IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-9524

LOCKHEED MARTIN CORP.,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

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

BRIEF FOR THE ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR

ORAL ARGUMENT
NOT REQUESTED

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There are no prior appeals in this matter or pending related appeals.

STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in any oral argument scheduled by this Court, she does not believe that oral argument is necessary in this case because the issues presented herein may be resolved based on the briefs submitted.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," "SOX," or "Act"), 18 U.S.C. 1514A; see 29 C.F.R. Part 1980.[1] The Secretary of Labor ("Secretary") had subject matter jurisdiction

[1] The Secretary has delegated authority to the Administrative Review Board ("ARB" or "Board") to issue final agency decisions under the employee protection provision of Sarbanes-Oxley. *See* Secretary of Labor's Order No. 04-2010 (Sept. 2, 2010), 75 FR 55355 (Sept. 10, 2010); *see also* 29 C.F.R. 1980.110(a).

over this case under Section 806 of Sarbanes-Oxley based on the complaint filed by Andrea Brown against her former employer, Lockheed Martin Corporation ("Lockheed"), on January 25, 2008, alleging that Lockheed violated the Act when she was constructively discharged. On February 28, 2011, the ARB issued a Final Decision and Order adopting the Administrative Law Judge's ("ALJ") Recommended Decision and Order.

On March 30, 2011, Lockheed filed with this Court a timely Petition for Review of the ARB's Final Decision and Order. Since the alleged violation occurred in Colorado, this Court has jurisdiction to review the ARB's final order. *See* 18 U.S.C. 1514A(b)(2)(A) (review of final order of the Secretary may be obtained in the court of appeals for the circuit in which the complainant resided on the date of the alleged violation); 49 U.S.C. 42121(b)(4) (same); *see also* 29 C.F.R. 1980.112(a).[2]

STATEMENT OF THE ISSUES

(1) Whether the ALJ and the Board properly found that Brown engaged in SOX-protected activity based on her reports of conduct she reasonably believed violated the mail and wire fraud statutes.

[2] Proceedings under Sarbanes-Oxley are governed by the rules and procedures, as well as the burdens of proof, 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* 18 U.S.C. 1514A(b)(2)(A), (C).

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

(3) Whether substantial evidence supports the determination of the ALJ, as affirmed by the Board, that Brown's protected activity was a contributing factor in Lockheed's constructive discharge of Brown.

(4) Whether substantial evidence supports the ALJ's damages award, including reinstatement, back pay plus interest, and compensatory damages, as affirmed by the Board.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

Sarbanes-Oxley prohibits a covered entity from retaliating against an employee who provides information to his employer, Congress, or the federal government regarding conduct that the employee reasonably believes violates 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 1343 (wire, radio, or television fraud), 18 U.S.C. 1344 (bank fraud), 18 U.S.C. 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any other federal law related to fraud against shareholders. *See* 18 U.S.C. 1514A; *see also* 29 C.F.R. 1980.102.

On January 25, 2008, Brown filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor, alleging that Lockheed retaliated against

her for her "whistleblowing" activities in violation of the employee protection provision of Sarbanes-Oxley.[3] *See* Compl. Ex. 41.[4] On February 6, 2008, Brown supplemented her complaint to allege that Lockheed constructively discharged her on February 4, 2008. Compl. Ex. 42. OSHA investigated and issued findings dismissing Brown's complaint on May 27, 2008. CL 1.

Brown objected to the Secretary's Findings and requested a hearing before the Office of Administrative Law Judges ("OALJ") on the merits of her whistleblower claim. CL 2. Following discovery, a two-day hearing took place in Denver, Colorado on January 12-13, 2009. CL 17, 19. On January 15, 2010, ALJ Russell D. Pulver issued a Recommended Decision and Order ("RDO") in which he concluded that Brown engaged in protected activity; Lockheed knew of the protected activity; Brown suffered an adverse employment action when Lockheed constructively discharged her; and Brown's protected activity was a contributing factor in Lockheed's constructive discharge.

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[3] The Secretary has delegated responsibility for receiving and investigating Sarbanes-Oxley whistleblower complaints to OSHA. *See* Secretary's Order No. 04-2010 (Sept. 2, 2010), 75 FR 55355 (Sept. 10, 2010); *see also* 29 C.F.R. 1980.104(a).

[4] Brown's hearing exhibits are identified as "Compl. Ex." References to the documents in the certified list filed with this Court by the ARB are indicated by the abbreviation "CL" followed by the document number. "Tr." refers to the transcript of the proceedings before the ALJ. References to the Petitioner's brief are noted as "Pet. Br."

CL 37. In addition, the ALJ ordered reinstatement; an award of back pay with interest; reimbursement of medical expenses; and $75,000 in non-economic compensatory damages. *Id.*

Lockheed timely appealed the ALJ's Recommended Decision and Order to the ARB. CL 54. On February 28, 2011, the ARB issued a Final Decision and Order ("FDO") adopting the ALJ's decision and holding that Brown established that she engaged in protected activity and that Lockheed constructively discharged her because of her protected activity. *Id.* Lockheed filed a timely Petition for Review with this Court on April 13, 2011.

B. Statement of Facts[5]

1. Background

Brown began working for Lockheed in June 2000 as a communications manager in Houston, Texas. FDO at 2; Tr. 228. She reported to the Vice President of Communications, Wendy Owen, who was located in New Jersey, and to Ron Meter. *Id.*; Tr. 229. In 2003, Brown was promoted to Director of Communications in Colorado Springs. *Id.* Brown reported to both Owen and Ken Asbury, president of Lockheed Martin Technical Operations ("LMTO"), and served as Asbury's spokeswoman. *Id.* Brown's

[5] This statement of facts is primarily based on the ARB's Final Decision and Order ("FDO"). The ARB found that the ALJ accepted Brown's testimony as credible thereby rejecting any contrary testimony. FDO at 2, n.1 Additionally, the ARB concluded that Brown's testimony was "more than enough substantial evidence to support the ALJ's findings of fact." *Id.*

duties focused on public, community, and employee relations. Tr. 232. Brown was a "Level-5 communicator" with an "L-code," indicating a leadership position with supervisory responsibilities. FDO at 2.

2. Events Leading Up to Brown's Ethics Complaint

Brown worked closely with Owen on high-visibility corporate activities. Tr. 233. In approximately May 2006, Brown began having difficulty getting responses from Owen regarding the payment of invoices. Tr. 234. Brown discussed this issue with other communicators, including Tina Colditz, who reported directly to Owen and also ran a Pen Pal program between Lockheed employees and U.S. soldiers in Iraq. FDO at 2; Tr. 236. Colditz also said she was having difficulty getting responses from Owen regarding invoice payments. *Id.*

Colditz told Brown why she thought Owen was unresponsive. *Id.* Colditz told Brown that Owen had developed sexual relationships with several soldiers in the Pen Pal program; had purchased a laptop for one of them; was sending inappropriate e-mails and items, including a box of sex toys, to soldiers; and was traveling to welcome-home ceremonies to visit soldiers under the pretext of doing business when she actually was taking soldiers in limousines to expensive hotels for intimate relations. *Id.* at 240; FDO at 2. Colditz expressed concern that Owen was using company funds for these activities. *Id.*

Brown's understanding was that most expenses that employees incurred were passed on to the government client. *Id.*

Colditz also told Brown that she had personally witnessed Brown's behavior. *Id.* For example, on several occasions when meetings were scheduled with a General, Owen would arrive and disappear with a soldier, leaving Colditz to work directly with the General. Tr. 242. Colditz also witnessed Owen leave with a soldier in a limousine and drive to an expensive golf resort while Colditz stayed in Fort Bragg to work. *Id.*

In addition, on one occasion, when Brown needed to contact Owen about an important media inquiry, Colditz told her that Owen was with a soldier. Tr. 243. Brown's call to Owen confirmed Colditz' warning. Based on what she heard, Brown thought she had interrupted a sexual encounter between Owen and a soldier. Tr. 244; FDO at 2.

Brown was concerned that Owen's actions were illegal and fraudulent because Owen controlled the Pen Pal budget and was using company funds for a laptop, hotels, limousines, and travel, under the pretext of doing business and Lockheed would pass those expenses on to the government. Tr. 245; FDO at 3. For example, Owen had told Colditz that she was going to say she gave the laptop to an employee, which suggested it was being charged as Lockheed equipment that would be billed to the government. *Id.* Brown also was concerned that there could be

media exposure, which could lead to government audits and impact current and future contracts between Lockheed and the government, and impact shareholders. Tr. 246-247; FDO at 3.

Brown told Asbury about her concerns and he said he would speak to Owen, but apparently Owen's behavior did not change. Tr. 242, 247-48; FDO at 3. Brown also stated that Colditz was afraid to report Owen's behavior because she did not want the Pen Pal program to be discontinued. Tr. 248-49.

3. The Ethics Complaint

Brown spoke with Jan Moncallo, Vice President of Human Resources, about Owen's behavior. FDO at 3; Tr. 249. Brown told Moncallo that she thought Owen was engaging in illegal and fraudulent acts and was concerned about reporting Owen's activities because Owen was both a high-level officer and Brown's boss. Tr. at 250-51. Moncallo told Brown that she would submit an anonymous complaint on Brown's behalf and assured her that no retaliation would occur. FDO at 3; Tr. 251.

On May 25, 2006, Moncallo emailed Jean Pleasant, the office Ethics Director, an anonymous ethics complaint based on her discussion with Brown. She stated that she had become aware of "allegations regarding Wendy Owen, in her role as Communications Vice President, specifically identified as improprieties, violations of corporate and ITS policies" with respect to:

misuse of company funds, misuse of company time, violating the Project 900 and 0507 Pen Pal Agreements, tarnishing [Lockheed's] image when it is her job to improve it. The allegations include the following actions by [Owen]:

1. Purchasing a laptop with company funds for one of [Owen's] numerous Project 900 and 0507 Pen Pals
2. Using company funds to rent limos to transport Pen Pals
3. Using company funds for lodging liaisons with Pen Pals
4. Using company funds to purchase thousands of giveaway items so that her Pen Pal could win an award
5. Communicating in activity reports and with staff that she is traveling to meet with Project 900 and 0507 Generals when instead she is meeting with Pen Pals
6. Not responding to calls from staff during paid working hours because she is in non-business related meetings with Pen Pals
7. Having affairs with multiple Pen Pals in violation of Project 900 and 0507 agreements
8. Sending pornographic material to Pen Pals in Iraq
9. Using her position to influence her staff and have them "cover" for her causing a fear of retribution and retaliation
10. Tarnishing [Lockheed's] image in the army community as some of the Army Generals associated with Project 900 and 0507 are aware of some of these incidents

Id. In the email, Moncallo also identified six individuals, including Brown, who should have had some direct or indirect knowledge of the allegations. *Id.*

4. Events Following the Submission of the Ethics Complaint

Lockheed conducted an investigation into Owen's behavior from May to August 2006. FDO at 4. Within a few days of Brown's anonymous complaint, Lockheed discontinued the Pen Pal

program. *Id.*; Tr. 255. During the investigation, Brown thought that Lockheed officials were retaliating against Colditz because they thought that Colditz, not Brown, had submitted the complaint. Tr. at 254. Brown informed Asbury that she had made the anonymous ethics complaint, not Colditz. *Id.* Brown eventually also told Colditz that Brown had shared information with Moncallo about Owen's conduct. *Id.* at 257.

Performance Rating and Call from Owen. Between November 2006 and January 2007, Asbury gave Brown a lower performance rating (*i.e.*, "successful contributor") than she had received in the prior two years. Tr. 259.[6] In addition, on or about December 19, 2006, Owen called Brown to try to find out who had filed the ethics complaint about her and stated that she had lost her annual bonus due to the complaint. FDO at 4; Tr. 262. Later, Brown told Owen she had shared "a few things" with Moncallo, but did not know whether her comments had resulted in the complaint. Tr. 263. Brown reported Owen's telephone call and inquiry to Asbury and Moncallo. FDO at 4; Tr. 266.

Conversation with Judy Gan and Job Posting. Brown continued to report to Asbury and Owen until Lockheed underwent

[6] For the calendar years 2003-2005, Asbury gave Brown the highest (*i.e.*, "exceptional contributor") or second highest performance rating (*i.e.*, "high contributor"). FDO at 2. In 2006 and 2007, after Brown filed an internal ethics complaint, Asbury and her new supervisor gave Brown a lower performance rating (i.e., "successful contributor"). *Id.*

a corporate reorganization, beginning on February 22, 2007. FDO at 4; Tr. 267. Brown's situation at Lockheed became progressively worse after telling Asbury and Owen that she had shared information with Moncallo about Owen's activities. Tr. 266. On March 1, 2007, the Communications Department announced further reorganizations. *Id.*; Tr. 267-68. Brown began reporting to Judy Gan, Senior Vice President of Communications. FDO at 4; Tr. 268-69. Owen also reported to Gan as a communicator, but retained her vice president title. *Id.*; Tr. 269. Owen worked very closely with Gan during the transition. Tr. 269. During Brown's first meeting with Gan, Gan told Brown she might not be the right person for her position and that Gan probably would have to reduce her staff. *Id.* at 271. Gan's attitude toward Brown was negative from the time they first met. *Id.* at 272-73.

On June 12, 2007, Owen called Brown to tell her that Brown's job had been posted on the Internet and that she "better get [her] resume pulled together or [she] [was] going to have a new boss." *Id.* at 274; FDO at 4. Brown called Asbury and told him about Owen's phone call and also told Gan about it in an email. FDO at 4; Tr. 277-78. After talking with her mentor at Lockheed, Brown decided to apply for the position. *Id.*; Tr. 279-80. The job description was identical to the position she had held for the previous five years. Tr. 280.

Brown emailed Asbury, Gan, Owen, and another high level communicator to tell them she had decided to apply for the job. *Id.* at 281. Within minutes, Gan called Brown to express outrage and falsely accused Brown of not being qualified for the position, performing poorly since she began working for Lockheed, and not having any media experience. Tr. 282-283; FDO at 4. Brown told Moncallo about Gan's reaction, and Moncallo suggested that Brown file an ethics complaint against Gan. *Id.* at 282. Brown refused to do so because she felt that the treatment she was receiving resulted from her ethics complaint against Owen. *Id.*; FDO at 4-5. Brown also told Asbury of the conversation with Gan. FDO at 5; Tr. 286.

Hiring of David Jewell. In September 2007, Lockheed hired David Jewell as the new Director of Communications. FDO at 5. Jewell took Brown's former title and her responsibility of supervising four employees. *Id.*; Tr. 295. Jewell had a close relationship with Owen before being hired and Owen, who was on the selection committee, had encouraged Jewell to apply. FDO at 5. Jewell also sought advice from Owen about his new position and his employees. *Id.* Owen told Jewell that Brown had received "less than perfect" evaluations in the past. *Id.*

During Jewell's first week, Brown trained Jewell in his new position. Tr. 297. Jewell then informed Brown that either she or another employee would be laid off. *Id.* at 298. Also,

shortly after Jewell was hired, Brown was told to vacate her office and to work from home or a visitor's office (also a storage room), despite the availability of other office space in the building. Tr. 288-91; FDO at 5. Additionally, during this time, Brown was nominated to receive an outstanding group performance award called the Comet Award. FDO at 5; Tr. 293-94. The award is presented at the annual conference for corporate communicators, an event to which Brown had always been invited in prior years. *Id.*; Tr. 293. But, Gan indicated that Brown would not be needed at the conference. *Id.*; Tr. 294. Finally, despite repeated inquiries, no one would tell her whether she would have a job or be laid off. FDO at 5; Tr. 302-304.

On January 3, 2008, Jewell told Brown he wanted her to be in the office to work. FDO at 5; Tr. 305-06. When Brown arrived in the visitor's office, someone else was using it. *Id.* Brown did not have a place to keep her files or office material or an office telephone number. Tr. 307. Brown told Jewell and expressed concern about not having a permanent office. *Id.* Jewell's responded that he was working on finding a cubicle for Brown. FDO at 5; Tr. 308. When Brown stated she was entitled to an office because she was in a leadership position (*i.e.*, "L-Coded Level 5"), Jewell told Brown that he was removing her from that position and she would only be entitled to a cubicle. *Id.*

After this incident, due to advice from her doctors, Brown took family medical leave. Tr. at 311-312. During this time, Brown attempted to contact Lockheed officials, including Moncallo and Jewell, several times to find out whether she would be laid off or not, but she either received no response or one that was not responsive. Tr. 312-313; Compl. Ex. 30.

OSHA Complaint. Brown filed a complaint with OSHA on January 25, 2008. Compl. Ex. 41; FDO at 5. She subsequently supplemented her complaint to allege she had been constructively discharged. FDO at 5. On February 4, 2008, Brown gave notice of her constructive termination to Lockheed. *Id.*; Compl. Ex. 42. In her OSHA complaint, Brown alleged her employment was constructively terminated because she opposed and filed a complaint regarding a Vice-President's unethical and fraudulent activities relating to Lockheed's Pen Pal program. Compl Ex. 41; FDO at 5. OSHA denied Brown's complaint. *Id.* at 6. Brown then requested a hearing on the merits of her claim before the OALJ. CL 2. A hearing was held on January 12-13, 2009.

5. The ALJ's Recommended Decision and Order.

Based on two days of testimony from four witnesses and deposition testimony from four other witnesses, the parties' stipulations, and 67 record exhibits, the ALJ issued a Recommended Decision and Order ("RDO") on January 15, 2010. The ALJ concluded that Brown proved by a preponderance of the

evidence that Lockheed violated the whistleblower protections contained in SOX. *See generally* RDO.

First, the ALJ found that Brown engaged in protected activity based on mail and wire fraud because she reasonably believed that her supervisor, Owen, had committed violations of 18 U.S.C. 1341 or 1343 and she communicated that belief to Lockheed officials with sufficient specificity. RDO at 42. According to the ALJ, Brown reasonably believed that Owen's laptop, limousine, and travel purchases with company funds were an attempt to recruit and lavish paramours involved in the Pen Pal program with gifts in the furtherance of a "scheme or artifice to defraud." *Id.* The ALJ concluded that Brown reasonably believed, even if her belief was mistaken, that these costs were passed on to the government based on Lockheed's standard business practice to bill costs to customers. *Id.*

Additionally, the ALJ found that Brown reported the following elements of mail and wire fraud to Asbury and Moncallo: Owens' mailing of letters to solicit prospective paramours; Owen's mailing of gifts to them; and her presumed billing – whether through mail or electronic means – of those items to the government as part of the Pen Pal program. *Id.* According to the ALJ, a reasonable belief in Owen's intent to have taken these actions as part of "scheme to defraud" flows naturally from the actions. *Id.* Brown also testified that she

specifically used the words "fraud" and "illegal" in her complaints to Asbury and Moncallo, and the ALJ found Brown's testimony to be credible. *Id.* at 44. The ALJ noted that Moncallo testified that she understood Brown to have described conduct that could be considered fraudulent and illegal. *Id.*[7]

Second, the ALJ concluded that Brown was constructively discharged. The ALJ found that the totality of actions that Lockheed took against Brown following her ethics complaint created an abusive and sufficiently adverse work environment such that resignation was her only option. *Id.* at 48. The ALJ placed particular emphasis on the following: the hiring of Jewell as the new Director of Communications, Gan's resistance to Brown applying for the position, the refusal to furnish an adequate office space, the insistence that Brown work in a visitor's office that was only sometimes available and also served as a supply closet, the removal of Brown's L-code, the requirement that Brown surrender her parking space to Jewell, the refusal to allow Brown to attend an awards ceremony where she was to receive an award, and the persistent uncertainty regarding whether she would continue to have a job with Lockheed, and, if so, what position she would hold. *Id.*

[7] The ALJ also found that Brown failed to establish protected activity under a general shareholder fraud theory on the basis of loss of shareholder value. *Id.*

Third, the ALJ found that Brown's protected activity was a contributing factor in her constructive discharge. According to the ALJ, Owen "poisoned" the opinions of Gan and Jewell regarding Brown's qualifications and performance. *Id.* Both Gan and Jewell thought highly of Owen, relied on her judgment regarding employees, including Brown, and did not know about Brown's complaint against Owen. *Id.* The ALJ found that Gan and Jewell relied on Owen's biased and discriminatory reports regarding Brown, as reflected in the actions they took. *Id.*

Finally, the ALJ ordered Brown reinstated and awarded Brown back pay with interest; reimbursement of all medical expenses incurred due to termination of medical benefits; $75,000 in non-economic compensatory damages for emotional pain and suffering, mental anguish, embarrassment, and humiliation; and attorney's fees and costs. *Id.* at 55.[8] The ALJ did not find sufficient animosity or hostility existed to justify subverting the preferred remedy of reinstatement. *Id.* at 51-53. Also, the ALJ found that Brown was not entitled to front pay, rather than reinstatement, due to medical inability to perform her job because she submitted no supporting evidence. *Id.* at 53. And,

[8] The ALJ awarded compensatory damages based on the testimony of Brown, her son, Moncallo, Asbury, and Colditz, which the ALJ found demonstrated Brown's emotional distress at the retaliation she suffered, depression, and resulting effects on both her family and their economic situation. RDO at 55.

that Brown's particular job position no longer exists did not prevent her reinstatement to a comparable position. *Id.* at 54.

6. The ARB's Decision

On February 28, 2011, the ARB issued a Final Decision and Order ("FDO"). First, the ARB agreed with the ALJ that Brown engaged in SOX-protected activity. FDO at 8. The ARB concluded that, under the SOX whistleblower provision, where an employee reports conduct that she reasonably believes constitutes mail or wire fraud, she has engaged in protected activity. *Id.* at 9. Section 806(a)(1) does not require that the mail fraud or wire fraud pertain to a fraud against shareholders. *Id.*

The ARB found that substantial evidence supported the ALJ's finding that Brown engaged in protected activity. Specifically, Brown met with Moncallo and shared her concerns about Owen. *Id.* Moncallo's complaint, submitted on Brown's behalf, identifies concerns of several instances of misuse of company funds. *Id.* The ARB also found that Brown "grew alarmed" that Owen's purchases would ultimately be billed to the government. *Id.* The ARB held that Brown reasonably believed Owen's actions were taken "in furtherance of a 'scheme or artifice to defraud'" and that costs were passed on to the government in light of Lockheed's standard business practice to bill costs to customers. *Id.* Because the ARB affirmed the ALJ's finding that Brown engaged in protected activity for reporting misconduct

relating to mail and wire fraud, the ARB concluded it need not address the ALJ's finding that Brown failed to engage in protected activity based on fraud against shareholders. *Id.*

Second, the ARB found that substantial evidence supported the ALJ's findings that Lockheed knew of Brown's protected activity. *Id.* at 10. Brown told Moncallo and Asbury that Owen had engaged in fraudulent conduct. *Id.* Moncallo reported Brown's disclosures in an anonymous complaint to Pleasant, the Ethics Director. *Id.* An ethics investigation followed, resulting in Owen's loss of her annual bonus. *Id.* Following the investigation, Brown told Owen that Brown had reported information that may have contributed to the investigation. *Id.* Owen poisoned Gan's and Jewell's opinions of Brown because Owen knew of Brown's involvement in the complaint against her. *Id.* Accordingly, the ARB affirmed the ALJ's findings that Lockheed knew of Brown's protected activity. *Id.*

Third, the ARB concluded that substantial evidence "overwhelmingly supports" the ALJ's finding that the overall combination of actions taken against Brown following the ethics complaint created an intolerable situation and a reasonable person in Brown's shoes would have been compelled to resign. *Id.* The ARB found that before Brown made the ethics complaint, she had her own office and an L-Code, and had received very high performance ratings. *Id.* After the complaint, her job position

was in a constant state of jeopardy; her performance ratings dropped; Jewell was hired to take over some of her duties and had taken her office; Brown faced strong resistance from Gan when she applied for the Director of Communications position; Lockheed did not provide her with adequate office space, asked her to work from home, and also demanded she work in the office although the inadequate office space previously provided was unavailable; Lockheed removed her leadership position status and gave her parking space to Jewell; Lockheed refused to allow Brown to attend an awards ceremony where she was to receive an award; and Lockheed continued to keep Brown uncertain as to whether she had a job, and if so, what it would be. *Id.* The ARB agreed with the ALJ that a reasonable person in Brown's shoes would have found the working conditions intolerable and would have felt forced to resign. *Id.*

Finally, the ARB found that substantial evidence supported the ALJ's finding that Brown's protected activity contributed to Lockheed's constructive discharge of Brown. *Id.* at 11. According to the ARB, "the temporal proximity of the beginning of Brown's employment difficulties is significantly close to the Owen investigation." *Id.* The investigation ended in late 2006 and in late 2006, Owen tried to discover who had reported her conduct and learned that Brown had shared information that led to the investigation. *Id.* In early 2007, Lockheed began its

"reorganization" that involved taking unfavorable employment actions against Brown, including hiring Jewell as the new Director of Communication. *Id.* Owen was on the committee that decided to hire Jewell and "poisoned" Jewell's and Gan's opinions of Brown. *Id.* Brown was stripped of her duties and office, among other things. *Id.* Therefore, the ARB concurred with the ALJ that Brown's protected activity was a contributing factor in Lockheed's constructive discharge of her. *Id.*

SUMMARY OF ARGUMENT

This Court should affirm the ALJ's decision, as affirmed by the Board. The Board correctly concluded that substantial evidence supports the ALJ's determination that Brown's SOX-protected activity contributed to her constructive discharge.

Ample evidence in the record shows that Brown engaged in protected activity under SOX. She had a subjectively and objectively reasonable belief that the misconduct she reported involved wire and mail fraud and she communicated that belief with sufficient factual specificity to Lockheed officials. That her protected activity did not include an allegation of fraud against shareholders is not fatal to her claim. An allegation of fraud against shareholders is not a required element of protected activity under SOX Section 806.

The evidence demonstrates that Brown suffered from an unfavorable series of events that began shortly after she raised

concerns to Lockheed officials about Owen's fraudulent activity. Lockheed officials gave her a lower performance rating; criticized her work performance; discouraged her from re-applying for her job; stripped her of her job title and responsibilities; denied her requests to attend an awards ceremony at which she was to receive an award; denied her requests for adequate support to perform (including an adequate work space and telephone number); told her she was one of two employees who would be laid off; and ignored her repeated requests for clarification about her status with Lockheed. The totality of these circumstances constituted intolerable working conditions, which compelled Brown to resign.

In addition, even if neither Gan nor Jewell knew of Brown's ethics complaint, substantial evidence supports the ALJ's finding, as affirmed by the Board, that Owen "poisoned" Gan's and Jewell's opinions regarding Brown's qualifications and work, contributing to Brown's constructive termination. Owen, who was distraught by the investigation, played a significant role in educating Gan and Jewell about the department and its employees, including Brown, had close relationships with Gan and Jewell, and was a member of the selection committee that hired Jewell into Brown's former position.

Finally, the ARB's damages award was proper and should be affirmed, as it correctly ordered the relief authorized by the

statute and necessary to make Brown whole, including reinstatement, back pay with interest, reimbursement of medical expenses, and compensatory damages for emotional pain and suffering, mental anguish, embarrassment, and humiliation.

STANDARD OF REVIEW

This Court reviews the Secretary's Final Decision and Order under Section 806 of Sarbanes-Oxley according to the standard of review established by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2)(A), (E). *See* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(4)(A). Under the APA, courts must affirm an agency's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); *see, e.g., Trimmer v. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999) (citing 5 U.S.C. 706(2)(A)). Consistent with the "arbitrary, capricious [or] abuse of discretion" level of scrutiny, the Secretary's factual determinations will be set aside only if they are unsupported by substantial evidence. *Id.* (citing 5 U.S.C. 706(2)(E)).

Under the substantial evidence standard, a court may not displace the agency's "'choice between two fairly conflicting views, even though the court would have justifiably have made a different choice had the matter been before it *de novo*.'" *Id.* (citations omitted). Substantial evidence is "something more than a mere scintilla but something less than the weight of the

evidence." *Via Christi Regional Medical Center, Inc. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (citation omitted); *see also Slingluff v. Occupational Safety & Health Review Comm'n*, 425 F.3d 861, 869 (10th Cir. 2005) ("[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). "[R]eview under this 'substantial evidence' standard is 'quite narrow.'" *Hall v. Dep't of Labor*, 476 F.3d 847, 850 (10th Cir. 2007) (citation omitted). In addition, when "the Secretary's opinion is in agreement with and based in part on the ALJ's credibility determinations, it is entitled to great deference." *Trimmer*, 174 F.3d at 1102.

Further, under this standard, a court's review is "narrow and deferential" and an agency's action must be upheld "if it has articulated a rational basis for the decision and has considered relevant factors. However, these limitations do not apply to questions of law." *Slingluff*, 425 F.3d at 866; *Turgeau v. Admin. Review Bd.*, 446 F.3d 1052, 1057 (10th Cir. 2006). Questions of law are reviewed *de novo*, giving deference to the Secretary's construction of the statute or law at issue. *Trimmer*, 174 F.3d at 1102 (citation omitted); *Newton v. Fed. Aviation Admin.*, 457 F.3d 1133, 1136 (10th Cir. 2006) ("we review issues of law, such as matters of statutory interpretation, [*de novo*]").

ARGUMENT

Substantial evidence supports the ALJ's determination, as affirmed by the Board, that Lockheed violated SOX Section 806. As required under SOX, Brown demonstrated that (1) she engaged in protected activity; (2) Lockheed knew of her protected activity; (3) she suffered an unfavorable personnel action; and (4) her protected activity was a contributing factor in the unfavorable action. *See Tides v. Boeing Co.*, No. 10–35238, 2011 WL 1651245, *3 (9th Cir. May 3, 2011); *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009)(citations omitted); 49 U.S.C. 42121(b)(2)(B); 29 C.F.R. 1980.104(b)(1).

I. THE BOARD AND THE ALJ PROPERLY CONCLUDED THAT BROWN ENGAGED IN PROTECTED ACTIVITY.

A. The ALJ and the Board Correctly Concluded that Brown Reported Activity She Reasonably Believed to be Mail and Wire Fraud with Sufficient Specificity.

Sarbanes-Oxley prohibits a covered entity from retaliating against an employee who provides information to his employer, Congress, or the federal government regarding conduct that the employee reasonably believes violates 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 1343 (wire, radio, or television fraud), 18 U.S.C. 1344 (bank fraud), 18 U.S.C. 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or

any other federal law related to fraud against shareholders. *See* 18 U.S.C. 1514A; *see also* 29 C.F.R. 1980.102.

The ALJ, as affirmed by the ARB, correctly found that Brown engaged in protected activity by specifically reporting conduct that she reasonably believed constituted mail and wire fraud, even though the ALJ found her reports did not relate to fraud against shareholders. Both the ALJ and the ARB properly recognized that to demonstrate protected activity under SOX, Brown needed to show that she specifically reported conduct that she reasonably believed constituted a violation of one of the laws enumerated in the statute. FDO at 9; RDO at 37; *See, e.g., Gale v. U.S. Dep't of Labor*, 384 Fed. Appx. 926, 930 (11th Cir. 2010) (unpublished); *Livingston v. Wyeth*, 520 F.3d 344, 352 (4th Cir. 2008); *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008) (agreeing with the ARB).

To fulfill the reasonable belief requirement, Brown needed to demonstrate that she "actually believed that Owen committed wire and/or mail fraud and that a person with her expertise and knowledge would have reasonably believed that as well." FDO at 9; RDO at 37; *see, e.g.*, *Gale*, 384 Fed. Appx. at 930; *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008); *Harp*, 558 F.3d at 723; *Welch*, 536 F.3d at 277 n.4. However, as the ALJ correctly recognized, Brown did not have to establish an actual violation of the mail or wire fraud statutes. RDO at 37; *Allen*,

514 F.3d at 477 ("reasonable but mistaken belief" is protected); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009) (same).

In addition, the ALJ required Brown to show that she "reported 'definitively and specifically' to, in this case, her supervisors that Respondent had committed any of the covered fraudulent acts." RDO at 37.[9] In reporting her concerns, Brown did not need to cite the relevant federal statutes or establish the various elements of wire and/or mail fraud. *Sylvester*, 2011 WL 2165854, at *17-*19; *Cf. Day*, 555 F.3d at 55 ("the complaining employee's theory of [shareholder fraud] must at least approximate the basic elements of a claim of securities fraud"). The ALJ correctly held that Brown "expressed

[9] A number of decisions have held that to constitute protected activity, an employee's communications to an employer must "definitively and specifically" relate to SOX-covered conduct. *See, e.g., Van Asdale*, 577 F.3d at 996-87; *Day v. Staples, Inc.*, 555 F.3d 42, 56 (1st Cir. 2009); *Welch*, 536 F.3d at 275; *Allen*, 514 F.3d at 476; *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (Sept. 29, 2006). This standard is not based on the text of Section 806, and is simply a way of requiring the employee's communication to provide sufficient notice to the employer that the employee is raising concerns about conduct the employee reasonably believes violates a law listed in the SOX Section 806. *See, e.g., Welch*, 536 F.3d at 276; *Day*, 555 F.3d at 55. The ARB recently refused to apply the "definitively and specifically" requirement in *Sylvester*. *Sylvester v. Parexel Int'l*, No. 07-123, 2011 WL 2165854, *14-*15 (ARB May 25, 2011). Here, the court need not review the appropriateness of the "definitively and specifically" standard. Both the ALJ and ARB found that Brown's communications to Lockheed met this standard and, as detailed herein, substantial evidence supports the ALJ's finding.

observations involving the elements of mail and/or wire fraud: that (1) Owen formed a scheme or artifice to defraud; and (2) Owen used the United States mails or caused a use of the United States mails [or sent or caused to be sent wire communications] in furtherance of the scheme; and (3) Owen did so with specific intent to deceive or defraud." RDO at 42.

Substantial evidence supports the ALJ's factual findings, as affirmed by the ARB, on each element of Brown's protected activity. Moreover, the ALJ and the ARB correctly applied the law to the facts to find that Brown engaged in protected activity when she reported her reasonable belief that Owen engaged in acts that would constitute mail or wire fraud. Based on Brown's testimony, the ALJ found that Brown grew concerned that Owen made inappropriate purchases with company funds and used the Pen Pal program to recruit and lavish gifts on paramours. RDO at 43; FDO at 9. The ALJ and the Board both correctly concluded that Brown reasonably believed that Owen's actions "were taken in the furtherance of a 'scheme or artifice to defraud'" because Brown reasonably believed, even if her belief was mistaken, that these costs were passed on to the government based on Lockheed's standard business practice to bill costs to customers. *Id.* Brown based her belief on more than six years of experience as a Lockheed manager and her knowledge of Lockheed's customary practice of billing costs,

including public relations costs, to the government. Tr. 245; FDO at 3; RDO at 42. Finally, based on Brown's testimony regarding her reports to Moncallo and Asbury, and the testimony of Moncallo herself, the ALJ and the ARB properly found that Brown's complaints to Lockheed were sufficiently specific for Lockheed to conclude that she was reporting possibly fraudulent and illegal conduct, prompting Lockheed to initiate its internal investigation. RDO at 44; FDO at 9.

As the ALJ correctly concluded:

> [W]oven into the story of Complainant's reporting to Asbury and Moncallo are undisputed facts that would satisfy the mail and wire communication elements of mail or wire fraud if proven: Owens's mailing of letters to solicit prospective paramours; Owen's mailing of gifts to the same paramours; and her presumed billing whether via physical mail or electronic means of communication of those items to the United States Government as part of the Pen Pal Program. A reasonable belief in Owen's intent to have taken these actions as part of a "scheme to defraud" flows naturally from their description.

RDO at 43. Because substantial evidence supports the ALJ's factual findings, as affirmed by the Board, on each element of Brown's protected activity and because the ALJ and the Board properly concluded that Brown reported conduct that she reasonably believed constituted mail or wire fraud with sufficient specificity, the court should affirm the Board's decision that Brown engaged in activity protected by SOX Section 806.

B. The ALJ and the Board Correctly Held that Brown Did Not Need to Establish that Her Complaint Involved Fraud Against Shareholders.

A complainant need not allege fraud against shareholders in order to engage in protected activity under SOX Section 806. Thus, the ALJ and the Board correctly found that Brown engaged in protected activity even though her complaints did not allege fraud against shareholders. RDO at 44; FDO at 10.

1. The Plain Language of SOX Section 806 Makes Clear that Fraud Against Shareholders is Not Required.

Section 806 prohibits retaliation against employees who report conduct they reasonably believe "constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. 1514A(a)(1). The plain language of Section 806 prohibits retaliation against employees who report conduct they reasonably believe constitutes a violation of any of six different laws or categories of laws: (1) mail fraud (18 U.S.C. 1341), (2) fraud by wire, radio, or television (18 U.S.C. 1343), (3) bank fraud (18 U.S.C. 1344), (4) securities fraud (18 U.S.C. 1348), (5) any rule or regulation of the SEC, and (6) any provision of federal law relating to fraud against shareholders. 18 U.S.C. 1514A(a)(1). Mail fraud, fraud by wire, radio, or television, and bank fraud on their face are not limited to frauds against

shareholders. *See* 18 U.S.C. 1341, 1343 (both applying to "[w]hoever, having devised or intending to devise any scheme or artifice to defraud"); 18 U.S.C. 1344 (applying to "[w]hoever knowingly executes, or attempts to execute, a scheme or artifice * * * to defraud a financial institution * * *"). If Congress had wanted to limit Section 806 to frauds against shareholders, it would not have listed these laws in Section 806 as it did. As a district court explained,

> By listing certain specific fraud statutes to which § 1514A applies, and then separately, as indicated by the disjunctive 'or,' extending the reach of the whistleblower protection to violations of any provision of federal law relating to fraud against securities shareholders, § 1514A clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud.

O'Mahony v. Accenture Ltd., 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008); *see also Reyna v. Conagra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382-83 (M.D. Ga. 2007) (relying on the plain language of Section 806 in rejecting contrary district court and ALJ decisions).

Under the "[doctrine] of the last antecedent," "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *U.S. v. Hayes*, 129 S. Ct. 1079, 1086 (2009). Therefore, the phrase "relating to fraud against shareholders" should be applied only

to the last antecedent, which is "any provision of Federal law." *Reyna*, 506 F. Supp. 2d at 1380. Although the rule "is not an absolute and can assuredly be overcome by other indicia of meaning," *id.* at 1383, such indicia are not present in Section 806 of SOX. "If the drafters meant for section 806 to only protect employees who report fraud against shareholders, then they could have easily done so by inserting a comma before 'relating to fraud against shareholders.'" *Id.*; *Sylvester* 2011 WL 2165854 at *16.

Thus, relying on the plain, unambiguous language of Section 806, federal courts have determined that the provision protects whistleblowers who report fraud "under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud." *O'Mahony*, 537 F. Supp. 2d at 517; *Reyna*, 506 F. Supp. 2d at 1382-83 (same); *Cf. Day*, 555 F.3d at 55 ("The first and third categories share a common denominator: that the conduct involves 'fraud,' and many of the second category claims (violations of SEC rules or regulations) will also involve fraud."); *Hemphill v. Celanese Corp.*, No. 3:08-CV-2131-B, 2010 WL 2473845, *6 (N.D. Tex. June 16, 2010) ("absent a more clear directive that fraud must be alleged, the Court declines to impose such a requirement on [plaintiff's] claims"). In addition, in *Sylvester*, which was issued during the pendency of this appeal, the ARB concluded, based on this plain reading of

the statute, that "an allegation of shareholder fraud is not a necessary component of protected activity under SOX Section 806." 2011 WL 2165854 at *10.

2. The Legislative History and Purpose of SOX Section 806 Indicate that SOX Section 806 Protects More Than Allegations of Fraud Against Shareholders.

Congress's purposes in enacting Sarbanes-Oxley support this plain reading of protected activity under Section 806 as not limited to allegations relating to fraud against shareholders. Congress enacted the law "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, *and for other purposes.*" Preamble to Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (emphasis added). Among those other purposes were provisions enhancing criminal penalties for white-collar criminal offenses, including mail and wire fraud and violations of the Employee Retirement Income Security Act, *id.* Title IX 901, 116 Stat. at 804. These provisions are not limited to frauds relating to shareholders. Similarly, provisions in Title VIII of the Act, the Title containing Section 806, are not limited to frauds against shareholders. *See* Pub. L. No. 107-204, 802, 116 Stat. at 800 (adding 18 U.S.C. 1519, prohibiting destruction, alteration, or falsification of records in federal investigations and bankruptcy, and destruction of corporate

audit records). Even provisions of the Act designed to enhance financial disclosures are not limited to disclosures, and include enhanced conflict of interest provisions and a required code of ethics for senior financial officers. Pub. L. No. 107-204, 402, 406, 116 Stat. at 787, 789.

The legislative history also supports giving effect to the plain meaning of Section 806, which does not require an allegation of fraud against shareholders. The provision was included in a free-standing bill, the Corporate and Criminal Fraud Accountability Act of 2002, which became Title VIII of the Sarbanes-Oxley Act. *See* 148 Cong. Rec. S7357-S7358 (daily ed. July 25, 2002 (statement of Sen. Leahy). The general purpose of this Act was to "restor[e] trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. No. 107-146, at 2 (2002). Section 806's purposes was to "protect whistleblowers who report fraud." *Id.* The provision was a response not just to actions against whistleblowers at Enron and Arthur Andersen, but to a "culture, supported by law, that discourage[s] employees from reporting fraudulent behavior," a "corporate code of silence" that "hampers investigations . . . [and] creates a climate where ongoing wrongdoing can occur with virtual impunity." *Id.* at 5. Legislators described Section 806 as addressing "fraud," but did not limit coverage to "fraud against

shareholders." *See id.* at 10, 13, 18-19; 148 Cong. Rec. S7418, S7420 (daily ed. July 26, 2002) (section by section analysis).

Protecting employees who report mail fraud; wire, radio or television fraud; and bank fraud, whether or not the misconduct adversely affects shareholders, fulfills these purposes. The frauds covered by these laws are serious and include conduct long considered unacceptable by companies even if they may not directly affect shareholders.

3. Even if Section 806 Were Ambiguous, the ARB's Reasonable Interpretation in This Case is Entitled to Deference and Should Be Upheld.

As described above, the ARB correctly held that Brown engaged in protected activity because the plain language of SOX Section 806 makes clear that an allegation of shareholder fraud is not a required element of all categories of protected activity under the statute. However, even if the language of Section 806 were ambiguous on this point, the ARB's interpretation of the statutory language here and in its recent decision in *Sylvester*, 2011 WL 2165854, is reasonable and should be upheld.

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 of Labor's Order No. 04-2010 (Sept. 2, 2010), 75 FR 55355 (Sept. 10, 2010). Thus, the ARB's

interpretations of SOX Section 806 are entitled to *Chevron* deference for the reasons enunciated in the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218, 226-27(2001). *Welch*, 536 F.3d at 276 n.2 (applying *Mead* to ARB's interpretation of SOX Section 806); *Day*, 555 F.3d at 54 n.7 (same). *Mead* held that *Chevron* deference applies to administrative implementation of a statutory provision "when it appears that Congress has delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. Delegation of such authority may be shown in a variety of ways, such as an agency's power to engage in adjudication, *id*. at 227, a power accorded the agency here.

Lockheed and the U.S. Chamber of Commerce argue that the ARB's decision contradicts a uniform body of case law following *Platone v. FLYi's* assertion that "when allegations of mail or wire fraud arise under the employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be materially adverse to investors' interests." No. 04-154, 2006 WL 3246910, *aff'd on other grounds*, 548 F.3d 322 (4th Cir. 2008). However, Platone's claims failed because she did not provide information that specifically related to a violation of one of the enumerated

laws, and not because she failed to show that her mail and wire fraud claims also related to fraud against shareholders. *Sylvester*, 2011 WL 2165854 at *15, *17-*18; *Platone*, 2006 3246910 at *11-*12. Thus, the cited language in *Platone* is dicta that was not necessary to the ARB's disposition of the case. In addition, the ARB in *Platone* described a violation of Section 806 by referencing a cause of action for securities fraud and describing the elements of a violation of SEC rule 10b-5, both of which necessarily require fraud against shareholders. *Sylvester*, 2001 WL 2165854 at *17-*18; *Platone*, 2006 3246910 at *7. As the ARB in *Sylvester* explained, "[s]ome courts have misinterpreted this analysis as a requirement that SOX complainants must allege the elements of securities fraud claim to qualify for protection." *Sylvester* at *18.[10]

[10] The remaining ARB decisions cited in the Chamber of Commerce's brief (pp. 8-13) found that the alleged protected activity did not relate to any of the laws enumerated in SOX Section 806 and thus did not directly address the circumstance at issue here, where the employee reported conduct she reasonably believed constituted mail or wire fraud but that did not relate to fraud against shareholders. *See, e.g., Frederickson v. Home Depot*, No. 07-100 at 6, __ WL __ (ARB May 10, 2010) (finding complainant's report did not "directly implicate the categories of fraud listed in the statute or securities violations"); *Neuer v. Bessellieu*, No. 07-036 at 5, __ WL __ (ARB Aug. 31, 2009)(finding complainant did not allege that he believed anyone engaged in mail, wire, bank or securities fraud or violated an SEC rule); *Smith v. Hewlett Packard*, No. 06-064 at 10, _ WL __ (ARB Apr. 29, 2008) (noting that none of complainant's complaints even remotely related to mail, wire, radio or TV fraud).

To the extent that the ARB's holding here and in *Sylvester* departs from the ARB's dicta in *Platone*, that departure does not constitute a change in agency position, because the dicta in *Platone* was not binding in any event. And even if it were, the ARB's current position as articulated here and in *Sylvester* would still be entitled to *Chevron* deference as the Secretary's reasonable interpretation of the statute. "[A]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 417 (1993), *quoting NLRB v. Iron Workers*, 434 U.S. 335, 351 (1978). The Secretary's interpretation of the statute as not requiring an allegation of fraud against shareholders, where the complainant has communicated conduct that she reasonably believes constitutes mail or wire fraud, is amply supported by the ARB's reasoning in *Sylvester*. As the ARB's *en banc* decision in *Sylvester* demonstrates, the ARB's interpretation of the scope of protected activity is consistent with the plain language of the statute, congressional intent, and federal court decisions. *Sylvester*, 2011 WL 2165854, at *15-*17, and discussion *supra* pp. 30-35. The ARB's extensive reasoning in *Sylvester* contrasts with *Platone*, where the ARB did

not undertake the extensive review of the statute's plain language, legislative history and purpose that underpins the ARB's current position expressed in *Sylvester*. 2011 WL 216854 at *15-*17. Thus, the agency has explained the basis for its current position and for declining to follow the dicta in prior case law. *See Nat'l Cable and Telecom Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("For *if the agency adequately explains the reasons for a reversal of policy*, 'change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'") (emphasis added); *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 787 (1990) (deferring to the NLRB's decision not to apply any presumption regarding whether strike-breakers support a union even though NLRB changed its views multiple times).

In any event, the ARB's interpretation of the statute would pass muster even if it were not entitled to *Chevron* deference on the scope of protected activity. The ARB's reading of the statute would be accorded *Skidmore* deference because it is based on a persuasive reading of the statutory language and legislative history. *See Mead*, 533 U.S. at 234-35(citing *Skidmore v. Swift & Co.*, 323 U.S. 134,139-40 (1944)). *See* discussion *supra* pp. 30-35; *Sylvester*, 2011 WL 216854 at *15-*17.

Nor is there any basis for the Chamber of Commerce's assertion that upholding this interpretation of the statute would give rise to trivial claims unrelated to Sarbanes-Oxley's underlying purposes. *See* Chamber of Commerce's Br. at 20-21. Any such possibility is mitigated by the statutory requirement that an employee reasonably believe that the reported misconduct relates to a law listed in SOX Section 806 and articulates that belief with sufficient specificity to put the employer on notice of this reasonable belief.

For all of these reasons, the ARB's construction of SOX Section 806 (to the extent the Court finds that provision to be ambiguous) is reasonable and should be upheld.

II. SUBSTANIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION, AS AFFIRMED BY THE BOARD, THAT BROWN WAS CONSTRUCTIVELY DISCHARGED.

Consistent with Tenth Circuit precedent, the ALJ properly held that "[e]stablishing a constructive discharge claim requires the showing of an even more offensive and severe work environment than is needed to prove a hostile work environment." RDO at 44 (citation omitted). To demonstrate constructive discharge, "a complainant must show that his employer created working conditions so intolerable that a reasonable employee would feel compelled to resign." *Id.*; FDO at 10. *See also Strickland v. UPS, Inc.*, 555 F.3d 1224, 1228 (10th Cir. 2009)

(citation omitted)(constructive discharge requires "working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign"); *James v. Sears, Roebuck and Co., Inc.*, 21 F.3d 989, 992-93 (10th Cir. 1994) (same).[11] The standard is an objective one: "the employer's subjective intent and the employee's subjective views on the situation are irrelevant." *Strickland*, 555 F.3d at 1228. Moreover, a finding of constructive discharge requires "aggravating factors that make staying on the job intolerable" in addition to the discriminatory act. *Id.*; *Sears*, 21 F.3d at 992-93 (citing *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 177 (10th Cir. 1986)).[12]

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[11] Petitioner argues that the ALJ and ARB applied the wrong legal standard and states that "Brown was required to prove that the working conditions imposed upon her were not only tangible or adverse, but objectively 'intolerable.'" Pet. Br. at 17-18. The ALJ and the Board applied this very standard. *See* discussion *supra* pp. 38-39; RDO at 44; FDO at 10. Petitioner also states that Brown had to demonstrate "she had *no other choice* but to quit." Pet. Br. at 18. Likewise, the ALJ and the Board applied this standard and held "[a] reasonable person such as Complainant would see resignation as her "*only* option." RDO at 48 (emphasis added).

[12] This Court has also analyzed constructive discharge under a four-factor test: (1) whether the former employee was given some alternative to resignation; (2) whether she understood the nature of the choice; (3) whether she was given a reasonable time in which to choose; and (4) whether she was permitted to choose the effective date of resignation. *Narotzky v. Natrona County Memorial Hosp. Bd. of Trustees*, 610 F.3d 558, 563 (10th Cir. 2010). As discussed herein, Brown was not given a choice for her "to understand," let alone a time frame of any sort.

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 Brown's working conditions became so intolerable after the conclusion of the ethics investigation that a reasonable person in her position would have felt compelled to resign. RDO at 48. In so determining, the ALJ properly evaluated the totality of the circumstances. *Potts v. Davis County*, 551 F.3d 1188, 1194 (10th Cir. 2009) ("We assess the voluntariness of [plaintiff's] resignation under the totality of the circumstances.").

Shortly after the conclusion of the ethics investigation, from late 2006 through March 2007, Brown experienced difficult, unfavorable circumstances and a surge of hostility at work: Brown's supervisor gave her a lower performance rating; Owen called her to find out who had filed the ethics complaint and Brown felt compelled to reveal to Owen that she played a role in it; and her new boss, immediately took an "inexplicably aggressive" and harsh, negative tone with Brown. RDO at 6, 46; FDO at 4; Tr. 259, 262, 269, 272-73. Indeed, after their initial meeting, Gan set out to find a replacement for Brown's

position, explaining that she was not qualified to continue as Director of Communications. RDO at 46; Tr. 272-73.

Brown's situation became progressively worse through the remainder of 2007. On June 12, 2007, Owen called Brown to tell her that "*her* [Brown's] job" had been posted on the Internet and that she needed to put together her resume or she was going to have a new boss. RDO at 46-67; FDO at 4; Tr. 274 (emphasis added). The job description for the position was identical to the position Brown had held for the previous five years. Tr. 280. Yet, Gan strongly discouraged Brown from applying for the job and falsely accused her of not being qualified for it, performing poorly since she began working for Lockheed, and not having any media experience. RDO at 47; FDO at 4; Tr. 282. Given that it was normal for new supervisors, (*i.e.*, Gan) to consult with old supervisors (*i.e.*, Owen) regarding employee performance (and Gan did not know about Brown's ethics complaint nor believe that the complaint was true), the ALJ properly found that "Owen contributed heavily to Gan's opinion that Complainant needed to be replaced as Director of Communications." *Id.*

During the summer of 2007, the hiring committee, which included Owen, selected Jewell to replace Brown as Director of Communications. RDO at 47; FDO at 5. Jewell and Owen had a close relationship from the past and Owen informed Jewell of the open position. *Id.* In addition, Jewell testified that Owen

advised him that Brown had received "less than perfect" evaluations and that he sought advice from Owen about his new position and employees. RDO at 47; FDO at 5; Tr. 295.

Once Jewell was hired, Brown's circumstances at work further deteriorated. Jewell assumed Brown's former title and her responsibility for supervising four employees. *Id.* Additionally, Brown endured a series of additional negative and humiliating events under Jewell's and Gan's supervision. Jewell told Brown that she was one of two employees who would be laid off, and directed her to vacate her office, and to work from a storage room or from home, even though other office space was available in the building. Gan denied Brown permission to attend the company's annual communications conference where she was to receive an award. Finally, despite Brown's repeated inquiries as to the nature of her position with Lockheed, no one would tell her whether she would have a job or be laid off. Tr. 288-91, 293-94, 297-298, 301-304; RDO at 47; FDO at 5.

Finally, on January 3, 2008, after Jewell told her to come to work in the office, Brown discovered that the visitor's office (that served as a storage area for canned goods and office supplies) was occupied. Tr. 307; RDO at 47; FDO at 5. Jewell told Brown that he was removing her L-code so that she would only be entitled to a cubicle. Tr. 308; RDO at 47; FDO at 5. Brown left the office in tears and, a few days later,

requested family medical leave on the advice of her psychiatrist and doctor "due to the stress and uncertainty regarding her job situation." RDO at 47. While on leave, Brown contacted Lockheed officials, including Moncallo and Jewell, to find out whether she would be laid off or have a position with Lockheed, but to no avail. Tr. 312-313; Compl. Ex. 30.

The facts here are similar to those in *Sears*, where this Circuit held that "[a] perceived demotion or reassignment to a job with lower status" may constitute "aggravating factors that would justify [a] finding of constructive discharge." 21 F.3d at 993. In *Sears*, employees brought an age discrimination action against Sears after they were offered a buy out or early retirement. "The evidence demonstrated Sears forced the retail [p]laintiffs to accept the buy-out or early retirement" because they believed Sears' threats to fire or transfer them to sales jobs with higher pressure to meet "unreachable quotas" if they stayed at Sears. *Id.* The plaintiffs had a "choice between two options" – lose benefits under early retirement or stay while being harassed or moved to a job they couldn't satisfactorily perform. *Id.* Based on these facts, the Court found the record fully supported the jury's finding of constructive discharge.

The circumstances facing Brown were even more severe than those facing the plaintiffs in *Sears.* Brown was never given a "choice between two options." Despite many inquiries about her

status with Lockheed, she remained in a constant state of uncertainty for more than nine months. *Id.* Like the *Sears* plaintiffs, she feared her job was in jeopardy because she had been threatened with a lay-off but, unlike the *Sears* plaintiffs, she did not have the comfort of knowing she would have a position with Lockheed if she stayed, let alone what that job would entail (even if it involved fewer responsibilities or lower pay). Indeed, her job title, responsibilities, and office had been taken away and given to someone else, and she was not given a new title, set of responsibilities, or adequate support to perform at work. Brown had been demoted to an undefined role, faced a potential lay-off, and had experienced aggravating circumstances, including hostility and criticism of qualifications and her performance by Gan and Jewell, and denial of career development opportunities.

Indeed, Brown was faced with a workplace more intolerable than that in other cases where this Circuit found sufficient evidence supported a finding of constructive discharge. *See, e.g., Sears*, 21 F.3d 989; *Barone v. United Airlines, Inc.*, 355 Fed. Appx. 169, 185 (10th Cir. 2009)(unpublished) (finding constructive discharge where "'choice' between resignation and a compound removal from management, demotion to part-time status, and transfer to distant state was effectively no choice at all"); *Strickland*, 555 F.3d 1224 (10th Cir. 2009) (affirming

constructive discharge claim where no job responsibilities had been taken away, but plaintiff believed her job was in jeopardy, was told by supervisors her performance was unacceptable, was not provided support to perform job when requested, and was forced to commit to win certain contracts); *Acrey v. American Sheep Indus. Assoc.*, 981 F.2d 1569 (10th Cir. 1992) (affirming finding that employee was constructively discharged where she believed her job was in jeopardy, she had been confronted by her supervisor with performance shortcomings, job responsibilities had been taken away, and she received inadequate support to perform job).

Lockheed argues that Brown was given "'alternatives to quitting' after she gave her initial resignation notice(s)." Pet. Br. 21. Lockheed claims that Brown "resigned before [s]he had complete details," Pet. Br. at 21, like the plaintiff in *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1222 (10th Cir. 2002). Significantly, Lockheed omits the remainder of the sentence quoted from the *Garrett* decision: "before he had complete details *as to the position into which HP was in the process of transferring him*." *Id.* (emphasis added). Management gave Garrett notice that he was being transferred to the new position of "Software Integration Specialist," which would not involve a demotion or a cut in pay. *Id.* at 1216-1217. In stark contrast, Lockheed never gave Brown notice that she was being

transferred to a new position and, in fact, threatened to lay her off. Despite Brown's repeated requests, Lockheed never clarified her undefined job situation. This critical distinction undermines Lockheed's claim that Brown had some "alternative to resignation" that made her resignation somehow voluntary.

Finally, Lockheed claims that Brown repeatedly resigned. Pet. Br. at 13-14. However, the record evidence does not support this allegation. Although Brown may have talked with co-workers about the possibility of quitting given how she was being treated, she did not turn in a formal notice until she gave notice of her constructive termination. Tr. at 279. Moreover, even if Brown resigned and retracted a resignation, that would not negate her constructive discharge claim. The objective standard "cuts both ways—just as an employee's subjective feelings that her working conditions were intolerable is not controlling . . . neither is an employee's desire to continue working despite conditions so intolerable any reasonable employee would have long since quit." *Barone*, 355 Fed. Appx. 169 at 185 (disagreeing with the lower court's emphasis on how plaintiff's request for reinstatement was inconsistent with her claim of intolerable working conditions) (citing *E.E.O.C. v. PVNF, Inc.*, 487 F.3d 790, 806, n.10 (10th Cir. 2007)).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION, AS AFFIRMED BY THE BOARD, THAT BROWN'S PROTECTED ACTIVITY CONTRIBUTED TO HER CONSTRUCTIVE DISCHARGE.

The ALJ's determination, as affirmed by the Board, that Brown's protected activity was a contributing factor in her constructive discharge is supported by substantial evidence. Under the SOX Section 806, 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.'" *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476, n.3 (5th Cir. 2008) (citing *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006)). "[T]he contributing factor test is broad and is a relatively low burden for a plaintiff to meet." *Barker v. UBS AG*, No. 3:09–cv–2084, 2011 WL 283993, at *4 (D. Conn. Jan. 26, 2011) (citing *Grove v. EMC Corp.*, 2006-SOX-99, at 26 (ALJ July 2, 2007)).[13]

Courts consider various facts to decide whether protected activity was a contributing factor in an employment decision, including the amount of time between the protected activity and the adverse employment action, whether the party and the employer had a strained relationship, and changed performance evaluations. *Id.* (citing *Mahony v. KeySpan Corp.*, No. 04 CV 554

[13] A contributing factor need not be significant, motivating, substantial, or predominant. *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Wegender v. Robert Half Int'l, Inc.*, 2005-SOX-59, at 12 (ALJ March 30, 2006).

SJ, 2007 WL 805813, at *6 (E.D.N.Y. Mar. 12, 2007)). In addition, temporal proximity between protected activity and an adverse action alone may be sufficient to demonstrate to meet the contributing factor test. *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir. 1996) (recognizing that protected conduct "closely followed" by an unfavorable personnel action may justify an inference of retaliatory motive); *Wegender*, 2005-SOX-59, at 12. Here, substantial evidence supports the ALJ's determination, as affirmed by the Board, that both the short time between Brown's complaint to Moncallo and the start of the events comprising her constructive discharge and evidence of Owen's retaliatory animus demonstrated that Brown's protected activity contributed to her constructive discharge.

A. Temporal Proximity is Sufficient to Establish that Brown's Protected Activity Was a Contributing Factor in Her Constructive Discharge.

As the Board and the ALJ found, "the evidence clearly demonstrates a cascade of unfavorable actions taken against Brown, beginning shortly after the investigation against Owen ended." FDO at 11. The ethics investigation was "closely followed" by the series of unfavorable acts comprising Brown's constructive discharge. *Marx*, 76 F.3d at 329. The Board properly found that the "temporal proximity of the beginning of Brown's employment difficulties is significantly close to the Owen investigation." FDO at 11. Indeed, shortly after the

conclusion of the ethics investigation in August 2006, in late 2006, Owen received a lower performance rating, and Owen called her to find out who had filed the ethics complaint, compelling Brown to reveal to Owen Brown's role in the investigation. RDO at 6, 46; FDO at 4, 11; Tr. 259, 262, 269, 272-73. During the course of 2007, Brown faced a continuous chain of events that made her working conditions unbearable. *See* discussion *supra* pp. 42-44.

In *Marx,* this Circuit held that "the phrase 'closely followed' must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the . . . complaint and only culminates later in the actual discharge." *Marx*, 76 F.3d at 329. As support, the Court cited to *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 377 n.4 (6th Cir. 1984), in which the Sixth Circuit reversed judgment for the defendant where a discharge occurred nearly one and one-half years after the complaint was filed, but a pattern of retaliation allegedly began soon after the complaint was filed. *Id.* Here, although Brown gave notice of her discharge in early January 2008, the pattern of retaliation closely followed, within months of Owen learning of Brown's protected activity. Temporal proximity alone sufficiently demonstrates that Brown's ethics complaint was a contributing factor in her constructive discharge.

Lockheed contends that the record contains no substantial evidence to support the ARB's finding of temporal proximity. Pet. Br. at 25. In support of this argument, Lockheed alleges that Brown's anonymous ethics complaint was made "more than twenty months before" she gave notice of her constructive termination and that the investigation report was produced "more than seventeen months" before she gave notice. *Id.* This argument disregards this Circuit's holding in *Marx* and incorrectly applies the "closely follows" standard by circumventing when the constructive discharge began (on the heels of the Brown's protected activity), and instead focusing on when the constructive discharge ended.[14]

[14] In addition, Lockheed's argument that "[p]ushing back the start date of the alleged retaliation would call into question the timeliness of Brown's SOX action. . ." (Pet Br. at 25, n.11) fails to recognize that a constructive discharge claim, like a hostile work environment claim, "generally rests on a series of discriminatory events and incidents." *Chapman v. Carmike Cinemas*, 307 Fed.Appx. 164 (10th Cir. 2009) (unpublished); *Velikonja v. Gonzales*, No. 04-1001, 2007 WL 6164807, at *4 n.7 (D.D.C. June 30, 2005). Therefore, as with a hostile work environment claim, as long as all of the acts are related, and at least one act falls within the 90 day time period--as Brown's notice of constructive discharge did--the complaint is timely and the Court may consider all acts in determining whether a violation has occurred. *See, e.g., Chavera v. Victoria Indep. School Dist.*, 221 F. Supp. 2d 741, 749 (S.D. Tex. 2002) (applying *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) to a constructive discharge claim); *McFarland v. Henderson*, 207 F.3d 402, 408-409 (6th Cir. 2002) (same); *Wilson v. New York City Police Dep't*, No. 09 Civ. 2632, 2011 WL 1215031, at *7 (S.D.N.Y. 2001) (same).

B. Other Record Evidence, Including Owen's Subordinate Bias, Demonstrates that Brown's Protected Activity Was a Contributing Factor in Her Constructive Discharge.

In addition to temporal proximity, other facts in the record demonstrate that Brown's protected activity was a contributing factor in her constructive discharge. Shortly after the ethics investigation, "a strained relationship" developed between Brown and her supervisors and colleagues at Lockheed, including Owen, Asbury, Gan, and Jewell. *Barker*, 2011 WL 283993, at *4. In addition, Brown suffered from a "changed performance [evaluation]" or lower performance rating shortly after the ethics investigation. *Id.*

Further, even if Gan nor Jewell knew of Brown's ethics complaint, substantial evidence supports the ALJ's finding, as affirmed by the Board, that Owen "poisoned" Gan's and Jewell's opinions regarding Brown's qualifications and quality of work, causing Brown's constructive termination. RDO at 49; FDO at 11. The Supreme Court recently affirmed this theory of subordinate bias, or "cat's paw" liability, in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (U.S. 2011), holding that, in a discrimination suit arising under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), an employer is liable if (1) a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action and (2) if that act is a proximate cause of

the ultimate employment action taken by a higher level supervisor or decision maker. The Tenth Circuit has applied the subordinate bias doctrine in cases arising under both Title VII of the Civil Rights Act of 1964 and the ADEA. *See EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006) (Title VII); *Simmons v. Sykes Enterprises, Inc.*, No. 09–1558, 2011 WL 2151105 (10th Cir. June 2, 2011) (ADEA).

After *Staub,* this Circuit held that, in Title VII and USERRA cases involving a theory of subordinate bias, the plaintiff "only [needs] to prove her supervisor's animus was *somehow* related to the termination and not that the animus was necessary to bring about the termination." *Simmons*, 2011 WL 2151105 at *4 (distinguishing age discrimination cases, which require age to be the "but-for" cause of the adverse employment action, from USERRA and Title VII cases, which only require proximate cause or a direct relation between the injury and the conduct). Similarly, in a SOX Section 806 case alleging a cat's paw theory, a plaintiff may establish discrimination by showing that the protected activity was simply "a motivating factor." *Bobreski v. Givoo Consultants, Inc.*, No. 09-057, 2011 WL 2614311, at *12 (ARB June 24, 2011) (remanding to ALJ to consider whether protected activity was a "contributing factor," not the sole or substantial factor in the final decision).

Recently, in *Chen v. Dana-Farber Cancer Inst.*, No. 09—58, 2011 WL 1247211, at *11-*12 (ARB March 13, 2011), the ARB issued a decision in a whistleblower case arising under the Energy Reorganization Act ("ERA") based on subordinate bias. In *Chen*, the ARB upheld the ALJ's determination that an employer violated the whistleblower protection provisions of the ERA because a subordinate's criticism and performance assessments regarding the complainant were infected with retaliatory animus and two supervisors largely based their decisions to discharge the complainant on the subordinate's biased reports. *Id.*

Similarly, in this case, there is substantial proof that Owen poisoned Gan's and Jewell's opinions of Owen due to retaliatory animus that was intended to cause an adverse employment action, and that her "poisoning the well" was a motivating factor in, or proximate cause of, Brown's constructive discharge. During Owen's December 19, 2006 call to Brown, she attempted to find out who had filed the ethics complaint against her and stated she had lost her annual bonus due to the complaint. FDO at 4; Tr. 262. This call showed that Owen was agitated and distraught by the investigation. After both Owen and Asbury became aware of Brown's role in the investigation, Brown's situation became progressively worse. *See* discussion *supra* pp. 42-44. On June 12, 2007, Owen called Brown to tell Brown her job had been posted on the Internet and

that she needed to get her resume together or she was going to have a new boss. Tr. 274; FDO at 4. This call demonstrated a foregone conclusion: Brown would be replaced even before she had a chance to express an interest in applying for "her job" and despite her performance and qualifications.

Further, the ALJ correctly found that "Gan and Jewell relied on the biased and discriminatory reports of Owen against [Brown]." RDO at 48. Owen played a significant role in transitioning and educating Gan and Jewell about the department. In addition, Owen had a close working relationship with Gan and already had a prior working relationship with Jewell. Owen's influence over Gan was evident in Gan's inexplicably harsh behavior and critical attitude toward Brown from the very beginning, and the false information about Brown's performance evaluations and qualifications she relied upon in actively discouraging Brown from applying for the Director of Communications position. In addition, the ARB properly noted that "Owen was one of the decision-makers who decided to hire Jewell in a position over Brown." FDO at 11. Gan was on the selection committee for the position and had encouraged Jewell to apply for it. FDO at 5; Tr. 295. Once selected, Jewell admitted that Owen had shared with Jewell that Brown had received "less than perfect" evaluations in the past. *Id.*

As demonstrated above, Lockheed's claim that the ARB and

ALJ "simply assumed" that the requirements of the "cat's paw" theory have been fulfilled, Pet. Br. at 28, is without merit. The ALJ exhaustively documented his evaluation that Brown's testimony was credible and that the evidence showed that Owen's retaliatory animus influenced the actions taken against Brown. The ARB found that Brown's credible testimony was more than enough substantial evidence to support the ALJ's findings of fact. FDO at 2, n.1. Because the ARB's opinion is in agreement with and based in part on the ALJ's credibility determinations, it is entitled to great deference. *Trimmer v. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999) (citing 5 U.S.C. § 706(2)(A)). Thus, the Court should affirm the ALJ and the ARB's determination that Brown's protected activity contributed to her constructive discharge as supported by substantial evidence.

IV. THE ALJ'S DAMAGES AWARD WAS PROPER.

An employee prevailing in a SOX Section 806 case is entitled to "all relief necessary to make the employee whole." 18 U.S.C. 1514A(c)(1). That relief includes reinstatement, back pay, with interest, and compensation for special damages, including reasonable attorney fees. *Id.* at 1514A(c)(2). The ALJ, as affirmed by the Board, properly ordered Brown to be reinstated and awarded back pay with interest; reimbursement of

medical expenses; $75,000 in non-economic compensatory damages for emotional pain and suffering, mental anguish, embarrassment, and humiliation; and attorney's fees. RDO at 50-55; FDO at 11.

Substantial evidence supports the ALJ's finding that sufficient animosity or hostility does not exist to justify subverting the preferred remedy of reinstatement awarding front pay. RDO at 51-53. But, to the extent a comparable position into which Brown could be placed no longer exists, *see* Pet. Br. at 38 n. 24, remand may be necessary to determine whether reinstatement is possible as well as to quantify the back pay, medical expenses, and attorney's fees due. *Id.* at 38.

Finally, Lockheed claims that "the sum of $75,000 as non-economic compensatory damages" is not an available remedy under 18 U.S.C. 1514A(c)(2)." *Id.* The enumerated relief in that subsection is prefaced with the term "including," suggesting a non-exhaustive list of relief. *Schmidt v. Levi Strauss & Co.*, 621 F. Supp. 2d 796, 804 (N.D. Cal. 2008). Moreover, 18 U.S.C. 1514A(c)(1), provides that a prevailing employee is entitled "*to all relief necessary to make the employee whole*." *Id.* (emphasis added). There is substantial evidence that Brown cannot be made whole without compensation for emotional pain and suffering, mental anguish, embarrassment, and humiliation. *Cf. Hanna v. WCI Comtys., Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (holding that a successful SOX plaintiff cannot be made whole

without being compensated for damages for loss of reputation even though not expressly listed in 18 U.S.C. 1514A(c)(1)).

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court affirm the Board's Final Decision and Order finding that Lockheed violated SOX Section 806 and ordering appropriate relief.

Respectfully submitted,

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Dated: September 2, 2011

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