toward other employees. JA 53. Kortright did not assert any other basis (such as a violation of company policy or other offense) for terminating Mrs. Gunther's employment. See id.; see also JA 184-85; Tr. 179-180. The ALJ

correctly concluded that Deltek failed to meet the clear and convincing evidence standard and that, on the contrary, Deltek's asserted basis for terminating Mrs. Gunther's employment was pretextual. See JA 52-53.

Instead of identifying the clear and convincing evidence that it would have terminated Mrs. Gunther's employment even absent her protected activity, Deltek recites Kortright's characterizations of Mrs. Gunther's conduct on the day that she returned to work (which lack an evidentiary grounding, as explained supra) and argues that the ALJ improperly acted as a "kind of super-personnel department" that second-guessed Deltek's termination decision. See Deltek's Br. 31-33. However, the ALJ did nothing improper or inconsistent with Sarbanes-Oxley or this Court's decisions. This Court's caution against acting as a "kind of super-personnel department" means that courts in retaliation cases should not decide whether the employer's reason for termination "'was wise, fair, or even correct'" if the reason is "'not forbidden by law.'" DeJarnette v. Corning, Inc., 133 F.3d 293, 299 (4th Cir. 1998) (quoting Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410-11 (7th Cir. 1997)). As this Court recognized in DeJarnette, courts must still, of course, evaluate the reason for termination to decide if "'it truly was the reason'" notwithstanding the caution against acting as a "kind of super-

personnel department." See id. at 299 (quoting Giannopoulos, 109 F.3d at 410-11).

Here, the ALJ did not second-guess whether Deltek's asserted reason for terminating Mrs. Gunther's employment was sufficient to justify the termination.[18] Instead, the ALJ evaluated the truth of that reason based on the evidence. Indeed, the ALJ fulfilled its statutory duty to determine whether Deltek showed by clear and convincing evidence that it would have terminated Mrs. Gunther's employment absent her protected activity. See 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(B); see also 29 C.F.R. 1980.109(b). Consistent with that duty, the ALJ evaluated the sufficiency of the evidence and the credibility of the witnesses. In other words, the ALJ determined whether Deltek showed that its asserted reason for terminating Mrs. Gunther's employment truly would have caused her termination absent her protected whistleblowing. The ALJ found that Deltek did not make that showing by clear and convincing evidence as required and that the evidence showed that Deltek's asserted reason was pretextual. In sum, the ALJ

[18] The ALJ even recognized that there "may have been legitimate reasons" for Deltek to terminate Mrs. Gunther, such as difficulty performing the work and layoffs. JA 53. Deltek did not offer those grounds as the basis for termination, and the ALJ appropriately focused on evaluating the truth of the grounds that Deltek did offer. See JA 52-53.

focused on the truth of Deltek's asserted reason for termination and did not overstep any bounds.

4. Deltek Failed to Show by Clear and Convincing Evidence that It Would Have Terminated Mrs. Gunther's Employment Because of After-Acquired Evidence.

The ALJ correctly recognized that the after-acquired evidence doctrine may apply in Sarbanes-Oxley cases:

> Under this doctrine, reinstatement or front pay is inappropriate if an employer discovers evidence of misconduct after it has wrongfully terminated an employee if the misconduct, standing alone, would have justified terminating the employee had the employer known of it at the time of discharge.

JA 65 (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995)).

To successfully invoke the doctrine, an employer must show by clear and convincing evidence that it would have terminated the employee when it discovered the misconduct. Indeed, the statutory text requires employers in Sarbanes-Oxley cases to meet this higher burden of proof to avoid liability once an employee has shown that her protected activity contributed to her employment termination. See 49 U.S.C. 42121(b)(2)(B)(ii), (iv) ("Relief may not be ordered ... if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."); see also 29 C.F.R. 1980.109(b). The clear and convincing standard applies regardless whether the

employer is relying on the basis for employment termination asserted at the time or on misconduct discovered later to prove that it would have terminated the employee even in the absence of the protected activity. See Ameristar Airways, Inc. v. Admin. Review Bd., U.S. Dep't of Labor, 771 F.3d 268, 273 (5th Cir. 2014) (clear and convincing standard "applies equally in all instances in which an employer is seeking to avoid providing relief, regardless of whether the employer is relying on pre-termination evidence or after-acquired evidence"). The ALJ's finding, affirmed by the Board, that Deltek failed to prove the after-acquired evidence defense is supported by substantial evidence.[19]

a. Deltek argued that Mrs. Gunther would have been terminated for surreptitiously recording meetings. See Deltek Br., 37-38. However, Deltek did not have "a specific policy" against such recordings, the recordings were not illegal, and Deltek offered no evidence to support its claim other than Schwiesow's bald assertion that an employee "absolutely" would be terminated for such recordings. See JA 66; Tr. 359, 379. Consistent with the evidence that the recordings were made after

[19] When analyzing Deltek's after-acquired evidence defense, the ALJ did not state whether a preponderance of evidence or clear and convincing evidence standard applied. To the extent that the ALJ applied the less burdensome preponderance of the evidence standard, Deltek was not harmed by the application of a more favorable standard.

Mrs. Gunther submitted her complaint and Schwiesow's direction to gather relevant evidence, the ALJ found that the recordings were "made in furtherance of her whistleblower claims," revealed that Deltek's reasons for terminating her employment were pretextual, and therefore constituted protected activity. JA 66. Substantial evidence supports the finding that Deltek failed to show by clear and convincing evidence that it would have terminated Mrs. Gunther's employment because of the recordings alone.

Moreover, the ALJ correctly identified the important policy reasons for concluding that such recordings, in appropriate circumstances, are protected activity. The ALJ noted that the Board has ruled that recordings to gather evidence of activities protected under the whistleblower statutes are themselves protected activities as long as the recordings are not indiscriminate or excessive (which did not happen here, as the ALJ found that Mrs. Gunther's recordings were in furtherance of her whistleblower claims). See JA 66 (citing cases); see also Benjamin v. Citationshares Mgmt., L.L.C., No. 12-029, 2013 WL 6354828, at *5-8 (ARB Nov. 5, 2013) (employee's attempt to record meeting was protected activity). Deltek's reliance on the Secretary's brief in Galinsky v. U.S. Department of Labor, Administrative Review Board is misplaced. In that case, the employee never argued before the ALJ that his secret recordings

were protected activity and raised the argument belatedly on appeal. See id. (2d Cir. No. 12-5133), Doc No. 108, at 34-35. Thus, the Secretary argued and the Board ruled that the employer showed by clear and convincing evidence that the employee was terminated for secret recordings and other misconduct without considering whether those recordings could be protected activity. See id.

b. For similar reasons, the ALJ correctly ruled that Mrs. Gunther's forwarding of Deltek documents relevant to her Sarbanes-Oxley claim to an email address that she shared with her husband was protected activity and therefore could not be a basis for terminating her employment. See JA 66-70. The ALJ found that Mrs. Gunther was directed by Schwiesow to collect relevant documents, did not gather documents indiscriminately or for ulterior purposes, "was reasonably concerned about their potential destruction," reasonably forwarded to her email address only documents relevant to her claim, and did not share the documents with Mr. Gunther or others. JA 67-69. Thus, the ALJ was correct to conclude that it was "clear" that Mrs. Gunther forwarded the documents solely to support her Sarbanes-Oxley claim. JA 69.

In light of these particular facts, the ALJ correctly ruled that "her forwarding of documents in furtherance of her whistleblower activities [was] protected activity that cannot

form the basis for [termination], notwithstanding the breach of any confidentiality agreement." JA 67. The ALJ relied on "strong policy reasons," noting that Sarbanes-Oxley's protections "would be ineffectual" if companies "were able to avoid liability by pointing to a confidentiality agreement when a whistleblower took documents with the express purpose of preventing their destruction." JA 70. Moreover, the ALJ narrowly confined the ruling to the particular facts of this case, recognizing that "an indiscriminate misappropriation of proprietary documents would not be protected." Id.

This ruling is consistent with Vannoy v. Celanese Corp., No. 09-118, 2011 WL 4915757, at *12-13 (ARB Sept. 28, 2011), in which the Board ruled that the Sarbanes-Oxley whistleblower's emailing confidential information to his personal account could be protected activity even if he violated company policy. And the cases relied on by Deltek are distinguishable. For example, the scope of the documents taken by the employee in JDS Uniphase Corp. v. Jennings was broad, and the employee did not show that he had been directed to preserve documents or that there was a risk that the documents would be destroyed. See 473 F. Supp.2d 697, 701, 704-05 (E.D. Va. 2007). And although the employee asserted a Sarbanes-Oxley whistleblower claim, the court focused more on whether a general California public policy in favor of whistleblowing protected the taking of confidential documents.

See id. at 701-03. The court did not examine the policies underlying Sarbanes-Oxley with the same detail as the Board in Vannoy or the ALJ here.[20]

In sum, the ALJ correctly ruled that a "public policy exception is warranted" under Sarbanes-Oxley in these circumstances to justify any breach by Mrs. Gunther of her confidentiality obligations to Deltek, especially given that she "took these documents for the sole purpose of preserving evidence relevant to her whistleblower complaint and alleged violations of [Sarbanes-Oxley]." JA 70.

c. Deltek failed to show any actual evidence that it would have terminated Mrs. Gunther for her allegedly derogatory instant messages. See Deltek Br., 37. For example, Deltek did

[20] Deltek also relies on Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047 (9th Cir. 2011), a False Claims Act ("FCA") case. The court acknowledged that there was "some merit" to a public policy exception to the enforcement of confidentiality agreements that "would allow relators to disclose confidential information in furtherance of an FCA action." Id. at 1061-62. However, the court stated that "we need not decide whether to adopt it here" and that even if it were "to adopt such an exception, it would not cover" the "vast and indiscriminate appropriation" of documents that occurred in that case. Id. at 1062. Indeed, courts in FCA cases have refused for public policy reasons to enforce confidentiality agreements against whistleblowers. See U.S. ex rel. Head v. Kane Co., 668 F. Supp.2d 146, 152 (D.D.C. 2009) (counterclaim against FCA whistleblower for violating confidentiality agreement "must be dismissed as contrary to public policy"); U.S. v. Cancer Treatment Ctrs. of Am., 350 F. Supp.2d 765, 773 (N.D. Ill. 2004) (confidentiality agreement cannot trump the FCA's "strong policy of protecting whistleblowers who report fraud against the government").

not argue that it has terminated others for such messages or that no other Deltek employee has ever sent such messages. See id. Given this failure of proof, the ALJ was correct to conclude that the messages were not of such severity that Deltek would have terminated Mrs. Gunther's employment for them alone. See JA 70 (citing McKennon, 513 U.S. at 362-63). Substantial evidence supports the finding that Deltek failed to meet its burden of showing clear and convincing evidence on this point.

d. Likewise, Deltek failed to show by clear and convincing evidence that it would have terminated Mrs. Gunther's employment because of her letter to Kortright or Mr. Gunther's letter to Deltek's CEO following her termination. Deltek identified as evidence only Schwiesow's characterization of Mrs. Gunther's letter as "'very threatening'" and "'very aggressive'" and Mr. Gunther's letter as reflecting "'a level of paranoia that's extremely concerning.'" Deltek Br. 39 (quoting Tr. 348-350, 352). Schwiesow's characterizations of the letters do not satisfy the clear and convincing evidence standard. The ALJ reviewed Mrs. Gunther's letter, concluded that it was neither "threatening or aggressive," and found its substance reasonable given that it was responding to Kortright's termination letter that mischaracterized her conduct. JA 71. The ALJ also reviewed Mr. Gunther's letter and, although its tone was inappropriate, found that its purpose "simply was to ask Deltek

to refrain from harassing his wife," and that it was not of such severity that Deltek would have terminated Mrs. Gunther's employment for her husband's letter. Id.

For these reasons, Deltek's after-acquired evidence arguments fail and do not bar Mrs. Gunther from recovering damages.

5. Substantial Evidence Supports the Front Pay Award.

Sarbanes-Oxley provides that a prevailing employee "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. 1514A(c)(1). Although reinstatement is the "presumptive remedy," "alternative remedies" such as front pay may be preferable in certain cases. Hobby v. Georgia Power Co., Nos. 98-166 & 98-169, 2001 WL 168898, at *6 (ARB Feb. 9, 2001); see also Jones v. Southpeak Interactive Corp. of Delaware, 986 F. Supp.2d 680, 684-85 (E.D. Va. 2013) (front pay is available under Sarbanes-Oxley). For example, front pay may be preferable to reinstatement when an amicable working relationship between the employer and the terminated employee is not possible. See Hobby, 2001 WL 168898, at *6. Here, both Deltek and Mrs. Gunther advocated against reinstatement. See JA 81. Based on the "apparent animosity between the parties" and "their

agreement that reinstatement is not feasible," the ALJ determined that reinstatement would be inappropriate. Id.[21]

"Front pay is designed to place the complainant 'in the identical financial position that he would have occupied had he been reinstated.'" Bryant v. Mendenhall Acquisition Corp., No. 04-014, 2005 WL 1542547, at *6 (ARB Jun. 30, 2005) (quoting Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1231 (7th Cir. 1995)). Front pay awards are of course "often speculative," but they "cannot be unduly so." Id. at *7. The complainant must provide the "'essential data necessary to calculate a reasonably certain front pay award.'" Id. (quoting McKnight v. Gen. Motors Corp., 973 F.2d 1366, 1372 (4th Cir. 1992)). However, there is "no precise formula" to determine whether to award front pay or the amount. Loveless v. John's Ford, Inc., 232 Fed. App'x 229, 238 (4th Cir. 2007) (citing Duke v. Uniroyal Inc., 928 F.2d 1413, 1424 (4th Cir. 1991)). Because of an "infinite variety of factual circumstances," front pay awards "rest in the discretion of the court in shaping the appropriate remedy." Duke, 928 F.2d at 1424.

Deltek objects to the four-year front pay award to Mrs. Gunther. See Deltek Br., 49-52. Deltek argues that the ALJ's reasoning for awarding front pay "makes absolutely no sense,"

[21] The determination that reinstatement was inappropriate is not at issue on appeal.

lacks any "evidentiary or logical basis," and is not supported by substantial evidence. See id. at 51-52. However, Deltek fails to explain why with any specificity. After presenting its view of the legal standard for awarding front pay, Deltek's few sentences of argument as to why the ALJ erred in awarding front pay *in this case* are conclusory and insufficient to engage the argument on appeal. See Lockheed Martin, 717 F.3d at 1138-39 (court would be justified in disregarding the argument altogether when employer devoted "all of four sentences to its argument that the relief awarded is unsupported by substantial evidence"); Eriline Co. S.A. v. Johnson, 440 F.3d 648, 653 n.7 (4th Cir. 2006) (conclusory assertion of error "is insufficient to raise on appeal any merits-based challenge to the district court's ruling") (citing Fed. R. App. Proc. 28(a)(9)(A)).

In any event, the front pay award is supported by substantial evidence. Mrs. Gunther did not have a college degree, and she worked in administrative and support positions for about ten years prior to Deltek. See Tr. 757-761, 771-72, 775. Her lack of a college degree prevented her from securing a job in a finance department — the job that she desired:

> I could not get a position [at my prior employer] in the finance department because I needed a college degree. So I really wanted that opportunity ... And I couldn't move into the finance department without a degree.

Tr. 775. Based on this testimony, the ALJ found that "[t]he only reason that she was able to obtain employment as a financial analyst with [Deltek] in the first place was that [Deltek] was willing to give her a chance that her employer at the time was unwilling to give her absent a degree in accounting." JA 81-82. The ALJ further found based on the testimony that Mrs. Gunther "is now unlikely to obtain employment in her chosen field without the degree, as she did not work for [Deltek] for a sufficient period of time to obtain on-the-job qualifications." JA 82.[22]

For these reasons and consistent with Mrs. Gunther's entitlement "to all relief necessary to make [her] whole," 18 U.S.C. 1514A(c)(1), the ALJ concluded that Mrs. Gunther "will need to be provided with the opportunity of completing her undergraduate degree." JA 82. The ALJ found that it was reasonable to expect that Mrs. Gunther "can recover her professional status after four years" (the normal time required to obtain the degree), and that once she obtained the degree, "it is reasonable to expect that she should be able to obtain a position similar to [her Deltek position]." Id.

[22] Following her employment termination, Mrs. Gunther was unable to secure a financial analyst position and found an administrative support position similar to her position prior to Deltek. See JA 81.

Thus, the four-year front pay award is supported by substantial evidence. The award is supported by the particular circumstances of Mrs. Gunther's employment with Deltek and puts her in the same position that she would have occupied had she not been terminated (i.e., employed as a financial analyst). See, e.g., Michaud v. BSP Transport, Inc., No. 97-113, 1997 WL 626849, at *5 (ARB Oct. 9, 1997) (affirming two-year front pay award based on medical evidence submitted that employee "would take two years to rehabilitate ... to the point that he could work again"), vacated on other grounds, 1998 WL 917112 (ARB Dec. 21, 1998); Doyle v. Hydro Nuclear Servs., No. 89-ERA-22, 1996 WL 518592, at *6 (ARB Sept. 6, 1996) (affirming five-year front pay award based on showing that it would take about five years before employee would be employable again), vacated on other grounds sub nom. Doyle v. Sec'y of Labor, 285 F.3d 243 (3d Cir. 2002).

Finally, the ALJ's rejection of the ten-year front pay award sought by Mrs. Gunther further demonstrates that the four-year award was the product of reasoned consideration grounded in evidence particular to her. Mrs. Gunther relied on Hagman v. Washington Mut. Bank, Inc., in which an ALJ awarded ten years of

front pay. See JA 81.[23] The ALJ noted that the Hagman decision was "clearly well reasoned and persuasive." Id. However, the ALJ compared the circumstances of the employee in Hagman to Mrs. Gunther's circumstances, found them to be "very different," and rejected her request for ten years of front pay. Id.

For these reasons, this Court should reject Deltek's argument against the front pay award.

[23] The ALJ's decision in Hagman was appealed to the Board, but the appeal was dismissed before it was briefed. See No. 07-039, 2007 WL 5650177 (ARB May 23, 2007).

## CONCLUSION

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

Respectfully submitted,

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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 Mrs. Gunther is clearly supported by substantial evidence and can be reviewed by this Court based on the parties' briefs and the materials in the Joint Appendix.

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor:

(1) was prepared in a monospaced typeface using Microsoft Office Word 2003 utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 13,978 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor was served this 11th day of May, 2015, via this Court's ECF system and by pre-paid overnight delivery, on each of the following:

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