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

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CYPRESS SEMICONDUCTOR CORPORATION,
Petitioner,

– v. –

ADMINISTRATIVE REVIEW BOARD, U.S. DEPARTMENT OF LABOR,
Respondent,

and

TIMOTHY C. DIETZ,
Intervenor.

On Petitions for Review of Orders of the Administrative Review Board of the U.S. Department of Labor, ARB Case Nos. 15-017 and 15-047

OPENING BRIEF OF PETITIONER CYPRESS SEMICONDUCTOR CORPORATION

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Cypress Semiconductor Corporation states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PRIOR AND RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(B), Cypress Semiconductor Corporation states that the following are prior or related cases:

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

JURISDICTIONAL STATEMENT

Timothy Dietz filed an administrative complaint in the U.S. Department of Labor alleging that Cypress Semiconductor Corporation constructively discharged him in violation of 18 U.S.C. § 1514A. AR2538-44.[1] The Administrative Review Board of the U.S. Department of Labor ("ARB") had jurisdiction under 18 U.S.C. §§ 1514A(b)(1)(A) and (b)(2)(A), 49 U.S.C. § 42121(b)(3), and 29 C.F.R. § 1980.110.

On March 30, 2016, the ARB issued a 2-1 decision affirming the order of an administrative law judge ("ALJ") ruling for Dietz on his complaint. AR2380-2403; *see* AR2159-2243. Cypress timely petitioned this Court for review on April 29, 2016. The petition was docketed as No. 16-9523.

On May 12, 2016, the ARB affirmed the ALJ's order awarding Dietz attorneys' fees and costs. AR2532-35; *see* AR2323-35. Cypress timely petitioned for review on May 23, 2016. The petition was docketed as No. 16-9529.

On June 21, 2016, the ARB awarded Dietz additional attorneys' fees and costs. AR2506. Cypress timely petitioned for review on June 30, 2016. The petition was docketed as No. 16-9534.

This Court has consolidated the three petitions. Order at 2, No. 16-1209 (10th Cir. June 13, 2016). The Court's jurisdiction rests on 18 U.S.C. § 1514A(b)(2)(A) and 49 U.S.C. § 42121(b)(4)(A).

[1] "AR" refers to the administrative record that the Department of Labor filed in these cases on July 18, 2016.

STATEMENT OF THE ISSUES PRESENTED

The Sarbanes-Oxley Act prohibits a publicly traded company from discharging an employee who provides information about conduct that "the employee reasonably believes constitutes a violation of [18 U.S.C.] section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities or commodities fraud], 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).

1. Whether, as a matter of law, Dietz was constructively discharged when, the day after he expressly resigned, his boss sent him a calendar invitation request that did not include an agenda.

2. Whether Dietz triggered 18 U.S.C. § 1514A by reporting that a Cypress bonus policy might violate state wage-and-hour laws, when (a) he could not have reasonably believed that Cypress committed criminal mail fraud or wire fraud by physically handing out job offer letters that did not disclose that policy and (b) Cypress could not have known or suspected he was making such an allegation.

3. Whether the ARB's orders awarding Dietz attorneys' fees and costs should be reversed because Dietz is not entitled to relief under 18 U.S.C. § 1514A.

STATEMENT OF THE CASE

Timothy Dietz worked for Cypress Semiconductor Corporation from November 2012 until he resigned in June 2013. AR2381, AR2384. After he quit, he filed an

administrative complaint in the Department of Labor alleging that Cypress had constructively discharged him in retaliation for protected whistleblower conduct, in violation of 18 U.S.C. § 1514A, part of the Sarbanes-Oxley Act. AR2538-44.

The Regional Administrator for the Occupational Safety and Health Administration investigated Dietz's complaint and dismissed it as meritless, finding no protected activity and no constructive discharge. AR2-4. Dietz appealed, and a trial was held before an ALJ, who ruled in his favor. AR2159-2243. Although Dietz had an annual salary of $148,500 and worked at Cypress for only seven months before resigning, the ALJ awarded Dietz $654,906 in front pay, $220,105.85 in back pay, interest, attorneys' fees, costs, and other monetary relief. AR2167, AR2240. Over a dissent, a panel of the ARB affirmed in a ruling that the majority itself characterized as "odd" and a "seeming contradiction." AR2394.

Cypress now petitions for review of the ARB's divided order and two other ARB orders that awarded Dietz more than $288,000 in attorneys' fees and costs. *See* AR2504-06, AR2532-35.

A. Factual Background

1. Dietz becomes a Program Manager at Cypress.

Dietz worked as a software engineer at Intel Corporation from 2000 to 2004. AR553. In 2006, he graduated from law school, passed the Maine bar exam, and began practicing as an attorney in Maine. AR553-55. In 2008, Dietz rejoined Intel as a

software engineer in California. AR555. Although he was not an attorney for Intel, he passed the California and New Hampshire bar exams in 2009 and 2011, respectively. AR555, AR558.

In May 2012, Dietz moved to Colorado Springs to work as a new products program manager for Ramtron International Corporation, a semiconductor company. AR563, AR567-68. He also claimed to be Ramtron's intellectual property attorney, although at trial Ramtron's former CEO denied that claim. AR1174-75.

Cypress acquired Ramtron in a deal that closed in November 2012. AR569-70. Dietz applied for employment at Cypress. AR950. Tom Surrette, Cypress's Executive Vice President of Human Resources ("HR"), physically handed Dietz an offer for employment as a Program Manager at Cypress, and Dietz accepted on the spot. AR581-82. Surrette also physically handed other Ramtron employees offer letters to become employed at Cypress. AR1226.

At Cypress, Dietz originally reported to Brian Todoroff, who reported to James Nulty. AR606. Nulty was the Senior Vice President of the Quality Department and was based in Cypress's headquarters in San Jose, California. AR660, AR944. Later Dietz reported directly to Nulty. AR606.

Program Managers at Cypress are responsible for maintaining schedules for the new projects that they manage. AR949, AR960. One of their primary functions is to issue warnings when potential scheduling slips occur and to resolve those issues

promptly. AR977. They are required to "escalate" potential slips to their bosses "immediately" upon becoming aware of them. AR994. In addition, at least weekly, they must update their projects' status on Cypress's computer system. AR1017-19.

Although Dietz at first received generally favorable reviews from Nulty, there were criticisms. In February 2013, Nulty wrote in Dietz's 90-day review that Dietz "should escalate . . . when he asks for something and doesn't receive it in time to get his job done." AR1444. In March 2013, Nulty reduced Dietz's bonus pay from 100% to 80%. AR607-08.

2. Dietz questions the legality of Cypress's Design Bonus Plan.

Cypress loses more than $1 million for each week its projects are delayed. AR966. To reduce delays, Cypress created a "Design Bonus Plan." The Bonus Plan applied only to a subset of engineers—about 20% of Cypress's workforce. AR512, AR1203-04, AR1257. It did not apply to Dietz. AR620-21.

The base salary of an employee who participated in the Bonus Plan was set at 10% below the pre-Bonus Plan salary. AR1206, AR1254. Bonuses were paid quarterly based on the progress rate of the employee's project. AR1207. Bonus payouts were calculated as a percentage of the amount of the salary differential and ranged from as low as 20% if the project was far behind schedule (leaving a total 8% below the pre-Bonus-Plan salary), to 200% if the project was on schedule (an effective 10% bonus above pre-Bonus-Plan salary), up to 500% if the project was far ahead of

schedule (an effective 40% bonus). AR1207, AR1254.[2] The incentive worked: on average, employees in the Bonus Plan received an effective 27% bonus above pre-Bonus-Plan salary. AR1223.

Cypress made sure that employees knew about the Bonus Plan before it applied to them. The Bonus Plan was thoroughly discussed on Cypress's intranet. AR624, AR629; *see* AR3041-98. Before any project subject to the Bonus Plan launched, each team member was required to acknowledge reading and agreeing to the project's Design Governing Spec, which referenced the Bonus Plan. AR624, AR840. And to ensure that new engineers were eased in to the Bonus Plan, employees had only upside potential during their first quarter in the Plan. AR523-24.

Because he was a Program Manager, Dietz was not subject to the Bonus Plan. AR620-21. In fact, no former Ramtron engineers were subject to having their salary set at a lower level for nearly a year after they began working for Cypress. AR642-43, AR1215-16. Until then, the former Ramtron employees who later became subject to the Bonus Plan received the salary stated in their employment offer letters (which did not mention the Plan). AR642-43.

In December 2012—many months before the Bonus Plan took effect for any former Ramtron employee—Cypress met with them to discuss the Bonus Plan.

[2] An employee who left Cypress before the quarterly payout was not eligible to receive a bonus, so received 10% less than the pre-Bonus-Plan salary for that partial quarter. AR1093-94.

AR1215-16, AR1224. Dietz attended a second meeting about the Plan on April 11, 2013—more than a quarter before any Ramtron employee's salary was set at a lower level. AR630-33, AR643.

The next day, April 12, Dietz emailed Nulty to express "concerns" that the structure of the Bonus Plan might violate California and Colorado wage laws, quoting wage statutes from both states. AR1695-97.[3] As the ARB found, Dietz's email "made no mention" of "fraud or of any of the provisions listed" in Section 1514A. AR2382. It "merely question[ed] the legality of the bonus plan under state wage laws." AR2389.

Nulty wrote back that he would have to review Dietz's email with others at Cypress before responding. AR648, AR1695. Nulty forwarded Dietz's email to Cypress's general counsel, Victoria Valenzuela, and to Surrette. AR1024. Had Surrette or Valenzuela understood Dietz to allege any kind of fraud, they would have been required to raise the issue with the Audit Committee of Cypress's Board of Directors; they did not perceive any allegation of fraud, however, but understood only

[3] The lawfulness of the Bonus Plan is not at issue in this case. Of course, the terms of at-will employment—including salary—can be changed prospectively at any time without risking a claim of fraud. *See Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 356-57 (2010) (upholding reduction in salary); *Lucht's Concrete Plumbing, Inc. v. Homer*, 255 P.3d 1058, 1061-63 (Colo. 2011) (en banc) (enforcing non-compete agreement signed after the start of employment). Cypress's at-will employees, including its employees who were formerly at Ramtron, knew about the Bonus Plan before it applied to them and could choose to leave Cypress before the Bonus Plan covered them.

that—as Dietz said—he was simply questioning compliance with state wage laws. AR1194, AR1197, AR1280, AR1285. Valenzuela was "happy" to answer Dietz's questions and told Nulty that she would reach out to Dietz. AR1284-85. Surrette thought that Dietz's email was a "non-event" and let Valenzuela respond. AR1228.

On April 22, Valenzuela spoke with Dietz for 20 minutes. AR649, AR652. According to Dietz, the meeting started with "friendly conversation." AR650. He "may have even" mentioned his "dreams in the future, once [he] was admitted to the Bar in Colorado," including that he would "'really like to work" in Cypress's legal department. AR650, AR792.

Their conversation then turned to Dietz's email alleging that the Bonus Plan violated state wage laws. At trial, Dietz did not recall ever complaining to Valenzuela about Cypress's November 2012 offer letters to Ramtron employees. AR900. According to Valenzuela's trial testimony, however, Dietz claimed during their conversation that Cypress's offer letters told prospective employees "'what their salary is going to be and then you change the game.'" AR1307. Regardless, Valenzuela told Dietz during their conversation that Cypress's employees are "at-will," that Cypress's "intent is to explain [the Plan] and make sure they understand it," that Cypress's employees "acknowledge that they've read it and they understand" the Plan before it applies to them, and that Cypress is "always available for questions." AR1307-08. She further said that, before it instituted the Bonus Plan, Cypress

received an opinion from outside counsel that the Bonus Plan was lawful. AR890. (Valenzuela testified that Cypress used Paul Hastings LLP for employment law advice. AR1274.) Valenzuela suggested, and Dietz agreed, that additional training on the Bonus Plan might be helpful. AR652. At trial, Dietz described the conversation as "cordial," "productive," and "not antagonistic." AR649, AR652, AR888. Valenzuela likewise described it as "very cordial." AR1324.

After their call, Dietz followed up with an email to Valenzuela, writing, "Thanks for taking the time to talk with me today!" AR1759. Until he resigned, Dietz never raised any additional questions about the Bonus Plan with Valenzuela, Nulty, or anyone else, leading them all to believe that Dietz's concerns were resolved. AR655, AR904, AR1230, AR1326, AR1334.

3. Dietz manages his project with oversight and support from Nulty.

Dietz's project launched at the end of March 2013. AR525. On April 19, 3 days before Dietz talked to Valenzuela, he circulated minutes from a meeting on his project. AR1027. Later that day, Nulty emailed Dietz, noting that Dietz had listed "lots of problems" with "no plans or follow up actions given to address them." AR854; *see* AR3630. Nulty asked whether "the project will slip" and suggested that Dietz schedule another meeting on the project and escalate issues to Dietz's managers. AR855-56. Dietz wrote back that "it would be premature to escalate." AR856.

Nulty responded that same day that it was Dietz's "call," but that Dietz should know "the following questions I evaluate schedule slips with," including when the Program Manager became aware of the event that caused the slip, and how quickly the Program Manager responded. AR857, AR1030; *see* AR3634. Nulty explained that the Program Manager's response "usually determines how I judge individual performance" because it is "where 99% of the screw-ups occur." AR858; *see* AR3634. Dietz testified at trial that Nulty's April 19 email was not "threatening" or "retaliatory." AR858.

On April 24, Dietz learned that John Groat, the manager of test engineers on Dietz's project, had pulled an engineer off Dietz's project to work on another project. AR667-68. Under Cypress's policies, Groat should have formally requested approval from a director before removing the engineer. AR1701. Dietz nevertheless believed that Groat's decision was in Cypress's best interests and asked Groat to submit the request, which Dietz approved. AR667, AR1701. Nulty emailed Dietz that he was "glad to see you guys are working to do the right thing," but asked Dietz to have Groat revise the request because Dietz did not have authority to approve it. AR1701.

On May 14, Ranier Hoehler, the new business unit manager of the Colorado Springs office, called Dietz at home to complain that Dietz was issuing too many scheduling warnings, which was depressing morale. AR619, AR875, AR1033-34. Dietz told Nulty about this conversation, and Nulty again supported Dietz, writing

Dietz that "this is solvable" and that "[y]our position is aligned with mine." AR1705. Dietz testified at trial that Nulty was "supporting" him. AR879.

4. Dietz forecasts that a three-week delay on his project would occur months in the future.

On May 22, Dietz sent Groat an email warning that Groat's team was not completing its tasks, which could cause scheduling slips; Groat did not respond. AR672-74. On May 23 or 24, Dietz could not find Groat and his team in the Colorado Springs office. *Id.* He then overheard that Groat might have pulled a test engineer off Dietz's project for a second time. AR674-75. On May 24, Dietz updated his project's status, which now showed a three-week delay for an important event that was not scheduled to occur for 14 weeks. AR1038-40.

On May 28, Dietz spoke with Groat and confirmed that, with Hoehler's apparent consent, Groat had pulled a test engineer off Dietz's project. AR675. Dietz escalated the issue to Todoroff. AR676. Later that afternoon, Dietz was sworn into the Colorado state bar. AR798-800.

That same day, Todoroff informed Nulty that Dietz had forecast that a three-week schedule slip would occur 14 weeks from then. AR1036-38. Nulty was concerned with the "very unusual" slip and wondered why Dietz could not "figure out a way to recover that slip." AR1038, AR1041. Nulty asked Todoroff to schedule a teleconference with Nulty, Dietz, Hoehler, and Groat. AR1040-41.

Shortly after that May 29 teleconference, Nulty wrote an email to Dietz criticizing him for allowing his project status report to "go stale," delaying "escalating" his knowledge that engineers had been pulled off his project, and failing to "explain in sufficient detail" why Dietz had projected a three-week delay scheduled to occur 14 weeks later. AR1712. Nulty wrote that he would document these issues in a formal memo and wanted Dietz to "know this before tomorrow's [prescheduled] meeting" with Cypress's CEO "so you aren't surprised if you hear this stated." AR880-81. Dietz admitted at trial that it would have been "legitimate" for the CEO to question Dietz on why Dietz had "extend[ed] the schedule three weeks, 14 weeks out in the future" and that Nulty's email alerted Dietz to this fact. AR881.

Within minutes of receiving Nulty's email, Dietz wrote back that he "will be preparing a responsive memo." AR1713. An hour later, Dietz sent another email saying that he and Groat had "met and moved some tasks around," which eliminated the three-week slip. AR1715. Nulty still thought that Dietz should have found a solution sooner rather than forecasting the slip. AR1047, AR1053, AR1063.

5. Nulty criticizes Dietz's management of his project.

Nulty drafted a memo with his concerns and consulted with Cypress's human resource department. One member of the HR team suggested that Nulty ask Dietz to respond with a memo on what he did wrong and what he could have done more effectively, and that Nulty let Dietz know that Nulty's memo and Dietz's response

would be kept in Dietz's personnel file. AR1153-54. Another HR employee recommended that Nulty add commonly used language that "[a]ny future infractions will result in further disciplinary action, up to and including termination." AR1156. She also recommended that Nulty give Dietz 90 days to correct his performance. AR1051. Nulty declined to invoke Cypress's formal 90-day warning process, which he believed would unnecessarily "escalat[e]" the situation; he simply wanted to document Dietz's performance issues and have Dietz correct them. *Id.*

On June 4, Nulty sent his memo to Dietz only, in accord with Dietz's request that Nulty remove Todoroff and Hoehler from the distribution list. AR712; AR1065-66. Nulty's memo warned only that "[a]ny *future* infractions will result in further disciplinary action, up to and including termination." AR1401 (emphasis added). As the ARB correctly found, "nothing on [the] face" of Nulty's memo "suggests a discharge (or future discharge) of any kind." AR2394 n.60. The record also is undisputed that nobody at Cypress ever discussed terminating Dietz (AR1236)—a fact that Dietz conceded at trial. AR921-22.

6. Dietz announces his resignation.

Nevertheless, Dietz resigned the very next day, June 5. He sent a letter to Surrette, Cypress's head of HR, and distributed it to Nulty and others. AR1409-14. The June 5 letter disputed Nulty's criticisms, claimed that Nulty had asked Dietz "attack questions" "as far back as January and February," and alleged that Nulty's

criticisms were "unlawful retaliation" for Dietz's "April 12" complaint about Cypress's Bonus Plan. AR1412-13. Dietz also claimed that he did "nothing wrong." AR1413. He then wrote:

> Therefore, my response is that I am terminating my employment at Cypress.
>
> I will agree to stay onboard [from June 5] through July 1 as a professional courtesy . . . and to keep [my] project stable while executing an orderly turnover, unless Cypress chooses to terminate my employment sooner.

Id. (underlining in original). Dietz then repeated his allegation that the Bonus Program is unlawful under "California [and] Colorado" law. *Id.* And he demanded "accelerated vesting of [Ramtron] stock," asserting "vested rights … as a third party beneficiary under the [Ramtron-Cypress] agreement." AR1414. Dietz signed his letter:

> Timothy C. Dietz, Esq.
> Admitted in California, Colorado, Maine and New Hampshire

Id.

Nulty was "stunned" by Dietz's resignation. AR1067. He quickly met with Valenzuela, who was "totally shocked" by Dietz's letter. AR1336, AR1339, AR1347. Nulty forwarded Dietz's letter to Surrette, who also was "surprised" by Dietz's response. AR1238. Surrette worked late into the night to gather information on the disagreement between Nulty and Dietz. AR1238-40. Surrette also sought legal advice regarding Dietz's retaliation accusations. *Id.*

The next day, June 6, Surrette determined that "there was merit" to Nulty's criticisms based on "data that was objectively available on our systems." AR1240. He also determined that there was no retaliation against Dietz for his complaint about the Bonus Plan's alleged noncompliance with state wage laws. AR1251.

Surrette nevertheless asked Nulty to meet with Dietz, Hoehler, and Diane Ratliff, an HR employee in Colorado. AR1240-41. On June 6, Nulty sent an invitation for a meeting at noon on the following day, June 7. AR747-48, AR1068; *see* AR2384. The meeting request did not list an agenda. AR748-49.

Surrette testified that Cypress generally follows a "turnaround process" when a valued employee resigns, which involves reacting quickly to try to retain the employee. AR1249. Surrette testified that, in arranging a meeting to take place within 48 hours of Dietz's notice, Cypress followed the spirit of the process with respect to Dietz's resignation, given "the significant fact-finding and multiple parties involved." AR1250. And because Dietz had written that he would not leave Cypress until July 1, Surrette thought that Cypress had time to discuss Dietz's resignation with him. *Id.*

When Dietz received Nulty's meeting request, he went to see Ratliff. AR750. Dietz also tried to call Nulty but could not reach him by phone. *Id.* Dietz later testified that, based on the absence of an agenda and Nulty's lack of communication with him, he concluded that Cypress was not following the turnaround process. AR752. He

nevertheless admitted at trial that nobody in the Colorado office was "isolating" him from June 5 through June 7. AR931-32.

7. Dietz makes his resignation effective immediately.

The next morning, June 7, Dietz sent an email to the Colorado office with the subject, "Last day at Cypress." AR1743. He wrote that he had planned to give Cypress until July 1 "to allow for an ordered transition" of his project; but, based on "the work environment over the past two days," Dietz "conclud[ed] that holding out until July 1 is unworkable" and he was making his "termination immediate." *Id.* He further wrote that, having been admitted to the Colorado bar the previous week, he planned to "open a small law office in Colorado Springs." *Id.*

Dietz then told Ratliff that he would not attend their noon meeting. AR436. She immediately called Nulty to tell him that Dietz had quit effective immediately. Ratliff's communication left Valenzuela and others in San Jose "scratching [their] heads" because "none of it made sense." AR1353. At that point, Nulty decided to accept Dietz's resignation at the noon meeting. AR436, AR438, AR1251. Nulty, Ratliff, and Hoehler attended the meeting; Dietz did not. AR1070.

Although Dietz is "fairly secure with [his] retirement income" from his military service, AR923, he spent the rest of June working to open a law practice—one of his "dreams" since he "went to law school." AR922, AR926. The office opened on July 1,

2013. AR762. That same day, Valenzuela confirmed that Cypress was accelerating Dietz's Ramtron stock. AR1852-53.

B. Proceedings Below

1. The Regional Administrator dismisses Dietz's complaint.

In August 2013, Dietz filed a complaint with the Department of Labor. He alleged that he was constructively discharged in retaliation for his April 12 complaint that the Bonus Plan allegedly violated California and Colorado wage laws. AR2538. Dietz further claimed that Cypress violated 18 U.S.C. § 1514A, but acknowledged that he did not specifically articulate the Sarbanes-Oxley statutory provisions in his complaint to Cypress. AR2543. He contended that Cypress had made false communications through the wires and mails, thereby violating the federal wire fraud and mail fraud criminal statutes, and also committed bank fraud. *Id*.

The Regional Administrator for the Occupational Safety and Health Administration investigated Dietz's complaint and concluded that there was "no reasonable cause to believe that [Cypress] violated [Section 1514A]." AR2. There was "insufficient evidence" that Dietz "was subjected to an adverse employment action because he provided his resignation after a meeting was scheduled with the upper management team." AR3. The Regional Administrator further found that "the resignation does not meet the threshold of constructive discharge as there is insufficient evidence to show that [Cypress] deliberately created working conditions

that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign." *Id.*

The Regional Administrator also found that Dietz did not engage in "protected activity" under Section 1514A. AR3. Dietz lacked "an objectively reasonable belief that [Cypress] engaged in wrongdoing that would violate wire fraud, bank fraud, securities fraud, an SEC rule or violation of any provision o[f] Federal law relating to fraud against shareholders." *Id.*

The Regional Administrator accordingly dismissed Dietz's complaint. AR3.

2. The administrative law judge finds for Dietz.

Dietz objected, and a trial was held before an ALJ, who ruled for Dietz. The ALJ found that Dietz was constructively discharged on June 7, 2013. AR2232. The ALJ wrote that Nulty's June 4 memo was "career ending," and Dietz was "entirely reasonable" in viewing the memo as "the first step in laying the foundation for his termination." AR2230-31. The ALJ also found that Dietz's June 5 resignation letter was sent in "rel[iance] on what he reasonably perceived to be" Cypress's turnaround process, which required Cypress to immediately persuade Dietz not to resign. AR2231. And the ALJ found that "under the circumstances," it was "objectively reasonable" for Dietz to "conclude that he faced imminent discharge" at the June 7 meeting and that "a reasonable person in Mr. Dietz's situation would conclude that quitting was his only option." AR2231-32.

The ALJ also found that Dietz engaged in protected activity under Section 1514A. The ALJ wrote that Section 1514A "brings within its ambit fraud that is reasonably believed to involve the use of interstate mails, wires, or banks," and that "Dietz clearly believed that [Cypress] was carrying out a fraudulent scheme by violating state laws on payment of wages to its employees, a scheme that necessarily implicated interstate mail, wires, and banks." AR2222.

The ALJ awarded Dietz $220,105.85 in back pay, $31,199.08 in back benefits, immediate vesting of 3,512 shares of Cypress stock and 2,041 shares of Cypress stock options, interest, costs, and attorneys' fees. AR2240. In addition, the ALJ awarded an additional $654,906.00 in front pay based on Dietz's "plan that he would work for about five years for [Cypress], and then re-evaluate." AR2239.[4]

3. The Administrative Review Board affirms in a divided opinion.

Cypress appealed to the ARB. Writing that its opinion "should not be viewed as agreeing with, or adopting, anything" in the ALJ's decision, and conceding that the ALJ made "mistakes," the ARB nevertheless affirmed in a 2-1 order. AR2381 n.3, AR2385.

The panel divided over whether Dietz was constructively discharged. The majority acknowledged that the ALJ had "conflate[d]" what it described as alternative

[4] The ALJ gave Cypress the option to "reinstate" Dietz to his "previous position" but no longer "report to Mr. Nulty," which would require Cypress to restructure its workforce. AR2238-39. Cypress declined reinstatement.

methods for establishing constructive discharge. AR2391. Viewing the issue as "a close case," the majority nonetheless upheld the ALJ's finding that Dietz was constructively discharged on June 7, 2013—two days *after* his June 5 resignation letter. AR2392-93, AR2400.

The majority admitted that its ruling was "unusual" and "odd" given that Dietz's June 5 letter "flat out states, 'I am terminating my employment at Cypress.'" AR2393-94. The majority observed that "[t]here is no indication of the conditions under which he would stay, no implication that he would be willing to stay if, for example, he did not have to work under Nulty any longer and could have the June 4th memo expunged from his personnel file." AR2394. And it found "odd, almost disingenuous" Dietz's testimony that he did "not actually" resign on June 5. *Id*. But it was "willing to accept this seeming contradiction because looking at Dietz's June 5th letter in its full context," the majority was "convinced that the ALJ *must have believed* (though she did not say in precisely these terms) that Dietz was effectively hedging his bets" by sending the June 5 letter with the "hope" that Cypress would "do something to retain [him]." AR2394-95 (emphasis added).

The majority further ruled that Cypress essentially communicated to Dietz that it "was *definitely*" going to fire him on June 7 because Nulty invited Dietz to an "agenda-less meeting that no one would tell Dietz anything about." AR2395 (emphasis in original). The ARB concluded: "Although Cypress did not say the magic

words, 'Unless you resign, you'll be fired' out loud, a reasonable person in Dietz's position would have understood Cypress's actions" in sending a meeting request without an agenda "to send just that message." AR2396.

The ARB also found that Dietz engaged in protected activity under Section 1514A. The majority began by conceding that the ALJ "misunderstood what Dietz had to show" and committed "clear error" in finding that Dietz alleged bank fraud. AR2386 n.28, AR2388. It further held that Dietz's allegation that Cypress's Bonus Plan violated "state wage laws is, by itself, insufficient to constitute protected conduct." AR2388. And it suggested that Dietz's April 12 letter to Nulty was *not* itself protected activity because it did not allege any misrepresentation. AR2389.

Nevertheless, the ARB ruled that Dietz in effect alleged fraud during his April 22 conversation with Valenzuela by arguing that Cypress's November 2012 employment offer letters to Ramtron employees should have mentioned the Bonus Plan. AR2389-90 & n.40. And the ARB found that Dietz alleged fraud involving the use of the mails or wires because "Dietz *had to have believed* that Cypress used either the mails" or the wires "to send the former Ramtron employees their offer letters." AR2387 n.30 (emphasis added).

Judge Corchado dissented in part. He did "not agree that the record contains substantial evidence supporting the ALJ's finding that Cypress constructively discharged Dietz." AR2401. Judge Corchado explained that "no record evidence

indicat[es] any additional personnel action forthcoming" after Nulty sent his June 4 memo. AR2402. Judge Corchado found it "[il]logical to infer, from the record as a whole, that Cypress was going to 'fire' Dietz when Dietz had already expressly resigned." *Id.* He also found "no substantial evidence supporting an inference that Cypress believed Dietz was bluffing" in his June 5 resignation letter, and "no substantial evidence that logically supports a *reasonable* inference that [Dietz] was going to be fired on June 7, 2013." *Id.*

In a subsequent order, the ARB affirmed the ALJ's award of $252,416.37 in attorneys' fees and costs. AR2533. And in a third order, the ARB awarded Dietz $35,620.75 in fees and costs for proceedings before the ARB. AR2505. Cypress now petitions from all three orders.

4. The district court enters judgment for Dietz, and Cypress posts a supersedeas bond.

After the ARB issued its first decision, Dietz filed a civil action in the district court to enforce the ARB's orders. *See* CA6-A9.[5] Finding its role "'ministerial,'" the district court entered a judgment for Dietz. CA172-76. It then stayed that judgment after Cypress posted a $1.25 million supersedeas bond. In No. 16-1209, Cypress has

[5] "CA" refers to the appendix that Cypress filed with this Court in Nos. 16-1209 and 16-1249 on July 26, 2016.

appealed from the district court's judgment. In No. 16-1249, Dietz has cross-appealed from the district court's stay order.[6] Briefing is under way.

Cypress respectfully requests that the appeals from the order enforcing the judgment be heard with these petitions for review. *See, e.g.*, *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1506 (10th Cir. 1985) (deciding petition for review together with the "related" appeal from judgment in the enforcement action).

SUMMARY OF ARGUMENT

The ARB did everything it could to salvage Dietz's claim, relying on facts that the ALJ did not find and substantial evidence did not support, in service of legal theories that the ALJ did not adopt and Dietz did not advance. But the ARB's effort to stitch together a retaliation claim for Dietz cannot withstand scrutiny under the legal principles that govern here.

Dietz unequivocally resigned on June 5. The ARB recognized that this resignation was not coerced. That should have ended the analysis under settled law. Yet the ARB decided that the resignation that Dietz unambiguously communicated to Cypress was not a resignation at all, because he hoped Cypress would try to talk him out of it. When Cypress the next day asked him to attend a meeting the day after that, Dietz did not accept the invitation, but responded by accelerating his resignation to

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[6] By written opinion, this Court denied Dietz's petition for a writ of mandamus to set aside the order staying execution of the judgment. *See* Order, No. 16-1205 (10th Cir. June 13, 2016).

become immediate instead of taking effect in three weeks. That second resignation, the ARB held, was a constructive discharge coerced by the failure to include an agenda with the meeting request, and by the fact that one person Dietz asked about the meeting did not know its purpose and the other did not happen to answer the phone.

That chain of events does not approach the objectively intolerable conditions that the Supreme Court has held necessary for a constructive discharge. The ARB asserted that intolerable conditions were not necessary if an employee perceived only a choice between resigning and being fired. No such alternative appears in the Supreme Court's jurisprudence, and, in the absence of an explicit threat of imminent termination, this Court has made clear that the lack of choice must itself result from intolerably harsh conditions. But there was no evidence, let alone substantial evidence, that Dietz was subject to the kind of intolerable conditions that could support a finding of constructive discharge. He received a negative comment on one project and responded by quitting. That is not a constructive discharge by any legally sound standard.

In addition, Dietz did not engage in conduct that Section 1514A protects. The complaint the ARB identified as a trigger for Sarbanes-Oxley protection did not fall within the statutory scope. Dietz complained that a Cypress bonus program violated state wage-and-hour laws. He later suggested that the program was concealed from certain employees when they received offers to join Cypress after it acquired the

company where they and Dietz had worked. From this, the ARB inferred that Dietz must have believed, and reasonably, that the concealment involved use of the mail or wires and amounted to federal mail or wire fraud.

But Dietz certainly did not say so in complaining about the program to Cypress, and no wonder: the offers in question were *handed* to the employees, just like Dietz's offer was handed to him. Nor does the ARB's theory stand up to analysis: not every allegedly misleading statement about a state-law violation amounts to wire fraud merely because electronic communications are ubiquitous. And even if Dietz may have thought that a federal violation was nested in the Cypress conduct he complained about, he did not intelligibly communicate the existence of a covered violation. As a result, Cypress could not reasonably have known or even suspected that Dietz meant to complain about conduct subject to protection by Sarbanes-Oxley. And Cypress could not retaliate against an accusation it could not and did not reasonably perceive.

Finally, the ARB's fee awards, which depend on the order upholding Dietz's complaint, fall along with it.

ARGUMENT

"This court is not in the business of rubber-stamping agency action." *St. Anthony Hosp. v. U.S. Dep't of Health & Human Servs.*, 309 F.3d 680, 690 (10th Cir. 2002). The Court reviews the ARB's orders under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d

1121, 1128 (10th Cir. 2013). "The APA requires meaningful review." *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

Under the APA, this Court reviews the ARB's legal determinations *de novo*. *Lockheed Martin*, 717 F.3d at 1129. It reviews the ARB's factual findings for "'substantial evidence,'" which means "'such relevant evidence [that] a reasonable person would deem adequate to support the ultimate conclusion.'" *Id.* The substantial-evidence standard "requires meaningful scrutiny of the agency's findings." *St. Anthony*, 309 F.3d at 691. "Because '[s]ubstantiality of evidence must be based upon the record taken as a whole,' [this Court] must 'meticulously examine the record,' to determine whether the evidence in support of the [ARB's] decision is substantial and 'take into account whatever in the record fairly detracts from its weight.'" *Washington v. Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994) (internal citations omitted).

Under these standards, the ARB's orders should be reversed.

I. As A Matter of Law, Dietz Was Not Constructively Discharged.

The ARB's conclusion that Dietz was constructively discharged cannot withstand scrutiny. First, under controlling Supreme Court authority, Dietz's June 5 memo was a resignation that precluded any subsequent constructive discharge. Second, the ARB erroneously did not require Dietz to prove intolerable working conditions, a demanding legal standard that Dietz cannot meet and that the omission of an agenda on an email does not come close to satisfying. Third, nothing Cypress

said approached the communication of a clear choice either to resign or be fired, and no substantial evidence supported the ARB's conclusion that Cypress effectively communicated to Dietz that he would be fired at the June 7 meeting.

A. As a matter of law, Dietz resigned on June 5.

"[T]he constructive discharge doctrine" treats "an employee's reasonable decision to resign because of unendurable working conditions" as the equivalent of "a formal discharge for remedial purposes" under a variety of anti-discrimination laws and anti-retaliation provisions. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). The constructive-discharge doctrine is limited to the "situation" where the employee's "working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) (quoting *Suders*). A plaintiff alleging constructive discharge "must prove" the "basic element[]" that "a reasonable person in his position would have felt compelled to resign." *Id*. at 1777. "The bar is quite high in such cases: a plaintiff must show that he had no other choice but to quit." *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1221 (10th Cir. 2002). Thus, a "plaintiff who voluntarily resigns cannot claim that he or she was constructively discharged." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1135 (10th Cir. 2004).

As a matter of law, Dietz cannot have been constructively discharged on June 7, 2013, because he had already resigned on June 5. *See* AR2393. When Cypress pressed

this point below, the ARB agreed that "Cypress would be right about this if Dietz's June 5th letter was in fact a resignation," but disagreed that Dietz resigned on June 5. AR2393-95. Thus, if Dietz's June 5 letter was a resignation, then by the ARB's own logic, this Court should reverse.

The dissent correctly concluded that Dietz "expressly resigned" on June 5. AR2402. Dietz's June 5 memo stated unambiguously that he was resigning: "Therefore, my response is that I am terminating my employment at Cypress." AR1413 (underlining in original). Dietz gave Cypress less than one month to find his replacement: "I will agree to stay onboard [from June 5] through July 1 as a professional courtesy . . . and to keep [my] project stable while executing an orderly turnover, unless Cypress chooses to terminate my employment sooner." *Id.* He expressed no equivocation, no hesitation, no nuance.

As a matter of law, Dietz's memo *was* a resignation. In *Green*, which postdates the ARB's order, the Supreme Court asked "when precisely an employee resigns," and answered that "an employee resigns when he gives his employer definite notice of his intent to resign." 136 S. Ct. at 1782; *see id.* ("If an employee gives 'two weeks' notice'—telling his employer he intends to leave after two more weeks of employment—the limitations period begins to run on the day he tells his employer, not his last day at work.").

Dietz provided "definite notice" of his resignation on June 5. The ARB majority admitted that Dietz's memo "on its face appears to be a resignation" and "flat out states, 'I am terminating my employment at Cypress.'" AR2393-94. The majority also held that the memo gave "no indication of conditions under which he would stay, no implication that he would be willing to stay if, for example, he did not have to work under Nulty any longer and could have the June 4th memo expunged from his personnel file." AR2394. Under *Green*, that is a resignation. 136 S. Ct. at 1782.

The majority nevertheless found that Dietz's June 5 memo was not a resignation because "Cypress had a 'turnaround process' of quickly and forcefully attempting to retain employees who express an intent to resign, and . . . Dietz knew of this policy." AR2393-94. The majority speculated that, "[i]n essence, [Dietz] was thinking something to the effect of 'I'll announce my resignation now, so as to prevent Cypress from firing me, but will hope that they can do something to retain me.'" AR2394-95. These findings—which disregarded Dietz's unequivocal communication to Cypress in favor of speculation about a "hope" he was "thinking" about—were difficult even for the majority to swallow, as it commented in the same breath that the result "seems odd, almost disingenuous" and is a "seeming contradiction." *Id.*

It also is error. As noted above, the majority's conclusion does not survive *Green*. Moreover, it makes no sense to claim that Cypress's turnaround process—the very name of which recognizes that the employee has already headed out the door—

converts an express, unambiguous resignation into a nullity, let alone a statement of intent to remain. That would make the act of resigning meaningless and create tremendous uncertainty over whether an employee who claims to have resigned has actually done so. An employee's unambiguous resignation does not become something else based on his hope that the employer will talk him out of it, any more than an oral resignation loses legal effect if the employee crossed his fingers behind his back. The law also should encourage employers to listen to their resigning employees, try to address their concerns, and try to persuade their employees to re-think their resignations. The ARB's rule penalizes employers for trying.

The ARB's finding that Dietz's June 5 letter was not a resignation also is belied by the contemporaneous evidence. Not only did Dietz's June 5 memo unambiguously state his intent to resign (AR2393-94), but he repeated that sentiment in his June 7 email to his colleagues: "On Wednesday of this week, I tendered my notice of intent to terminate with an effective date of July 1. I had planned to give that much time to allow for an ordered transition of [my] project to a different project manager." AR1743. Again, Dietz offered no equivocation, nor did he condition his resignation on any efforts by Cypress under the turnaround policy.

Further, as the dissent correctly concluded, "there is no substantial evidence supporting an inference that Cypress believed Dietz was bluffing." AR2402. And even if there were, such a belief would not transform the legal force and effect of what

Dietz said. Faced with "'such relevant evidence[,] a reasonable person'" cannot find that Dietz's June 5 letter was not a resignation. *Lockheed Martin*, 717 F.3d at 1129. Tellingly, the ARB could not identify a single court that based a constructive discharge finding on conduct occurring after a similarly unequivocal resignation.

B. The ARB erroneously did not require Dietz to prove intolerable working conditions.

The ARB also erroneously relieved Dietz of the burden to prove that he resigned because of intolerable working conditions, the legal standard that should have governed his claim. *See Green*, 136 S. Ct. at 1776. In determining whether conditions were "unendurable," "[t]he inquiry is objective." *Suders*, 542 U.S. at 141.

The ARB conceded that these "legal standard[s]" are "ordinarily used to determine what constitutes a constructive discharge." AR2390. But it did not require Dietz to meet them. Instead, it applied what it called a "second way of finding a constructive discharge," even while observing that Dietz did not argue for it. AR2391 & n.48.

The ARB asserted that, under the so-called second method, "an employee who can show that the 'handwriting is on the wall' and the 'axe is about to fall' can make out a constructive discharge claim." AR2391. It then watered down that standard even further: "Dietz's constructive-discharge claim does not *require* Dietz to show that Cypress was on the verge of firing him, it is enough to show that Cypress

communicated to Dietz that he would be fired." AR2391 n.48 (internal citation omitted). The ARB applied the wrong law, causing it to reach the wrong conclusion.

1. The ARB applied the wrong legal standard.

The ARB's legal standard conflicts with binding precedent. The Supreme Court recently emphasized that the constructive-discharge doctrine "contemplates" "'intolerable'" working conditions. *Green*, 136 S. Ct. at 1776-77; *see Suders*, 542 U.S. at 141 (conditions must be objectively "intolerable" or "unendurable"). This Court imposes the same demanding burden on plaintiffs. *See Fischer v. Forestwood Co.*, 525 F.3d 972, 980-82 (10th Cir. 2008) ("difficult or unpleasant" conditions, workplace "heckl[ing]," "sexually explicit and derogatory remarks," "harassment," and "discriminatory animus" are not intolerable conditions); *Exum*, 389 F.3d at 1135 ("Working conditions must be so severe that the plaintiff simply had no choice but to quit."); *Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1270-71 (10th Cir. 2004).

The ARB admitted that the Eighth Circuit would have required Dietz to prove intolerable working conditions. *See* AR2391 n.46 ("the Eighth Circuit has 'not recognized the second form of constructive discharge in . . . non-hostile work environment cases'"). But it suggested that the law in this Circuit and in the Seventh Circuit conflicts with Eighth Circuit precedent and that, as a consequence, Dietz need not prove intolerable working conditions. To support its claim, the ARB cited Seventh

Circuit decisions and this Court's decision in *Burks v. Oklahoma Publishing Co.*, 81 F.3d 975 (10th Cir. 1996). *Id.* The ARB misread the law.

Burks does not depart from well-settled law that requires a plaintiff to prove intolerable working conditions. *Burks* called the intolerable-conditions test the "paradigmatic" legal standard. 81 F.3d at 978. To be sure, *Burks* stated in *dicta* that "[t]his court has recognized that an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired." *Id.* (citing *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569 (10th Cir. 1992), and *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990)). But *Burks held* that the district court properly *refused* to instruct the jury that a plaintiff can prove constructive discharge merely by showing that she was about to be fired. *Id.* The plaintiff there asked her boss twice whether her services were still needed and her boss stared at her, refusing to answer the question. *Id.* at 977. This Court held that the district court properly refused to tender plaintiff's requested instruction, because the facts were "ambiguous as to whether [the plaintiff] truly was presented with a choice between resigning or being fired." *Id.* at 978. To call the facts here "ambiguous" as to whether Dietz was "presented with a choice between resigning or being fired" is unduly charitable towards Dietz.

Both of the cases that *Burks* cited (*Acrey* and *Spulak*) applied the intolerable-conditions test to long patterns of discriminatory conduct (not one negative memo on

one project). In neither case did this Court purport to remove the intolerable-conditions standard.

Moreover, both cases involved an explicit (and thus unambiguous) ultimatum from the employer. In *Acrey*, the plaintiff was asked "to quit" on "at least two occasions" because of "her age and her 'image,'" and was specifically told that if she did not quit, she would be fired—all while her employer interviewed her replacement before she quit. 981 F.2d at 1574. In *Spulak*, the plaintiff "was given an ultimatum either to retire or be fired," and testified that his boss told him that if he withdrew his resignation, the boss "would find some other way to fire him." 894 F.2d at 1153-54. Neither opinion suggested that a quit-or-be-fired choice could amount to a constructive discharge in the absence of an explicit threat to fire an employee who did not resign. *See also Parker v. Bd. of Regents of Tulsa Jr. Coll.*, 981 F.2d 1159, 1162 (10th Cir. 1992) (rejecting constructive discharge, in due process context, despite explicit choice between resignation and termination). Contrary to the ARB's insinuation, it was not "[b]affling[]" that Dietz's lawyers did not fasten on this line of authority (AR2391 n.48), which does not even arguably apply here.

As this Court explained after *Burks*, this Court has "held that even requiring an employee to choose between resignation and termination is not necessarily a constructive discharge, unless the employee's decision is, for some reason, involuntary." *Exum*, 389 F.3d at 1135 (citing *Parker*, 981 F.2d at 1162 (no

constructive discharge even though employee was "given a week to decide whether to resign")).[7] *Exum* required a showing of "intolerable conditions" in the face of evidence that the employer told the employee "he could leave sooner rather than later." *Id*. at 1133. This Court explained that it "judge[s] the voluntariness of an employee's resignation under an objective standard, looking to whether his or her working conditions were so intolerable that a reasonable employee would have had no other choice but to quit." *Id.* at 1135-36. Thus, in this Circuit, a plaintiff must prove objectively intolerable conditions in constructive discharge cases that, like this case, do not involve an explicit choice whether to resign or be fired. Even in the latter category, there can be no finding of constructive discharge unless other oppressive factors are present that demonstrate that the decision to resign was "objectively involuntary." *See* n. 7, *supra*.

On this record, the law in this Circuit is consistent with the law in the Eighth Circuit, which the ARB noted requires a plaintiff to prove intolerable conditions. AR2391. The Seventh Circuit also has held that this "second form of constructive discharge . . . does not eliminate the need for the plaintiff to show that his working conditions had become intolerable." *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673,

[7] Factors that weigh against a constructive-discharge finding based on an explicit resignation-or-termination choice include whether the employer offered some alternative to resignation, or gave the employee time to decide whether to resign, or allowed the employee to choose when to resign. *See id.*

679 (7th Cir. 2010). Indeed, the Seventh Circuit rejected the very formulation that the ARB adopted here. When a plaintiff argued that "working conditions are irrelevant when a prospect of discharge lurks in the background," the Seventh Circuit disagreed, holding that "[r]econciling that position with the Supreme Court's view in *Suders* is not easy." *Cigan v. Chippewa Falls School District*, 388 F.3d 331, 333 (7th Cir. 2004); *see Suders*, 542 U.S. at 141 (requiring "unendurable working conditions"). Validating that holding, the Supreme Court's recent decision in *Green* required the plaintiff to prove "'intolerable'" working conditions. *Green*, 136 S. Ct. at 1776.

Accordingly, the ARB applied the wrong legal standard in concluding that Dietz was constructively discharged. That error alone is grounds to reverse. *See Thompson v. Sullivan*, 987 F.2d 1482, 1487 (10th Cir. 1993) ("if the ALJ failed to apply the correct legal test, there is a ground for reversal apart from a lack of substantial evidence"); *Okla. Dep't of Envtl. Quality v. E.P.A.*, 740 F.3d 185, 195 (D.C. Cir. 2014) (granting petition for review because agency's "interpretation" was "incorrect as a matter of law").

2. The record does not support a finding of intolerable working conditions.

Here, however, although the ARB did not analyze the question, no substantial evidence supports a finding that working conditions at Cypress were "intolerable" or that Dietz's resignation was "involuntary." *Exum*, 389 F.3d at 1135.

This Court need only look at the email that Dietz sent to the entire Colorado office on the morning of June 7, 2013, the day of his alleged constructive discharge. The email begins: "Colleagues, mentors, and most importantly, my friends." AR1743. And it states: "All of you are wonderful, and I wish all of you the very best for success in your future endeavors!" and "[i]f you need anything, do not hesitate to reach out to me." *Id.* (underlining in original). Those are not the words of someone suffering from "intolerable" working conditions. *Exum*, 389 F.3d at 1135.

Dietz inadvertently highlighted the lack of objectively intolerable working conditions when he tried to justify his resignation in that same email. He wrote that on June 5 he had "tendered [his] notice of intent to terminate with an effective date of July 1" to "allow for an ordered transition" of his project. AR1743. But "*after reflecting on the work environment over the past two days*, I have reached the conclusion that holding out until July 1 is unworkable," and "[t]herefore, I am making my termination immediate." *Id.* (emphasis added). Those are not the words of an "involuntary and coerced" resignation where "the totality of the circumstances indicate [the lack of an] opportunity to make a free choice." *Narotzky v. Natrona Cnty. Mem. Hosp. Bd. of Trs.*, 610 F.3d 558, 566 (10th Cir. 2010) (internal quotation marks omitted). On the contrary, the "record does not come close to demonstrating that [Dietz's] resignation was objectively involuntary." *Exum*, 389 F.3d at 1136; *see also Parker*, 981 F.2d at 1162 (failure to show "duress" and lack of "real choice").

The ARB did not try to identify evidence of objectively intolerable working conditions or involuntariness with good reason: there was no such evidence. The most Dietz could point to was (1) a single negative write-up for improperly forecasting a three-week schedule slip that he was able to resolve within an hour once he "moved some tasks around" (AR1715), and (2) the failure of Cypress management to include an agenda with the meeting request emailed to Dietz the day *after* he resigned. Apart from the failure to include an agenda, Dietz could not identify what about "the work environment over the past two days" (that is, June 6 and June 7) had made "holding out until July 1 [the effective date of his first resignation] … unworkable" (AR1743).

Dietz failed to present evidence that "a reasonable person would deem adequate to support the ultimate conclusion" that he was subjected to intolerable working conditions. *Lockheed Martin*, 717 F.3d at 1129. Because he lacked substantial evidence of constructive discharge, the ARB order should be vacated.

C. Substantial evidence does not support the ARB's finding that Cypress effectively told Dietz that it "definitely" would fire him.

Even if the ARB had been right in its legal definitions of resignation and constructive discharge, its order is insupportable under its own, erroneous legal standard. No substantial evidence supports the ARB's finding that Cypress communicated to Dietz that "he was *definitely* going to be fired" at the June 7 meeting. AR2395 (emphasis in original). As a consequence, there is no substantial evidence—indeed, no evidence at all—that Cypress put Dietz to the choice of

resigning or being fired, let alone that it did so after Dietz had submitted his resignation on June 5.

1. Cypress did not communicate to Dietz that it was planning to fire him.

The cases addressing constructive discharge in the context of a choice to resign or be fired have done so only when the employer explicitly presents that choice to the employee. *See Acrey*, 981 F.2d at 1174-75; *Spulak*, 894 F.2d at 1154. There was no evidence that Cypress presented that choice to Dietz, and the ARB recognized that Cypress did not tell Dietz that it planned to fire him. AR2396. Because Cypress did not tell Dietz that it planned to fire him, this case bears no resemblance to the cases the ARB invoked. And the only remaining question under the ARB's novel and erroneous test is whether Cypress mistakenly *conveyed the impression* to Dietz that it was "*definitely*" going to fire him. AR2395. Under that erroneous analysis it would be "enough to show that Cypress communicated to Dietz that he would be fired." AR2391 n.48. But there was no evidence that Cypress communicated anything of the sort.

The majority recognized that Dietz's first unequivocal resignation was not coerced by a communication that Cypress would definitely fire him. *See* AR2394 n.60 ("Nulty's memo says nothing like that" it was "tantamount to future termination"). Rather, the "communicat[ion] to Dietz that he would be fired" on which the majority relied was this: Nulty's June 6 invitation for the June 7 meeting did not include an

agenda. *See* AR2395. There was no testimony that Nulty or anyone else at Cypress sent agenda-less calendar meeting requests before terminating employees. Dietz himself suggested that he did not always send agendas for meetings that he scheduled. AR678. And Ratliff, the only other witness who was asked about whether including agendas is a standard practice, testified that "on occasion" it would be "typical" to include agendas, but that it was "[n]ot necessarily" "typical." AR417. No reasonable person would conclude that the absence of an agenda on a meeting invitation is definite proof that the employee has "no other choice but to quit." *Garrett*, 305 F.3d at 1221.

The ARB also asserted that Cypress communicated to Dietz that "he was *definitely* going to be fired" because "no one would tell Dietz anything about" the June 7 meeting. AR2395. The support for that assertion is that Dietz asked Ratliff on June 6 whether she knew the purpose of the June 7 meeting, and she told him that she did not (AR750)—which was truthful (AR417)—and that Dietz called Nulty's cell phone once that night and Nulty did not pick up, which Dietz found "somewhat" surprising but not "really surpris[ing]" (AR750-51). That was it. Dietz did *not* testify that he left a voice message, a text, an email, or any other form of communication or

otherwise asked Nulty to call him back before their noon meeting the next day to discuss the agenda.[8]

In short, then, Dietz circulated a June 5 memo unequivocally announcing his resignation; he received a meeting request from Nulty on June 6 for a June 7 meeting that did not list an agenda; he asked Ratliff, who also received the invitation, about the purpose of the meeting and learned she did not know; and he made a phone call that was not answered. All the while, Dietz testified, his co-workers in Colorado were *not* "isolating" him. AR931-32.

It does not matter whether Dietz resigned because he lost confidence in his long-term future at Cypress, because he was unreasonably paranoid, or because he decided to pursue his years-long "dream[] to have [his] own law practice" (AR926) the week after he was admitted to the Colorado bar. What matters is that no *reasonable* person could believe that Cypress's actions—in particular, scheduling a meeting to discuss Dietz's resignation with him, but without including an agenda—were "tantamount to informing [Dietz] that he was to be fired" during the three weeks between his June 5 resignation and its July 1 effective date, so that Dietz "ha[d] to

[8] The ARB also cryptically referred to "all that had previously transpired" to support its finding of constructive discharge on June 7. AR2395. But looking to events *before* Dietz's June 5 resignation makes no sense given the ARB's finding that Dietz was not constructively discharged then. In any event, nothing that "previously transpired" remotely approaches the objectively intolerable conditions needed to support a constructive discharge finding.

choose 'between resigning and being fired,'" as the ARB majority erroneously concluded. AR2395-96.

2. Cypress was not secretly planning to fire Dietz.

There is an obvious reason why Cypress did not *tell* Dietz that he had to choose between resigning or being fired: there is not one iota of evidence that Cypress *actually planned* to fire Dietz at the June 7 meeting. Before trial, Dietz obtained discovery on Cypress's documents and emails and deposed Nulty. Yet Dietz admitted at trial that he "certainly wasn't aware" of any termination orders "at the time" when he made his resignation immediately effective on June 7, 2013, and he also was "not aware of any orders for termination, at this point," when he testified before the ALJ in 2014. AR921-22.

Other witnesses likewise testified that there was no plan to fire Dietz. *See* AR437 (Ratliff); AR1073 (Nulty); AR1241-42 (Surrette); AR1351-52 (Valenzuela). The very notion of firing Dietz confused Cypress witnesses at trial because they thought that Dietz had already resigned. *See* AR1352 (Valenzuela: "[T]erminate him? I don't know how we would have—he resigned."); AR1252 (Surrette: "I don't see how I could terminate a person who has already resigned.").

Cypress also did not follow any of its "well-defined" termination procedures in advance of the June 7 meeting. AR1242. Surrette asked Nulty to invite Rainer Hoehler to the meeting, who would have been "absolutely excluded from any kind of

termination meeting" because Hoehler was neither Dietz's boss nor in HR. AR1241; *see also* AR1351. Cypress also did not cut off Dietz's access to accounts, prepare a final payroll statement, or prepare a final check—all acts that Cypress would have done if it planned to terminate Dietz at the meeting. AR1242.

It therefore should be incontrovertible, as the dissent correctly concluded, that Cypress did not plan to fire Dietz on June 7. There simply was "no substantial evidence that logically supports a *reasonable* inference that [Dietz] was going to be fired on June 7, 2013." AR2402.

The ARB majority rested its contrary conclusion on the premise that Cypress witnesses testified inconsistently about the purpose of the June 7 meeting. That purported inconsistency, the majority concluded, "makes it all the more likely that Cypress did in fact intend to fire Dietz." AR2395. But there was no inconsistency at all, and nothing about what the witnesses said even remotely supported the conclusion that Cypress intended to fire Dietz. On the contrary, each witness testified that the meeting was intended as an opportunity to learn about and potentially address Dietz's concerns underlying his resignation. Surrette, who ordered the meeting, testified that purpose of the meeting was "to get to the bottom of this and understand what was happening," "to do additional fact-finding," and "to listen and understand [Dietz's] concerns more clearly and then determine what would be the resolution." AR1240-41, AR1248. Valenzuela testified that the meeting was to have a "conversation about can

we resolve this, can we fix it?" AR1351. Nulty testified that the original purpose of the meeting was to "talk about" Dietz's June 5 memo. AR1068. All three witnesses were in accord.

Ratliff, the HR employee in Colorado whom Nulty invited to the meeting, testified that she originally did not know its purpose, AR417, which is what she told Dietz when he asked on June 6, AR750. She further testified that, *after* Dietz sent his June 7 email making his resignation immediately effective, and *after* Dietz told her that he would not attend their noon meeting, she called Nulty to inform him that Dietz had quit effective immediately, and at that point Nulty decided "to accept Dietz's resignation" at their meeting. AR417-18, AR436-38. Ratliff also specifically denied that the intent of the meeting was to terminate Dietz. AR437.

Nulty and Surrette testified consistently with Ratliff. Nulty explained that Ratliff's recollection was accurate "depend[ing] on the time that we had the discussion." AR1077. Surrette testified that "Mr. Dietz changed his termination date – his resignation date – from July 1st to June 7th. . . . And left. And then at that point, yes, Mr. Nulty did agree to accept the resignation, at that point." AR1251.

The ARB's suggestion that these witnesses testified inconsistently ignores the chronology, as the testimony of Ratliff, Nulty, and Surrette made clear. And the ARB's conclusion that this so-called inconsistency is proof that Cypress planned to *fire* Dietz at the June 7 meeting is contradicted by every single piece of relevant

evidence in this case. No reasonable person could conclude that Cypress planned to fire Dietz at the June 7 meeting.

* * * * *

The majority was wrong in another way: this is not "a close case." AR2392. The majority ruled for Dietz only by applying the wrong law and by grafting inference upon unreasonable inference in the face of undisputed, directly contrary evidence. The dissent had it right: the majority's finding of constructive discharge is not supported by substantial evidence. AR2402. The ARB's order therefore should be reversed.

II. As A Matter of Law, Dietz Did Not Engage In Protected Conduct.

Reversal also is warranted because Dietz did not engage in conduct that is protected by 18 U.S.C. § 1514A. Section 1514A prohibits retaliation against an employee who "provide[s] information … regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], 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).

Section 1514A is part of the Sarbanes-Oxley Act ("SOX"), which was enacted "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014). "Congress installed [Section 1514A] as one means to ward off another

Enron debacle." *Id.* at 1169. The ARB's finding of protected activity—Dietz's complaint about the omission of the Bonus Plan from Cypress's employment offer letters to Ramtron employees—is worlds removed from the accounting fraud that caused the collapse of Enron.

We share some common ground with the ARB. The ARB observed that "[t]he ALJ found that Dietz's April 12, 2013 e-mail to Nulty was Dietz's protected activity and, on appeal, that is where both parties focus their attention." AR2389. But the ARB properly rejected the ALJ's conclusion, noting that this email "primarily consisted of his claim that the bonus plan violated state wage laws." AR2387; *see* AR2388 ("the crux" of Dietz's complaint alleged wage law violations). The ARB also held that "an allegation of a violation of state wage laws is, by itself, insufficient to constitute protected activity under SOX's whistleblower provision without some allegation of a knowing misrepresentation or concealment of a material fact." *Id.* Finally, it recognized that Dietz's April 12 email to Nulty "made no mention" of "fraud or of any of the provisions listed in the SOX whistleblower provision" (AR2382), but "merely question[ed] the legality of the bonus plan under state wage laws." AR2389.

After rejecting the ALJ's analysis and finding, however, the ARB nonetheless ruled for Dietz by substituting a new and equally erroneous analysis. It held that Dietz engaged in protected conduct *during his April 22 conversation with Valenzuela* by telling her that Cypress's November 2012 job offer letters to Ramtron employees

should have disclosed the Design Bonus Plan. *See* AR2382, AR2387-90. The ARB concluded that "Dietz believed" that "Cypress concealed material facts about the bonus plan" in these "job offers," which "possibly induc[ed] [Ramtron employees] to take jobs at Cypress without understanding that their true base salary was effectively less than they thought." AR2389; *see* AR2390 ("[Dietz] concluded that it was fraud to induce former Ramtron employees to accept employment offered at salaries when the true intent was to pay them 90%.").

Further, the ARB held that Dietz "had to have" reasonably believed that Cypress offer letters involved the use of interstate mails and wires: "Dietz had to have also believed that Cypress used either the mails . . . or some form of electronic communication to send the former Ramtron employees their offer letters, the very documents he viewed as integral to the scheme to defraud the former Ramtron employees." AR2387 n.30. The ARB did not find that Dietz actually believed all this, much less that he had communicated this belief to Cypress clearly enough for Cypress to perceive an allegation of conduct covered by Section 1514A (and thus to retaliate against it).

The ARB's ruling was a transparent effort to manufacture protected conduct and retaliation from a record that supported neither. Dietz did not mention the job offer letters to Ramtron employees in his April 12, 2013 letter to Nulty or in his June 5, 2013 resignation letter. *See* AR1695-99, AR1733-38. He did not mention them in

the complaint he filed in the Department of Labor. *See* AR2543. At trial, he did not testify that he complained to Valenzuela about the job offer letters. *See* AR649-53. In fact, when he was cross-examined over whether he told Valenzuela that the job offer letters should have disclosed the Bonus Plan, Dietz testified that he did not "recall having that part of a conversation." AR900.

Dietz could not and did not reasonably believe that those letters constituted criminal fraud. Nor did Dietz subjectively or reasonably believe that Cypress sent those letters through interstate mails or wires. And because there is no evidence that he communicated his complaint in a form that could reasonably inform Cypress that he was complaining about conduct protected under Section 1514A, Cypress could not retaliate against an accusation that it could not reasonably perceive. Each of these grounds is sufficient to require reversal.

A. Dietz did not reasonably believe that Cypress's offer letters were criminal frauds.

Section 1514A requires that the employee "reasonably believe" that the information he provides to his employer "constitutes a violation" of specific federal statutes, including wire fraud and mail fraud. 18 U.S.C. § 1514A(a)(1). The reasonable-belief standard "include[s] both a subjective and an objective component; an employee must actually believe in the unlawfulness of the employer's actions and that belief must be objectively reasonable." *Lockheed Martin*, 717 F.3d at 1132. Dietz's complaints about the offer letters to Ramtron employees were not supported

by an "objectively reasonable" belief that the letters violated the federal mail fraud or wire fraud laws.

In affirming the dismissal of a complaint raising a claim under Section 1514A, the Second Circuit held that the plaintiff did "not plausibly ple[ad] an objectively reasonable belief that [the defendant] engaged in mail or wire fraud, as both require a scheme to steal money or property—allegations that do not appear in the complaint." *Nielson v. AECOM Tech. Corp.*, 762 F.3d 214, 222 (2d Cir. 2014). Dietz's claim fails for the same reason.

There is no reasonable basis for Dietz to believe that Cypress's failure to mention the Bonus Plan in its offer letters to Ramtron employees was a "scheme to steal money or property" from them. Cypress did not *take* "money" or "property" from them. On the contrary, it *paid* them money and, as Dietz admitted, paid them at the salary stated on their job offer letters from November 2012 until at least August 2013. *See* AR642-43. Cypress also gave Ramtron employees the option to quit during their first year of employment at Cypress, in which case they would retroactively receive all of the benefits under the Ramtron-Cypress agreement that they would have received if they declined employment back in November 2012 (AR1217-20)—an option that Dietz exercised (AR1414).

Moreover, during the former Ramtron employees' first month at Cypress, Cypress held a meeting with them to describe the Bonus Plan, and held another

meeting with them to describe the Bonus Plan in April 2013, when their first projects that were subject to the Bonus Plan were launching. AR630-33, AR1224. Indeed, it was the latter meeting—not investigative elbow-grease—that prompted Dietz's email to Nulty and his conversation with Valenzuela. Cypress also described the Bonus Plan in detail on the company's intranet, as Dietz acknowledged. AR624, AR629; *see* AR3041-98. Cypress on average also paid its employees who were subject to the Bonus Plan a 27% bonus above and beyond their pre-Bonus-Plan salaries. AR1223.

No reasonable person standing in Dietz's shoes could believe that Cypress did not mention the Bonus Plan in its offer letters to Ramtron employees so that it could "steal money or property" from them. *Nielson*, 762 F.3d at 222. To the extent that Dietz ever believed that Cypress's offer letters "constitute[d] a violation of" the wire fraud and mail fraud statutes (18 U.S.C. § 1514A(a)(1)), that belief was objectively unreasonable. *See Nielson*, 762 F.3d at 222. The ARB's finding of protected conduct should be reversed.

B. Dietz did not subjectively or reasonably believe that Cypress used interstate mails or wires to communicate its offer letters to Ramtron employees.

Dietz also did not subjectively or reasonably believe that Cypress's alleged criminal fraud involved the use of interstate mails or wires. The federal mail and wire fraud statutes both require the "use of the United States mails [or wires] for the

purpose of executing the scheme." *United States v. Cardall*, 885 F.2d 656, 679 (10th Cir. 1989); *see United States v. Redcorn*, 528 F.3d 727, 738 (10th Cir. 2008).

There is no record evidence that Dietz "actually believe[d]" that Cypress used the interstate mails or wires to communicate its job offer letters to Ramtron employees. *Lockheed Martin*, 717 F.3d at 1132. When trying to prove that he satisfied the "mails" and "wires" elements, Dietz testified at trial that Cypress discussed the Bonus Plan on its intranet, whose server was housed in California, and that Dietz participated in phone conversations, email exchanges, and Webex meetings about the Plan. AR660-62. Dietz *never* testified that Cypress sent its job offer letters to Ramtron employees through the mails or wires.

The only record evidence related to the job offer letters establishes that Cypress did not use the mails or wires in conveying the offer letters to Ramtron employees, including Dietz. Dietz testified that he received his job offer letter in a one-on-one meeting with Surrette, who physically handed him the letter, which Dietz signed and handed back to Surrette in the same meeting. AR580-82, AR828-29. Dietz further testified that during the transition from Ramtron to Cypress, "a number of HR reps" from Cypress were present in the Colorado office. AR570. Dietz did *not* testify that any former Ramtron employee received a job offer letter through the mails or wires. Further, Surrette testified that he physically handed job offer letters to other Ramtron employees. AR1214-15, AR1226.

The ARB essentially conceded that there is no record evidence that Dietz believed that Cypress used the mails or wires to send its offer letters to Ramtron employees. *See* AR2387 n.30. Instead, the ARB claimed that, "even without such explicit evidence in the record, [it] can infer the necessary connection with either the mails or the wires" because, "given that Cypress's corporate headquarters were in California and the former Ramtron employees were in Colorado, Dietz had to have also believed that Cypress used either the mails (or a 'private or commercial interstate carrier' such as Federal Express or UPS) or some form of electronic communication to send the former Ramtron employees their offer letters." *Id.* (internal citation omitted).

This turns a reasonable-belief standard into a standard of unsupported speculation. The record evidence shows that Dietz himself recalled receiving his offer letters in person and Surrette testified that he personally distributed the offer letters to Ramtron employees. So the record provides no basis to surmise that Dietz "had to have believed" that the offer letters were sent by wire or mail. The ARB's mind-reading in the face of no "explicit evidence in the record" is legally insufficient. The APA allows this Court to affirm only if there is "*substantial* evidence" supporting the ARB's finding. *Lockheed Martin*, 717 F.3d at 1129 (emphasis added). The fact that there is *no* evidence on this point—when the available evidence all points in the opposite direction—requires reversal.

The ARB otherwise claimed that there is "substantial evidence" to support Dietz's testimony "that he thought that the bonus plan was fraud" and that he "believe[d]—and reasonably so—that Cypress used at least e-mail, a website, and interstate video conferencing technology in executing and administering the bonus policy." AR2386. But the email, website, and video conferencing technology that Cypress used to *explain* the bonus policy to its employees have nothing to do with the alleged *fraudulent concealment* of that policy in the offer letters to Ramtron employees that allegedly induced them to accept employment at Cypress. The ARB divorced the alleged fraudulent scheme from the use of the mails and wires—a legal error. *See United States v. Lake*, 472 F.3d 1247, 1255 (10th Cir. 2007) (reversing wire fraud convictions because "the wire communications [were not] 'transmitted . . . for the purpose of executing [the] scheme'"); *Redcorn*, 528 F.3d at 742 (reversing wire fraud conviction because "the 'scheme to defraud' ended . . . before the interstate wires were used"); *Cardall*, 885 F.2d at 679-82 (reversing mail fraud conviction because the "scheme had 'reached fruition'" before the mails were sent). No reasonable person—and certainly no reasonable attorney, like Dietz, who was admitted to the bars of four States—could believe that Cypress's use of the mails and wires to communicate about its bonus policy somehow transformed its prior, in-person alleged concealment of that bonus policy into the federal crimes of mail fraud and wire fraud.

C. Because Cypress could not reasonably know or suspect that Dietz had accused it of federal mail or wire fraud, its conduct could not constitute retaliation that violated Section 1514A.

Dietz's claim fails for another reason: whatever unexpressed beliefs he might have harbored (or the ARB might have created for him after the fact), his failure to communicate to Cypress anything resembling a violation of the federal mail or wire fraud statutes brings this case outside the scope of Section 1514A. An employee raising a Section 1514A claim must prove that "the employer knew of [his] protected activity." *Lockheed Martin*, 717 F.3d at 1129. That requirement exists because an employer cannot retaliate in violation of Section 1514A unless it knows or suspects that the plaintiff is engaged in protected conduct. And it cannot know or suspect that the plaintiff is so engaged unless the plaintiff's intracorporate communications "'relate in an understandable way to one of the stated provisions of federal law'" in Section 1514A. *Wiest v. Lynch*, 710 F.3d 121, 134 (3d Cir. 2013).

The ARB did not address Cypress's argument (AR3860-61) that Dietz had not satisfied this employer-knowledge requirement. Instead, the ARB *eliminated* employer knowledge as an element of the cause of action under Section 1514A. *See* AR2385 & n.24. That decision is contrary to the law in this Circuit and others. *See Lockheed Martin*, 717 F.3d at 1129 (employer knowledge is an element of a claim

under Section 1514A).[9] It also conflicts with OSHA regulations promulgated after notice-and-comment rulemaking, which require a showing that the employer "knew or suspected that the employee engaged in the protected activity." 29 C.F.R. § 1980.104(e)(2)(ii); *see Lawson*, 134 S. Ct. at 1186-88 (Sotomayor, J., dissenting) (explaining that ARB legal interpretations do not deserve *Chevron* deference and that "the Secretary [of Labor] has expressly withdrawn from the ARB any power to deviate from the rules OSHA issues on the Department of Labor's behalf"). The ARB's decision to eliminate an important element of Dietz's cause of action is yet another legal error that requires reversal. *See, e.g.*, *Thompson*, 987 F.2d at 1487.

In addition, substantial evidence does not support a finding that Cypress knew that Dietz engaged in protected conduct. Dietz's complaint fell so far short of intelligibly communicating a violation of any of the federal crimes listed in Section 1514A that neither the Regional Administrator nor the ALJ could perceive more than a claim that state wage-and-hour laws had been violated. *See* AR3, AR2227-28. The ARB with great effort and sweeping assumptions managed to repackage Dietz's complaints in a form that better fit Section 1514A (albeit by ignoring Section 1514A's employer knowledge requirement). But Cypress could not be expected to engage in

[9] *Accord Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 379 (8th Cir. 2016); *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107 (4th Cir. 2016); *Nielsen*, 762 F.3d at 219 (2d Cir.); *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 109 (5th Cir. 2014); *Wiest*, 710 F.3d at 134 (3d Cir.).

the same free-floating speculation about what Dietz might or "had to have" had in mind. AR2387 n.30. As a consequence, Cypress could not know that Dietz was engaging in protected conduct, and thus could not knowingly retaliate against him on that basis.

Indeed, Cypress did not *actually* know or suspect that Dietz was engaging in protected conduct under Section 1514A. As Valenzuela and Surrette testified, Cypress's corporate policies require allegations of fraud to be reported to the Audit Committee of the Board of Directors. AR1194, AR1197, AR1280. But neither Valenzuela nor anyone else reported Dietz's complaints to the Audit Committee, because no one thought that Dietz was complaining about fraud. AR1285.

This case is strikingly similar to *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014). There, a Colombian employee who had a law degree believed that his company was underreporting taxes to the Colombian government. *Id.* at 106-07. He complained to his company, specifically alleging that the scheme was instigated at the direction of officials in Houston, Texas. *Id.* at 106. The Fifth Circuit held that the plaintiff's claim failed under Section 1514A because "the 'specific conduct' that [the plaintiff] asserted was illegal" was "the supposed orchestration of violations of Colombia tax law, not the violation of U.S. mail or wire laws to effectual those purported Colombian law violations." *Id.* at 110. Similarly, "the crux" of Dietz's complaint was that the Bonus Plan violated state wage laws, not U.S. mail or wire

laws. AR2388. Dietz's complaint about state wage laws failed to put Cypress on notice that Dietz was engaged in protected activity under Section 1514A.

* * * * *

In short, because there is no substantial evidence that Dietz *actually* believed Cypress's offer letters to Ramtron employees constituted mail fraud or wire fraud, the ARB's finding of protected conduct under Section 1514A must be reversed. *See Lockheed Martin*, 717 F.3d at 1132. It must be reversed because Dietz could not *reasonably* believe that Cypress's offer letters to Ramtron employees were federal crimes. *Nielson*, 762 F.3d at 222. And it must be reversed because Cypress did not know or suspect that Dietz was complaining of conduct that is protected under Section 1514A. *Villanueva*, 743 F.3d at 109-10.

III. The ARB's Award of Attorneys' Fees And Costs Should Be Vacated Along With Its Liability Determination.

The ARB's award of attorneys' fees and costs to Dietz must fall along with the finding of liability. This Court should review the issue *de novo*.[10]

Dietz is entitled to fees and costs only if he "prevail[s]" on his complaint. 18 U.S.C. § 1514A(c)(1), (c)(2)(C). As we have explained above, Dietz is not entitled to prevail on his complaint. Accordingly, upon reversing the ARB's order for Dietz on

[10] Cypress argued to the ARB that Dietz is not entitled to fees and costs because he is not entitled to prevail on his complaint. AR2511-12, AR2520-22. After ruling for Dietz on his complaint, the ARB rejected Cypress's argument regarding fees and costs, finding it "moot." AR2533-34.

his complaint, the Court also should reverse the ARB's two orders that awarded Dietz fees and costs. *See Burrell v. Armijo*, 603 F.3d 825, 836 (10th Cir. 2010) (reversing award of fees and costs after reversing district court's judgment because plaintiff was no longer the prevailing party); *Estate of DiMarco v. Wyoming Dep't of Corrections*, 473 F.3d 1334, 1345 (10th Cir. 2007) (same); *see also Palmer v. City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986) ("when a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it").

CONCLUSION

The Court should grant Cypress's petitions for review, reverse the orders of the Administrative Review Board, and consolidate No. 16-1209 for decision with this case.

STATEMENT ON ORAL ARGUMENT

Cypress believes that oral argument will assist the panel. In particular, there is considerable overlap between Cypress's petitions for review, its appeal in No. 16-1209, and Dietz's cross-appeal in No. 16-1249. In addition, the administrative record is long and complex. The panel may have questions regarding all of these issues, which can be effectively discussed at oral argument, which should be consolidated with the argument on Cypress's appeal and Dietz's cross-appeal from the district court's judgment enforcing the ARB decision.

Dated: August 29, 2016

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief that (1) all required privacy redactions have been made per 10th Cir. R. 25.2; (2) if required to file additional hard copies, that the ECF submission is an exact copy of the documents; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Virus definition version 1.277.1023.0, last updated on August 29, 2016, and according to the program are free of viruses.

/s/ Donald M. Falk

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,963 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared using Microsoft Word and set in Times New Roman in a typeface size of 14 points.

/s/ Donald M. Falk

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system on August 29, 2016. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF, except for the following participants listed below. For the parties listed below, I certify that on August 29, 2016, I caused a copy of the foregoing brief to be served by U.S. mail, first class, postage prepaid, to the addresses listed below:

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ATTACHMENT 1

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

TIMOTHY C. DIETZ, **ARB CASE NO. 15-017**

COMPLAINANT, **ALJ CASE NO. 2014-SOX-002**

v. **DATE:** MAR 30 2016

CYPRESS SEMICONDUCTOR CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul F. Lewis, Esq. and Andrew E. Swan, Esq.; *Lewis Kuhn Swan PC*, Colorado Springs, Colorado

For the Respondent:
Raymond M. Deeny, Esq.; *Sherman & Howard L.L.C.,* Colorado Springs, Colorado, and William A. Wright, Esq.; *Sherman & Howard L.L.C.*, Denver, Colorado

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*. Judge Corchado, concurring, in part, and dissenting, in part.

FINAL DECISION AND ORDER

An Administrative Law Judge (ALJ) found that Timothy C. Dietz reported violations of the federal mail and wire fraud statutes[1] to his former employer Cypress Semiconductor Corporation (Cypress) and that, in retaliation, Cypress placed an undeserved disciplinary memo in his personnel file and then constructively discharged him, thereby violating the whistleblower provision of the Sarbanes-Oxley Act (SOX).[2] On appeal, Cypress's primary arguments are that

[1] 18 U.S.C. §§ 1341, 1343 (2012).

[2] 18 U.S.C. § 1514A (2012).

(i) because the alleged violations Dietz reported were of state wage laws, not the federal fraud statutes, he is not protected by the SOX whistleblower provision, and (ii) it did not constructively discharge Dietz, and he is thus not entitled to any relief due to his leaving Cypress's employ. Because the record contains substantial evidence to support a finding that Dietz did in fact provide information to Cypress that he reasonably believed constituted violations of the federal fraud statutes and that he was constructively discharged, and because we also reject all of Cypress's other arguments, we affirm the ALJ's order granting Dietz relief.[3]

FACTS

Timothy Dietz was working for Ramtron International Corporation (Ramtron) when, in September 2012, Cypress acquired Ramtron. Cypress did not automatically retain all of the Ramtron employees after the acquisition, instead requiring them to reapply for jobs at Cypress. Dietz did, and in November 2012, Cypress hired him as a program manager. Cypress is based in California, but Dietz and the other former Ramtron employees at issue in this case worked in Colorado, both while at Ramtron and after joining Cypress.

Cypress requires—and has required from before the Ramtron acquisition—certain employees to participate in what it calls the "Design Bonus Plan" (and which, for ease of exposition, we will refer to as the "bonus plan"). Dietz was never subject to the bonus plan, but many of the former Ramtron employees, including some who worked under Dietz's supervision at Cypress, were. Though the details of the 55-page bonus plan are not crucial, a few pertinent aspects of the plan are: (1) for those employees in the bonus plan, participation is mandatory; (2) under the plan, Cypress deducts 10% of participants' salaries, and these deductions are also mandatory; (3) at the end of each calendar quarter, Cypress calculates the employees' "bonus" and some employees get less than the amount they put in; (4) payouts are based on the performance of the whole "team" that a given employee is on, and so an individual employee's payout is not entirely in that individual's control; (5) any employee who leaves Cypress before a given quarter's payout (which comes six weeks after the end of the quarter) receives nothing (and thus forgoes the 10% mandatory deduction); (6) the bonus plan is the brainchild of T.J. Rodgers, Cypress's founder and CEO; and (7) the bonus plan applies to Cypress employees in several states, including California and Colorado, and Cypress communicates with their employees about the plan via (at least) a website, e-mail, and video conferencing.[4] Importantly, none of the former Ramtron employees were told about the bonus plan—and its compulsory deductions—prior to taking their jobs with Cypress, and in the spring of 2013, when they were first subject to the plan, some of them were confused about how it worked.

In February 2013, Dietz received his first performance review; it was "very positive, and he exceeded expectations in most categories."[5] Although Dietz was not subject to the so-called

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[3] Recommended Decision and Order (R. D. & O.) at 82. Our affirmance of the order granting Dietz relief should not be viewed as agreeing with, or adopting, anything in the ALJ's R. D. & O.

[4] R. D. & O. at 13.

[5] *Id.* at 75.

Design Bonus Plan at issue in this case, he did earn 80% of his target bonus (under a different bonus program) for the first quarter of 2013. In short, all seemed to be going well for Dietz at Cypress.

At some point prior to April 12, 2013, several of the former Ramtron employees who worked under Dietz complained to him about the bonus plan. Then, on April 12, 2013, Dietz sent an e-mail memorandum to James Nulty explaining that he believed the bonus plan violated both California and Colorado law. Nulty, a Senior Vice President at Cypress, was Dietz's direct supervisor and on the Design Bonus Review Board, the entity within Cypress that reviews quarterly results and approves bonuses from the Design Bonus Plan.[6] In his April 12th memo, Dietz explicitly invoked Cypress's formal whistleblower policy and cited the specific state statutes he believed were being violated. He made no mention in that memo of fraud or of any of the provisions listed in the SOX whistleblower provision,[7] although he did testify at the hearing before the ALJ that he believed that Cypress was engaging in fraud.

In response to Dietz's complaints, two of Cypress's California-based lawyers, Victoria Valenzuela, the General Counsel, and Jennifer Joaquin, a contract attorney, held a teleconference with Dietz ten days later, on April 22, 2013. During that teleconference, Valenzuela told Dietz that Cypress had a legal opinion confirming the legality of the bonus plan, but neither lawyer explained to Dietz how the plan comported with the state statutes he had cited. At the hearing before the ALJ, it became clear that Cypress did not have a *written* legal opinion of any kind, and Cypress was still unable to provide any cogent explanation of how the plan was legal under state wage laws.

More importantly, during that teleconference, Dietz complained not only about the legality of the bonus plan but also about the fact that Cypress did not inform the former Ramtron employees that the plan entailed compulsory deductions from base salary when Cypress gave those prospective employees their offer letters.

From mid-April until June 4, 2013, much happened to Dietz at Cypress, but we limit our discussion to those facts specifically relevant to our analysis. First, starting on approximately April 24, 2013, Cypress began undermining Dietz's ability to do his job: it began taking resources away from the project he was supervising, without his knowledge or approval and in violation of Cypress's own policies.[8] Cypress continued to undermine Dietz's ability to do his job throughout the rest of April and all of May. On May 29, 2013, Dietz, Nulty, and a few others

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[6] R. D. & O. at 26.

[7] *See* 18 U.S.C. § 1514A (2012) (noting that the provision protects whistleblowing about 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, or television fraud), 1344 (bank fraud), or 1348 (securities fraud), "or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.").

[8] R. D. & O. at 15, 72.

had a teleconference about an alleged schedule slip on Dietz's project, and later that day, Nulty sent Dietz an e-mail telling him that he was going to "formally document[] performance issues."[9]

About a week later, on June 4, 2013, Nulty did just that, sending Dietz a formal disciplinary memo that warned Dietz "that it would be placed in his personnel file to serve as the basis for 'further' discipline."[10] Dietz believed that there was absolutely no basis for these accusations of alleged "performance issues" and that it was all retaliation for his whistleblowing about the bonus plan. Nulty's memo also demanded that Dietz "confess fault" for his alleged performance shortcomings, giving him no opportunity to dispute the memo's charges.[11] In particular, Nulty's June 4th memo demanded that Dietz "write a memo on 'What you did wrong and what you should have done.'"[12] Dietz viewed Nulty's order to write such a memo "as the first step in laying the foundation for his termination by requiring him to draft a memorandum admitting misconduct," and the ALJ found Dietz's belief to be "entirely reasonable."[13] Moreover, Dietz's uncontradicted testimony, which the ALJ credited, was that the language in this memo in his personnel file would make it virtually impossible for him to get another job in the industry.[14]

The details about the parties' dispute about the legitimacy of Nulty's June 4th disciplinary memo are not important here. What is crucial, though, is that the ALJ, who heard testimony from Dietz, Nulty, and numerous other Cypress employees, concluded that Cypress's claims were all "false."[15] She found Dietz "wholly credible on this issue"[16] and "Nulty's claims of performance shortcomings . . . not credible."[17] In short, the ALJ found, and for a variety of

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9 *Id.* at 28.

10 R. D. & O. at 44, 70; Complainant's Exhibit (CX) 9.

11 R. D. & O. at 72.

12 R. D. & O. at 44; CX 9.

13 R. D. & O. at 73. The ALJ specifically found that Dietz's characterization of Nulty's June 5th memo was correct as a factual matter. She wrote, "Mr. Nulty did not give Mr. Dietz the opportunity to challenge or rebut the allegations. His only option was to admit fault, which would result in a memorandum in his personnel file that could be used as the basis for further disciplinary action, including termination, or to refuse to admit to Mr. Nulty's charges, thereby being insubordinate, and incurring further disciplinary action, up to and including termination." *Id.*

14 *Id.*

15 *Id.* at 76.

16 *Id.* at 73. She further elaborated on her credibility determination as follows: "I had the opportunity to observe Mr. Dietz's demeanor and testimony during the hearing, and I found him to be a fully credible witness. He was forthright, and professional and courteous even in the face of aggressive and often hostile questioning." *Id.* at 73 n.37.

17 *Id.* at 76.

reasons that were well supported by the evidence and her credibility determinations, that Dietz had not deserved the disciplinary memo, and that all of Cypress's stated reasons for it were simply pretext, thereby "raising the rational inference that the real motivation for the memorandum was discriminatory."[18]

The next day, June 5, 2013, Dietz responded with a six-page letter disputing all of the disciplinary memo's allegations, point by point, and stating that he believed he was being retaliated against for his whistleblower complaint.[19] Moreover, in that letter, Dietz stated that Nulty's demand that he write a memo confessing fault "presume[d] that [Dietz would] acknowledge that [he] was wrong, under duress (i.e., the implied threat of termination), in this adverse employment action, without any discussion of the facts." His response to this was that he was "terminating [his] employment at Cypress," though he hedged his resignation ever so slightly: immediately after stating that he was "terminating [his] employment at Cypress," he said that he was willing to remain until July 1, 2013 for the sake of his colleagues on the project he was working on, unless, as he put it, "Cypress chooses to terminate my employment sooner."[20] Although Dietz's June 5th letter stated unequivocally that Dietz intended to resign, the ALJ found as a fact that Cypress had a "turnaround process" policy, a policy of aggressively attempting to retain employees who express an intent to resign; that Dietz knew about the policy; and that he sent his June 5th letter expecting the policy would kick in—that is, the ALJ found as a fact that, despite explicit language stating Dietz's "intent to terminate [his] employment," the June 5th letter did *not* actually constitute a resignation.

The day after that, June 6, 2013, Dietz was ordered to appear at a meeting with three others: his supervisor (Nulty), a business unit manager with whom Dietz had previously had hostile interactions, and a human resources representative. The meeting was set to occur the following day (June 7, 2013), but no one sent Dietz an agenda, which Dietz claimed, and the ALJ found, was an unusual occurrence at Cypress. At the hearing before the ALJ, Cypress's witnesses gave conflicting stories about the reason for summoning Dietz to this agenda-less meeting: one said it was to accept Dietz's resignation; a second said it was "to listen to and understand Mr. Dietz's 'concerns' more clearly and find a resolution"; and a third, Cypress's General Counsel, said that it "was to proceed with the turnaround process."[21] Fearing that this demand to attend an agenda-less meeting in this manner and under these circumstances could mean only one thing—that he was about to be fired—Dietz decided not to attend the meeting and instead tendered his resignation the next day (June 7, 2013), effective immediately.

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18 R. D. & O. at 79.

19 CX 12; R. D. & O. at 21.

20 R. D. & O. at 45-46; Respondent's Exhibit (RX) 23.

21 R. D. & O. at 74.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to issue final agency decisions arising under SOX.[22] The ARB reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo.[23]

DISCUSSION

To prevail on his SOX whistleblower complaint, Dietz must prove by a preponderance of the evidence that (1) he engaged in activity or conduct that SOX protects; (2) Cypress took some adverse personnel action against him; and (3) Dietz's protected activity was a contributing factor in Cypress's adverse personnel action.[24] Even if Dietz establishes this, however, he is still not entitled to relief if Cypress "demonstrates by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of" Dietz's protected activity.[25]

Cypress makes four arguments in seeking reversal, and we reject each one.[26] Two raise substantial legal issues, and we address them in some detail. But the other two are based on the mistaken view that the ALJ's failure to dot every "i" and cross every "t" in her exhaustive eighty-two page decision warrants reversal or remand. The ALJ made some mistakes; about that, Cypress is correct. But, none of her mistakes warrants reversal or remand.

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22 *See* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. § 1980.110 (2015).

23 29 C.F.R. § 1980.110(b). *Gunther v. Deltek, Inc.*, ARB Nos. 13-068, 13-069; ALJ No. 2010-SOX-049, slip op. at 2 (ARB Nov. 26, 2014).

24 *See Stewart v. Lockheed Martin Aeronautics, Co.*, ARB No. 14-033, ALJ No. 2013-SOX-019, slip op. at 2 (ARB Sept. 10, 2015). The ALJ cited four prongs, with a separate requirement that the employer also be "aware" of the protected activity. R. D. & O. at 62. For reasons we have recently explained, we avoid the four-prong formulation here. *See generally Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2 n.3 (ARB Feb. 18, 2016).

25 *See* 15 U.S.C. § 1514A(b)(2)(C) (2012); 49 U.S.C. § 49121(b)(2)(B)(iv) (2012).

26 In addition, Cypress takes a broad swipe at the ALJ's whole decision: Cypress claims that "[t]he ALJ applied a mistaken legal standard," by relying on the "'proof of a *prima facie* case' and Supreme Court precedent under the [Age Discrimination in Employment Act]," rather than the proper legal standard for a SOX whistleblower claim. Though at times the ALJ's formulation of the standard was inartful, it is clear that she *applied* the correct standard, and to the extent that her decision articulates aspects of the standard incorrectly, this was harmless error.

A. Protected Activity

Cypress argues that Dietz's actions prior to his discharge are not protected by the SOX whistleblower provision. That statute only protects whistleblowing about violations of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, or television fraud), 1344 (bank fraud), or 1348 (securities fraud), "or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[27] Dietz's accusations that Cypress broke the law, Cypress contends, only related to state wage laws; these wage laws are not listed among the laws the SOX whistleblower provision protects; ergo, Dietz's complaints of wrongdoing do not constitute protected activity within the meaning of the SOX whistleblower provision.

The ALJ gave this argument short shrift: since Dietz testified at the hearing that he thought the bonus plan was fraud, and Cypress obviously used the mails or wires in the course of developing and implementing its bonus plan, that's enough, she reasoned, to constitute whistleblowing about mail or wire fraud.[28] She rightly pointed out that "no magic words were required," and that "it is not dispositive . . . that Mr. Dietz did not characterize [the bonus plan] as 'fraud' or 'fraudulent.'"[29] Nor does it matter that he did not explicitly tell Cypress what uses of the mails or wires were involved in Cypress's allegedly fraudulent scheme: he did in fact believe—and reasonably so—that Cypress used at least e-mail, a website, and interstate video conferencing technology in executing and administering the bonus plan.[30] And of course we

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27 18 U.S.C. § 1514A (2012).

28 She also swept bank fraud in there as well, but that was a clear error. The federal bank-fraud statute requires a defendant not just to have *used* a financial institution, but rather to have *defrauded* a financial institution or to have *obtained funds under the control of* a financial institution. *See* 18 U.S.C. § 1344 (2012); *United States v. Young*, 952 F.2d 1252, 1256 (10th Cir. 1991) ("each offense [under the bank fraud statute] requires the criminal act be directed against a federally chartered or federally insured institution"). Obviously, Dietz alleged nothing even remotely resembling bank fraud. The only plausible claim here is that he alleged either mail or wire fraud.

29 *See generally Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -42, slip op. at 14-16 (ARB May 25, 2011) (employee need only have a "reasonable belief" of a violation of law and need not have communicated that belief to the relevant authority); *see also Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1132 (10th Cir. 2013). The flip side, though, is true too: it would not be dispositive if Dietz had in fact used the word "fraud" in his description of the plan. Thus, it is not dispositive that Dietz testified that he thought the bonus plan was "fraud," *see* R. D. & O. at 23, even if we accept the ALJ's determination that he was credible. The facts he was alleging need to plausibly encompass what the law treats as fraud and thus must include allegations of some kind of knowing misrepresentation or concealment of material fact. *See infra* text accompanying notes 33 to 35.

30 *See* Transcript at 89-90; 245-247; 276-278; *see generally Sylvester*, ARB No. 07-123, slip op. at 14-16 (employee need only have a "reasonable belief" of a violation of law and need not have communicated that belief to the relevant authority). Knowledge of such communications suffices to constitute a reasonable belief that Cypress was violating the wire-fraud statute, even without a more direct connection between the use of the wires and any specifically fraudulent acts. In this respect,

have repudiated any notion that he had to "definitively and specifically" connect his complaints about Cypress's bonus plan with any of the statutory violations listed in the SOX whistleblower provision.[31] But the ALJ seemed to think it self-evident that Dietz's allegations—which, Cypress rightly points out, primarily consisted of his claim that the bonus plan violated state wage laws—related to fraud.[32]

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the ALJ was correct when she assumed that the mail and wire fraud statutes can be triggered even when the connection between the alleged fraud and the use of the mails or wires might seem tenuous. Indeed, one commentator has gone so far as to ask whether these statutes now amount to, in effect, "federal fraud" statutes. *See* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. Rev. 435 (1995). As the Supreme Court has explained, the "use of the mails need not be an essential element of the [fraudulent] scheme. It is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (internal citations and quotation marks omitted); *see also United States v. Barraza*, 655 F.3d 375, 383 (5th Cir. 2011) ("The wire 'need not be an essential element of the scheme'; rather, '[i]t is sufficient for the [wire] to be incident to an essential part of the scheme or a step in [the] plot'" (quoting *Schmuck* with alterations for wire fraud)); *cf. Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis."); *United States v. Redcorn*, 528 F.3d 727, 739 n.6 (10th Cir. 2008) (same). In short, substantial evidence supports Dietz's claim that he reasonably believed that Cypress "transmit[ted] or cause[d] to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, . . . writings . . . for the purpose of executing [its allegedly fraudulent] scheme or artifice." 18 U.S.C. § 1343 (2012). In any event, even without such explicit evidence in the record, we can infer the necessary connection with either the mails or the wires: given that Cypress's corporate headquarters were in California and the former Ramtron employees were in Colorado, Dietz had to have also believed that Cypress used either the mails (or a "private or commercial interstate carrier" such as Federal Express or UPS, *see* 18 U.S.C. § 1341) or some form of electronic communication to send the former Ramtron employees their offer letters, the very documents he viewed as integral to the scheme to defraud the former Ramtron employees. *See infra* text accompanying notes 37 to 42.

[31] *See Sylvester*, ARB No. 07-123, slip op. at 17-19; *Nielsen v. AECOM Tech Corp.*, 762 F.3d 214, 221-22 (2d Cir. 2014).

[32] For example, she viewed it as sufficient that "Mr. Dietz specifically identified the conduct that he believed to be illegal, and he cited to state statutes that he believed were on point." R. D. & O. at 64; *see also id.* ("Mr. Dietz clearly believed that [Cypress] was carrying out a fraudulent scheme by violating state laws on payment of wages to its employees, a scheme that necessarily implicated interstate mail, wires, and banks."). She also says, "Nor, as the Respondent seems to argue, would the employees' full and knowing consent to participation in the [bonus plan] make it legal." R. D. & O. at 68. The issue, though, is not whether the plan is "legal." The issue is what, if any, *fraud* Dietz may have alleged, not what *illegality* Dietz may have alleged, and as we explain below, fraud requires a knowing misrepresentation or concealment of a material fact. *See also* R. D. & O. at 66 (describing Cypress's argument that Dietz failed to identify any misrepresentation as "simply nonsensical"). At one point, she does say, "Mr. Dietz was clearly concerned about not only the legality of the plan as it applied to all of [Cypress's] employees, *but also about the fact that*

That, however, isn't quite right: an allegation of a violation of state wage laws is, by itself, insufficient to constitute protected activity under SOX's whistleblower provision without some allegation of a knowing misrepresentation or concealment of a material fact. In fact, lots of violations of state (and even federal) wage laws do not constitute fraud. If an employer were to pay its workers less than the minimum wage, that would be illegal; but allegations that an employer did that would not constitute protected activity under the SOX whistleblower provision. Ditto for failing to pay overtime or the employer's share of Social Security or for violating countless other laws that amount to pocketing money that legally belongs to employees. That was the crux of what Dietz accused Cypress of doing with its bonus plan. Put another way, larceny is not the same as fraud.[33]

Rather, to be fraud, there has to be some form of trickery, of deception, a "knowing misrepresentation or knowing concealment of a material fact."[34] Without that, the alleged wrongdoing isn't fraud. Of course, Dietz only had to have a reasonable belief that Cypress engaged in fraud, but Dietz's "reasonable belief" had to include a reasonable belief that Cypress knowingly either misrepresented or concealed facts, not just that Cypress was, in the words of Dietz's brief, "illegally siphoning money from its employees to its corporate coffers" in violation of state wage laws.

Thus, to answer the question of whether Dietz's actions constitute "protected activity" under the SOX whistleblower provision requires us to analyze whether Dietz reasonably believed not only that Cypress's bonus plan's compulsory deductions violated state wage laws but also that Cypress was knowingly misrepresenting or concealing material facts about the bonus plan from its employees.[35]

Although the ALJ seems to have misunderstood what Dietz had to show, the record nonetheless supports the conclusion that Dietz did in fact engage in protected activity. The

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[Cypress] did not disclose the existence of [the bonus plan] to the Ramtron employees when it made offers of employment to them." R. D. & O. at 67 (emphasis added). However, her *analysis* of whether Dietz engaged in any protected activity focuses on the legality of the compulsory deductions under state law. *See* R. D. & O. at 69 ("I find that Mr. Dietz . . . had a subjectively and objectively reasonable belief that [Cypress] was engaged in fraud *through its compulsory [Design Bonus Plan] deductions from its employees' salaries* (emphasis added).).

[33] *Cf. Harvey v. Home Depot*, ARB No. 04-115, ALJ No. 2004-SOX-036, slip op. at 14 (ARB June 2, 2006) ("Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX.").

[34] BLACK'S LAW DICTIONARY (10th ed. 2014); *see generally Neder v. United States*, 527 U.S. 1, 23 (1999) (in context of federal mail, wire, and bank fraud statutes, noting that the "well-settled meaning of 'fraud' requires a misrepresentation or concealment of material fact").

[35] *See* 18 U.S.C. § 1514A (to trigger whistleblower protections, employee must "provide information . . . regarding conduct which the employee *reasonably believes*" violates one of listed provisions).

uncontroverted evidence demonstrates that Dietz believed—and had good reason to believe—that Cypress concealed material facts about the bonus plan from some of the former Ramtron employees receiving job offers in the wake of Cypress's acquisition of Ramtron. In particular, the evidence suggests that Dietz reasonably believed that Cypress knowingly failed to disclose to those potential employees the fact that the bonus plan required compulsory deductions from their salaries, possibly inducing them to take jobs at Cypress without understanding that their true base salary was effectively less than they thought.[36]

The ALJ found that Dietz's April 12, 2013 e-mail to Nulty was Dietz's protected activity, and, on appeal, that is where both parties focus their attention. Cypress argues, for example, that "the ALJ's basis to believe fraud occurred postdates the protected conduct." In essence, Cypress's theory appears to be that Dietz did not learn that the Ramtron employees' offer letters failed to mention the bonus plan until after his April 12th e-mail. Cypress doesn't say it in quite these words, but the argument appears to be that while Dietz may have believed that the bonus plan violated state wage laws when he wrote his April 12th e-mail, he could not have believed it was fraudulent because he did not know anything about Cypress's alleged concealment.

Even if this is factually correct (and there is some dispute about this), this argument takes an overly narrow view of what constitutes the protected activity in this case. Here, the activity includes any and all interactions Dietz had with the relevant authorities at Cypress that related to his complaints about the bonus plan, not just the April 12th e-mail to Nulty. So, although Dietz's April 12th e-mail merely questions the legality of the bonus plan under state wage laws, by April 22, 2013, Dietz's characterization of his concerns clearly also included allegations of misrepresentations and/or concealment of material facts.

Indeed, it is undisputed that, on April 22, 2013, Dietz told Cypress's General Counsel, Victoria Valenzuela, that he thought Cypress had knowingly concealed material facts about the bonus plan from the former Ramtron employees. In that conversation, Dietz clearly expressed concerns beyond the illegality of the bonus program under state law, specifically stating that he believed Cypress had knowingly concealed from the former Ramtron employees the fact that the bonus plan entailed mandatory deductions from employees' base pay. Indeed, Valenzuela herself said as much at the hearing. She testified that "Mr. Dietz kept referring to the [bonus plan] as being a compulsory deduction, and a condition of employment; the employees were given an offer letter with a salary, *and then the game was changed.*"[37] "According to Ms. Valenzuela, Mr. Dietz said several times that Cypress was just taking the deductions away, *as though they were surprising the employees.*"[38] Dietz himself also testified that he thought that "Cypress *misrepresented* its right to make compulsory deductions from employee pay, on money

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[36] We of course make no determination about the legality of the bonus plan under state law, only about whether Dietz had a reasonable belief that Cypress violated the federal mail or wire fraud statutes.

[37] *See* R. D. & O. at 40 (emphasis added).

[38] *Id.* (emphasis added); *cf. also* R. D. & O. at 14 (Dietz testifying that "[h]e recalled Ms. Valenzuela stating (in their April 22nd teleconference) that the [bonus plan] was not identified in the offer letters given to the former Ramtron employees").

often forfeited back to the corporation. He also learned that the offer letters did not put the Ramtron employees on notice that they would be subject to the [bonus plan]. He concluded that it was fraud to induce former Ramtron employees to accept employment at offered salaries when the true intent was to pay them 90%."[39] Although his testimony is not explicit as to *when* he learned about the offer letters or when he thought about the possibility that this omission could be thought of as fraud, it is clear that by April 22nd, he not only knew about this, but also made clear to Cypress's General Counsel that this was part of his concern.

If we thus view Dietz's April 22nd teleconference with Valenzuela as part of the course of his potential "protected activity,"[40] Dietz's complaints about the bonus plan included allegations involving misrepresentations. Whether this would in fact be a violation of the federal mail or wire fraud statute, we of course make no determination. But, given Dietz's position in the company—as a manager of employees, including former Ramtron employees, who seemed confused about the way the bonus plan worked and unaware that the plan required employees to contribute from their base salary in a manner that might well violate state wage laws—his belief was reasonable.[41]

In short, on April 22, 2013, Dietz "provided information . . . regarding . . . conduct [that he] reasonably believ[ed]" violated either 18 U.S.C. § 1341 (mail fraud) or 18 U.S.C. § 1343 (wire fraud) to Cypress's General Counsel, someone "working for [Cypress] who has the authority to investigate, discover, or terminate misconduct."[42] This constitutes protected activity within the meaning of the SOX whistleblower provision.

B. Adverse Personnel Action: Constructive Discharge

The legal standard ordinarily used to determine what constitutes a constructive discharge is whether the employer has created "working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign."[43] Constructive discharge is a question of

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39 R. D. & O. at 15.

40 Or, we could characterize the April 22nd teleconference as a second, separate, act that itself constituted "protected activity." During that teleconference, Dietz was after all, in the words of the SOX whistleblower provision, "provid[ing] information . . . regarding . . . conduct which [he] reasonably believe[d] constitute[d] a violation of [one of the listed federal fraud statutes] . . . to" Valenzuela, Cypress's General Counsel who is "a person . . . working for the employer who has the authority to investigate, discover, or terminate misconduct." 18 U.S.C. § 1514A.

41 *See, e.g., Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) ("Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee" (internal quotation marks and citation omitted).).

42 18 U.S.C. § 1514A.

43 *Strickland v. United Parcel Svc.*, 555 F.3d 1224, 1228 (10th Cir. 2009); *see also Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011) (formulating the question of constructive discharge as whether employer created 'working

fact,[44] and the standard is objective: the question is whether a "reasonable person" would find the conditions intolerable, and the subjective beliefs of the employee (and employer) are irrelevant.[45]

"But that is not the only method of demonstrating constructive discharge. When an employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns, the employer's conduct may amount to constructive discharge."[46] Under this standard, an employee who can show that the "handwriting is on the wall" and the "axe is about to fall"[47] can make out a constructive-discharge claim. While the ALJ seemed to conflate these two standards at times, it is clear that, even though she did not rely on legal authority supporting this second way of finding a constructive discharge, her intuition about the law was correct.[48]

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conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign"); *Fox v. Geren*, EEOC Doc. 0120063132 (E.E.O.C.), 2007 WL 2416622, at *2 (Aug. 10, 2007). Though the concept of constructive discharge originated in the NLRB as far back as the 1930s with retaliation claims for union activities, this language derives from a 1975 Title VII case, *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975). *See generally* Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 406-10, 412 (2002). Irrespective of the type of wrongful-discharge claim, though, the principle is the same: there are times when the law will treat an employer's acts as tantamount to a discharge, even when the employer did not formally fire the employee. In both the discrimination and the retaliation contexts, the basic standard is the same.

44 *Strickland*, 555 F.3d at 1228.

45 *Id.*

46 *E.E.O.C. v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002); *see also Burks v. Okla. Pub. Co.*, 81 F.3d 975, 978 (10th Cir. 1996) ("This court has recognized that an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired."). *But see Ames v. Nationwide Mut. Ins. Co.*, 760 F.3d 763, 769 (8th Cir. 2014) (noting that the Eighth Circuit has "not recognized the second form of constructive discharge in . . . non-hostile work environment cases").

47 *Univ. of Chi. Hosps.*, 276 F.3d at 332.

48 Among Cypress's arguments is that the ALJ used the wrong legal standard. Rather than focusing on whether continued employment would have been intolerable, Cypress argues, the ALJ wrongly focused on the question of whether Cypress was threatening to fire Dietz and whether Cypress's actions were tantamount to firing him. In light of this second way to demonstrate constructive discharge, this argument is obviously mistaken: while Dietz's constructive-discharge claim does not *require* Dietz to show that Cypress was on the verge of firing him, *see, e.g.*, *Haley v. Alliance*, 391 F.3d 644, 650 (5th Cir. 2004), it is enough to show that Cypress communicated to Dietz that he would be fired. Bafflingly, even Dietz's attorney does not appear to realize that this is

First, although she did not cite to authority that this was the legal standard, she specifically stated, "I find that, under the circumstances, . . . *it was objectively reasonable for Mr. Dietz to conclude that he faced imminent discharge[]* and a stain on his career that would adversely affect his future employment."[49] She then concluded, "Viewing the totality of the evidence, I find that a reasonable person in Mr. Dietz's situation would conclude that quitting was his only option."[50] She thus applied the correct legal standard and, under that standard, found that Cypress constructively discharged Dietz.

Second, though we view this as a close case, the full context of the facts[51] here supports the ALJ's conclusion that Cypress constructively discharged Dietz on June 7, 2013: as of that date, Cypress had, for all intents and purposes, "communicated to [Dietz] that [he was to] be discharged,"[52] and he was effectively faced "with a choice between resigning and being fired."[53] Supported by substantial evidence, the ALJ found the following facts: (1) in April 2013, Dietz made complaints under Cypress's own whistleblower policy and never learned whether Cypress had resolved the issues raised by those complaints; (2) in the few weeks between his whistleblower complaint and June 4, 2013, Cypress was acting in ways that undercut Dietz's ability to do his job, and in ways that violated Cypress's own policies; (3) on May 29, 2013, Dietz received an undeservedly unfavorable performance review; (4) on June 4, 2013, Dietz received an undeserved disciplinary memorandum that (a) was to be placed in his personnel file and (b) included language suggesting it was a prelude to Dietz being fired, language that would serve as an automatic disqualification for any other job Dietz might seek in the industry;[54] (5) the following day, June 5, 2013, Dietz replied with a letter (a) explaining in some detail why he believed he did not deserve any discipline, (b) complaining that he was being retaliated against for his whistleblower complaint, and (c) stating his intent to resign, effective July 1, 2013; (6) Dietz's June 5, 2013 "intent to resign" was not in fact a resignation, because Cypress had what it referred to as a "turnaround process" policy, a policy of working to retain employees who expressed an intent to resign, a policy Dietz knew about and thought should apply to his letter; (7) on June 6, 2013, Dietz was ordered to attend an agenda-less meeting the next day (June 7,

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the law, since his brief does not cite any of this authority either, instead focusing on the "intolerable conditions" method of satisfying the constructive-discharge standard.

49 R. D. & O. at 73 (emphasis added).

50 *Id.* at 74.

51 By "facts," we of course mean the facts, supported by substantial evidence, as the ALJ found them.

52 *Univ. of Chi. Hosps.*, 276 F.3d at 332.

53 *Burks*, 81 F.3d at 978.

54 R. D. & O. at 72-73. The ALJ treated this June 4, 2013 memo as adverse action independent of the constructive discharge, R. D. & O. at 73, but, as Cypress rightly points out, if there were no constructive discharge here, Dietz's damages would be minimal. Cypress does not, however, contest the finding that the disciplinary memo was an adverse action.

2013)—an unusual occurrence at Cypress—with three others: his supervisor, a business unit manager with whom Dietz had previously had hostile interactions, and a human resources representative; and then (8) on June 7, 2013, rather than attend the agenda-less meeting, Dietz resigned effective immediately.

This set of facts constitutes a constructive discharge as of June 7, 2013. The constructive discharge consisted of communicating to Dietz the message that he was going to be fired, and, furthermore, to do so under circumstances under which being fired would be a stain on his work record so indelible that he could never get another job in his field. From late April through June 5th, Cypress was acting in ways that Dietz reasonably believed meant someone was out to get him: resources were taken from the project he was supervising in violation of Cypress's own policies, undermining his ability to do his job and in ways that he reasonably believed were designed to make him fail. Then, on May 29th, Dietz's supervisor, Nulty, told Dietz in no uncertain terms that he had performance issues, despite the fact that Dietz actually had no performance issues at all. On June 4th, Nulty followed up by putting those alleged performance deficiencies into what the ALJ found to be a "disciplinary memorandum." However, rather than using Cypress's formal system for dealing with performance deficiencies—a system that would have permitted Dietz an opportunity to respond—Nulty's memorandum specifically required Dietz to, as the ALJ put it, "confess wrongdoing."[55] This, the ALJ also found, was by design: the disciplinary memo was "meant to be held over Mr. Dietz's head for future use."[56]

What makes this case unusual is the fact that Dietz's response to Nulty's June 4th disciplinary memo the next day included what on its face appears to be a resignation. His June 5th letter not only contests Nulty's June 4th disciplinary memo and asserts that Nulty's memo was retaliatory, but it also states Dietz's intent to resign effective July 1st.[57] But, as Cypress argues, if as of June 5th Dietz had already resigned, then how could he have been constructively discharged on June 7th?[58] Cypress would be right about this if Dietz's June 5th letter was in fact a resignation. But the ALJ found, as a fact, that Cypress had a "turnaround process" of quickly

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55 R. D. & O. at 72.

56 *Id.*

57 The dissenting opinion refers to Dietz's June 5th letter as a "resignation letter." *See infra* at 23. While accurate in the most literal sense, this characterization of the six-page June 5th letter ignores the fact that the letter was clearly meant as a direct response to Nulty's June 4th claims that Dietz had performance shortcomings. The bulk of Dietz's letter is a point-by-point response to what the ALJ found to be Nulty's false allegations; the reference to Dietz's "intent to resign" is brief and, in any event, is also styled as a direct response to Nulty's demand that Dietz "acknowledge that [he] was wrong, under duress (i.e., the implied threat of termination)." Moreover, the letter included a lengthy section accusing Cypress of retaliating against him for his complaints about the bonus plan. RX 23.

58 Worst case scenario, Cypress argues, he was constructively discharged twenty-four days before he otherwise would have left on his own volition. So, even if we affirm the constructive-discharge finding, Cypress contends, we should limit his back-pay damages to the June 7th through July 1st period.

and forcefully attempting to retain employees who express an intent to resign, and that Dietz knew of this policy.

Thus, in essence, the ALJ found that Dietz's "intent to resign" was not actually an intent to resign—or, at least, it was not an irrevocable statement that he was resigning effective July 1, 2013—but rather an opening gambit in a negotiation related to his alleged performance deficiencies. This interpretation of Dietz's June 5th letter seems a little odd. After all, Dietz's letter flat out states, "I am terminating my employment at Cypress." Only after that seemingly unequivocal statement does he then say that he "will agree to stay onboard through July 1, as a professional courtesy to [his] fellow Cypress employees in Colorado Springs, and to keep [the project he was working on] stable while executing an orderly turnover"—which he then follows with the caveat "unless Cypress chooses to terminate my employment sooner."[59] There is no indication of conditions under which he would stay, no implication that he would be willing to stay if, for example, he did not have to work under Nulty any longer and could have the June 4th memo expunged from his personnel file. More importantly, Dietz's June 5th letter contains no indication that he knew anything about Cypress's "turnaround process." Its tone and content imply that he feels as though Nulty's June 4th memo itself was the constructive discharge—not just a first step towards the *possibility* of termination, but tantamount to future termination.[60] But if Dietz thought that Nulty's memo meant that he sooner or later would definitely be fired, wouldn't that mean that, *on June 5th*, Dietz really believed he had to resign? If that's true, then his "I am terminating my employment at Cypress" statement was in fact an unequivocal statement of his real intent, and his claim that he thought that Cypress would respond to his June 5th letter with some kind of aggressive "turnaround process" seems odd, almost disingenuous. But that seems to be what the ALJ found as a fact: as of June 5th, Dietz was convinced both that he was definitely going to be fired at some point in the future[61]—hence, the resignation to pre-empt it[62]—and, at the same time, that Cypress would follow its "turnaround process" to try to retain him.[63] But, which was it? Did he think he was definitely going to be fired and so needed to resign? Or, did he think he wasn't actually going to be fired because Cypress would instigate the "turnaround process"?

We are willing to accept this seeming contradiction because looking at Dietz's June 5th letter in its full context, we are convinced that the ALJ must have believed (though she did not say in precisely these terms) that Dietz was effectively hedging his bets. In essence, he was

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59 CX 12.

60 On its face, though, Nulty's memo says nothing like that. It does effectively say, shape up or you could get fired, but nothing on its face suggests a discharge (or future discharge) of any kind.

61 R. D. & O. at 73 ("I find that, given the circumstances, Mr. Dietz was entirely reasonable in viewing Mr. Nulty's request as the first step in laying the foundation for his termination, by requiring him to draft a memorandum admitting misconduct.").

62 *Id.* ("Believing that he had no choice, Mr. Dietz submitted a memorandum indicating his intent to resign, effective July 1, 2013.").

63 *Id.* ("Mr. Dietz relied on what he reasonably perceived to be [Cypress's] own policy, which states that every attempt should be made to retain a valued employee who threatens to quit.").

thinking something to the effect of "I'll announce my resignation now, so as to prevent Cypress from firing me, but will hope they can do something to retain me—starting with getting rid of this stain on my personnel record."

According to the ALJ, then, it was Cypress's response the next day (June 6th) that told Dietz he did not need to hedge any more: he was *definitely* going to be fired, and it was going to happen the following day, June 7th, at this agenda-less meeting that no one would tell Dietz anything about. And so, rather than attend the agenda-less meeting and be fired, he resigned immediately. As the ALJ put it, "the complete lack of any response to his June 5, 2013 memo, raising claims of retaliation to the Executive Vice President for Human Resources, followed more than a day later by a meeting notice with no agenda, caused him to be concerned about the purpose of the June 7 meeting."[64]

Although the ALJ recognized that Cypress's subjective beliefs were not relevant for the constructive-discharge determination, she further noted that at the hearing, Cypress's witnesses gave conflicting stories about the reason for the June 7th agenda-less meeting: one said it was to accept Dietz's resignation; a second said it was "to listen to and understand Mr. Dietz's 'concerns' more clearly and find a resolution"; and a third, Cypress's General Counsel, said that it "was to proceed with the turnaround process."[65] So, even Cypress itself did not have a consistent story about why Dietz was being summoned to an agenda-less meeting that included a human resources representative. This makes it all the more likely that Cypress did in fact intend to fire Dietz. Of course, an employee in Dietz's position would not have known that Cypress's witnesses would later contradict each other on this question, but this lack of a consistent story contextualizes Cypress's unwillingness to give Dietz any reason for the agenda-less meeting at the time and makes even clearer how unusual the events of June 5th through 7th were.

In short, substantial evidence supports the ALJ's finding that Cypress constructively discharged Dietz on June 7, 2013. In particular, the ALJ found as a fact that the June 6th summons to an agenda-less meeting with his supervisor, a business unit manager, and a human resources representative was, in the context of all that had previously transpired, tantamount to informing him that he was to be fired, and in circumstances in which Dietz reasonably believed

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[64] R. D. & O. at 74, n.38.

[65] *Id.* at 74. In concluding that there is insufficient evidence to support "an inference that an employer would fire an employee who submitted a resignation letter such as Dietz's letter," the dissenting opinion states that if Cypress had known Dietz's June 5th letter was not a real resignation, "[p]erhaps . . . a reasonable person could infer that the employer would fire the employee to make the termination certain." *See infra* at 23. But, Cypress *did* know that Dietz's June 5th letter was not a real resignation: Or, more precisely, at least two Cypress employees, including its General Counsel, specifically testified that they were *not* treating Dietz's June 5th letter as a categorical resignation. Though Cypress thus did know that Dietz's June 5th memo was not an unequivocal "resignation letter," the ALJ properly concluded that Cypress's subjective state of mind was not relevant for the constructive-discharge inquiry. R. D. & O. at 74 ("Although [Cypress's] subjective intent is not relevant, . . ."); *see Strickland*, 555 F.3d at 1228 ("The [constructive-discharge] standard is objective: the employer's subjective intent and the employee's subjective views on the situation are irrelevant.").

that being fired would end his career in the industry. Although Cypress did not say the magic words, "Unless you resign, you'll be fired" out loud,[66] a reasonable person in Dietz's position would have understood Cypress's actions to send just that message. Cypress thus "communicated to [Dietz] that [he was about to] be discharged,"[67] and placed him in the unenviable position of having to choose "between resigning and being fired."[68] That suffices to demonstrate Cypress constructively discharged him.

C. Contributing Factor/Cypress's Defense

To prevail on his SOX whistleblower claim, Dietz needs to show, by a preponderance of the evidence, that his protected activity—here, his complaints about the bonus plan—"was a contributing factor in the unfavorable personnel action[s]"—here, the constructive discharge;[69] if Dietz makes this showing, the ALJ is nonetheless prohibited from granting him relief if Cypress can show, by clear and convincing evidence, that it "would have taken the same unfavorable personnel actions in the absence of" Dietz's protected activity.[70]

The ALJ effectively found as fact that the *only* reason for the unfavorable personnel actions was Dietz's protected activity.[71] She based this conclusion on a wide array of circumstantial evidence connecting Dietz's protected activity and the adverse personnel actions, including temporal proximity, evidence of pretext, inconsistent application of Cypress's policies, and inconsistent explanations for the adverse personnel actions.[72] Supported by substantial

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66 *Acrey v. Am. Sheep Indus. Ass'n*, 981 F.2d 1569, 1574 (10th Cir. 1992); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1153-54 (10th Cir. 1990).

67 *Univ. of Chi. Hosps.*, 276 F.3d at 332.

68 *Burks*, 81 F.3d at 978.

69 18 U.S.C. § 1514A(b)(2)(C) (providing that actions under the SOX whistleblower provision "be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code"); 49 U.S.C. § 49121(b)(2)(B)(iii) (under "criteria for determination" of a violation, noting that "the complainant [must] demonstrate[] that [his protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint").

70 18 U.S.C. § 1514A(b)(2)(C) (providing that actions under the SOX whistleblower provision "be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code"); 49 U.S.C. § 49121(b)(2)(B)(iv) (providing that "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").

71 *See* R. D. & O. at 76 ("I find that the totality of the evidence, and the reasonable inferences it supports, establishes not only that . . . Mr. Nulty's June 4, 2013 memorandum was pretextual, but that [Cypress's] stated reasons for this memorandum are false, and support a finding of discriminatory motive.").

72 *Sylvester*, ARB No. 07-123, slip op. at 27.

evidence, she found the following facts: (i) the temporal proximity—here, a little more than a month—between Dietz's protected activity and the adverse actions created a strong inference connecting the two; (ii) prior to Dietz's protected activity, in February 2013, he received a "very positive" performance review, his first scheduled review after joining Cypress from Ramtron in November 2012; (iii) starting on approximately April 24, 2013, just twelve days after Dietz's e-mail complaining about the legality of the bonus plan (and a mere two days after his teleconference with Cypress's General Counsel discussing the issue), Cypress began undermining Dietz's ability to do his job—and continued to do so over the next few weeks until the showdown of June 4th through 7th; (iv) the way in which Cypress undermined Dietz violated Cypress's own policies; (v) *none* of Cypress's alleged justifications for Nulty's June 4th memo were either "supported or credible," thereby "rais[ing] the rational inference that the real motivation for this memorandum was discriminatory";[73] and (vi) in dealing with Dietz's complaints about the legality of the bonus plan, Cypress did not even follow the requirements of its own "Global Whistleblower Policy," a policy that Dietz had explicitly invoked when he sent his original April 12th e-mail questioning the legality of the bonus plan. The evidence also clearly supports the ALJ's determination that the June 4th memo led directly and inexorably to Dietz's constructive discharge on June 7th. In short, she found that Cypress's stated reasons for its adverse actions were internally inconsistent and not credible, and thereby just pretexts for the real reason: Dietz's whistleblowing activity.

We affirm the ALJ's order because this finding logically necessitates a finding that (a) Dietz's protected activity was a contributing factor in the unfavorable personnel actions, and (b) Cypress would not have taken the same unfavorable actions in the absence of Dietz's protected activity.

Cypress argues that the ALJ "impermissibly reversed the burden of proof on contributing factor" and that she relied on the wrong standard and facts that lack a substantial basis in assessing what Cypress had to show for what it calls its "affirmative defense." We need not waste too much ink on these arguments: neither requires reversal here.

1. Dietz's Protected Activity Was a Contributing Factor in the Unfavorable Personnel Actions

Cypress is wrong that the ALJ "impermissibly reversed the burden of proof." She did nothing of the kind. The fact that she may have made some adverse inferences in determining a handful of facts in support of her finding that Dietz's protected activity was a contributing factor in the adverse action was permissible[74] and, even if not, was clearly harmless error. Indeed, by

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[73] R. D. & O. at 79.

[74] *See Batyrbekov v. Barclays Group US, Inc.*, ARB No. 13-013, ALJ No. 2011-LCA-025, slip op. at 13 n.68 ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." (internal quotation marks and citation omitted)); *cf. Gilbert v. Cosco, Inc.*, 989 F.2d 399, 406 (10th Cir. 1993) (adverse inference permitted in federal court "when there exists an unexplained failure or refusal of a party . . . to produce evidence that would tend to throw light on the issues" (internal quotation marks and citation omitted)).

itself, temporal proximity can suffice to establish that protected activity was a contributing factor to an adverse personnel action.[75] The fact that the ALJ may have made some adverse inferences is hardly grounds for reversal.

Cypress is also wrong when it argues that ALJs are categorically prohibited from considering employer evidence in assessing whether an employee's protected activity was a contributing factor in the adverse personnel action. Here, the ALJ used Cypress's lack of credibility to support her finding that Dietz's complaints about the bonus plan were a contributing factor in Nulty's disciplinary memo and Dietz's subsequent constructive discharge. The fact that the ALJ considered, but then rejected as not credible, Cypress's stated reasons for the adverse actions, is not grounds for reversal. Cypress cites our decision in *Fordham v. Fannie Mae* to the contrary.[76] While there is disagreement on this Board about the merits of *Fordham*,[77] we all agree that ALJs are not precluded from considering evidence of pretext, inconsistent application of an employer's policies, and inconsistent explanations for the adverse personnel actions to support a finding that a complainant has met his burden to show that his protected activity was a contributing factor.

Finally, we reject Cypress's attempt on appeal to relitigate the facts surrounding the legitimacy of its reasons for Nulty's June 4th disciplinary memo. Substantial evidence supports the ALJ's rejection of Cypress's stated reasons for that memo.

2. *Cypress Would Not Have Taken the Same Unfavorable Personnel Action in the Absence of Dietz's Protected Activity*

We similarly reject Cypress's request to remand based on the argument that the ALJ used the wrong standard in assessing whether Cypress would have taken the same adverse actions in the absence of Dietz's protected activity. Cypress is correct that the ALJ's articulation of the law was, as Cypress's brief puts it, "muddled" on this question. At one point, for example, the ALJ said, "[Cypress] has the burden to produce evidence that the adverse actions *were motivated by legitimate, nondiscriminatory reasons*."[78] While such a showing could provide support for a finding in Cypress's favor, Cypress is correct that this is not the legal standard,[79] as Dietz himself concedes.

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75 *See Lockheed Martin Corp.*, 717 F.3d at 1136 ("Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.").

76 *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014).

77 *Compare Fordham*, ARB No. 12-061, slip op. at 13-37 *with id.* at 42-50 (Corchado, J., dissenting).

78 R. D. & O. at 80 (emphasis added).

79 *See* 49 U.S.C. § 49121(b)(2)(B)(iv) ("Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that *the employer would have taken the*

Nonetheless, this error was harmless: notwithstanding the ALJ's "muddle[]," the facts she did find make crystal clear that we should affirm her order granting Dietz relief. Once she found, as a matter of fact, that Cypress had no reason for its adverse actions other than Dietz's whistleblowing, she quickly dispensed with Cypress's claim that it could prove that it would have otherwise taken the same adverse actions. Cypress quibbles with her statement of the standard and argues that her "failure to separate factual findings that support the proper affirmative defense from proof that allows [Dietz] to meet his lower standard renders [her decision] unintelligible, and it must be set aside." But, in rejecting Cypress's claims that it would have otherwise taken the same adverse actions, the ALJ specifically said that she was doing so "for all of the reasons discussed above,"[80] obviously alluding to her extensive discussion in the contributing-factor section of her decision.

The only authority Cypress cites for such a drastic remedy for the ALJ's minor misstatements and unwillingness to restate her factual findings is the regulatory provision that lays out the procedures for ALJs in SOX whistleblower claims. But, the provision Cypress cites says nothing about "set[ting] aside" an ALJ's decision. All it says is, "The decision of the ALJ will contain appropriate findings[] [and] conclusions . . . ."[81] Now, Cypress may well be correct when it (at least implicitly) argues that the world would be a better place (and certainly our job would be easier) if ALJs drafted all their decisions with specific findings of fact listed separately from their conclusions of law, facts that would then be referenced specifically in the legal analysis, section by section. But that is not what the regulation Cypress cites provides, and in any event, it says nothing about remanding if the ALJ's decision fails to "contain appropriate findings[] [and] conclusions." We decline to set aside a decision that is well-supported by substantial evidence simply on the basis of the word "appropriate" in a procedural regulation.[82]

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same unfavorable personnel action in the absence of that behavior" (emphasis added)); *see also Lockheed Martin Corp.*, 717 F.3d at 1130 n.3 (noting that "[a]n employer may still avoid liability . . . by proving, through clear and convincing evidence, it would have taken the same unfavorable personnel action in the absence of the protected activity"). For further elucidation of factors to be applied and evidence that can be considered in assessing the legal standard, *see Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11-12 (ARB Apr. 25, 2014).

[80] R. D. & O. at 80. In the same paragraph, the ALJ correctly stated the affirmative defense standard: "Mr. Dietz cannot prevail if the Respondent shows by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of any protected behavior." *Id.*

[81] 29 C.F.R. § 1980.109(a).

[82] Arguably, the general rules of practice that apply to adjudicatory proceedings before the Department's ALJs, rather than the specific rules that apply in SOX cases, would have been a better source for Cypress's argument. Those rules provide that "[t]he decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record." 29 C.F.R. § 18.57(b) (2014) (emphasis added). Even reading this more robust provision as a requirement that ALJs clearly delineate their findings of fact as such, we view a remand as inappropriate in this case: despite the ALJ's failure to "include

Here, in the full context of the ALJ's exhaustive 82-page decision, it is obvious why she felt it unnecessary to repeat her reasons for viewing Cypress as not having established (by any standard of proof) that it would have otherwise taken the same adverse action: The evidence establishing that Dietz's protected activity was a contributing factor in the adverse actions was enough to defeat Cypress's claim that it would have otherwise taken the same adverse actions. After all, the ALJ didn't believe *any* of Cypress's stated reasons for the adverse actions, and she said so.[83] Was it really "[in]appropriate" for her to save the trees and time, and not say it twice?

Cypress's argument simply misses the big picture here: the ALJ did not believe the evidence Cypress provided about its reasons for the adverse personnel actions, evidence it would have needed to meet its burden to show that it otherwise would have taken the same adverse actions. Where an ALJ finds an employer's stated reasons not to be credible, that can effectively end the analysis: Here, since the ALJ determined, as a fact, that Cypress's stated reasons were flat-out false, Cypress simply cannot prevail on its argument that it would have otherwise taken the same adverse actions.

In sum, whatever misstatements of the standard the ALJ may have made and whatever one thinks of her unwillingness to repeat her factual findings twice in the course of an already lengthy decision, we must affirm because the facts she found so clearly support a conclusion that (i) Dietz's protected activity was a contributing factor in the June 4th disciplinary memo and his June 7th constructive discharge, and (ii) Cypress would *not* have taken either adverse action in the absence of Dietz's protected activity.

CONCLUSION

The record contains substantial evidence to support a finding that (i) Dietz's complaints about the bonus plan included allegations of violations of the federal mail or wire fraud statutes, thereby triggering the protection of SOX's whistleblower provision; (ii) Cypress constructively discharged him on June 7, 2013; (iii) his protected activity was a contributing factor in both the June 4, 2013 disciplinary memo and his June 7, 2013 constructive discharge; and (iv) Cypress

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findings of fact," her opinion is clear as to why she rejected Cypress's claim that it would have taken the same adverse action in the absence of Dietz's protected activity.

[83] *See* R. D. & O. at 76 ("I find that the totality of the evidence, and the reasonable inferences it supports, establishes not only that . . . Mr. Nulty's June 4, 2013 memorandum was pretextual, but that [Cypress's] stated reasons for this memorandum are false, and support a finding of discriminatory motive.").

would not have disciplined him or constructively discharged him if he had not made his complaints about the bonus plan. Accordingly, we **AFFIRM** the ALJ's order granting Dietz relief.

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado, concurring in part and dissenting in part.

I concur that substantial evidence supports the ALJ's finding that protected activity contributed to some of Cypress's unfavorable employment actions against Dietz, like Nulty's June 4, 2013 memorandum. But I do not agree that the record contains substantial evidence supporting the ALJ's finding that Cypress constructively discharged Dietz and, therefore, would reverse the ALJ's finding that this adverse action occurred. I briefly explain.

In *Bobreski v. J. Givoo Consultants,* ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 13-14 (ARB Aug. 29, 2014), the Board articulated a methodical three-part test for conducting a "substantial evidence review" based on the various general definitions often assigned to that term. The *Bobreski* test attempts to more objectively spell out the process of reviewing each finding of fact relevant to the issues on appeal, examining: (1) whether the ALJ and/or the parties have identified record evidence for each of the material fact findings; (2) whether the supporting evidence logically supports the fact finding; and, if so, (3) whether the record as a whole overwhelms the fact finding or contains factual disputes that expose the fact finding as still unresolved. Stated more simply, substantial evidence is a legal term that means record evidence exists to logically and sufficiently support each of the ALJ's material findings of fact when the record is considered "as a whole." In my view, it is error to look at individual pieces of evidence in isolation and assess its strength standing alone, resulting in a fragmented and most likely distorted view of the evidence.[84] In my view, this error seems to be the error most often committed when deciding questions of "causation," "intent," and "reasonableness."

In this case, the second step of the three-part "substantial evidence test" causes the breakdown for me as to the issue of constructive discharge. As I understand the ALJ's findings,

[84] As some courts have noted, pieces of circumstantial evidence often have little significance standing alone but, like the many tiles that make up a mosaic art piece, the circumstantial evidence as a whole reveals a clear picture. *See, e.g., Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)(using the "mosaic art" analogy).

she found that Cypress constructively discharged Dietz because he reasonably believed he would be fired on June 7, 2013, unless he resigned first. On June 4, 2013, Cypress sent a memo that memorialized Cypress's personnel decision for Dietz's alleged performance problems. I saw no record evidence indicating any additional personnel action forthcoming in the next few days. The next day, June 5, 2013, Dietz sent a memorandum to Cypress that started with his "Notice of Intent to Terminate [his] Employment . . . effective July 1, 2013." RX 23. The day after Dietz's expressed resignation, on June 6, 2013, Cypress ordered Dietz to attend an agenda-less meeting on June 7, 2013. Instead of meeting with Cypress, Dietz resigned on June 7, 2013, effective immediately. I do not understand how it is logical to infer, from the record as a whole, that Cypress was going to "fire" Dietz when Dietz had already expressly resigned. Even if Dietz supposedly did not intend to truly resign as his June 5th memorandum said, I do not see substantial evidence supporting an inference that an employer would fire an employee who submitted a resignation letter such as Dietz's letter. Perhaps if there was evidence that Cypress knew Dietz was bluffing, a reasonable person could infer that the employer would fire the employee to make the termination certain. But, as the record stands, there is no substantial evidence supporting an inference that Cypress believed Dietz was bluffing and I see no substantial evidence that logically supports a *reasonable* inference that he was going to be fired on June 7, 2013.

The only other point I address is the issue of the *Fordham* holding. First, to the extent that *Fordham* can be considered binding precedent on the question of "contributing factor," I agree with Cypress that the *Fordham* decision unequivocally stands for the proposition that respondent's evidence should not be "considered" in deciding "contributing factor," a point the *Fordham* majority made eleven times.[85] The majority in Fordham expressly held as follows:
the determination of whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, *in disregard* of any evidence submitted by the respondent in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only. Should the complainant meet his or her evidentiary burden of proving "contributing factor" causation, the respondent's affirmative defense evidence is *then to be taken into consideration*, subject to the higher "clear and convincing" evidence burden of proof standard, in determining whether or not the

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[85] *See Fordham*, ARB No. 12-061, slip op. at 3, 22, 24, 26 (including n.52), 28-29, 30, 33, 35 at n.84, 37. This holding directly contradicts Board precedent where the Board considered the employer's reasons in deciding the question of contributing factor. *See, e.g., Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012) (unanimous three-judge panel affirmed summary dismissal of a claim while relying on the employer's reasons); *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012) (unanimous three-judge panel affirmed dismissal of claim on contributing factor by considering employer's reasons). *See also Bobreski*, ARB No. 13-001, slip op. at 13-14 (thoroughly explained how the employee's and employer's evidence on causation must be considered as a whole to decide what did or did not cause the adverse action); *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025 (ARB Apr. 30, 2013) (unanimous three-judge panel summarily affirmed the dismissal of complainant's complaint on the question of contributing factor where the ALJ believed the employer's subjective explanation).

respondent is liable for violation of SOX's whistleblower protection provisions.[86] (Emphasis added.) Second, I do not understand how a respondent's reasons are only relevant to the question of contribution if the ALJ finds those reasons to be false. False reasons for the respondent's actions are no more relevant on the question of causation than true reasons. Whether true or false, the employer's stated reasons address the heart of a disputed causation issue: why the employer did what it did. False reasons permit but do not require an inference that the protected activity was a reason (or maybe the reason) for an unfavorable employment action. In contrast, credible reasons permit the inference that whistleblower retaliation was not a reason or that both protected activity and other reasons caused the unfavorable employment action. Either way the truth or falsity of the employer's reasons must be determined by considering all the evidence together, and the ALJ decides how the employer's stated reasons affect the question of causation after the evidentiary hearing ends.[87]

LUIS A. CORCHADO
Administrative Appeals Judge

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86 *Fordham*, ARB No. 12-061, slip op. at 3.

87 *Bobreski*, ARB No. 13-001.

ATTACHMENT 2

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

TIMOTHY C. DIETZ,

COMPLAINANT,

v.

CYPRESS SEMICONDUCTOR CORPORATION,

RESPONDENT.

ARB CASE NO. 15-047

ALJ CASE NO. 2014-SOX-002

DATE: MAY 12 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul F. Lewis, Esq.; and Andrew E. Swan, Esq.; *Lewis Kuhn Swan PC*, Colorado Springs, Colorado

For the Respondent:
Raymond M. Deeny, Esq.; *Sherman & Howard L.L.C.*, Colorado Springs, Colorado; William A. Wright, Esq.; *Sherman & Howard L.L.C.*, Denver, Colorado; and Lori Phillips, Esq.; *Sherman & Howard L.L.C.*, Atlanta, Georgia

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*. Judge Corchado, concurring.

ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND ORDER AWARDING ATTORNEYS' FEES

Cypress Semiconductor Corporation (Cypress) appeals the decision of an Administrative Law Judge (ALJ) to award attorneys' fees and litigation costs to Timothy C. Dietz (Dietz) in a case brought under the whistleblower provision of the Sarbanes-Oxley Act (SOX).[1] We deferred deciding this appeal until after we resolved the appeal of the ALJ's decision on the merits of

[1] 18 U.S.C. § 1514A (2012).

Dietz's whistleblower claim. We have now affirmed the ALJ's decision on the merits.[2] Dietz is thus an "employee prevailing" within the meaning of the SOX whistleblower provision and is entitled to his "litigation costs" and "reasonable attorney fees."[3] Because Cypress does not contest the award of attorneys' fees and costs on appeal except to say that Dietz should not be awarded any fees or costs if he does not prevail, we affirm the ALJ's award of attorneys' fees and costs.

DISCUSSION

Dietz filed a complaint against Cypress under the whistleblower provision of the SOX.[4] On December 1, 2014, after extensive discovery, a four-day hearing, the submission of more than a hundred exhibits, and post-hearing briefing, an ALJ concluded that Cypress had retaliated against Dietz in violation of the SOX whistleblower provision.[5] On December 31, 2014, Dietz then filed with the ALJ a Bill of Costs and Attorneys' Fees, to which Cypress responded on January 7, 2015. In the meantime, Cypress had appealed the ALJ's decision on the merits to this Board. That appeal was docketed as ARB Case No. 15-017. Then, on April 20, 2015, the ALJ issued an order awarding Dietz $241,923.50 in fees and $10,492.87 in costs, for a total of $252,416.37.[6] Cypress timely appealed the ALJ's attorneys' fees order. That appeal was docketed as ARB Case No. 15-047, and that is the appeal before us now.

On March 30, 2016, this Board affirmed the ALJ's decision on the merits. We concluded that substantial evidence supported a finding that (i) Dietz made complaints that included allegations of violations of the federal mail or wire fraud statutes, thereby triggering the protection of SOX's whistleblower provision; (ii) Cypress both placed an undeserved disciplinary memorandum in Dietz's personnel file and constructively discharged him; (iii) his protected activity was a contributing factor in both the disciplinary memo and his constructive discharge; and (iv) Cypress would not have disciplined him or constructively discharged him if he had not made his complaints.[7] Accordingly, we must now address Cypress's appeal of the ALJ's award of attorneys' fees and costs.

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2 *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (Mar. 30, 2016).

3 18 U.S.C. § 1514A(c)(1), (c)(2)(C).

4 18 U.S.C. § 1514A.

5 ALJ's Recommended Decision and Order (R. D. & O.) at 82.

6 ALJ's Supplemental Decision and Order Awarding Attorneys' Fees (Supplemental D. & O.) at 12.

7 *Dietz*, ARB No. 15-017, slip op. at 21-22.

Prevailing complainants in SOX whistleblower cases are entitled to "litigation costs . . . and reasonable attorney fees."[8] Dietz prevailed on the merits. He is thus entitled to costs and reasonable attorneys' fees.

An award of attorneys' fees must be reasonable. We review the reasonableness of an ALJ's attorneys' fees award under an abuse of discretion standard[9] and set aside an award only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[10]

Under this standard, we affirm the amount the ALJ awarded in attorneys' fees. Cypress does not contest the amount of the ALJ's award on appeal. Its only argument is that we should reverse the award of attorneys' fees and costs if we reverse the ALJ's decision on the merits, because then, Dietz would not be a "prevailing" complainant. We did not reverse the ALJ's decision on the merits, and so that argument is moot.

Moreover, the amount the ALJ awarded was reasonable. She used the lodestar method and provided sufficient reasons for the hourly rates she applied and the number of hours she approved. She also reasonably explained the amount she awarded for costs. Consequently, we affirm the ALJ's award of attorneys' fees and costs.

Finally, we note that, in ARB Case No. 15-017 (the appeal on the merits), Dietz filed a "Request for Costs and Expenses before the Administrative Review Board" on April 18, 2016. If Cypress wishes to contest any aspect of this request, it may do so by filing a response with this Board on or before **May 18, 2016**.

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[8] 18 U.S.C. § 1514A(c)(2)(C); *see also* 29 C.F.R. § 1980.109(d)(1) (prevailing complainant entitled to "litigation costs, expert witness fees, and reasonable attorney fees.").

[9] *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-067, ALJ No. 2013-FRS-003, slip op. at 2 (ARB Aug. 12, 2015).

[10] *Petersen v. Union Pacific R.R. Co.*, ARB Nos. 13-090, 14-025; ALJ No. 2011-FRS-017, slip op. at 3 (ARB Feb. 20, 2015).

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Supplemental Decision and Order Awarding Attorneys' Fees.

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado, ***concurring:***

I understand Cypress's only argument in its attorneys' fees appeal to be that we should reverse the ALJ's Order on attorneys' fees and costs if we reverse the ALJ's decision on the merits. The Board affirmed the ALJ's decision on the merits, which disposes of Cypress's appeal. That is sufficient for me to concur and go no further in analyzing the attorneys' fees awarded.

LUIS A. CORCHADO
Administrative Appeals Judge

ATTACHMENT 3

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

TIMOTHY C. DIETZ,

COMPLAINANT,

v.

CYPRESS SEMICONDUCTOR CORPORATION,

RESPONDENT.

ARB CASE NO. 15-017

ALJ CASE NO. 2014-SOX-002

DATE: JUN 21 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul F. Lewis, Esq. and Andrew E. Swan, Esq.; *Lewis Kuhn Swan PC*, Colorado Springs, Colorado

For the Respondent:

Raymond M. Deeny, Esq.; *Sherman & Howard L.L.C.*, Colorado Springs, Colorado and William A. Wright, Esq.; *Sherman & Howard L.L.C.*, Denver, Colorado

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*. Judge Corchado, concurring.

ORDER AWARDING ATTORNEYS' FEES

This case arises from a complaint Timothy C. Dietz filed under the whistleblower provision of the Sarbanes-Oxley Act (SOX).[1] On December 1, 2014, after extensive discovery, a four-day hearing, the submission of more than a hundred exhibits, and post-hearing briefing, an Administrative Law Judge (ALJ) concluded that Cypress had retaliated against Dietz in violation of the SOX whistleblower provision.[2] On April 20, 2015, the ALJ issued an order awarding

[1] 18 U.S.C. § 1514A (2012).

[2] ALJ's Recommended Decision and Order (R. D. & O.) at 82.

Dietz $252,416.37 in fees and costs.[3] Cypress appealed both orders. On March 30, 2016, this Board (ARB or Board) affirmed the ALJ's decision on the merits,[4] and on May 12, 2016, the Board affirmed the ALJ's decision awarding attorneys' fees and costs.[5] The ALJ's award of attorneys' fees and costs covered only that portion of the case before the ALJ. On April 18, 2016, Dietz filed a Request for Costs and Expenses Incurred Before the Administrative Review Board in ARB No. 15-017, seeking attorneys' fees and costs for defending the ALJ's decision on appeal. That request is now before us.

Prevailing complainants in SOX whistleblower cases are entitled to "litigation costs . . . and reasonable attorney fees."[6] Dietz prevailed on the merits. He is thus entitled to costs and reasonable attorneys' fees, including those he incurred in defending the ALJ's decision on appeal to this Board.

We find Dietz's itemization of fees and costs to be reasonable. He requests $35,620.75 in attorneys' fees and $143.88 in costs, for a total of $35,764.63. Cypress has not filed any objection to Dietz's request. Dietz calculated the fees based on the lodestar method, using the hourly rates approved by the ALJ. The number of hours was also reasonable: Cypress's appeal required Dietz's attorneys to brief several difficult legal issues in a case with extremely complex facts. We thus approve Dietz's request for the award of attorneys' fees and costs in the amount of $35,764.63 for defending the ALJ's decision before the ARB.

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3 ALJ's Supplemental Decision and Order Awarding Attorneys' Fees (Supplemental D. & O.) at 12.

4 *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB Mar. 30, 2016). For the ARB's authority, see Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. § 1980.110 (2015).

5 *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB May 12, 2016) (Order Affirming the Administrative Law Judge's Supplemental Decision and Order Awarding Attorneys' Fees).

6 18 U.S.C. § 1514A(c)(2)(C); *see also* 29 C.F.R. § 1980.110(d) ("If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing all relief necessary to make the complainant whole, . . . including litigation costs, expert witness fees, and reasonable attorney fees.").

CONCLUSION

Complainant Dietz's request for an award of attorneys' fees and costs in the amount of $35,764.63 is **GRANTED**. Accordingly, Cypress is **ORDERED** to pay Dietz $35,764.63 for attorneys' fees and litigation costs incurred before this Board.

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado, concurring:

Given that Cypress has not filed any opposition and seeing no extraordinary request for attorneys' fees and costs, I concur.

LUIS A. CORCHADO
Administrative Appeals Judge

ATTACHMENT 4

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 01 December 2014

Case No.: 2014-SOX-2

In the Matter of:

Timothy C. Dietz,
Complainant

v.

Cypress Semiconductor Corporation,
Respondent

RECOMMENDED DECISION AND ORDER[1]

This proceeding arises from a complaint filed by Mr. Timothy C. Dietz against Cypress Semiconductor Corporation (Cypress), alleging violations of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. § 1514A (hereinafter "the Act"). Enacted on July 30, 2002, the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Security Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78o(d)). Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. § 42121(b). 18 USC § 1514A(b)(2)(B).

On August 14, 2013, the Complainant, Timothy C. Dietz, filed a Sarbanes-Oxley whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U.S. Department of Labor. After conducting an investigation, OSHA's regional director issued a letter dated September 9, 2013, advising the parties that Mr. Dietz's complaint lacked merit. Subsequently, Mr. Dietz filed his objections with the Office of Administrative Law Judges, U.S. Department of Labor. A formal hearing was held before me in Denver, Colorado, on July 7 through 10, 2014, at which times the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainant's Exhibits 1 –

[1] Citations to the record of this proceeding will be abbreviated as follows: "Tr." refers to the Hearing Transcript; "CX" refers to Complainant's Exhibits; and "RX" refers to Respondent's Exhibits.

43, 55 - 67, Respondent's Exhibits 1 – 47, 49 - 52, and ALJ Exhibits 1 - 5 were admitted into evidence.[2] The parties submitted post-hearing briefs and reply briefs pursuant to an Order Establishing Briefing Schedule dated August 19, 2014. I have reviewed and considered these briefs in making my determination in this matter.

STATEMENT OF THE CASE

Hearing Testimony

Diane Ratliff

Ms. Ratliff worked for Cypress as a Human Resources Business partner until she left on March 28, 2014. In that position, she was responsible for handling everything personnel related, including hiring, termination, development, and benefits (Tr. 29). Before she worked for Cypress, Ms. Ratliff worked for Ramtron for 19 years, until Cypress took over on November 12, 2012 (Tr. 30).

When Cypress took over, people were interviewed for their positions. If they were not selected, they were given a bonus plan. She was offered a position at Cypress. In November 2012, Mr. Dietz was a product or project manager at Ramtron; he was also offered a position as product manager. There was no position of legal counsel open at Cypress. (Tr. 35-36).

Ms. Ratliff recalled that Mr. Tom Surrette made presentations to the Ramtron people about the working conditions at Cypress, and the terms and conditions of employment. T.J. Rodgers, the CEO of Cypress, visited Ramtron in December 2012 (Tr. 37).

Ms. Ratliff received an email from Mr. Dietz dated April 11, 2013. She recalled that Mr. Dietz asked her to read it, but he did not say why; she did not remember him asking her to read it for tone (Tr. 38, 47). Ms. Ratliff did not recall the exact words, but Mr. Dietz's memo said that the Design Bonus Plan (DBP) was not legal. He quoted some laws, and stated that it was a violation (Tr. 38-39). Ms. Ratliff did not forward the email, or tell anyone that she had gotten it, although she may have called Mr. Nulty, Mr. Dietz's manager. (Tr. 31, 40).

Ms. Ratliff received an email on June 6, 2013, scheduling a meeting involving Mr. Dietz for June 6, 2013 (Tr. 31). There was nothing in the email to indicate what the meeting would be about.[3] She called Mr. Nulty to see what the purpose of the meeting was, and he told her that it was to accept Mr. Dietz's resignation (Tr. 32). By that time, Mr. Dietz had already sent out his email stating that he planned to resign, with his last day being June 7 (Tr. 33).[4]

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[2] The parties agreed to designate Claimant's Exhibits 7, 8, 13, 15-16, 18, 21-29, 31, 36, 38-43, 47, 56, 59, and 60; and Respondents Exhibits 1-2, 4, 7-8, 15-18, 24, 29-33, 38, 40, 42, and 47 as Confidential Business Information pursuant to 29 C.F.R. § 70.26.

[3] Ms. Ratliff guessed that it would be typical "on occasion," but not necessarily, to include an agenda on a meeting notice (Tr. 32).

[4] Ms. Ratliff was not sure of this date.

Ms. Ratliff saw Mr. Dietz the morning of June 7, and asked him if was going to the meeting; he told her he was not. He had already sent out his email saying that June 7 was his last day, and that he planned to take some time off to travel with family and set up a law practice. (Tr. 50-51).

Ms. Ratliff stated that no one told her the June 7 meeting was designed to terminate Mr. Dietz's employment; this was not the intent of the meeting. She told Mr. Nulty that Mr. Dietz had said he was not coming to the meeting. At that point, Mr. Nulty told her that he would accept Mr. Dietz's resignation at the meeting. (Tr. 52-53). Ms. Ratliff heard that when Mr. Hoehler asked Mr. Dietz to turn over his password and security information, Mr. Dietz refused to give him his password (Tr. 52).

According to Ms. Ratliff, it was customary to have an exit interview (Tr. 53). Mr. Dietz came in later to go over some documents, but there was no full blown exit interview (Tr. 54). Ms. Ratliff stated that if Mr. Dietz had said he was resigning because he was a whistleblower and the victim of retaliation, she would have put the brakes on, and escalated the matter (Tr. 54).

Ms. Ratliff knows Ms. Valenzuela and Ms. Joaquin, and has heard no disparaging comments from them about Mr. Dietz. Nor has she heard any such comments from Mr. Nulty or Mr. Surrette. (Tr. 41).

According to Ms. Ratliff, at Ramtron, if a product manager let a schedule slip, his non-performance would be grounds for immediate termination, and would spark a "Come to Jesus" meeting with Eric Balzer (Tr. 42). Ms. Ratliff has not seen anything in anyone's file that involved writing a memo about what the employee did wrong, and how he was going to correct it. She stated that this could have been between a hiring manager and an employee. Generally, such an incident would be reflected in the performance evaluation, which is kept in the personnel file, to allow employees to understand the scope of their responsibilities and correct them, and to document an incident. (Tr. 43).

Ms. Ratliff was not consulted about Mr. Nulty's June 4, 2013 memo (Tr. 44, CX 9). She thought that the memo, in which Mr. Nulty asked Mr. Dietz to write a memo on what he did wrong, and what he should have done, was a proper coaching method for an employee (Tr. 46). She did not think it was anything out of the ordinary, threatening, or irresponsible. She stated that it was not proper for a supervisor to demand that a subordinate confess to wrongdoing if the subordinate did not believe he did anything wrong (Tr. 55). But she did not think that this memo asked Mr. Dietz to admit wrongdoing; it was a coaching and counseling memo to improve performance (Tr. 56).

David Still

Mr. Still is the Design Center Manager for the Cypress Colorado Design Center (Tr. 58). He has worked for Cypress for just over six years and a month (Tr. 59). Mr. Still is not a program manager, and he does not report to Mr. Nulty, or to the project management office. He reports to Andy Wright, the executive vice president of new product development. He is involved in creating schedules for new projects before they launch, and in that regard, meets with

the program manager. (Tr. 96). He also meets with all of the workers on a project; everyone on the design team has input into the schedule. They try to forecast everything that will need to be done at each stage of the project, as he builds the schedule. They break them down into specific tasks, and assign people to each task. They determine how much time each task will take, in terms of work and people. This is referred to as the work breakdown structure. (Tr. 97).

The result is called a Gantt Chart. In determining who to assign to particular tasks, they take into account the skill level of the employee, whether the employee is still in a learning curve, and has some planned vacation, or might plan some. The schedule is run past the entire team. (Tr. 98). Each task associated with the work breakdown structure has a duration, the number of people working on the task, and the percentage, multiplied by the duration, calculates the man weeks associated with a task. All of the man weeks are added up for the chart, which shows how many man weeks need to be done on the schedule. There are multiples of man weeks done in any week. If there are ten people working on a project, and they all work a week, there would be ten man weeks. The schedule shows the anticipated man weeks for purposes of the DBP; it extends all the way to the end of the project. (Tr. 99-100).

The TR-20005 project was launched the end of the first quarter, with tape-out in roughly the end of the third quarter, or six months to tape-out. The work breakdown structure covered six months and beyond; there were additional milestones after tape-out, such as engineering sampling and marketing. (Tr. 100).

According to Mr. Still, they pay close attention to the schedule. There are built in circuits for double checking work, and buffers. The program manager's job is to help with the launch of the project, and the creation of the schedule, and to be the question and answer person on the schedule. Once the project launches, the program manager manages the program, and keeps the program management system updated. (Tr. 101).

Mr. Still stated that there are cross functional team meetings every week, to raise issues as they come up to management. Every milestone has a scorecard that must be completed. The program managers set up the scorecard, track it, and sign off on a number of items on the scorecard. The program managers are basically there to audit and police, and help the project. The program manager does not report to him. He is a third party onsite, to make sure the project is on schedule according to the work breakdown structure that the team created. (Tr. 102).

There is a program management system on the intranet, with a series of tools that allow a status report to be created every week, and schedules to be uploaded. When people finish items, and mark them complete, it goes to the program manager, who goes into the system and checks it as complete, uploads it, and makes sure the man weeks are credited. He reports on slips or potential slips. This is done in Microsoft Project, and uploaded into the program management system. (Tr. 103-104). The program manager is supposed to do weekly updates; he is notified by email, and if he does not, the system automatically generates a status report. (Tr. 104). Each person is responsible for maintaining "My Work" up to date. (Tr. 105). The program manager's job is to raise issues, and note in the system if they are running behind, or if there is a spec issue. (Tr. 109-110).

When the work breakdown structure is built, it anticipates that a task will take a certain number of weeks. But someone might hit on the right solution quicker, and take fewer man weeks, or get stalled, and take more man weeks than anticipated. If they are behind, they can update a forecast; they can communicate with the program manager about when they expect to have a task done. (Tr. 106).

Mr. Still stated that the program manager is responsible for running the cross functional team, made up of design people, the product engineering team, the applications lead, the marketing lead, and the design center manager. They meet once a week to go through where they are at on the project. (Tr. 107). The participants in the cross functional team are the leads of all the different functions on the team. (Tr. 108).

Mr. Still reviewed a May 14, 2013 status report by Mr. Dietz (RX 18). He noted that it showed a warning that the test engineering was pushing the schedule; it did not say anything about test engineers being pulled off without authorization. This would appear under "Team." (Tr. 112).

Mr. Still was first involved with the DBP in the second quarter of 2010. His rights were explained, and how a goal could be changed within a quarter if they had a good reason. No one explained how it was legal. (Tr. 63). Mr. Still understood that a condition of being a design person with Cypress was following the Design Governing Spec, of which the DBP was a part. (Tr. 64). Mr. Still stated that 30 to 32 people on his team are on the DBP; of these 10 or so came over from Ramtron (Tr. 65).

Mr. Still met with the Ramtron people, and told them they should probably know about the DBP; he tried to explain it. He did not believe that the offer letters had any language specifically discussing the DBP; he does not know if he apologized to the Ramtron people. (Tr. 65-66). He stated that people had expressed concerns, and things they did not like about the DBP. As it gets closer to the end of the quarter, people talk more about it, and what they think they will get. People will bring the subject up more when it looks like they will be forfeiting money. He tries to address their concerns, and get more information. He talks about it in meetings, and what it will take to meet the goals and get the bonus. (Tr. 66-67).

Mr. Still stated that he talks with his boss, Andy Wright, about the DBP probably once every other month (Tr. 68). As an example, he talked a situation where the project was very late, and they were trying to catch up by bringing in extra people. This helped to pull in the schedule, but the extra people got put on the DBP for that project. Mr. Still felt bad, because they did not cause the project to be late, they came on and were trying to bring it in, but they got a bad design bonus. (Tr. 69).

The pay in is ten percent of salary. (Tr. 69). If you are exactly on target in completing your man-weeks, you earn an "incentive multiplier" of 2.0, which means you get twice what you paid in, or 20 percent of your salary. If you are more than 5.8 percent late, you forfeit your contribution. The incentive multiplier would be .2, meaning you get back two percent of your pay in; you lose 8 percent of your total base pay. At 3.2 percent late, the incentive multiplier is one, and you get back what you paid in. The scale is reset every quarter. (Tr. 70-71).

Mr. Still stated that the Design Bonus Review Board decides who should be on and who should be off the DBP. (Tr. 73). The information on the goals comes from the system at the beginning of each quarter. Mr. Still is not aware of anyone who has left Cypress because of the DBP. (Tr. 74).

Mr. Still stated that the Design Governing Spec is a set of governing principles that the CEO wrote on how to work day to day, and how to operate when doing designs. Cypress requires acknowledgement from each member of the team that they have read it before they start a project. (Tr. 80). He has never had anyone decline to do so. Cypress's culture says that you follow the Spec or you change it. This is another Spec, and you don't decline to follow; you try to change it. (Tr. 81).

To make sure that each person understands the plan, each design person has to write a memo before the project is launched. They highlight the things the employee needs to know about the design bonus in relation to the project they are doing. After the Ramtron people were hired, he had one on ones with the team, and introduced them to the DBP. He pointed to the Design Governing Spec, and had everyone read it. (Tr. 117). He had a staff meeting in December or January to answer questions. The Design Governing Spec was available to the employees in the intranet. (Tr. 118).

According to Mr. Still, not everyone at Cypress is subject to the DBP. If it is a Designer Development Project, it is subject to the Design Governing Spec. An employee can be moved from a project not on the DBP to a project on the DBP. Mr. Still stated that when Cypress acquired Ramtron, there were a few people who were more into applications than systems. They reported to him, and they were automatically not part of the DBP. When one of them transferred to Colorado, Mr. Still put him on a project to do digital design, and as a result, he was included in the DBP, which was fine with the employee. If he had said no, Mr. Still could have put him on an applications type project. (Tr. 82-83).

Mr. Still stated that in Design, people are not reassigned onto a project unless someone on the project has left, and he needs a replacement. With respect to the Rainer project, he has gotten payouts, and has lost money in five or six quarters. He lost thousands of dollars in five or six quarters, but in the aggregate he did not lose money. (Tr. 85-86). He knows of other employees who have lost money on the DBP. The payout is based in part on the performance of other employees; a team effort is needed to earn the required number of man-weeks. The payouts could be conditioned on the performance of employees other than those who report directly to him. (Tr. 88). Mr. Still stated that an employee can forfeit his deductions to Cypress; he saw it happen with his new team. If an employee leaves before the bonus payment, they would not get the DBP payout; it would go back to Cypress. (Tr. 91-92).

According to Mr. Still, a project has a lot of engineers, and others in the project schedule, with certain weeks they have to earn. All of them work toward the same goal, but they don't all necessarily work under his supervision. A rotten apple can corrupt the whole bushel, and it is management's responsibility to weed them out before they ruin things. (Tr. 88).

Mr. Still stated that Cypress has cross functional teams that meet at least once a week on air, from different locations. They communicate using video technology, and a video conferring system for the last nine months. Mr. Still was getting a lot of questions on the DBP. It is a complicated program, and he decided to have a meeting about it with the person who managed the design bonus. There was a training session about the DBP in early April run by Ryan Wellsman, where he presented information about the DBP, and the Design Governing Spec. He had a chart with examples. He explained that each quarter was a new opportunity with respect to the DBP. His chart showed the different ways people end up earning money under the DBP. There was a possibility of getting a multiplier of five, if you were about six percent ahead of schedule. Mr. Dietz was in this training session, which was run in the boardroom, and done by phone. Mr. Wellsman was in Kentucky, and they were in Colorado Springs. (Tr. 89-90, 120-126).

According to Mr. Still, the DBP includes all design product and test engineering associated with a launch project. People doing applications or marketing work, and the program manager, are waived from the DBP. Mr. Nulty publishes a memo with the DBP participants for the quarter, and the projects they are on. (Tr. 127-128). There may be a person working for the entire quarter on new architecture, or launching a new project. They are not in the DBP until the project is launched. (Tr. 130).

Mr. Still stated that the pay in for the first quarter is made by the company, ten percent of salary. It used to be reflected on the paychecks. The pay is taken out pre-tax. (Tr. 138-139). None of the Ramtron employees participated in the DBP in the first quarter of 2013. They did not pay into the DBP in the second quarter, because the company pays for the first quarter contribution. The DBP pay in usually starts in the 18th week. At the time of the meeting with Mr. Wellsman, none of the attendees had paid anything in. (Tr. 140-141).

Mr. Still talked with Mr. Dietz about the DBP, multiple times, usually in his office, because Mr. Dietz was trying to learn what it was. They had many conversations where Mr. Still answered Mr. Dietz's questions. It seemed to Mr. Still that Mr. Dietz had concerns; one time, about a month before he left the company, he said that he was concerned about the legality of the DBP. He thought it was not legal, because it was not in the offer letter, which was a binding contract of employment. Mr. Still asked why would this be any different than a company cutting your salary when they get into trouble, or terminating you because you are at will. Mr. Still stated that he probably did not understand the law, but to him it did not seem illegal. There were things people did not like about it, but they never talked about it being illegal (Tr. 94, 143-144).

Mr. Still did not talk with Mr. Dietz about meeting with Mr. Nulty on May 29, 2013. He recalled that Mr. Dietz mentioned that he was written up by Mr. Nulty for not updating or warning that the 20005 project had the possibility of slipping quickly enough. (Tr. 146).

Mr. Still stated that the term "kids soccer event" is one Mr. Nulty came up with. He showed a picture with a kids' team, with everyone running over to the ball instead of staying in their positions. It meant that you stay the course; you should not pull people off one project to help on another project without permission. (Tr. 147). The DBP has provisions for adjusting for

authorized personnel changes. If people are moved without authorization, there are fewer people available to do the man weeks of work. (Tr. 148).

When Mr. Still got the resignation memo from Mr. Dietz, he was surprised, and went looking for him. Mr. Dietz came by his office before he left building. He was upset, and it was a short conversation. Mr. Still did not recall if Mr. Dietz said why he was leaving. Mr. Dietz left his portable computer, but there was a password, and he could not get in. Mark Fee took over the project management after Mr. Dietz left. (Tr. 149-150).

Timothy Dietz

Mr. Dietz served as a non-commissioned officer in the Marines. He was appointed as a Warrant Officer in 1988, then to Chief Warrant Officer Two, Chief Warrant Officer Three, and then as a Captain. He served in a leadership capacity until 2006. (Tr. 160). When he was in the Marines, part of his performance evaluations assessed leadership qualities, which would be referred to in the private sector as management qualities. The factors included the ability to influence junior Marines reporting to him, and his peers, as well as upward management, and to influence the chain of command to achieve objectives. (Tr. 162). Mr. Dietz was encouraged by his commanders to report problems that he did not have the ability to solve. (Tr. 164). As an officer, it was his obligation to identify problems that needed to be solved. (Tr. 165).

Mr. Dietz found the skills that he developed as a Marine useful after he left the service. He was hired at Intel because he had the degree, and a military background. They were looking for people who could manage other employees to success. Mr. Dietz was hired in 2000 as a Senior Software Engineer, doing test development for a graphics driver. (Tr. 166). In this position, he had supervisory responsibility of three to four people to start, expanding to about twenty people reporting to him. (Tr. 167).

Mr. Dietz left Intel in October 2004. At that time, he was in law school, in the evening program, and his grades had slipped. He wanted to focus on school. Mr. Dietz got a job offer from Intel in early 2005, and about May 2005, he was hired by Liberty Mutual Insurance as a law clerk in their San Diego office. He worked there part time during his last year of law school, and did a few engineering analyses on a couple of cases. He graduated in May 2006, and was hired by NATO Legal in Wells, Maine, a general practice boutique firm, as a law clerk. When he received his bar results, he was advanced to an attorney position. He worked generally on civil litigation, with some criminal defense work. He graduated in May 2006. (Tr. 168-169).

In February 2009, Mr. Dietz took the California Bar, and passed. He passed the New Hampshire Bar in July 2011, and the Colorado Bar in February 2013. Mr. Dietz left Maine in August 2008, with an offer to return to Intel as a software engineer in Folsom, California. At the time, the economy was tanking, and a lot of firms in southern Maine were laying off attorneys and closing doors. His firm was in trouble; by January 2008, it was down to him and the owner. Mr. Dietz still had connections at Intel, and was able to get hired back. His salary as an attorney was $45,000 a year; at Intel, it was $90,000. (Tr. 170-172).

Mr. Dietz stated that he wanted to do *pro bono* legal work, and after his bar admission, did this work through Voluntary Legal Services of Northern California. He worked with the Intel law firm legal services outreach until he left in May 2012. (Tr. 174). At Intel, he supervised three or four direct reports, and about twenty dotted line reports; he was a firmware team manager (Tr. 166, 170, 175).

Mr. Dietz was recruited by a good friend at Ramtron. He interviewed with Ramtron in September 2011; Ramtron paid for his travel to Colorado Springs. (Tr. 174, 177). Mr. Dietz liked what he saw. He knew there were some risks, because Ramtron was not as strong a corporation as Intel. (Tr. 420-423). Ramtron was on a thin budget, and could not offer him a job at the time. (Tr. 178). He spoke with Mark Kent, the CFO, about the debt load. He still saw it as a wonderful opportunity. (Tr. 179).

In March 2012, Ramtron invited him and his wife for a sightseeing trip. Mr. Dietz did a lot of research on Ramtron. He knew that it was much smaller, and he was running the risk of being laid off. (Tr. 180). In March 2012, he got a job offer from Ramtron; he accepted, and started in May. (Tr. 182).[5] He was a New Products Program Manager, and also Intellectual Property Counsel. He had dotted line reports, but no direct reports. (Tr. 180-183).

The agreement for the acquisition of Ramtron by Cypress was reached in about the third week of September 2012. At that time, he started to see informational briefings from Cypress. There was a briefing from Tom Surrette, the Executive Vice President, and from HR representatives. There was some training and information sessions online. All Ramtron employees were invited to a quarterly briefing by CEO Dr. Rodgers. (Tr. 184-185).

The Ramtron employees got an information packet before their interviews, with paper copies and email, about pay and benefits, and medical, dental, and vision plans. (Tr. 186). Mr. Dietz had a "wolf pack" interview in October 2012, in Colorado Springs. He got an offer of employment in November, in a one on one meeting with Mr. Surrette in Colorado Springs. (Tr. 194-195).

Based on his review of SEC filings, Mr. Dietz concluded that Cypress was substantially more stable than Ramtron, and he was very optimistic about joining Cypress; he thought it was a wonderful opportunity. (Tr. 427). He reviewed articles and websites about Dr. Rodgers, the CEO; he considered Dr. Rodgers to be a brilliant man who was running a very successful operation. Mr. Dietz's philosophies were very consistent with Dr. Rodgers'. He was also impressed with Mr. Surrette. (Tr. 428-429, 431).

Mr. Dietz was hired as a New Products Program Manager 2, reporting to Brian Todoroff, at $148,500 a year with benefits. (Tr. 196). He accepted immediately, signed a copy, and gave it to Mr. Surrette. (Tr. 197). Mr. Dietz was excited about the opportunities at Cypress, and the chance to grow into the Cypress culture. (Tr. 423).

[5] Mr. Dietz identified his offer letter from Ramtron, dated April 13, 2013, which was approved by Eric Balzer electronically. (Tr. 974-975, CX 67).

Mr. Dietz discussed an article Dr. Rodgers wrote in the 1980s, called "What to do when a valued employee quits." (Tr. 187, CX 32). He stated that Jared Eliason, who had interviewed him at Ramtron in September 2011, and who went with Cypress as part of the merger, was assigned as the chip lead at the start-up of the TR 20005 project, reporting to David Still. Mr. Eliason was the design team's primary interface to David Still. (Tr. 187, 189). Mr. Eliason notified Cypress he was resigning, and when this happened, Mr. Dietz saw a whole lot of activity involving Mr. Eliason, with him being called into meetings with persons in a position to respond to his resignation, as described in Dr. Rodgers' policy. Mr. Eliason confirmed that they were trying to convince him to stay. Mr. Dietz thought that his employment would be covered by these policies. (Tr. 190-191).

After the separating Ramtron employees were gone, and the continuing employees had accepted their offers of employment, the new employee orientation started. At the time, Mr. Dietz was trying to shepherd Ramtron products that were in flight. (Tr. 198). He was working with Mr. Todoroff to keep projects going forward until they were fully inducted into the Cypress methodology. He was still dealing with customers, and he had broken products to fix. (Tr. 200).

Mr. Dietz discussed the Cypress corporate whistleblower policy. He interpreted this policy to obligate Cypress to promptly and thoroughly investigate matters. (Tr. 203-213, CX).

After the Cypress acquisition, Mr. Dietz withdrew from the Colorado Bar; he had only one client in Colorado, Ramtron. He planned to sit for the Colorado Bar in February 2013. (Tr. 215-216).

Mr. Dietz stated that when he started working for Cypress, things were going very well. He was working on getting broken products into production. (Tr. 218). The first one that was successfully started was the TR 20005 project. (Tr. 219). For the first quarter of 2013, Mr. Dietz earned 80% of his Performance Profit Sharing Program target bonus. He stated that at the beginning of the quarter, you set your goals, and at the end of the quarter, you grade yourself, and your manager grades you. At some point, in March 2013, his direct supervisor had changed from Mr. Todoroff to Mr. Nulty. Mr. Dietz graded himself and submitted it to Mr. Nulty, giving himself credit for a specific line item that was beyond his control. Mr. Nulty reduced this 30% portion to zero, and brought it back up by 10%, recognizing that it was beyond Mr. Dietz's control. Mr. Dietz was paid 80% of his bonus. (Tr. 221-223, CX 6).

In January, there was a rollout for the new product plan. Mr. Todoroff announced that the goal was to launch the project by the end of January. In his discussions with more experienced people who had been through the process before, Mr. Dietz stated that it was unanimous that it was impossible to launch a product of that scope in that amount of time. He advised Mr. Todoroff that they would try, but he did not think it was feasible to launch by the end of January. (Tr. 444). Mr. Dietz stated that there were three key fixes that they were putting in the product. (Tr. 445). All of the team members were required to acknowledge the design governing spec (DGS). (Tr. 447).

According to Mr. Dietz, the NPP is the controlling document for getting a product out to production, and it is signed by Dr. Rodgers. Leading up to the NPP launch, there are levels of

checklists to be completed, including the Pre-Launch Review Board, which requires everyone assigned to the product to acknowledge the DGS spec. By this time, the team members are already assigned to the product launch. Before the Pre-Launch Review Board checklist is signed, there is prelaunch work, such as assembling the project file, putting all tasks in the project file, and getting approval on the schedule. The project team members are already assigned by the time they are required to acknowledge the DGS. (Tr. 448-450).

Mr. Dietz identified his 90-day initial performance evaluation that he received from Mr. Nulty in February 2013. (Tr. 224, CX 7).[6] Mr. Nulty praised his performance; he had a pretty strong collaborative activity going on, building the broken products list. (Tr. 230). Mr. Dietz noted that in its response to his complaint to OSHA, the Respondent claimed that he was ranked by Mr. Nulty second to last in terms of performance out of 8 persons he supervised. Mr. Dietz explained that at the time, he was being evaluated against 7 other employees, whose performance Mr. Nulty had observed over an entire year. Mr. Dietz had worked for 28 days for Cypress. He had already out performed at least one person in those 28 days of work. Mr. Dietz noted that during those 28 days, Mr. Nulty did not raise any performance concerns. (Tr. 228-229).

Mr. Dietz thought that it was inherently unfair to compare his performance to the other seven, but he welcomed it, because it showed that he outperformed a four year employee in a very short period of time on a relative ranking scale. (Tr. 231). After he acknowledged receipt of Mr. Nulty's evaluation, Mr. Nulty did not communicate any concerns about his performance until May 29, 2013. (Tr. 232).

Mr. Dietz discussed an email from Mr. Nulty, after an informal meeting that Mr. Dietz chaired at the request of the product engineering and quality team, where they could brainstorm ideas on how to optimize the product. Mr. Nulty indicated that there were lots of problems listed, but no plans or follow up actions to address them. Mr. Dietz thought that Mr. Nulty was identifying things that were out of context. This was not a problem solving meeting; they were brainstorming, and exploring options that would optimize the test plan. It was not incumbent on Mr. Dietz as the product manager to prepare plans or follow up actions, and he did not think Mr. Nulty's suggestion of a follow up meeting, and ways to correct the problems, were helpful. (Tr. 463-465, RX 8).

There was some disagreement with Mr. Hoehler, Mr. Fee, and Mr. Todoroff about a shutdown warning he issued on the TR 200005 project in early May 2013, because of slipping tasks.[7] Mr. Hoehler called him at home the night he issued the warning, and was very hostile. (Tr. 234). According to Mr. Dietz, Mr. Hoehler wanted to squelch all shutdown warnings until they could go through a committee process for review. (Tr. 484). Mr. Dietz was concerned about how that would affect the timeliness of getting the right message out, that a shutdown

[6] Mr. Dietz discussed the critical success factors (CSF) used for performance evaluation. He stated that the employee sits down with his manager, and they compile the CSF, which is basically a list of big milestones that are going to be accomplished during the upcoming quarter. The employee is evaluated at the end of the quarter on how the events are accomplished. (Tr. 468).

[7] Mr. Dietz stated that this May 22 pre-shutdown warning was not about a kids soccer event; it was about specific tasks within the project file, in the design and test engineering teams, that were bumping up against the critical path. He forwarded it to Mr. Nulty to make sure that he and Mr. Todoroff were aware of it, consistent with his obligations to escalate something like this. He did not recall receiving a response from Mr. Nulty. (Tr. 488-489).

warning was being issued, as opposed to having it get stalled in committee while people figured out what to do with it. He did not want to see the schedule slip. (Tr. 484-485, RX 10). Mr. Dietz forwarded his email correspondence with Mr. Hoehler on this issue, notifying Mr. Nulty that he might be approached about forming a management committee to review potential shutdown warnings. Mr. Nulty agreed with Mr. Dietz that they did not need a committee for that, because it was the product manager's job. He planned to meet with Mr. Hoehler to discuss it. (Tr. 486-488).

The first indication Mr. Dietz had of a change in attitude was on May 29, 2013, when he got an email from Mr. Nulty, after a meeting to address resource issues within the test engineering team. (Tr. 234).

Mr. Dietz was not subject to the financial contributions of the DBP, but the persons on his team were. (Tr. 234, 236). They were looking to him to help make their bonuses successful. He had frequent visits, at least weekly, more or less, from some of the design engineers, layout people, and product and test engineers, who were concerned about how to make their bonus happen. (Tr. 234-238). Mr. Dietz looked into the design guideline specs, and talked with Diane Ratliff in HR to ask if she understood how the DBP worked. She told him she did not know. (Tr. 239-240).

Mr. Dietz was concerned about his fellow employees, who were approaching him about getting their bonuses. He thought it was important to understand the implications of the DBP, so that he could help them get their bonuses. The people who approached him never raised legal or ethical concerns; they didn't like the concept of giving up ten percent of their pay, with the possibility that they might forfeit it to the corporation. (Tr. 243).

Mr. Dietz went back and looked at the spec, and searched on the intranet for information on how the program worked. The information he saw initially was very complex, and he was looking for a simple answer. When he did not find answers, he went a bit further. He looked at the concept of a compulsory payroll deduction, and wondered how Cypress could take a compulsory payroll deduction when they had agreed on a salary at the start of a shift. (Tr. 244).

The FAQ page stated that if an employee left before the payout, they would forfeit everything they had paid in; this struck him as improper. He looked at the legal implications, and found the applicable statutes in California and Colorado. (Tr. 245).

Mr. Dietz stated that the DBP payroll deductions apply from the moment that the product launches, which is the date the NPP is signed. The TR 200005 product was signed by the CEO on March 29, the end of the first quarter. In the case of the former Ramtron employees, this was the first product where they would be incorporated into the DBP. For the first 18 weeks, Cypress would contribute the 10% deduction, and after that, the employees would make the contribution. (Tr. 451, 453).

Mr. Dietz learned that David Still was coordinating a training session on the DBP, and they agreed that it would be good for him to attend. The session was held in the boardroom at Colorado Springs, and run by Ryan Wellsman from Kentucky, with an audio and computer

connection. (Tr. 246-247, RX 37). There was a chance to ask questions, and Mr. Dietz asked if there were any conditions where an employee would forfeit his contributions to the corporation; Mr. Wellsman said yes. (Tr. 247). He did not explain what the conditions might be, and Mr. Dietz did not follow up, because he did not want to derail the training session, which took close to two hours. (Tr. 248). It did not answer his concerns about the DBP. (Tr. 249).

Mr. Dietz looked for statutes on point, addressing wage laws. On April 11, 2013, he prepared a draft complaint under the Global Whistleblower Policy and Corporate Ethics spec, identifying what he believed to be illegal conduct with respect to the DBP. He copied the statutes into his complaint. (Tr. 250, 254). Mr. Dietz felt that the bonus itself was not illegal, but the compulsory payroll deductions were. He went to see Ms. Ratliff to give her a heads up, and he asked her to review his draft for tone. He was very concerned about pointing out that a program that was the brainchild of Dr. Rodgers was not legal, and that it might have a retaliatory effect. He went to Ms. Ratliff because he wanted to deliver the right message to solve the problem, rather than take a chance on creating another problem. Mr. Dietz felt very strongly that the DBP was illegal, but he wanted someone else to ensure the tone was proper before he sent his complaint up the chain. (Tr. 255).

Mr. Dietz stated that Mr. Nulty is a voting member of the Design Bonus Review Board, and a personal approver of any changes to the spec. He is someone that Mr. Dietz would consider to be a person who enforces the implementation of the DBP for the corporation. Mr. Dietz was very concerned about raising this to Mr. Nulty and ruffling feathers, and he wanted to be very careful. He wanted to facilitate his co-workers in getting their bonuses. (Tr. 256).

Mr. Dietz's role in the program management office was to enforce the DBP for his project, and he was concerned that it could create legal and ethical concerns with his attorney license. He was very concerned that if he did not address this issue, but someone else did, and sued the corporation, he could be dragged in from an ethical standpoint. (Tr. 257). He also thought that the DBP created a program risk. The Ramtron employees would not start having deductions until mid August, with tape out scheduled four weeks later. Mr. Dietz was very concerned about employees leaving once the payroll deductions kicked in, and he would be left with a shortage of resources, and not be able to deliver to the tape out date. He wanted to work through Mr. Nulty. (Tr. 257-258). He noted that the Whistleblower spec provided for raising an issue to a direct manager. (Tr. 259).

Mr. Dietz did not use the whistleblower hotline, which is an anonymous system. He preferred to confront the issue, and partner to solve the problem. In addition, with the hotline, he would never get a response or have closure. The only way to assure that he got closure was to send his memo. After he saw Ms. Ratliff, Mr. Dietz finalized his whistleblower complaint the next day, and sent it to Mr. Nulty. (Tr. 260-261).

Mr. Dietz stated that he wanted to invite discussion, and give Mr. Nulty the opportunity to think about and review it before he blindsided him in a one on one meeting. He thought that they could have a discussion, and perhaps Mr. Nulty could give him a rational explanation. He referred to the Code of Business Conduct and Ethics and the Global Whistleblower Policy because Mr. Nulty was an integral part of the enforcement of the DBP for the corporation, and he

wanted to ensure he was protected under those programs. It was not meant to be hostile; he was invoking the protections of those programs. (Tr. 261-262).

Mr. Nulty responded a short time later, acknowledging receipt of his memo. A few days later, he was contacted by Jennifer Joaquin, a contract attorney who reports to Ms. Valenzuela in the legal department. Ms. Joaquin set up a meeting with her and Ms. Valenzuela for April 22, 2013. (Tr. 263). Mr. Dietz thought the meeting, which took place by phone call, was cordial, and somewhat productive. But at the end of the meeting, his concerns were not resolved. The meeting started out with friendly conversation, and he gave them an update on the status of his bar exam. They then got into the meat of his complaint. He asked Ms. Valenzuela to explain how the DBP was legal, and he got no answer that was responsive. Ms. Valenzuela said that Cypress got an opinion from an attorney about the DBP, with the implication that it was about compliance with the law. She did not say who prepared the legal opinion or when it was prepared, only that there was a legal opinion (Tr. 264-265, 499, 511).

He asked how they got around the California Labor Code, and Ms. Valenzuela said that she had not read that section. He thought that was odd, because he had put the statute, not just the citation, in his email. (Tr. 264-265, 499).

Mr. Dietz did not bother asking about any of the other provisions in the email, since Ms. Valenzuela had not read them. He was questioning the DBP, but he never received a response. There was no attempt to explain the legality of the DBP; to this day, no one has ever explained how the payroll deductions to fund the DBP could be legal under California or Colorado law. (Tr. 266).

Mr. Dietz did not agree that the DBP was a compensation payment. The payment of bonuses is compensation, but the plan also involves payroll deductions. He recalled Ms. Valenzuela stating that the DBP was not identified in the offer letters given to the former Ramtron employees. (Tr. 506, 509).

The meeting lasted maybe twenty minutes. It was productive, because Ms. Valenzuela suggested that additional training was required for former Ramtron employees in Colorado Springs on the workings of the DBP. He thought this was a good idea. But it was not the end of the discussion, or his concerns about the DBP. (Tr. 267, 500). There was no followup from Ms. Valenzuela or Ms. Joaquin. (Tr. 269).

A day or two later, he had a very short conversation with Mr. Nulty, who asked him if the DBP issue was resolved, and Mr. Dietz said no. Mr. Nulty asked him what his next step would be, and Mr. Dietz said that he would need to reflect on his conversation with Ms. Valenzuela and Ms. Joaquin before he made any decisions. The matter was still unresolved, and he did not know what else to do, because he had concerns about the legality of the DBP. He had raised the issue, he had the attention of a senior vice president, and a vice president at the corporate level, but no followup. He did not know what to do. Mr. Dietz stated that it was left open ended, with no conclusion or closure. He felt that what would have been proper closure would have been a memo addressing his concerns, as required by the whistleblower spec (Tr. 270, 513). But the

only thing that Ms. Valenzuela told him would happen was that they needed additional training in Colorado Springs. She did not tell him how the DBP was legal.[8] (Tr. 514-515).

Mr. Dietz believed that there was fraud occurring pursuant to the DBP. He thought that Cypress misrepresented its right to make compulsory deductions from employee pay, on money often forfeited back to the corporation. He also learned that the offer letters did not put the Ramtron employees on notice that they would be subject to the DBP. He concluded that it was fraud to induce former Ramtron employees to accept employment at offered salaries when the true intent was to pay them 90%. They had a contract with the corporation to be paid salaries, and they were not. (Tr. 271-272). Mr. Dietz stated that a tangible value was forfeited back to the corporation after the employee worked the shift to earn the income. The bonus is great when it pays out the multiplier. But during his research, he discovered that in many cases the employees forfeit their contribution to the corporation. The spec is designed for employees to forfeit their own income to the corporation. (Tr. 273). If there is one poor performer, all members of a team suffer the consequence of having earned income forfeited to the corporation. His opinion would not change if everyone subject to the DBP made money. It is not the bonus that he considers illegal, but the payroll deductions. (Tr. 274).

According to Mr. Dietz, he never got a response from Mr. Nulty, Mr. Surrette, Ms. Valenzuela, Ms. Joaquin, or anyone else. No one tried to address his substantive concerns, or explain how it was legal for Cypress to keep the deductions from people who left the company. He felt that, based on the Whistleblower spec, someone should have responded as to how the plan was legal. If the response was satisfactory, he would have accepted it. (Tr. 278-279). He noted that paragraph 8.2.3 of the spec provides for investigation and closure. (Tr. 280, CX 14). He was not aware of any investigation, and neither Mr. Nulty, Ms. Valenzuela, nor Ms. Joaquin ever referred to any investigation. (Tr. 281).

Mr. Dietz stated that in mid to late April 2013, a test engineer was pulled off the TR 200005 project without his knowledge. When he found out, and found out why the test engineer was pulled, he required the test engineering manager to request a formal waiver, as required by the spec, which he concurred with, because he thought it was the right thing to do for Cypress. Mr. Dietz had thought the engineers were working on customer returns, but another project needed the engineer's assistance. Pulling the engineer from the project was a violation of his assignment, but in the grand scheme of things, Mr. Dietz thought it was better for Cypress to let the engineer do the other task. That is why he concurred with the waiver. He referred to this as "kids soccer one;" the manager was Mr. Groat, who was a dotted line report to him. (Tr. 281-283).

Mr. Dietz received an email from Mr. Nulty in response to the waiver request. Mr. Nulty said he was doing the right thing. The waiver was not really in accordance with the spec, and Mr. Nulty told him to fix it and resubmit it. (Tr. 283-284).

[8] After the meeting with Mr. Dietz, Ms. Valenzuela sent an email to Mr. Nulty, Mr. Surrette, and Ms. Joaquin, stating "I want to give the clear impression that we are not afraid of threats from a legal perspective," and that she wanted a quick conversation to understand the "Tim dynamic." CX 37.

On May 22, 2013, the Wednesday before the Memorial Day weekend, Mr. Dietz discovered that there were some tasks in the design and engineering teams that were bumping up against the critical path. He stated that once this happens, the project starts slipping major milestones. He issued a shutdown warning on May 22, indicating that they were facing potential schedule problems. Mr. Dietz was warning his team that there was a problem in design and test engineering; tasks were slipping, and bumping up against the critical path. He wanted them to come up with an action plan on how to fix it by Friday May 24, before he had to issue a formal shutdown notice, shutting the project down until the problem was fixed. (Tr. 287-288). Mr. Dietz also made a companion update to the program manager system.

Mr. Dietz stated that when a project is shut down, that is the triggering mechanism to effect a lockout. The result is that all of the design engineers on a project team are locked out from their design tools. This brings the entire production to a halt until the problem is fixed, and then the project is unlocked, and the engineers are allowed back into their design tools. (Tr. 327).

Mr. Dietz maintains the project file, with updates, marking tasks complete and incomplete, and tracking the critical path, and uploads it to the program manager system. If there were tasks in the project file that were due to be completed in the past, but not marked as complete in his project file, he would be locked out from the program manager system, meaning that he could not do the upload to the system. (Tr. 327, 329). It is basically a self-correcting problem – all he had to do was go into the project file once he confirmed with the engineer responsible that a task was complete, mark it complete, and then he is unlocked, and can do his upload to the project manager system. (Tr. 329-330).

The design team responded, and fixed the problem. The test engineering team did not respond; this was Mr. Groat's team. He had invited both teams to talk to him to help resolve the issues. On May 23 or 24, when no one came to say they were working on the problem, or needed help, he went looking for the test engineering team, to help them. He could not find Mr. Groat or Mr. Dale anywhere in the building. (Tr. 289).

Mr. Dietz overheard a comment that Mr. Dale might be working on RMAs, which caused him to be even more interested in what they were doing, but he could not find Mr. Dale or Mr. Groat before the Memorial Day weekend. Mr. Dietz was trying to find the people who had tasks slipping in the project file that were bumping up against the critical path, whom he had specifically tasked with coming up with an action plan to fix it. He was not getting any responses to his action item for them to complete; he had flagged this in the program manager system as a warning that tasks were potentially causing a milestone slip. The tasks and action plan were still unresolved. Mr. Dietz knew there was nothing that could happen on the project until Tuesday morning. (Tr. 290, 414).

Mr. Dietz did not enter in the system that there was a lack of resources and that he was flagging the event at this time, because he did not discover the kids soccer event, or that they had a lack of resources, until the morning of the 28th. He was trying to find the people so that he could find out why they were not pulling together their action plan in response to the three week schedule slip he identified on May 22. (Tr. 410). Mr. Dietz was aware that there were tasks in

the design and test engineering space that were bumping up against the critical path, but he was not aware that a kids soccer event had occurred, because they had concealed it from them. (Tr. 411). He escalated the kids soccer event as soon as he learned about it. (Tr. 415).

The first thing on Tuesday, Mr. Dietz went to find Mr. Groat, and asked him where Mr. Dale was. Mr. Groat told him that Mr. Dale was pulled off the project to work on RMAs. When Mr. Dietz asked who told him to do this, Mr. Groat said it was Rainer Hoehler. Mr. Groat had pulled Mr. Dale off the project a second time and concealed it from him, with the consent of Mr. Hoehler to send Mr. Dale to work on something else, knowing it would impact the project. But Mr. Dietz had no way of verifying that there had been another kids soccer event until the morning of May 28, right before the regular meeting with Mr. Todoroff and the program managers. (Tr. 285, 290).

Mr. Dietz stated that although he was aware that there were tasks in the design and test engineering space within the project file that were bumping up against the critical path, he was not aware that the kids soccer event had occurred, because it was concealed from him. There was no way he could have known about it. (Tr. 411).[9]

When Mr. Dietz discovered this second kids soccer event, he escalated it to Mr. Todoroff, and scheduled a meeting for May 29, with Mr. Groat, Mr. Hoehler, and Mr. Nulty. (Tr. 285). He sent an email invitation to address the issue on the evening of May 28. However, this meeting was superseded by another meeting scheduled by Mr. Todoroff on the same subject at the same time, with the same attendees but for Mr. Todoroff. Mr. Dietz cancelled his meeting out of respect for Mr. Todoroff. (Tr. 292)

The meeting was on the phone. The agenda was to address test engineering resources, and what they were working on. He escalated the kids soccer event, and the schedule problems. (Tr. 291).

Mr. Dietz described the "critical path" as the shortest amount of time in which a project can be completed. Although his exhibits included screen shots of the Microsoft Project File for the TR 200005 project, he stated that one can only identify the critical path in the live file; it can't be done in paper form. (Tr. 293-295). At the meeting, it was impossible to review the critical path. If it had been included in the agenda, someone would have had to come to the meeting with the Microsoft Project File on a computer. With the meeting logistics, this was impossible; there was no Webex connection, which needed to be set up ahead of time. (Tr. 296). The meeting was focused on the issue of what was happening with the test engineering head count. (Tr. 297).

According to Mr. Dietz, the critical path can't just be orally explained. It would have been very easy to set up a subsequent meeting with Webex and the correct software to review the critical path, and he suggested this, but his idea was rejected. There was no interest from Mr. Nulty. (Tr. 298).

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[9] Mr. Dietz's memo at RX 23, p. 33, says that he only learned about a *potential* kids soccer situation when he overheard a hallway conversation on May 24 or 25. (Tr. 518).

Right after the meeting, Mr. Dietz met with Mr. Groat to review the tasks that were bumping up against the critical path. He described the meeting as cordial. The test engineer was back, and Mr. Dietz was able to sit down with Mr. Groat and rearrange tasks and resolve dependencies that were causing the bump up against the schedule. They were able to rearrange some, and to resolve the schedule slip. Mr. Dietz sent an email to everyone who had been at the meeting, telling them that they had resolved the issue. He thought it was well received, because they were no longer looking at the tape out date slipping to work week 39; they were back on track to tape out at work week 36. (Tr. 299, 301, 495). Mr. Dietz informed Mr. Nulty within 40 minutes that the tape out to week 36 had been pulled back. (Tr. 496, RX 13).

Mr. Dietz stated that the issue of the test engineer being pulled off the project was resolved at the May 29 meeting, which was why he wanted Mr. Nulty at the meeting, to help enforce getting the test engineer back on his project. The second concern was resolving the tasks in the test engineering team that were bumping up against the critical path. But this was not the primary concern at the meeting; he had sent out the warning the week before. The focus of the meeting was putting his resources back on the project. (Tr. 300, 494).

While Mr. Dietz was meeting with Mr. Groat, he received an email from Mr. Nulty; he described his reaction as shock, dismay, surprise, and frustration. He could not believe it was happening, because this was not the subject of the meeting he had just left. In the context of the fact that his whistleblower complaint had not been resolved, his first thought was that they were retaliating. He immediately responded, and informed Mr. Nulty that he would be preparing a response. Mr. Dietz stated that this was his way of telling Mr. Nulty that he was disputing his allegations in the email. (Tr. 301-303).

None of it made sense to Mr. Dietz; it did not fit with what was happening with the project.[10] He thought that Mr. Nulty could have been conflating the first kids soccer event with the second kids soccer event when he said that Mr. Dietz delayed in escalating a kids soccer issue after he became aware of it, but otherwise there was absolutely no basis for his allegations. (Tr. 302-303). He noted that the team that concealed the second kids soccer event from him was the same test engineering organization that was responsible for the first kids soccer event in April. (Tr. 412). Mr. Dietz's whistleblower issue remained unresolved, and there was no indication that anyone had done any investigation, or taken any steps to resolve the issue.

Mr. Nulty's email did not fit the circumstances – there was no basis for him to claim that the TR 200005 project was stale. According to Mr. Dietz, there is a daily and a weekly stale schedule report automatically published by the system. When a project is stale, it means that tasks that are due to be completed in the project file have not been marked as complete. The daily report for May 29 does not list his name, or the TR 200005 project; if it were stale on May 19, it would have shown on the May 29 report. (Tr. 303-307, 314, RX 24). Mr. Dietz stated that Mr. Nulty was referring to "stale" as not updating the project manager system in ten days; Mr. Dietz never had any training about such a definition of "stale." (Tr. 331).

[10] Mr. Dietz also thought it was odd that Mr. Fee, who was the co-program manager, was not required to draft a similar memorandum (Tr. 743).

Mr. Dietz had no recollection that he was ever locked out of a project, whether as a result of status reports being submitted or otherwise. (Tr. 333). He referred to a status report from the program management system for May 18, 2013, which reflected that the system made an automatic update to the system. (Tr. 332-334, CX 40). Four days after this automatic update, he made an update to the system on May 22, 2013, the same day he escalated to Mr. Nulty and Mr. Todoroff the three week schedule slip in the project. (Tr. 334, CX 41).

Mr. Dietz stated that Mr. Nulty had access to the program manager system. The only way he could have derived his claim that Mr. Dietz did not update the system within ten days would be to look at the May 18 status report (CX 40), with the automated update. But although he was supposedly locked out ten days after his May 10 update, Mr. Dietz was able to make an update to the system on May 22; he was not locked out. (Tr. 335). He also made an update on May 24, and on May 30. (Tr. 336, CX 42, 43). There was no basis to claim that the project status was allowed to go stale, resulting in an automatic lockout from the program management system. (Tr. 340).

With respect to Mr. Nulty's second allegation, that he delayed in escalating a kids soccer game, Mr. Dietz stated that he escalated this event on May 28; he had learned of it that morning. Mr. Dietz brought it up in the meeting Mr. Todoroff had scheduled shortly after Mr. Dietz learned of the event, and confirmed it with Mr. Groat. According to Mr. Dietz, the regular project management meeting was the appropriate place to escalate this issue; he had no reasonable opportunity to do so sooner. (Tr. 340-341).[11]

Mr. Nulty's third allegation was that he was unable to explain the details behind the tape out delay, and did not know the critical path. (Tr. 342). Mr. Dietz stated that he did not even have access to a screen shot of the Microsoft Project file (CX 18) at his meeting with Mr. Nulty on May 29, or to the project file. He had no idea what Mr. Nulty meant by "adequately explain" in Mr. Nulty's June 4 memo means. Mr. Dietz offered recommendations at the meeting, a deeper dive in a second meeting on the critical path. But it was impossible to review the project file in the May 29 meeting. There was no way, with the available resources, to better explain the critical path in the May 29 meeting. No one took him up on his offer. (Tr. 342-344).

Mr. Dietz discussed the performance action plan at Intel, which he described as telling the employee he was deficient, and assigning a series of tasks that would be monitored. If the employee completed the tasks, he would successfully move off of the performance GAP action plan. Mr. Dietz thought there were grounds for immediate termination at Cypress, but there is also a situation where a performance or series of performance issues has been identified, and Cypress puts the employee on a path not to exceed 90 days, with a series of events, including a weekly meeting with the manager, to report progress against the plan. If the employee does not successfully complete the plan, the natural result is termination. This process was analogous to the performance improvement plan at Intel. Mr. Dietz thought it was a wise thing for a manager to give an employee an adequate opportunity to recover from a performance issue before it becomes a permanent part of the performance evaluation. (Tr. 482-483).

[11] Mr. Dietz stated that it was "absolutely false" that by May 24, he had not put anything in the system about the kids soccer event. He had no way of knowing that it had occurred until he learned about it on May 28. (Tr. 413).

When Mr. Dietz got the disciplinary memo from Mr. Nulty, he did not have access to the final copy of the memo in the system, because it was marked confidential. He went to the stale schedule reports, and looked at weekly reports over several months, and corresponding memos from Mr. Nulty marked confidential. He wanted to see if there were confidential memos in the system corresponding with other stale projects, to see of other project managers were being similarly treated. (Tr. 310-311). He could not find any others.

Mr. Nulty had sent Mr. Dietz his email on May 29, indicating that he was going to be documenting performance issues in his personnel record. He sent Mr. Nulty a response a few minutes later. On June 4, 2013, Mr. Nulty emailed Mr. Dietz the disciplinary memo; it was the response Mr. Dietz was expecting but hoping not to receive. (Tr. 321-322, CX 9). His reaction was the same as with the original email – shock, dismay, and frustration. He could not believe it was happening to him. There was no foundation for the allegations that his performance was deficient. (Tr. 322-323). Mr. Dietz and Mr. Nulty talked on June 4, and Mr. Nulty read him the email. According to Mr. Dietz, there was no room to talk about the memo, or dispute the allegations. It was abundantly clear to Mr. Dietz that it was a one way discussion with no interaction. (Tr. 524-526).

According to Mr. Dietz, if someone applied to his team and had a memo like this in his personnel file, he would consider it to be a disqualifying factor. It would cast doubts on the person's professional abilities to serve in the organization. (Tr. 324).

Mr. Nulty demanded that he write a memo for his approval, and the executive Vice President for human resources, on what he did wrong and what he should have done. Mr. Dietz perceived this as a requirement that he admit misconduct and waive any opportunity to dispute Mr. Nulty's allegations. (Tr. 344). When he got Mr. Nulty's first draft, Mr. Dietz did not respond to the substance, hoping that Mr. Nulty would reconsider his course of action and do something different. In addition, Mr. Nulty had told him that he was preparing a formal memo, and Mr. Dietz was waiting for it so he could provide a formal response disputing the allegations. (Tr. 344-345).

According to Mr. Dietz, this memo was absolutely not a coaching opportunity, which is a mid course adjustment to make an employee more successful. Mr. Dietz interpreted this as a career ending event. It would have required him to admit misconduct. Mr. Dietz believed that if he were terminated, the memo would have been used to preclude attempts to obtain unemployment benefits. (345, 346). Mr. Dietz thought that if he did not write the memo, he would be terminated for insubordination. (Tr. 346).

Mr. Dietz stated that he would have welcomed a PGAP instead of Mr. Nulty's memo, because it is a much more formalized process, with the opportunity to dispute the allegations. Mr. Nulty's memo was avoiding the PGAP process, which would be assurance of continued employment. (Tr. 527-528).

Mr. Dietz believed that his memo would be kept in his personnel file indefinitely. The sentence stating that future infractions would result in further disciplinary action, up to and including termination, indicated that disciplinary action had already begun. Mr. Dietz

interpreted the language as threatening. Mr. Nulty never asked him if he agreed with the allegations, or gave him an opportunity to challenge them, or to escalate to Mr. Daniel or anyone else. He could either admit misconduct, or he was being insubordinate; neither path had a good outcome. (Tr. 347-348).

Mr. Dietz did not feel that he was treated fairly. He has learned that other events occurred in the project that were much more severe than what Mr. Nulty alleged that he did. But there were no corresponding disciplinary memos, or any requirement to write a memo to the executive Vice President for human resources detailing what they did wrong and what they should have done. (Tr. 348).

Mr. Dietz stated that the entire project revolves around the tape out date, when they tape out the mask for burning the silicon. If there is a bug in the tape out, it affects the entire projection line; it is very expensive. If you miss the tape out date, you have to go back to square one and start the whole design process, or try to fix it. (Tr. 351). He identified five formal shutdown warnings issued by Mr. Fee on the project, from August 13, to September 23, after he left Cypress. (Tr. 349, CX 21-25). One was a shutdown warning indicating that a schedule update was required, which occurred after they already missed the tape out date. (Tr. 350, CX 24). This means that the schedule was not updated until after they already missed the tape out date. (Tr. 351). But Mr. Fee never got a memo like he received from Mr. Nulty. (Tr. 352).

Mr. Dietz stated that as of May 29, 2013, there were four projects that were more than 10 days stale. To the best of his knowledge, none of those project managers, including Mr. Fee, got disciplinary memos. (Tr. 353).

Mr. Dietz thought that the formatting of Mr. Nulty's memo was unusual; it looked very similar to a word document, which has a track changes function. This is a function that is turned off by default; it must be affirmatively turned on. An email that goes back and forth with the track changes function turned on would have marks on it. Mr. Dietz had never seen Mr. Nulty use the track change feature in previous email correspondence. (Tr. 323-324).

Mr. Dietz prepared a memo disputing all of the allegations, and tendered his notice of his intent to terminate, and his demand for acceleration of his Ramtron stock, which he sent to Mr. Surrette, Mr. Nulty, Ms. Gustafson, and Mr. Daniel. (Tr. 354, CX 12). He stated that it was consistent with the Whistleblower spec to send a copy to Mr. Surrette. In his memo, Mr. Dietz alleged three times that he was being retaliated against. Mr. Dietz thought that Mr. Nulty's allegations did not make sense; nothing lined up. It was not consistent with what was happening at Cypress and to other people. There was no foundation for the allegations about his performance. (Tr. 355). His only logical conclusion was that the reason for the memo was his unresolved whistleblower complaint, and Mr. Nulty was taking action against him because of that. (Tr. 355-356).

A little more than a day later, Mr. Dietz received a meeting notice from Mr. Nulty, setting a meeting for noon on Friday June 7, with no agenda. Mr. Dietz would have expected the notice to have an agenda, especially if it was going to be a meeting responsive to his memo. According to Mr. Dietz, it was rare at Cypress to attend a meeting without an agenda; the only time he could

recall was when some said, let's get together in ten minutes in the conference room. But for a formal meeting, especially an important one, he would expect to see an agenda. The other attendees were Ms. Ratliff, Mr. Hoehler, and Mr. Nulty. (Tr. 357-358).

The first thing Mr. Dietz did when he got the memo was to go see Ms. Ratliff. He was very concerned about the purpose of the meeting, and he asked her if she knew what it was about; she did not. Then he called Mr. Nulty's cell phone to ask him what the meeting was for, but he could not reach him. Mr. Nulty had been fairly accessible before, and would usually return a call in a fairly short period of time. (Tr. 359). Mr. Dietz thought it was somewhat unusual that he would not get a response, but given the events, he was not surprised.

It was his expectation that Mr. Nulty would follow the corporate policy set by the CEO in his article, and react immediately, by talking to him and finding out what was going on. (Tr. 360). But none of the corporate policies were followed. On June 7, Mr. Dietz went to his desk and prepared an email for his friends, mentors, and colleagues, explaining what was happening with him. He went to shake some hands, and meet with some people. He had previously tendered an email with his intent to leave on July 1, so Cypress could do an orderly transition to formally turn the project over to another manager, presumably Mr. Fee. He was also hoping that this would allow sufficient time to take a step back and resolve the issues, and find a way to keep him on board. (Tr. 361-362).

After Mr. Dietz submitted his memo, and nothing happened in response to his allegations of retaliation, which went directly to the executive Vice President for human resources, and not hearing anything back until he received a meeting notice with no agenda, and given the composition of the attendees, it was clear to him that the people who were going to be in the meeting were the people who were going to fire him. Mr. Nulty would be on the phone conducting traffic, and telling people what to do to effect the termination. Mr. Hoehler would be there to recover his computer and any other equipment belonging to Cypress. Ms. Ratliff would be there to take his employee ID and escort him out of the building. (Tr. 363).

To Mr. Dietz, this was the logical conclusion on who was going to be doing what in the meeting, based on his years of experience as a manager. He stated that if he were going to terminate someone, that would be the way he would do it. All indications were that he was gone. It did not make sense to him to go through the humiliation of going into a meeting and being terminated, when he still had the chance to pull the trigger himself and conserve what was left of his reputation and ability to find other employment. (Tr. 364, 529).

Mr. Dietz sent his memo announcing his intended resignation on July 1, and his memo with his allegations of retaliation on June 5. His expectation was that Mr. Nulty and possibly others would respond as required by Dr. Rodgers' article, but it did not happen. He expected some kind of response to his allegations of retaliation, certainly on his distribution to Mr. Surrette, Ms. Gustafson, Mr. Nulty, and Mr. Daniel, but he heard nothing. This conveyed to him the message that he was being isolated, and this was an unworkable solution. (Tr. 534).

Mr. Dietz stated that most employers, including Cypress, ask why you left your previous employer. You either have to lie, or tell the truth and say if you were fired, which is another

disqualifying red flag. Mr. Dietz did not think there was anything else he could have done. He noted that Cypress suggested four courses of action he could have taken. The problem was, he tried three of the four, and got no response. The fourth, the whistleblower hotline, was an anonymous system, and unless he identified himself, no one would have known it was him calling. Mr. Dietz stated that even if he took Cypress at its word, that the purpose of the meeting was to address the concerns he had raised, and he attended the meeting and kept his job, he would be less likely to report future whistleblower complaints. He does not know anybody who would want to put themselves through what he went through, both before and after he left Cypress. (Tr. 365-366). Every day he went to work, he worried about what was going to happen next; he was hopeful that it would all blow away. (Tr. 367).

Mr. Dietz stated that leaving Cypress meant a loss of income and security, and the satisfaction of working with his peers at Cypress on projects. Mr. Dietz takes an enormous amount of personal pride in the products he works on. He lost the security of employer supported medical, dental, and vision coverage. It also completely derailed the longterm plans of himself and his wife. Mr. Dietz's plan was to work for about five years, and then evaluate. Five years would put him and his wife in a very strong financial position, possibly having their house paid off, so he could retire and live on his military pension. He planned to either retire, or start a solo practice or some other business, perhaps software development. (Tr. 369-370). He did not recall telling Cypress that his five year plan was to be the senior litigation counsel at Cypress, although this would be within the scope of what he was willing to do at Cypress. (Tr. 376).[12]

Mr. Dietz opened a solo practice on July 1, 2013, with an office in downtown Colorado Springs. The firm has generated a profit, or about $13,000 in profit over expenses from January through June 2014. (Tr. 371-372). Mr. Dietz has not paid himself; he rolls the profits back into the operating account. He also does some software development. (Tr. 373).

Mr. Dietz wants reinstatement to his former position, with some level of assurance that he would not be retaliated against. He would not be willing to report to Mr. Nulty, Mr. Surrette, or anyone else involved in the litigation. (Tr. 373-374). Mr. Dietz also wants back pay, and compensation for benefits, from the time of his departure, offset by his gains from the law firm. If he is not reinstated, he would like to recover front pay. (Tr. 373-374). He would also like a neutral job recommendation, and attorneys fees and costs. (Tr. 375). He is not seeking any compensation for emotional distress.

Mr. Dietz stated that he believes the corporation is engaged in fraud, because the compulsory payroll deductions constitute fraud. (Tr. 381-382). He does not know what was the intent of any of the Cypress employees, and cannot identify any particular individual who is engaging in fraud, or who decided to represent that the DBP does not violate state law when it does. (Tr. 381-382).

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[12] One of Mr. Dietz's aspirations in December 2012 was to pass the Colorado Bar exam, and partner with Ms. Valenzuela and start a *pro bono* outreach program under the Cypress banner. In email conversations with Ms. Valenzuela, he had the clear impression that she liked this idea. He also expressed interest at some point in eventually joining the legal department in Colorado Springs. (Tr. 402, 404-405).

Mr. Dietz described the corporate culture at Intel as open, energetic, and challenging. They were developing silicon products and software, and it was exciting to work there. The company had an open door policy, and valued brain power. (Tr. 385, 387-388). The culture was absolutely not like Cypress. Mr. Dietz stated that he received an email from Mr. Todoroff around February or March 2013, advising everyone that they should not contact the CEO or his executive assistant without prior authorization; they did not want communications to the CEO unless they were filtered ahead of time. However, the Global Whistleblower policy says that you can go to the CEO. (Tr. 388).

Mr. Dietz noted that Dr. Rodgers' article on what to do when a valued employee quits states that you should react immediately, and tell your boss within an hour. At his deposition, Mr. Nulty confirmed that he did not reach immediately, nor did he tell his boss, which would have been Mr. Daniel or Mr. Rodgers, within an hour. (Tr. 393).

James Nulty

Mr. Nulty is a Senior Vice President at Cypress Semiconductor, in charge of the Quality Department. He manages the program management office, which reports to him, and also works with sales on quality issues. (Tr. 553). Mr. Nulty started his career in 1980 as a process engineer at National Semiconductor. He then worked at VLSI Technology as a Process Engineer for five years, and then as the Director of Technology at Drytek, a unit of General Signal. He has been at Cypress since 1993, where he has been a process engineer, the Director of Technology, the Director of Product and Test Engineering, the Director of New Products and SRAM, SRAM General Manager, Senior Vice President of Corporate Engineering, Senior Vice President of the Program Management Office, and Senior Vice President of Quality. (Tr. 554).

Mr. Todoroff reports to Mr. Nulty. Most of the program managers report to Mr. Todoroff, and a few to him. Mr. Todoroff runs all of the day to day operations, and handles all new product work. (Tr. 555).

Mr. Nulty stated that the Program Management Office was created in about October 2008 in response to the need for professional program management for new products. Its primary responsibility is to keep and maintain the schedules of new products. Its second responsibility is governance, making sure the work flow and quality standards are maintained and the internal specs are met. They have to report problems, and are tasked to report bad news. They are encouraged to do so. The PMO reports to the Quality Department, which reports to the CEO. (Tr. 556). Mr. Nulty reports to Sabbas Daniel, the Executive Vice President of Quality. (Tr. 560).

The design governing spec specifies several program management functions. The program managers have no responsibility for the tasks in the new products being developed; the people who own the tasks are responsible for them, such as engineers. (Tr. 557). Mr. Nulty's entire organization is program managers, who keep the schedules for the people making things. They are primarily responsible for maintaining the schedule in all new products. (Tr. 558).

Mr. Nulty was not involved in the Ramtron merger, or in hiring any Ramtron engineers. He interviewed Mr. Dietz, who originally reported to Mr. Todoroff. (Tr. 559-561). Mr. Nulty was asked on the Program Management side to make sure the integration went well, and he thought that having Mr. Dietz report directly to him would help. (Tr. 561). After the merger, one of the existing Ramtron products was selected to go through the Cypress new product plan process. It was a production product, but it needed design fixes, because it had various problems in production. This product, the TR 200005, was the first one to go through the NPP process. (Tr. 561).

Mr. Nulty stated that there was a training curriculum for the new Program Managers, who needed to complete three classes, or obtain a waiver. (Tr. 561-562). The Program Managers are not responsible for fixing defects; they are only responsible for knowing where they are, and how they will be fixed. (Tr. 565).

According to Mr. Nulty, one of the purposes of initiating the Program Management office was to increase advance warning about schedule slips. (Tr. 574). Missed milestones cost the company about $1.06 million a week on average. The PMO dashboard shows the priority of the projects, their milestone goals, the status of the projects, and the Program Manager names and chip lead names. (Tr. 575, 577). The PMO dashboard is shown at every Thursday NPRD meeting. Not every active project is on there, only the big ones. (Tr. 582-583).

Mr. Nulty identified the memo that launched the PMO, which he reviewed with the CEO three times. In the slide presentation, the CEO is trying to convey that it is not enough to report bad news that has already happened, they need to report predictions of potential slips. (Tr. 583, 584. Mr. Nulty stated that the Program Managers report predictions of a potential slip first in the PM system. They should also escalate to make sure they have an owner, and it should come up at cross function meeting of the teams. He and Mr. Todoroff review problems at their weekly PM meeting. He stated that if there is a problem, it should be escalated until there is a working solution. (Tr. 587-588).

Mr. Nulty described a kids soccer event as the unauthorized removal of resources for a project. It almost always happens because of another priority that the business unit manager or someone with a direct supervisory role for the employees on a project decides that there is a higher priority, and he takes them off the project and puts them on the higher priority one. (Tr. 590-591).

Mr. Nulty builds the work breakdown structure in Microsoft Project. The upload occurs from the Program Manager's laptop, with the schedule, and it is then downloaded and reported in the Program Management system. Mr. Nulty fills out a status report, which feeds into the status report dashboard. (Tr. 598).

Mr. Nulty stated that all potential NPP schedule slips must be escalated by the Program Manager immediately; he does not need to verify for a potential slip. His expectation for "immediately" is no later than a working day from when the person becomes aware of a potential slip. (Tr. 602-603). The Program Manager should escalate the problem immediately if it is a

kids soccer problem, where project resources are removed or are not available for a project. It should be escalated to Brian Todoroff and him. (Tr. 605).

According to Mr. Nulty, if a project is shut down, the program manager is removed, and the team design bonus for the quarter is forfeited. This happens if you go two weeks after the milestone and have not updated the NPP on the schedule. (Tr. 604).

According to Mr. Nulty, the Design Bonus Plan is a part of how design is operated at Cypress. It gives a positive incentive for the teams to meet or exceed their schedule. It is a pretty high return for the company, and if the team meets the schedule, the payout will be higher than what they put in. The revenue return exceeds the extra costs for the bonus for Cypress. (Tr. 612-613). The Program Managers are not included in the DBP, but they are responsible to audit the man hours earned at every quarter. (Tr. 612).

Mr. Nulty is on the Design Bonus Review Board, which reviews quarterly results and approves bonuses. (Tr. 614). He had no responsibility for writing the DBP, or for reviewing its legality (Tr. 615.

Mr. Nulty identified the Cypress Best Practices spec, which covers program management techniques, with performance standards for program managers. (Tr. 615, RX 4). The program managers are supposed to report week by week slips as they happen; there is no reporting of multiple week surprises. (Tr. 617. The program managers are supposed to verbally inform them about what is going on, in the weekly status meeting, or by phone call to him or Mr. Todoroff. The PM system must be kept current, and the program manager must warn about even the possibility of a slip. (Tr. 618).

According to Mr. Nulty, Cypress is a very fact driven company, and the expectation is that people know the details. Any time executive management has questions, the program manager should be able to discuss details. (Tr. 620).

Mr. Nulty stated that the reason for a shutdown warning is to try and avoid a schedule slip. If a problem is detected before it actually causes a schedule slip, it is the program manager's job to get it resolved. Sometimes it is necessary to focus the team on solving the immediate problem that will cause a schedule slip. A shutdown warning focuses the team, and gives them a warning that they have so much time to solve a problem. If the deadline date is not met, the project is shut down. The tools are turned off, removing the ability of the design team to work on the design team. There is nothing to do but work on the problem. When it is resolved, the shutdown is released, and the team turns back on. Experience has shown that schedule delays are minimized this way, because they do not linger and are solved as efficiently as possible once the shutdown happens. Even though there might be a little bit of delay, it saves a lot of time. Mr. Nulty described this as a variant on killer software, except it is manually done by the program manager. It must be approved by the director of the Program Management Office, and the form is distributed to senior management, including the Business Unit Manager, who is the customer of the project. (Tr. 621-622).

According to Mr. Nulty, the minimum for status updates is once a week, or within 24 hours of a status change. The dashboard with projects is shown at the NPRD meetings on Thursday. (Tr. 626-627). If there has been a kids soccer event, or an unauthorized removal of resources, the program manager marks it in red, meaning that there is a shutdown notice. This is the time to get a waiver approved, or to pull the person back. (Tr. 628).

Mr. Nulty received Mr. Dietz's email about the DBP, and responded a little over an hour later. (Tr. 630, RX 6). He forwarded the email to legal, HR, the head of the DBP, and his boss. He asked Ms. Valenzuela to review it and advise him, and he was waiting to hear from her before he responded to Mr. Dietz. (Tr. 631, RX 31). Ms. Valenzuela told him that it would be best if they responded to Mr. Dietz. She felt that they needed to find out what his concerns were and resolve them, and hook him up with the right people to work on it. He told Mr. Dietz that he was working on it, and a meeting was being set up. (Tr. 632).

Mr. Nulty talked with Mr. Dietz after the meeting, and asked him if his concern was addressed, and whether he thought the DBP was legal. Mr. Dietz told him that he still had to think about it, and he did not have his opinion finalized. Mr. Nulty told him to let him know if he needed more. He did not recall whether he heard back from Mr. Dietz about the DBP before June 1. (Tr. 633).

Mr. Nulty identified an email he sent to Mr. Dietz on April 19, 2013 (Tr. 634, RX 8). He stated that he received this document in an email, and he made comments and forwarded it to Mr. Dietz. He stated that he was coaching Mr. Dietz, that although there were a lot of problems listed, he did not see action plans on how they were going to be addressed. Because the memo had already been published, he suggested a follow up meeting to close on resolution of the issues. He also suggested that the issue regarding the sub-con capacity be escalated immediately to the Vice President of Operations, as it was a time consuming and difficult problem to resolve. (Tr. 635). Mr. Nulty indicated that this issue needed to be escalated by direct email, plus phone call and voice mail. He also suggested putting a couple of other people on the distribution list. According to Mr. Nulty, he was giving Mr. Dietz feedback on how he was doing. (Tr. 636).

Mr. Dietz told Mr. Nulty that maybe he misinterpreted, and this was just discussion, not real problems, and he did not see the need to escalate. Mr. Nulty said okay, it was Mr. Dietz's call, and he was aware of the issues and had to make sure they were taken care of. (Tr. 636-637). Mr. Nulty let Mr. Dietz know that he judged product manager performance on three main things. After a problem already happened, when did it occur, when did the product manager become aware of it, and how and when did he do something about it. He told Mr. Dietz that most product managers almost always get the first and second one correct; the mistake is almost always in three, the execution. Mr. Nulty usually judges the product manager response by when he was aware of the problem, and what he did about it. (Tr. 637).

Mr. Nulty identified another coaching response to Mr. Dietz. (Tr. 639, RX 9). Mr. Nulty received a request for a waiver for a kids soccer event on April 24, 2013. He noted that Mr. Dietz had approved it, and pointed out that he was not authorized to do so; it required approval at the Vice President level. He also noted that he, Mr. Todoroff, or Mr. Sabbas could sign off. He said that he was glad that Mr. Dietz was working on doing the right thing. (Tr. 639). According

to Mr. Nulty, it was the right thing for the company to keep the person off the project, and he was glad they were seeking a waiver. His only comment was that the waiver was not valid, and they needed to make it valid. (Tr. 640).

Mr. Nulty recalled that Mr. Dietz said he was getting a lot of heat from Mr. Hoehler about issuing shutdown warnings. He let Mr. Nulty know that he would be approached, and that this was a problem. (Tr. 640, RX 10). Mr. Nulty responded that Mr. Dietz's position was aligned with his. Mr. Dietz was concerned about latency, and the time it would take to set up a committee to address shutdown warnings. Program managers were independent, and that is what they did. But he also understood that there was a morale issue, and thought they needed to educate Mr. Hoehler on shutdown warnings. He told Mr. Dietz that they would talk about it and see if they could alleviate Mr. Dietz's concerns. Mr. Nulty recalled that he talked to Mr. Hoehler about this, and Mr. Hoehler stated that there were morale problems when shutdown warnings were issued. Mr. Nulty explained to him that this was how they operated, and it was the best way to get things solved. (Tr. 641). Mr. Nulty thought he suggested that it could help if they could let Mr. Hoehler know before the shutdown warnings came out, so he would have a little warning. But they were going to do shutdown warnings. (Tr. 642).

Mr. Nulty stated that Mr. Dietz told him he had had previous conflicts with Mr. Hoehler. He had gotten a hostile reaction to a previous shutdown warning. Mr. Hoehler was upset that it was issued, because it affected morale, and had a negative impact on the team. (Tr. 643).

On May 28, Mr. Nulty scheduled a meeting for May 29; he had learned from Mr. Todoroff that Mr. Dietz's project had shown a schedule slip of three weeks. (Tr. 643-644). What got his attention was that this was a three week slip that happened all at once; the milestone was still 14 weeks away. Mr. Nulty wondered why they could not figure out a way to recover the slip. He identified the May 24 project status report, which shows the slip in the tape out milestone. (Tr. 645-646). He wanted to understand the story, which did not sound like a good one. (Tr. 647).

Mr. Nulty stated that it was very unusual for a milestone that far out to push out three weeks. He was also concerned with the fact that there was a three week slip all at once. He was concerned about the program management. He met with Mr. Dietz, Mr. Groat, Mr. Hoehler, Mr. Rainer, and Mr. Todoroff on the phone. He discovered that the problem was due to test engineering being late, and a kids soccer event. He discovered that the status reports in the system had not been updated at least once a week over a certain time period, from May 10 to May 22. He might have said in the meeting that it was an issue that the status report had not been updated over a period of time. He documented in the meeting that Mr. Dietz was aware of the test engineering schedule slipping, but he did not update the schedule. (Tr. 648-649).

Mr. Nulty sent an email to Mr. Dietz after the meeting, to give him a heads up that the three week slip would come up in the NPRD meeting, and also to let him know he was formally documenting performance issues. (Tr. 650, RX 12). The schedule status had been allowed to go stale, Mr. Dietz delayed in escalating a kids soccer event after he became aware of it, and he was unable to explain in sufficient detail why the test program delay caused the tape out, which was 14 weeks away, to slip. (Tr. 650). Mr. Nulty had found out in the meeting that Mr. Dietz was

aware of test engineering slips along the way, and did not update the schedule. The status report did not reflect changes, and was not updated. He expected this to be a "red" issue at the NPRD meeting. (Tr. 651). If these items were on the dashboard at the NPRD meeting, he would expect an explanation of the problems. (Tr. 652).

Mr. Dietz responded that he would be preparing a responsive memo. Mr. Nulty assumed that Mr. Dietz would make a response, which was appropriate. (Tr. 653). About 48 minutes later, he got an email from Mr. Dietz saying that the schedule had been corrected and pulled back in, and there was no longer a slip. (Tr. 654, RX 13). Mr. Nulty felt that this probably could have been taken care of before Wednesday, because the slip happened the previous Friday. The project status report showed a three week slip on Friday the 24th. (Tr. 654).

Mr. Nulty wrote a draft memo reflecting the three program management issues, and he sent it to Mr. Todoroff and Kim Kubiak, an HR business partner, for feedback and proofreading. (Tr. 655, RX 14). Ms. Gustafson responded, and added a paragraph, which she said was standard, and HR wanted in. He told her okay, and asked, by the way, do you know Mr. Dietz has a complaint about the DBP? Mr. Nulty wanted to make sure the language was still appropriate. Ms. Gustafson said yes, it had nothing to do with that, it was based on Mr. Nulty's memo. (Tr. 656-657).

Ms. Gustafson suggested Mr. Dietz be put on a 90 day warning, like a PGAP, with a timeline to correct the issues. Mr. Nulty did not adopt this recommendation, because he did not think it was necessary. He thought this would be escalating it more than it was. He wanted to document the issues, make sure Mr. Dietz understood them, and get him to correct them. He finalized the memo and sent it to Mr. Dietz on June 4, 2013. (Tr. 658-659, RX 20).

Mr. Nulty had not sent formal memos to Mr. Dietz for previous performance issues. There had not been problems that involved a problem on the dashboard of change in the project schedule. This was serious, and had a big impact; it needed to be corrected so it did not happen again. In addition to sending the memo by email, Mr. Nulty called Mr. Dietz on the phone and highlighted points, and explained. He did not recall Mr. Dietz's response. (Tr. 660). Mr. Nulty stated that he did not raise his voice, or tell Mr. Dietz to listen and not respond. Mr. Nulty planned to keep this memo in Mr. Dietz's personnel file, so he would be able to refer to it in the future. If it reoccurred, he would have a history, and be able to see if there was a trend. If it was corrected, he would be able to see, and in the performance review, he could say that these were issues that got resolved. (Tr. 661).

Mr. Nulty stated that he was referring to the project status report, which had not been updated. It was not the stale schedule report, which is not related, and talks about tasks that have not been updated but are in the forecast date in the past, and not marked complete. Mr. Nulty does not discipline product managers with projects on the stale list. (Tr. 663-664, RX 24). Mr. Nulty calculated that Mr. Dietz filed a status report on May 10, but not again until May 22. (Tr. 665).

According to Mr. Nulty, the kids soccer event occurred three weeks earlier, but Mr. Dietz said that he was only aware of it the Wednesday or Thursday of the previous week. Mr. Groat

admitted that they withheld information from Mr. Dietz, that the test engineers had been pulled from the project. Mr. Nulty was not going to hold Mr. Dietz accountable for not knowing about the kids soccer event, but when he became aware on Wednesday or Thursday, that was when the clock started on how to respond to a kids soccer event. Mr. Nulty claimed that Mr. Dietz reported in the meeting that he was aware of the kids soccer event on the previous Wednesday or Thursday. (Tr. 668-669).

According to Mr. Nulty, although Mr. Dietz was not aware that resources had been pulled, he was aware that tasks were not getting done, and the schedule was slipping. He did not update the PM system schedule forecast until May 24. Mr. Nulty claimed that Mr. Dietz told him in the meeting that he was aware on a week to week basis that tasks were pushing out. (Tr. 670).

Mr. Nulty stated that the language added to his memo by HR rang a bell; he had heard it done elsewhere, and felt it was what they needed to do here. Mr. Dietz objected that the distribution list was too broad, and it was not appropriate for the memo to go to Mr. Hoehler and Mr. Todoroff, who were not in the direct management chain. Mr. Nulty changed the distribution list after speaking with Ms. Gustafson. (Tr. 672-673).

When Mr. Nulty received Mr. Dietz's response, he was stunned. He did not expect this reaction to his memo. Mr. Dietz's response included accusations. Mr. Nulty went to the Legal department, and Mr. Surrette told him to wait until he could get back to him on what he should do. (Tr. 674, RX 23). Mr. Nulty scheduled a meeting to review Mr. Dietz's memo on June 7, with Ms. Ratliff, Ms. Hoehler, Mr. Dietz, and himself. He planned to ask Mr. Dietz if he wanted to talk about the memo and the issues that generated it. (Tr. 675).

Mr. Nulty has terminated an employee once before. He flew to the site in Washington, had a meeting with HR, prepared, and had all of the documentation ready. He met with the employee and told him he was terminated on the spot. (Tr. 676).

The purpose of inviting Mr. Hoehler to the June 7 meeting was because Mr. Nulty was not local, and he wanted a site manager at the meeting. He wanted another person to hear what was going on, and if this affected the site, and was a resignation, they would need a new product manager in Colorado. He expected Mr. Dietz to respond with, here is what I am going to do to correct these issues. Ms. Ratliff told him she had spoken with Mr. Dietz, and he said he was not going to attend the meeting. (Tr. 676-677).

Mr. Nulty stated that if Mr. Dietz wrote a memo responding to the allegations about his performance, and disputed them, he would not have been fired. (Tr. 679). There was never any discussion about terminating Mr. Dietz's employment in the spring and early summer of 2013, and no talk about him leaving when Mr. Nulty got the April 12 memo about the DBP. Mr. Nulty claimed that there was no talk about trying to manage Mr. Dietz out of the company, or trying to find some kind of misconduct to fire him for. He was not trying to get Mr. Dietz to confess to wrongdoing. He expected Mr. Dietz to write a memo on what he did wrong with respect to the three performance issues, what he should have done, and what he would change. It was an

opportunity for him to explain why the program status was not updated between May 18 and May 22. (Tr. 681).

According to Mr. Nulty, the June 7 meeting was to give Mr. Dietz a chance to discuss the contents of the June 4 memo. If Ms. Ratliff said the purpose was to accept Mr. Dietz's resignation, it would depend on the time of the discussion. (Tr. 684).

After Mr. Dietz left, the project taped out at work week 40, with a 4 week slip. No one else got a memo from him asking what they did wrong, and what they were going to do to avoid it in the future. (Tr. 687).

Mr. Nulty stated that the DBP was conceived of by Dr. Rodgers, and others worked out the details. He stated that the Design Bonus Review Board can adjust payouts, even if there were delays in a project, if there is an approved justification. They could also adjust the payout downward. (Tr. 692-695). Although he was not very familiar with that aspect, Mr. Nulty acknowledged that an employee can forfeit his contributions to the DBP; he did not know the circumstances where this could happen. He did not know if the contribution was forfeited to Cypress. (Tr. 696-697). Mr. Nulty did not know how the residual bonus funds worked, and would have to read the spec. (Tr. 698). He knows that the deductions are forfeited if the employee is terminated before the payout date. (Tr. 701).

Mr. Nulty did not know whether it was required to get employee consent to participate in the DBP in the United States. He assumed that there are laws, but he did not know what they were. He has made no independent conclusion that the DBP is legal. (Tr. 696, 701). He did not know all aspects of the spec, but stated that a person who has "skin in the game" has contributed something he owns, or has something to lose, some possibility of loss and gain. (Tr. 706-707). Mr. Nulty stated that people behave differently when they have their own property in a project, when they have skin in the game. (Tr. 708-709). Dr. Rodgers felt that the DBP increased the incentive to work harder, and make a project come out on time. (Tr. 710).

Mr. Nulty did not know whether an employee who did not consent to be in the DBP would lose his job. He was not aware of any opt out provisions for Cypress employees in Ireland, and did not know if U.S. employees had the ability to opt out of the DBP. (Tr. 713, 716).

Mr. Nulty felt that Mr. Dietz raised the issues and his concerns about the legality of the DBP positively. (Tr. 717). When asked if there was a formal investigation of his allegations in his memo to Mr. Dietz, Mr. Nulty stated that he was only aware that after he got Mr. Dietz's notice to resign, he gave his memo to the Legal department for them to look at. (Tr. 722). There was no executive management review. (Tr. 723).

Mr. Nulty acknowledged that there was no conclusion that there was no core violation that would have been grounds for termination, and no discussion of any consequences. Nor was there any time limit on how long his memo would be in Mr. Dietz's file. (Tr. 724). He thought that he had required other employees to write a memo on what they did wrong, and how they

planned to correct it, but could not recall any specific memos. He was asked to search for similar memos; he did, and provided them to his attorney. (Tr. 726, 729).

According to Mr. Nulty, the project was not late in the end because of any mistakes by Mark Fee, who took over as product manager. There was no discipline issued in connection with the project. (Tr. 743).

Mr. Nulty stated that it may have been acceptable for Mr. Dietz to respond to his June 4 memo by stating that he did nothing wrong. He stated that he would want further closure, and would not just stop there. (Tr. 743-744). According to Mr. Nulty, there were no consequences to Mr. Dietz for the June 4 memo, and no reduction in his bonus. Mr. Dietz was a valued employee. (Tr. 748, 752).

Erica Gustafson

Ms. Gustafson has worked for Cypress for 7 years, in Washington. She is the HR rep for her assigned business unit. She has worked for the Quality Organization under the executive Vice President Sabbas Daniel, and Software under Alan Hawse. She worked with Mr. Nulty as the HR rep for the program management group, which she took over in May 2013. (Tr. 755-756).

Ms. Gustafson never met Mr. Dietz. In late May 2013, she conferred with Mr. Nulty about a performance memo regarding Mr. Dietz. (Tr. 757). At the time, she was taking over as the business partner for the quality organization, and Kim Kubiak-Mota had forwarded an email that Mr. Nulty sent her. (Tr. 758, RX 14). She met with Mr. Nulty and Ms. Kubiak-Mota to review the memo that Mr. Nulty had drafted. (Tr. 759). Ms. Kubiak recommended adding the first three sentences that are underlined, and she recommended the last sentence. (Tr. 760).

Ms. Gustafson stated that Ms. Kubiak referred to another document used for corrective action on another issue, involving employees who were part of an investigation. (Tr. 761-762, RX 41). She stated that there was no discussion of any further corrective action, or any financial consequences. They did not discuss putting a time limitation in the memo. She stated that the statement regarding "any future infraction" was standard HR language, which they got from the Operations and Standards of Conduct Warning Spec. (Tr. 763, RX 36). She referred to a warning form used for step level warnings, primarily in the manufacturing environment; Ms. Gustafson stated that this is standard HR language that they use in corrective action documents. She suggested using the language about additional incidents in the future. (Tr. 764).

Ms. Gustafson sent her suggestions to Mr. Nulty by email. Mr. Nulty sent a followup email, asking about the distribution, and whether it was appropriate to include Mr. Todoroff and Mr. Rainer. She instructed him to remove them, since it was a performance related memo. (Tr. 765-766). After they discussed the memo, and went over it, Mr. Nulty referred to the fact that Mr. Dietz had sent an email about his concerns with the DBP. This was separate from the memo that they were drafting. (Tr. 767).

Ms. Gustafson stated that a corrective action is similar to a disciplinary action, which is simply an instruction to ensure that they are making changes to an employee's behavior. (Tr. 769).

Eric Balzer

Mr. Balzer was the CEO and a Board Member of Ramtron. He became a Board Member in 1998, and joined as CFO in 2005. He was the presiding officer during the acquisition or merger with Cypress. (Tr. 773).

Mr. Balzer stated that Mr. Dietz joined Ramtron when he was the CEO. He interviewed Mr. Dietz principally for a program management position. Mr. Balzer liked his drive in joining the Marines, and getting his college and law degrees, but mostly the fact that he was a drill instructor. He figured that this experience would be good to take the Ramtron employees from being kind of loose and unstructured, to getting them focused on the mission and understanding their job. (Tr. 775-776). Mr. Balzer thought that drill instructors in the Marines were probably even better than those in the Navy, and maybe even harsher, and could deal with a broad range of people. (Tr. 777).

Mr. Balzer described a schedule slip as missing certain milestone dates. At Ramtron, he would have "come to Jesus" meetings to help the employees understand that this was unacceptable, and to coach them through how to deal with it in the future. (Tr. 778).

Mr. Balzer stated that they did not use in house legal counsel, and Mr. Dietz did not have responsibilities for intellectual property law. He had an interest in intellectual property, but he was hired as a program manager. (Tr. 773, 781). Mr. Dietz stated that he was hoping to get into Intel's intellectual property group, but they outsourced it; his interest was to go in that direction. If Mr. Dietz was accepted in the Colorado Bar, and worked with Ramtron for 5 to 10 years, that might be enough experience where he could start to pick up some work. He did not recall Mr. Dietz giving him legal opinions on intellectual property, or to Mr. Moran either; Mr. Moran always used outside intellectual property attorneys. (Tr. 782).

Mr. Balzer did not remember signing Mr. Dietz's offer letter, reflecting his dual role position of product development program manager and intellectual property attorney. (Tr. 784, CX 34).

Thomas Surrette

Mr. Surrette is the executive Vice President of Human Resources for Cypress, in San Jose, California. He reports directly to Dr. Rodgers. He has worked for Cypress for about five and a half years. (Tr. 786-787).

Mr. Surrette stated that he has a very professional relationship with Mr. Nulty, whom he described as exceptionally disciplined, organized, detail oriented, and process driven. (Tr. 788).

Mr. Surrette has one on one meetings with his direct reports and employees. It is fairly routine to engage in counseling and corrective actions if necessary. He stated that virtually every meeting involves a discussion of some issue or problem, and he works with the manager and employee to work through the issue, and take corrective actions and improvements. (Tr. 794). Mr. Surrette stated that it was very important to expose issues quickly, and admit to them, so that a cross functional team can work together to address the problem. Solving problems quickly is a core value, and it requires prompt disclosure of bad news. A failure to disclose the truth is a violation of the company core values. Mr. Surrette never heard of a policy that Dr. Rodgers was not to be contacted without approval; this would be counter to their core values, and how they do business. (Tr. 793, 795-796).

Mr. Surrette stated that the Cypress whistleblower policy is a process for employees who are concerned about some type of conduct or behavior to complain or report an incident directly to the Board of Directors, bypassing management, HR, or Legal, if they feel those avenues are not appropriate. The hotline is monitored, and calls are reported to the audit committee and the legal department. (Tr. 798-799). The policy is set out on posters, and during new hire orientation, and in a monthly newsletter. There are about one or two complaints a year. (Tr. 802). Anything having to do with fraud would be escalated directly to the audit committee, and anything related to state, local, or federal laws would be handled by the Vice President of legal. (Tr. 804).

Mr. Surrette contributed to the writing of the DBS and to the implementation of the policy when it was launched in 2010, and is a member of the Design Bonus Review Board. (Tr. 805). His primary contribution was to implement the policy where Cypress contributes the pay in for new employees, which protects their cash flow until their reduced salary kicks in about 18 weeks later. He recommended this policy and got approval for it. He also prepared some of the FAQs. (Tr. 805-806).

Mr. Surrette stated that the DBP was vetted legally; he consulted with the Cypress legal team, and was convinced that they had sound legal opinions confirming that the DBP was legal as implemented. He stated that it is a global policy, and there has never been a legal challenge. (Tr. 810).

Mr. Surrette stated that the engineers working as a team on a project participate in the DBP. They are all salaried professionals. The employee contributes 10% of his "former base pay" before he was a participant in the plan, plus a portion of his bonus, from 50 to 100 percent of his bonus, depending on the bonus plan. The combination is the pay in. (Tr. 811).

According to Mr. Surrette, the executive staff felt that the employees would take the DBP very seriously, because there is a pay in. It is critical for the company's success, and is a significant change from previous bonus plans, which typically guarantee some of the base pay, with some level of upside. Now, the base pay is being reduced, but there is a substantial upside. The employee has skin in the game. (Tr. 812). Although the employee now has a lower base pay, there is a substantially larger upside potential on the variable pay, which is performance based. He would probably not use the term "invested" in the plan; he would not agree that they were taking money from the owner for the contribution. The employee now has a lower base

pay, with a higher bonus component. The bonus component is not earned until the requirements for the payout are completely accomplished. (Tr. 813).

Mr. Surrette stated that the simplest form of the payout is pay in times the incentive multiplier, which is a function of the performance to the schedule, the earned man weeks. The minimum is 0.2, where the payout is only 20 percent of the pay in. If the project is ahead of schedule, the incentive multiplier can increase to 5 times the pay in. (Tr. 814). The contributed money is pre-tax. (Tr. 815).

According to Mr. Surrette, the payout terms are well defined in the specs, and require the employee to be employed on the payout date, which happens about six weeks after the end of the quarter. He stated that it is not viable to allow people to opt out of the DBP; it would defeat one of the core purposes of the program. The DBP was created to accomplish the primary goal of making Cypress more successful by improving performance to the schedule. Employees who deliver improved performance to the schedule are extremely well compensated. Mr. Surrette acknowledged that the legal opinion in Ireland was different than in the United States. (Tr. 818). The employment laws are different, and they had to allow the employees to opt in or out. But once an employee opts in, they are in permanently for the rest of their employment with Cypress. (Tr. 819). In the U.S., a project cannot be launched without the employees signing the design governing spec. (Tr. 820).

There is a requirement that a project plan be well defined and documented, for the project and the employees who are working on the team and included in the DBP. This level of management rigor did not exist at Ramtron. There was no way of knowing which employees would be in the DBP at the time of the acquisition. It was impractical to implement the DBP at that time, and they did not include the language about the DBP in the Ramtron offer letters. (Tr. 822).

When there are design specifications, and people are selected for projects, they are informed of the DBP. The Ramtron employees who did want to go to Cypress were entitled to certain benefits with respect to accelerated stock options; if they accepted the Cypress offer, they would not give up their pre-acquisition rights. Recognizing the differences in culture, and that some employees would not be sure if Cypress was right for them, as well as other unknowns related to the DBP, it was possible that some of the Ramtron employees would be anxious or concerned. The offer letters had a clause saying that Ramtron employees were able to resign in a year and still retain benefits.[13] (Tr. 824).

According to Mr. Surrette, the DBP was not designed to make the company money through employee contributions; they expect the payout to be greater than the pay in. There was training on the DBP at the time of its launch, with David Still and Ryan Wellsman making presentations. (Tr. 830-831). Mr. Surrette stated that the DBP is not loved by all of the employees, and he has been told that employees would prefer not to have it. He has not gotten questions about how it works, or heard any concerns about its legality. (Tr. 832-833).

[13] The former Ramtron employees could only invoke this clause if they met certain conditions.

Mr. Surrette did not think that Mr. Dietz's April 12 memo was clear on his contention. Mr. Surrette concluded that it was a question about compliance with state or local laws, and in the whistleblower spec, it would fall under the responsibility of the legal department for investigation. (Tr. 834). He alerted the legal team, and got confirmation that they would lead the investigation. It seemed that Mr. Dietz had a difference of opinion on the legality of the bonus program, and thus it was an issue to be handled by the legal department. It seemed to Mr. Surrette like a non-event, and once he handed it off to the legal department, he did not see any need to follow up with Mr. Nulty, because no action was required of him. (Tr. 835).

Mr. Surrette stated that there was nothing he read in the memo that constituted fraud under the global whistleblower policy. If there were, he would have escalated it to the audit committee. (Tr. 836).

Mr. Surrette stated that Mr. Nulty was not involved in any investigation of Mr. Dietz's allegations. He was aware that Ms. Valenzuela followed up, and she confirmed that she had a conversation with Mr. Dietz, and they discussed the issue. He also got email confirmation from Mr. Nulty that Mr. Dietz had acknowledged that the meeting happened, and he needed to think about it more. No one resented Mr. Dietz, or suggested any course of action. Ms. Ratliff did not escalate any concerns about the DBP or its legality (Tr. 837-838).

Ms. Kubiak told him that between her and Ms. Gustafson, they advised Mr. Nulty to include language in his memo to Mr. Dietz, requiring him to write a memo explaining what he did wrong and what could have been done, and referring to possible future disciplinary action. He agreed with that advice, and stated that it was a fairly common performance management tool used at Cypress in the past. (Tr. 839).

According to Mr. Surrette, a PGAP is more severe than the memo that was sent to Mr. Dietz. There is much more rigor, and financial consequences. The memo, however, requires a fairly informal free form response; the employee can choose the format, length, and level of detail, and respond much less formally. The memo is kept in the employee's file, with other sources, as documentation gathered over an entire year, and when it is time to do performance reviews, the managers have access to get a proper perspective on performance over the entire year, not just recently. (Tr. 841).

Mr. Surrette stated that the memo sent to Mr. Dietz is one of the performance improvement tools used in HR. He would absolutely not characterize it as career ending; it is just the opposite. It is an opportunity for the employee to learn and improve, and a core value of managing, admitting to, and solving problems quickly. It is an opportunity for an employee to respond and resolve an issue. (Tr. 842).

According to Mr. Surrette, there was no discussion about starting to collect evidence to terminate Mr. Dietz. Mr. Nulty does not have the authority to unilaterally terminate an employee; it requires HR approval and involvement. Anything that is controversial is escalated to him. He does not approve every termination, but he is aware of all of them. Participation by the HR business partner is required. (Tr. 843-844).

When Mr. Surrette read Mr. Dietz's June 5 memo, it was clear that there were two major issues involved. The first was Mr. Dietz's resignation. The second was the link with the April discussion of the legality of the DBP. Mr. Surrette started to gather information on Mr. Dietz's response on the merits of Mr. Nulty's memo, and also got legal advice regarding the link to the whistleblower complaint. (Tr. 845). Reading Mr. Dietz's memo was the first time the thought of retaliation occurred to him, and he sent an email to Ms. Joaquin to meet and discuss. (Tr. 846).

Mr. Surrette had already started his own investigation to review the program management spec and the status documentation, to independently verify what Mr. Dietz was claiming. He was satisfied that there was merit to Mr. Nulty's reprimand and memo, based on the data objectively available on the systems. It was completely fact based, with nothing that was subjective. Mr. Surrette thought that it was a fairly measured response, but clearly Mr. Dietz disputed the facts. He concluded that they needed a meeting with all involved stakeholders to get to the bottom of it and understand what was happening. (Tr. 847).

Late on June 6, Mr. Surrette requested a meeting with Mr. Dietz, Mr. Nulty, Mr. Hoehler, and the HR business partner in Colorado Springs, to try to do additional fact finding in parallel with his independent research efforts.[14] No one said anything about the need to terminate Mr. Dietz, and seize the opportunity to get him out. If the plan was to terminate Mr. Dietz, Mr. Hoehler would not be in the meeting, because anyone who is not a direct manager or in HR is never allowed in a termination meeting. (Tr. 848). If this were a termination meeting, they would have to initiate the well defined termination process, cutting off access to accounts, and preparing final payroll statements and a final check. None of that was initiated. (Tr. 849).

Mr. Surrette stated that the instruction to sign off on the memo by him and the executive Vice President of HR is typically how they handle this type of memo. Mr. Surrette is independent and objective, and can ensure employee fairness. It also makes sure that the employee realizes that this type of performance can have a big impact on the company. (Tr. 850). They want the employee to think carefully about it, and copying the executive Vice president typically results in a higher quality response. No one was motivated to retaliate against Mr. Dietz, and there were no instructions to do so, or any causal linkage. The memo would have been given to Mr. Dietz regardless of his April complaint; it was an independent event based on performance problems. (Tr. 851-852).

According to Mr. Surrette, the primary purpose of the meeting on June 7 was to listen and understand the concerns more clearly, and determine a resolution. (Tr. 855).

Mr. Surrette discussed the Turnaround Process, which is how a manager should respond when a valued employee resigns. The manager should react quickly, and make it a top priority to put together a strategy, and work on retaining the employee. (Tr. 856). Mr. Surrette did not give explicit instructions to Mr. Nulty about reacting immediately, because Mr. Nulty already was coming to him with the email. People were reacting promptly, gathering data, integrating with legal, and following the spirit of the process. Mr. Surrette read Mr. Dietz's notice to terminate, which said that his last day would be July 1. He thought that scheduling a meeting for

[14] Although Mr. Surrette was vague, it appears that his "investigation" concerned the merits of the claims in Mr. Nulty's memo, not the issues raised by Mr. Dietz in his April 12, 2013 memo.

June 7 was adequate time before July 1. (Tr. 857). But he found out on June 7 that Mr. Dietz decided not to attend, and made that his last day. (Tr. 858). He does not understand how Mr. Dietz could have concluded that the June 7 meeting was to terminate him. It absolutely was not the purpose of the meeting, due to the attendance at the meeting, the lack of preparation, and the lack of any discussion of termination. (Tr. 859).

Mr. Surrette stated that an employee's salary is recorded in PeopleSoft. If the salary is $100,000, and the employee is in the DBP, it will be updated to show $90,000. (Tr. 860). Mr. Surrette wrote RX 49, which has no mention of the DBP in the FAQs. (Tr. 865). He does not recall if he chose the word "contribute" with respect to the ten percent of salary. He claimed that it was not actually salary, because the salary was reduced. (Tr. 870).

He stated that if an employee decided that he did not want to work on a project they were assigned to, which required their signature on the DGS, they would not be fulfilling their duties. He would have a discussion with management and HR, and one option would be to apply for an internal transfer to a job that did not participate in the DBP. Or the employee could choose to work somewhere else. (Tr. 868).

Victoria Valenzuela

Ms. Valenzuela is the General Counsel and Vice President of legal affairs at Cypress in San Jose, California. She has worked there for the last six or seven years. (Tr. 874). She stated that Ms. Joaquin is a Labor and Employment Counsel; she is a contract attorney. (Tr. 875). Ms. Valenzuela reports to Thad Trent, the CFO, with a dotted line report to Dr. Rodgers. (Tr. 877).

According to Ms. Valenzuela, she has never been asked to compromise, including with the DBP. She would not do anything to jeopardize her professional reputation. (Tr. 877, 879). She was on the initial team that helped to implement the DBP. (Tr. 879). According to Ms. Valenzuela, Dr. Rodgers' expectation was that they would figure out how to implement it, and if they had problems, they would bring them to him. (Tr. 880). She stated that they used outside counsel to advise them, and to scour the DBP for compliance. The firm of Paul Hastings helped with the implementation. (Tr. 881).

Ms. Valenzuela is the owner of the global whistleblower spec. She is responsible for updating it. (Tr. 883, RX 28). The hotline is monitored by a third party vendor, Global Compliance; she is responsible to make sure that the hotline is always working and they receive regular reports. (Tr. 885). They receive quarterly reports, at most, but a lot of quarters, none. They get two to three reports a year, which are presented to the audit committee about meetings. (Tr. 886). A hotline call about legal compliance on the state or local level would be in her bailiwick, and she would not necessarily forward it to the audit committee; fraud complaints go to the audit committee. (Tr. 887). She stated that since 2010, there have been no hotline complaints about the DBP. There are also other ways to report suspicious activities, by coming directly to her, to HR, or to a manager. (Tr. 888).

Ms. Valenzuela stated that Mr. Dietz did not send his complaint directly to her, although he could have. (Tr. 889, RX 32). She first heard about it from Mr. Nulty; he had already

forwarded her the email, but she talked with him before she saw it. Mr. Nulty explained that one of the managers had contacted him, and had some questions about the DBP. She took this to mean that Mr. Dietz had questions about the legality of the plan, and that he was getting questions from the employees. (Tr. 890). Her interpretation was that Mr. Dietz needed assistance. (Tr. 891).

Ms. Valenzuela told Mr. Nulty that she would talk to Mr. Dietz. She got the email, and asked Ms. Joaquin to get involved. Her initial understanding was that Mr. Dietz had legal questions, and wanted to understand the DBP. She assumed that he just needed help with messaging, and answering employees' questions. (Tr. 891). When she saw the email, she was surprised to see the word "ethical," but she still thought that they would be able to talk to Mr. Dietz about any questions he had. She asked Ms. Joaquin to take the lead in the conversation. (Tr. 892).

Ms. Valenzuela did not think that the email needed to be forwarded. She had not yet spoken with Mr. Dietz, and was not fully apprised of the nature of his concern. It clearly had to do with questions of law, so her department would be the correct one to have the first interaction. But nothing jumped out at her about fraud; there were no accusations of fraud, but only simple legal questions. (Tr. 892).

Ms. Valenzuela was a little surprised at Mr. Dietz's need to ask for protection; she did not perceive there to be any significant concern. Nor was she alarmed by the fact that someone was asking questions. She stated that of course Mr. Dietz could avail himself of the whistleblower protection at any time. But it was not remotely needed, and this was an inquiry they were happy to deal with. She told Mr. Nulty that she would take care of it. (Tr. 893-894).

Ms. Valenzuela had originally told Ms. Joaquin to take the lead on going through and refreshing her memory about the institution of the DBP. But Ms. Joaquin told her that it was before her time, and she thought Ms. Valenzuela should come back in. Ms. Valenzuela had a few conversations with HR, and went through her notes from when they implemented the plan to refresh her memory, because she knew they had talked with counsel, and went through the legality. They were clearly comfortable with the DBP when it was launched. Ms. Valenzuela stated that they did not have a written legal opinion from the outside law firm, but she had notes and back and forth documentation on how they got there.[15] She also talked with HR to confirm and understand how certain things were being done. She wanted to make sure that HR agreed, and were still practicing under the same legal conclusion and advice that they got in 2010. (Tr. 895-896, 906-907).

Ms. Valenzuela had spoken with Mr. Dietz just after the Ramtron acquisition, when he introduced himself, and they had a brief conversation. He said nothing to her about legal positions, or a desire to become a lawyer with Cypress; they had no positions open. (Tr. 905).

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[15] Ms. Valenzuela did not specifically identify the "outside law firm," although she stated that Paul Hastings helped with the implementation of the DBP, and part of the reason that they consulted with Paul Hastings was that, like firms such as Morgan Lewis, they are "common go-tos" for programs that cross international borders. (Tr. 881,929).

There were no allegations of fraud in Mr. Dietz's letter. It was clear to her that he had questions about the DBP and its legality, and he had provided excerpts from code sections. She thought it was clear that he probably just wanted to have a conversation, and understand the background. She had also been told that he was a manager, and had people on his design team, so if he had messaging issues, they could help him come up with a response. (Tr. 907).

Ms. Valenzuela stated that there had been training for employees on the DBP and how it worked. She felt that she could do two things for Mr. Dietz – she could start to explain why they were comfortable with the legality of the plan, and she could offer herself as a resource for the employees. (Tr. 910).

The meeting with Mr. Dietz was on April 22. One of the things she tried to explain to Mr. Dietz was "disclosure" and information, and making sure the employees knew and had the opportunity to make a choice. Mr. Dietz kept referring to the DBP as being a compulsory deduction, and a condition of employment; the employees were given an offer letter with a salary, and then the game was changed. She told him that they disclose the fact that employees are on the DBP as early as the offer letter, and they continue to educate them. At all points along the way, the intent is to explain it and make sure they understand. They have the employees acknowledge that they have read and understand it, and they are always available for questions. (Tr. 912-913).

According to Ms. Valenzuela, Mr. Dietz said several times that Cypress was just taking the deductions away, as though they were surprising the employees. But she told him that when you interview for a position that will be part of the DBP, your offer letter shows your salary, that you will be part of the plan, how it works, and your other benefits. The employee makes the decision to accept the position or not. For the people who were already at Cypress, it was explained at the time the DBP was implemented. It was not like they one day just started the program without warning. The terms of the plan were explained, and there was plenty of notice before anything started. Ms. Valenzuela stated that one of the concepts she tried to drive home was that they were not surprising people; their intent was to make sure they were fully informed, so they could make that choice. (Tr. 913).

Ms. Valenzuela stated that Mr. Dietz expressed concerns about the DBP during the call, and asked to have them addressed. (Tr. 919). She was trying to help him without waiving the privilege with respect to their legal opinion about why the DBP was okay. She was trying to explain to him, in concepts, about why they were comfortable, the diligence they did, the effort they made, and the fact that they consulted with outside counsel, so that he could feel comfortable that a significant amount of work went into ensuring that the plan was legal. She told Mr. Dietz that they did not take this lightly; they had a cross-functional team to make sure they thought of everything. Her end goal was to make Mr. Dietz comfortable that this was not something that they just launched without any thought. (Tr. 920).

Ms. Valenzuela tried to tell Mr. Dietz that she was not going to pretend that she had read through the entire code. She told him that the statutes he cited did not necessarily apply, and that they were not all of the applicable code sections. She was not in a position to review the code sections, and did not pretend to be a labor and employment expert; that was why she consulted

with outside counsel. (Tr. 921). Once Ms. Valenzuela made it clear that she was not prepared to discuss the statutes, because the entire statute was not there, and she had relied on outside counsel, she did not discuss the Colorado laws. (Tr. 928).

Ms. Valenzuela stated that Mr. Dietz was contending that the DBP required compulsory deductions, and the employee had no choice, Cypress was just taking their money. She talked to him about concepts like unearned income, and tried to send him in the right direction, because he was capable of doing research. She told him that these were concepts that allowed them to get comfortable, without going into details. (Tr. 922). She recalled that Mr. Dietz talked about conditions of employment, effectively trying to say that Cypress was forcing the employees to do it. She talked about at will employment, and that they all had a choice. She pointed out that the statutes he sent were wage statutes, when the persons on the plan were salaried, exempt employees. (Tr. 924).

Ms. Valenzuela wanted to know the gravity of the questions about the DBP, and who she needed to get more information to. She asked Mr. Dietz if additional training would be helpful, and he said that was a good idea. She told him that she would talk to Mr. Surrette about additional training. It was her understanding that Mr. Dietz was satisfied. She sent an email to her team, that it was a good conversation. (Tr. 927, 930-931, RX 33).

Mr. Nulty told Ms. Valenzuela that Mr. Dietz had told him that it was a good meeting, and that he would think about it. She thought that this was good, and it meant that he had picked up on where she was trying to get him, and was thinking about what she told him. She took it as a good sign. Mr. Dietz also sent her an email thanking her for talking with him. (Tr. 932, RX 34).

Ms. Valenzuela had the impression that people were really concerned about the reduction in salary, and she wanted to show them some performance results to alleviate these concerns. She recommended a training session for the former Ramtron employees. She wanted to make it clear that they were not concerned about threats, and had no hesitation in talking about or reassuring people about the legality of the DBP. She was willing to be as transparent as they could. (Tr. 936).

Ms. Valenzuela stated that the "Tim dynamic" in her email means that, if she took everything Mr. Dietz told her as the truth, then there was significant confusion in the Colorado office. This surprised her, because she had not heard anything about it. But she did not pretend to know the organizational structure in Colorado, and she wanted to know if Mr. Dietz was uniquely positioned to be hearing about this when they were not. Either there were a lot of people not comfortable with the DBP and Mr. Dietz was coming to her on their behalf, or it was just Mr. Dietz with concerns. She needed to know whom to address. (Tr. 937-938).

Mr. Dietz sent her an email about passing the Bar, and she congratulated him. She heard no further communication from him about the DBP, which she took as a good sign, because he would have come back if he were still confused. (Tr. 939).

Ms. Valenzuela got a copy of Mr. Dietz's June 5, 2013 memo from Mr. Nulty, who set a meeting with her the same day to discuss it. (Tr. 940, RX 23). She did not have any context for it, and was surprised when she read it. She sent it to Ms. Joaquin to coordinate with HR. Ms. Valenzuela noted that an allegation of retaliation would set off a red flag, as would a resignation or demand for payment. She needed to think about a few things, and look at the retaliation piece, to understand whether she was okay with having a conversation with Mr. Dietz. (Tr. 941-942). She knew that Mr. Surrette would look at the retaliation part, because it was an employee relations issue. (Tr. 943).

Ms. Valenzuela met with Mr. Nulty and Ms. Joaquin at 2:00 that afternoon, and the next morning with Mr. Surrette, HR, and Mr. Nulty. (Tr. 944). They discovered that Ms. Gustafson had been involved in writing the memo to Mr. Dietz, and that Mr. Surrette had suggested some language. (Tr. 947). It did not surprise her that Mr. Nulty had asked Mr. Dietz to write a response, to make sure he understood what had happened, and to capture the learning. (Tr. 947-948).

According to Ms. Valenzuela, she was absolutely comfortable with the lack of any connection between the April 12 memo and any retaliation. She stated that no one was even remotely upset with Mr. Dietz after he asked about the DBP. They all walked away assuming that he was comfortable, that they had answered his questions, and life went on. She had interactions with Mr. Dietz later, and he did not bring it up. She could not get there, or make a connection, and she was shocked; it made no sense. She could not see what motive they would have to retaliate based on Mr. Dietz asking about the plan; it was so far removed from reality. (Tr. 952). The internal team made a decision to sit down and have a meeting with Mr. Dietz on June 7. (Tr. 954-955).[16]

According to Ms. Valenzuela, the article on employee turnaround is not policy; it is a philosophy, and there is a spec which calls for the manager being involved in the turnaround process. The manager would not be involved if it were a termination meeting. It would be fairly common to have an HR rep at such a meeting. But Mr. Dietz resigned, and there was no need to discuss his termination. She recalled that there was some issue with Mr. Dietz's laptop, and the paperwork was not done for a termination. There was no opportunity to try a turnaround. She was not going to talk someone out of a career change. (Tr. 956-961).

EXHIBITS

Complainant's Exhibits[17]

CX-1

This is a copy of Mr. Dietz's application for single-client certification to the Colorado state bar, submitted to the Colorado Supreme Court, dated July 23, 2012.

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[16] Ms. Valenzuela was asked if there was a decision made to proceed with the turnaround process, and she answered that "There was a decision, yes. . . there was a decision to sit down and set a meeting with Tim, with Mr. Dietz, yes." (Tr. 954).

[17] The parties jointly agreed to classify the following Complainant's Exhibits as Confidential Business Information under 29 C.F.R. §70.26: 7, 8, 15, 16, 18, 21-29, 31, 36, 38-43, 47, 56, 59, and 60. They are marked with an "*".

CX-2

This is a copy of Mr. Dietz's request to resign from the Colorado bar, dated November 19, 2012.

CX-3

This is a Colorado Supreme Court character and fitness form, filled out and signed by Brian Todoroff on January 11, 2013, confirming Mr. Dietz's employment start date as new products program manager-2 at Cypress.

CX-4

This is a May 2013 letter announcing the completion of the 2013 Stock Focal Review Process, advising Mr. Dietz of the approved grant of stock options, as part of his total compensation. The letter is signed by Sabbas Daniel, Cypress Executive Vice President.

CX-5

This is a May 2013 letter informing Mr. Dietz that he earned his Q113 Quarterly PPSP Bonus, which was 80% of his target bonus. The letter is signed by Sabbas Daniel, Cypress Executive Vice President.

CX-6

This is Mr. Dietz's 90 day initial performance evaluation. It was digitally signed by Mr. Dietz on February 22, 2013. Mr. Dietz exceeded most expectations in the initiative/execution category. He met expectations in the problem solving category. He additionally exceeded all expectations in the quality category and exceeded most expectations in the teamwork/interpersonal skills category. With respect to future development, the review noted that Mr. Dietz was "off to a great start and is still on the learning curve of Cypress systems. He should document gaps in the integration process . . . so the process is improved next time and perhaps right now as Ramtron is going through it. It is good to have Tim on board."

CX-7*

This is a set of emails between Mr. Dietz and Mr. Nulty on April 12, 2013 concerning several issues Mr. Dietz raised about the DBP.

CX-8*

This is a set of emails between Mr. Dietz and Mr. Nulty on April 12, 2013 concerning several issues Mr. Dietz raised about the DBP.

CX-9

This is an internal correspondence from Mr. Nulty to Mr. Dietz dated June 4, 2013. The subject line is "(Confidential) Performance Issues Regarding the T20005 Three Week Schedule Slip."

Mr. Nulty stated that on May 28th he became aware of a three week schedule slip to the "Tapeout" milestone for the T20005 project during his meeting with Mr. Todoroff. As a follow-up, Mr. Nulty and Mr. Todoroff held a meeting with Mr. Dietz to review the slip. Mr. Nulty discovered three performance issues during the meeting:

1. The project status was allowed to go stale resulting in an automatic lockout from the PM system (stale is not updating the system in 10 days)
2. Mr. Dietz delayed escalating a kid soccer event until the May 29th meeting. In the meeting Mr. Dietz reported the event occurred three weeks ago and he became aware of it approximately Wednesday or Thursday last week. The event was not reported to BMT on May 28th nor was it included in the latest status report filed by Mr. Dietz (Friday, May 24th).
3. Mr. Dietz was unable to adequately explain the details behind the tapeout delay and did not know the critical path when asked how a 3 week delay could affect a tapeout date 14 weeks from now.

In a paragraph that appears to be inserted using track changes, Mr. Dietz was instructed to write a memo on what he did wrong and what he should have done. This memo must be signed by Mr. Nulty and the EVP of Human Resources. The memo and this correspondence would be included in Mr. Dietz's personnel file. Any future infractions would result in further disciplinary action, up to and including termination.

On the second page of the correspondence, Mr. Nulty informed Mr. Dietz that he failed to meet the requirement of knowing his schedule because he could not provide an answer on how the 3 week test program slip resulted in a tape out slip of 3 weeks fourteen weeks from now. Mr. Nulty added the following: "After the May 29th meeting I received an email from you that 'moving a few tasks around' eliminated the tapeout slip. This should have been determined days before."

CX-10

This appears to be a duplicate of the previous exhibit but with a subject line omitting the word "confidential."

CX-11

This is an email chain with the subject line "TR20005 WBS." On May 15, 2013, Mr. Dietz emailed Rainer Hoehler to follow up on a conversation the day before. He expressed several concerns regarding timeliness and shutdowns. First, he worried about pointing out to the team in meetings that tasks are late while seeking input into how the team will get late tasks back on track. Secondly, he was concerned about having messaging getting stalled in committee. One of the metrics used by Cypress is the latency between when the MP becomes aware of the

program slips and when the issue gets raised up the management chain and within the team. Mr. Dietz suggested a protocol for the management committee to follow to deal with a time constraint. Mr. Dietz added that "there are larger problems affecting morale than holding performance to the schedule, but that is beyond my control."

Mr. Dietz forwarded this email to Mr. Nulty on May 15th. Mr. Nulty responded the same day, asking Mr. Dietz to set up a meeting on the matter and noting that "[y]our position is aligned with mine by the way."

CX-12

This is Mr. Dietz's internal correspondence, dated June 5, 2013, responding to Mr. Nulty's allegations and expressing his plans to resign from Cypress. It is addressed to Tom Surrette and contains the subject line: "Response to JEN-1181; Notice of Intent to Terminate Employment; Demand for Payment pursuant to the Ramtron International Corporation, Rain Acquisition Corporation and Cypress Semiconductor Corporation Merger Agreement [...]"

Mr. Dietz disputed Mr. Nulty's first allegation that the project status was "allowed" to go stale. Mr. Dietz referenced specific tasks that were behind deadlines, with him attempting to resolve those matters while also holding the top level milestone schedule. Further complicating Mr. Dietz's efforts was the unannounced reassignment of a test engineer from his unit to work on RMAs. According to Mr. Dietz, the test engineering manager admitted concealing the kids soccer event at the May 29th meeting. Mr. Dietz never received a recovery plan from the PE/TE group for the shutdown meeting but took the initiative to move tasks around to resolve the schedule slip. At this time, Mr. Dietz was locked out of the system by one of the company's "killer applications," which only exacerbated the problem: "I was doing everything I could to contain issues that were snowballing."

Mr. Dietz conducted a search on the company's server and found that Mr. Nulty did not issue performance memos for numerous other projects that were as much as 90 days stale. According to Mr. Dietz, this was evidence of Respondent's "selective enforcement of otherwise unenforced standards, which appear to me as an unlawful retaliation to the Whistleblower/Ethics complaint that I raised on April 12, 2013."

Mr. Dietz also disputed Mr. Nulty's second allegation that he delayed escalating the kids soccer event until the May 29th meeting. Mr. Dietz insisted that as soon as the affected employees returned to work after the Memorial Day weekend on May 28th, he confirmed that a kids soccer situation existed and he immediately brought this up to the business unit manager, Rainer Hoehler, both by a personal visit to Mr. Hoehler's office and by email. While Mr. Dietz was aware that that the specs specify the need to escalate events in real time, he also thought it was prudent to investigate and verify before raising red flags.

Mr. Dietz additionally disputed Mr. Nulty's third allegation that he did not adequately explain the details behind the tapeout delay. Mr. Dietz could not determine what "adequately explain" meant. Moreover, during the May 29 meeting, he suggested doing a deeper dive on the

critical path but was interrupted by Mr. Nulty. On that basis, he was denied any opportunity to explain the details behind the "now resolved tapeout delay."

Mr. Dietz noted his refusal to write a memo on what he did wrong and what he should have done: "I will do no such thing, because I have done nothing wrong, and this requirement is nothing more than bullying with legal implications. Therefore, my response is that I am terminating my employment at Cypress." (emphasis in original). He agreed to stay onboard until July 1st as a professional courtesy.

Finally, Mr. Dietz demanded payment under the September 25, 2012 amendment, which specified several conditions for the vesting of stock, following the Ramtron-Cypress merger. According to Mr. Dietz, "[b]y requiring me to adopt and participate in DBP at Cypress, though not financially, Cypress has failed to honor Ramtron policies as they apply to me."

CX-13*

This is Cypress's Design Bonus Plan, Document No. 001-58687 Rev. *L.

CX-14

This is a copy of Cypress's Global Whistleblower Policy. The document outlines several channels through which complaints can be made and received. Section 2.11 notes that all employees are responsible for cooperating in the investigation of any complaints in which their assistance is requested. Section 2.12 notes that all employees, especially supervisors and managers, are responsible for ensuring that no retaliation of any form is taken against an employee who reported conduct under this policy, or an employee who cooperates or assists in an investigation of conduct under the policy.

CX-15*

This is a copy of Cypress's Program Management Best Practices Spec.

CX-16*

This is an excerpt of the TR20005 (2Mb FRAM) New Product Plan, version 001-85975 *B.

CX-17

This is a copy of an email sent from Mr. Dietz to Rainer Hoehler and Mark Fee on May 22, 2013, with the subject line: "TR20005 Pre-Shutdown Warning; milestones slipping (Project Rev 102)." Mr. Dietz also forwarded the email to Mr. Nulty and Mr. Todoroff on the same day. He alerted everyone of the pre-shutdown warning and flagged a milestone slip as a warning in the PM system. He noted several changes to the project file to accommodate forecast dates and attempt to avoid a formal shutdown warning. Mr. Dietz wrote that "the changes are somewhat cumulative, but each one pushes milestones separately."

CX-18*

This is a copy of Cypress's Project Task List.

CX-19

This is an email from Mr. Nulty to Mr. Dietz on April 24, 2013. Mr. Todoroff and Balu Sivaraman were also copied on the email. The subject line of the email is "hot; Invalid waiver not following spec 00-00017." Mr. Nulty informed Mr. Dietz that this type of waiver requires a memo notification and an electronic signature, with approval from a director or higher level supervisor. The memo Mr. Dietz submitted did not have the proper signature and Mr. Nulty instructed him to resubmit it. The email referenced John Groat's waiver request for a kids soccer event on FM33256, where Mr. Groat brought attention to a customer lines-down situation that required moving a resource from the TR20005 schedule.

CX-20

This is copy of an internal correspondence from Mr. Dietz to Rainer Hoehler and Brian Todoroff on May 2, 2013, with the subject line "TR20005 2Mb Shutdown Warning." Mr. Dietz noted that certain tasks, including tasks in the critical path, were behind schedule and would push milestones if not completed immediately. The shutdown would include all engineering activities from design tools to product and test engineering.

CX-21*

This is a memo from Mark Fee to Rainer Hoehler, dated August 13, 2013.

CX-22*

This is a memo from Mark Fee to Rainer Hoehler, dated August 23, 2013.

CX-23*

This is a memo from Mark Fee to Rainer Hoehler, dated September 6, 2013.

CX-24*

This is a memo from Mark Fee to Rainer Hoehler, dated September 23, 2013.

CX-25*

This is a memo from Mark Fee to Rainer Hoehler, dated October 7, 2013.

CX-26*

This is a memo from Mark Fee to Rainer Hoehler, dated November 20, 2013.

CX-27*

This is a memo from Mark Fee to Rainer Hoehler, dated December 1, 2013.

CX-28*

This is a memo from Mark Fee to Rainer Hoehler, dated January 22, 2014.

CX-29*

This is a memo from Mark Fee to Rainer Hoehler, dated January 31, 2014.

CX-30

This exhibit includes Mr. Dietz's 90 day performance evaluation, and annual performance evaluations for seven Cypress employees for January through December 2012, in Oregon, India, and Washington, covering January 2012 to December 2012.

CX-31*

This is a memo from Mr. Nulty to Badri Kothandaraman, dated June 11, 2012. This exhibit also includes subsequent memos from Mr. Nulty on June 13, 2012 and July 8, 2012.

CX-32

This is a copy of T.J. Rodgers' February 24, 1988 letter to Vice Presidents and Managers, "What to do When a Valued Employee Quits." It was published in the July-August 1990 issue of the Harvard Business Review. It encourages Cypress staff to react immediately and to pay close attention to the needs of an employee who expresses his or her intention to resign. Dr. Rodgers stated "I realized I have never formally stated our policy on resignations. Here it is:"

CX-33

This is Respondent's position statement to the OSHA investigator handling Mr. Dietz's complaint, dated September 16, 2013.

CX-34

This is an email from Respondent's counsel to Mr. Dietz, dated February 11, 2014 concerning outstanding discovery.

CX-35

This is a copy of Respondent's Third Supplemental Responses to Complainant's First Set of Requests for Production of Documents.

CX-36*

This is an undated list of software fixes.

CX-37

This is an email chain between Victoria Valenzuela (formerly Victoria Tidwell), James Nulty, and several other management staff at Cypress. On April 27, 2013, Ms. Valenzuela emailed Mr. Nulty, noting that she that she preferred a one-on-one call with Mr. Dietz to address his concerns. Mr. Nulty replied the same day, indicating his agreement. On April 22nd, Mr. Valenzuela followed up with an email to Mr. Nulty, Mr. Surrette, and Ms. Joaquin. She stated that she completed her call with Mr. Dietz and concluded that an information session on DBP was needed in Colorado. She recommended highlighting how the program worked as well as its past performance. She noted that HR and Legal should be present: "Normally, I would not include us, but the legality of the program is clearly a topic of conversation there (which I think Tim is partly responsible for by the way), so I want to give the clear impression that we are not afraid of threats from a legal perspective." She also requested a quick conversation that day "to understand the Tim dynamic."

CX-38*

This is a memo from Ryan Wellsman to Paul Keswick, dated February 4, 2013, with the title "DBRB Q412 Payout Review."

CX-39*

This is a set of printouts entitled Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 10, 2013.

CX-40*

This is a set of printouts entitled Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 18, 2013.

CX-41*

This is a set of printouts entitled Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 22, 2013.

CX-42*

This is a set of printouts entitled Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 24, 2013.

CX-43*

This is a set of printouts entitled Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 30, 2013.

CX-55

This is a copy of Complainant's Interrogatories.

CX-56*

This is an affidavit of Mr. Dietz in support of Complainant's Motion for Summary Decision.

CX-57

This is another copy of Complainant's Interrogatories.

CX-58

This is a copy of Complainant's Combined Motion for Summary Decision and Opposition to Respondent's Motion for Summary Decision.

CX-59*

This is a memo from Ryan Wellsman to Paul Keswick, dated June 3, 2013.

CX-60*

This is a printout of Cypress's A-10 Principles of Program Management.

CX-61

This is a copy of Mr. Dietz's employment offer letter and accompanying instructions from Cypress, dated November 2, 2012.

CX-62

This is Mr. Dietz's pay receipt from Cypress, covering his employment from April 1, 2013 to April 14, 2013.

CX-64

This is a chart summary of Mr. Dietz's financial awards and stock options as of June 9, 2013.

CX-65

This is Cypress's New Hire Action Item Checklist for U.S. Regular Employees. It was signed by Mr. Dietz, with the hire date listed as November 12, 2012. The checklist notes that all employees must review the company's whistleblower policy.

CX-66

This is a transcript of Mr. Nulty's March 13, 2014 deposition.

When asked what happens under the DBP if an employee who is in the plan refuses to participate, Mr. Nulty responded that he did not know (CX-66 at 20). Mr. Nulty described his involvement in the Design Bonus Review Board as approving the results that are presented by the design group on the quarterly payouts (*Id.* at 25). He was "not intimately familiar" with the calculations of how payouts under the DBP are made (*Id.*).

Respondent's counsel invoked attorney-client privilege when Complainant asked Mr. Nulty if he ever obtained a legal opinion on the legality of the DBP (*Id.* at 30-31).

CX-67

This is Mr. Dietz's offer of employment at Ramtron for the dual-role position of Product Development Program Manager and Intellectual Property Attorney. The letter specifies a base salary of $135,000, with a $10,000 signing bonus. The letter is dated April 12, 2012 and is signed by Mr. Dietz on May 14, 2012. It was signed by email by Eric Balzer.

Respondent's Exhibits[18]

RX-1*

This is a printout of a training course entitled "A-10 Principles of Program Management."

RX-2*

This is a document entitled Design Governing Specification and an accompanying handout called Design Governing Spec.

RX-3

This is an internal correspondence, dated February 7, 2013, from Mr. Dietz to Mr. Nulty, providing confirmation that Mr. Dietz read and understood the DBP as required by the Pre-PLRB checklist item # 71.

RX-4*

[18] The parties jointly agreed to classify the following Respondent's Exhibits as Confidential Business Information under 29 C.F.R. §70.26: 1, 2, 4, 7, 8, 15-18, 24, 29-33, 38, 40, 42 and 47. They are marked with an "*".

This is a copy of Cypress's Program Management Best Practices Spec.

RX-5

This is a set of email exchanges between Mr. Dietz and Mr. Nulty between March and May 2013.

RX-6

This is an email chain between Mr. Dietz and Mr. Nulty, with the subject line "Design Bonus; 65-06000, 00-00099." On April 12, 2013, Mr. Dietz emailed Mr. Nulty, indicating that in the next couple of meetings he would like to discuss the DBP as "I have some concerns from a legal and an ethical standpoint." Mr. Dietz expressed his belief that the DBP was not legal under either California or Colorado law. Mr. Dietz added that he was sending this inquiry pursuant to Spec 65-06000 (Code of Business Conduct and Ethics) and Spec 00-00099 (Global Whistleblower Policy). Mr. Dietz included the following recommendations:

1. Make participation in DBP an opt-in program, or
2. Rework the DBP to eliminate the 10% compulsory contribution from employee base pay.

Mr. Dietz also included references to the relevant California and Colorado state labor codes at the bottom of his email.

Mr. Nulty replied to Mr. Dietz the same day, confirming receipt and noting that he would have to review with others before responding.

RX-7*

This is an email from Mr. Dietz to Mr. Nulty, dated April 19, 2013.

RX-8*

This is a copy of an email chain between Mr. Nulty and Mr. Dietz, dated April 19, 2013,.

RX-9

This is an email sent from Mr. Nulty to Mr. Dietz on April 24, 2013. Mr. Todoroff and Balu Sivaraman were also copied on the email. The subject line of the email is "hot; Invalid waiver not following spec 00-00017." Mr. Nulty informed Mr. Dietz that this type of waiver requires a memo notification and an electronic signature, with approval from a director or higher level supervisor. The memo Mr. Dietz submitted did not have the proper signature and Mr. Nulty instructed him to resubmit it. The email referenced John Groat's waiver request for a kids soccer event on FM33256, where Mr. Groat brought attention to a customer lines-down situation that required moving a resource from the TR20005 schedule.

RX-10

This is an email chain with the subject line "TR20005 WBS." On May 15, 2013, Mr. Dietz emailed Rainer Hoehler to follow up on a conversation the day before. He expressed several concerns regarding timeliness and shutdowns. First, he worried about pointing out to the team in meetings that tasks are late while seeking input into how the tam will get late tasks back on track. Secondly, he was concerned about having messaging getting stalled in committee. One of the metrics used by Cypress is the latency between when the MP becomes aware of the program slips and when the issue gets raised up the management chain and within the team. Mr. Dietz suggested on a protocol for the management committee to follow to deal with a time constraint. Mr. Dietz added that "there are larger problems affecting morale than holding performance to the schedule, but that is beyond my control."

Mr. Dietz forwarded this email to Mr. Nulty on May 15th. Mr. Nulty responded the same day, asking Mr. Dietz to set up a meeting on the matter and noting that "[y]our position is aligned with mine by the way."

RX-11

This is a copy of an email sent from Mr. Dietz to Rainer Hoehler and Mark Fee on May 22, 2013, with the subject line: "TR20005 Pre-Shutdown Warning; milestones slipping (Project Rev 102)." Mr. Dietz also forwarded the email to Mr. Nulty and Mr. Todoroff on the same day. He alerted everyone of the pre-shutdown warning and flagged a milestone slip as a warning in the MP system. He noted several changes to the project file to accommodate forecast dates and attempt to avoid a formal shutdown warning. Mr. Dietz wrote that "the changes are somewhat cumulative, but each one pushes milestones separately."

RX-12

This is an email exchange between Mr. Nulty and Mr. Dietz. On May 29, 2013, Mr. Nulty emailed Mr. Dietz, with the subject line "TR20005 call." He was following up on a phone call and identified three concerns:

1. Schedule was allowed to go stale
2. Mr. Dietz delayed in escalating a kids soccer issues after he became aware of it
3. Mr. Dietz was unable to explain in sufficient detail whey the test program delay caused the tapeout to push by an equal amount.

Mr. Nulty noted that these performance issues would be documented in a memo that would go into Mr. Dietz's personnel file.

Mr. Dietz responded the same day, stating that he would be preparing a responsive memo.

RX-13

This is an email from Mr. Dietz to Mr. Hoehler, Mr. Nulty, Mr. Todoroff, and Mark Fee, sent on May 29, 2013. John Groat and David Still are copied on the email. The subject line is

"TR20005 Schedule Slip – recovery." Mr. Dietz wrote that he and Mr. Groat moved some tasks around which resulted in pulling the tapeout schedule back to WW36.

RX-14

This is an email chain between Mr. Nulty and Erica Gustafson, HR Business Senior Partner. On May 29, 2013, Mr. Nulty emailed Kim Kubiak and Mr. Todoroff, asking for input on Mr. Dietz's disciplinary memo. On May 31, 2013, Ms. Gustafson replied, noting that she added a paragraph and some grammatical corrections via track changes. She also suggested incorporating the memo into an Operations Standard of Conduct process warning, which has a duration of 90 days.

RX-15*

This is a copy of Respondent's Project Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 10, 2013.

RX-16*

This is a copy of Respondent's Project Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 18, 2013.

RX-17*

This is a copy of Respondent's Project Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 22, 2013.

RX-18*

This is a copy of Respondent's Project Status Reports: TR20005 F-RAM 2T2C 2MB, dated May 24, 2013.

RX-19

This appears to be a list of Mr. Dietz's completed online courses during his employment at Cypress.

RX-20

This is an internal correspondence from Mr. Nulty to Mr. Dietz dated June 4, 2013. The subject line is "(Confidential) Performance Issues Regarding the T20005 Three Week Schedule Slip."

Mr. Nulty states that on May 28th he became aware of a three week schedule slip to the "Tapeout" milestone for the T20005 project during his meeting with Mr. Todoroff. As a follow-up, Mr. Nulty and Mr. Todoroff held a meeting with Mr. Dietz to review the slip. Mr. Nulty discovered three performance issues during the meeting:

1. The project status was allowed to go stale resulting in an automatic lockout from the PM system (stale is not updating the system in 10 days)
2. Mr. Dietz delayed escalating a kid soccer event until the May 29th meeting. In the meeting Mr. Dietz reported the event occurred three weeks ago and he became aware of it approximately Wednesday or Thursday last week. The event was not reported to BMT on May 28th nor was it included in the latest status report filed by Mr. Dietz (Friday, May 24th).
3. Mr. Dietz was unable to adequately explain the details behind the tapeout delay and did not know the critical path when asked how a 3 week delay could affect a tapeout date 14 weeks from now.

In a paragraph that appears to be inserted using track changes, Mr. Dietz was instructed to write a memo on what he did wrong and what he should have done. This memo must be signed by Mr. Nulty and the EVP of Human Resources. The memo and this correspondence would be included in Mr. Dietz's personnel file. Any future infractions will result in further disciplinary action, up to and including termination.

On the second page of the correspondence, Mr. Nulty informed Mr. Dietz that he failed to meet the requirement of knowing his schedule because he could not provide an answer on how the 3 week test program slip resulting in a tape out slip of 3 weeks fourteen weeks from now. Mr. Nulty added the following: "After the May 29th meeting I received an email from you that 'moving a few tasks around' eliminated the tapeout slip. This should have been determined days before."

RX-21

This is a set of emails with Mr. Nulty, Mr. Dietz, and Ms. Gustafson. On June 4, 2013, Mr. Dietz emailed Mr. Nulty, noting that he wanted to see the final memo before responding. He also stated that it was inappropriate to include Brian [Todoroff] and Rainer [Hoehler] on a confidential employment-related manner, as neither of them was in Mr. Dietz's management chain.

Mr. Nulty forwarded this email to Ms. Gustafson on the same day, asking for her opinion. Ms. Gustafson replied the same day, advising that it would be best to keep Mr. Todoroff and Mr. Hoehler off the distribution.

RX-22

This is an email exchange between Mr. Nulty and Mr. Dietz on June 4, 2013. Following up on Mr. Dietz's request to remove Mr. Todoroff and Mr. Hoehler from the list, Mr. Nulty wrote that they were removed from distribution.

RX-23

This is Mr. Dietz's internal correspondence, dated June 5, 2013, responding to Mr. Nulty's allegations and expressing his plans to resign from Cypress. It is addressed to Tom Surrette and contains the subject line: "Response to JEN-1181; Notice of Intent to Terminate Employment; Demand for Payment pursuant to the Ramtron International Corporation, Rain Acquisition Corporation and Cypress Semiconductor Corporation Merger Agreement [...]"

Mr. Dietz disputed Mr. Nulty's first allegation that the project status was "allowed" to go stale. Mr. Dietz referenced specific tasks that were behind deadlines, with him attempting to resolve those matters while also holding the top level milestone schedule. Further complicating Mr. Dietz's efforts was the unannounced reassignment of a test engineer from his unit to work on RMAs. According to Mr. Dietz, the test engineering manager admitted concealing the kids soccer event at the May 29th meeting. Mr. Dietz never received a recovery plan from the PE/TE group for the shutdown meeting but took the initiative to move tasks around to resolve the schedule slip. At this time, Mr. Dietz was locked out of the system by one of the company's "killer applications", which only exacerbated the problem: "I was doing everything I could to contain issues that were snowballing."

Mr. Dietz conducted a search on the company's server and found that Mr. Nulty did not issue performance memos for numerous other projects that were as much as 90 days stale. According to Mr. Dietz, this was evidence of Respondent's "selective enforcement of otherwise unenforced standards, which appear to me as an unlawful retaliation to the Whistleblower/Ethics complaint that I raised on April 12, 2013."

Mr. Dietz also disputed Mr. Nulty's second allegation that he delayed escalating the kids soccer event until the May 29th meeting. Mr. Dietz insisted that as soon as the affected employees returned to work after the Memorial Day weekend on May 28th, he confirmed that a kids soccer situation existed and he immediately brought this up to the business unit manager, Rainer Hoehler, both by a personal visit to Hoehler's office and by email. While Mr. Dietz was aware that that the specs specify the need to escalate events in real time, he also thought it was prudent to investigate and verify before raising red flags.

Mr. Dietz additionally disputed Mr. Nulty's third allegation that he did not adequately explain the details behind the tapeout delay. Mr. Dietz could not determine what "adequately explain" means. Moreover, during the May 29 meeting, he suggested doing a deeper dive on the critical path but was interrupted by Mr. Nulty. On that basis, he was denied any opportunity to explain the details behind the "now resolved tapeout delay."

Mr. Dietz noted his refusal to write a memo on what he did wrong and what he should have done: "I will do no such thing, because I have done nothing wrong, and this requirement is nothing more than bullying with legal implications. Therefore, my response is that I am terminating my employment at Cypress." (emphasis in original). He agreed to stay onboard until July 1st as a professional courtesy.

Finally, Mr. Dietz demanded payment under the September 25, 2012 amendment, which specified several conditions for the vesting of stock, following the Ramtron-Cypress merger.

According to Mr. Dietz, "[b]y requiring me to adopt and participate in DBP at Cypress, though not financially, Cypress has failed to honor Ramtron policies as they apply to me."

RX-24*

This is a copy of a Stale Schedule Report, dated May 29, 2013.

RX-25

This is a set of emails dated June 4 and 5, 2013. On June 5th, Mr. Dietz emailed Mr. Nulty his response to the memo and his notice of intent to terminate. Mr. Nulty forwarded this email to Thomas Surrette the same day, requesting a phone call to discuss the situation. A portion of the exhibit is redacted.

RX-26

This is an email from Mr. Dietz on June 7, 2013, with the subject line "Last day at Cypress." It is addressed to his "[c]olleagues, mentors, and most importantly, my friends." He explained that as of Wednesday of that week, he planned on resigning on July 1st. However, he changed his mind and decided to resign immediately after concluding that his work environment made "holding out until July 1 unworkable." Mr. Dietz was taking a few months off and then setting up a small law practice in Colorado Springs in the fall. He included his email and mobile phone number in the email in case anyone needed to reach him.

RX-27

This is Cypress's New Hire Action Item Checklist for U.S. Regular Employees. It was signed by Mr. Dietz, with the hire date listed as November 12, 2012. The checklist notes that all employees must review the company's whistleblower policy.

RX-28

This is a copy of Cypress's Global Whistleblower Policy. The document outlines several channels through which complaints can be made and received. Section 2.11 notes that all employees are responsible for cooperating in the investigation of any complaints in which their assistance is requested. Section 2.12 notes that all employees, especially supervisors and managers, are responsible for ensuring that nor retaliation of any form is taken against an employee who reported conduct under this policy, or an employee who cooperates or assists in an investigation of conduct under the policy.

RX-29*

This is a copy of the Respondent's Design Bonus Plan.

RX-30*

This is a draft of Mr. Dietz's complaints about the DBP, sent to Diane Ratliff on April 11, 2013.

RX-31*

This is a series of emails that is redacted, between Mr. Surrette and Mr. Nulty concerning Mr. Dietz's complaints about the DBP.

RX-32*

This is a series of emails reflecting that Mr. Nulty copied Mr. Surrette with Mr. Dietz's concerns about the DBP.

RX-33*

This is a series of emails between Mr. Nulty and Ms. Tidwell, in which Mr. Nulty forwarded Mr. Dietz's concerns about the DBP on April 12, 2013, and asked her to review and advise. Ms. Tidwell advised Mr. Nulty of the results of the phone meeting with Mr. Dietz on April 22, 2013.

RX-34

This is an email from Mr. Dietz to Ms. Joaquin and Ms. Valenzuela (formerly Tidwell) on April 22, 2013. Mr. Dietz thanked them for taking the time to speak to him. A portion of the exhibit is redacted.

RX-35

This is a copy of Cypress's Performance Management Evaluation Process and Forms.

RX-36

This is a copy of Cypress's Misprocess and Operations Standards of Conduct for Employees at Wafer Labs.

RX-37

This appears to be an Outlook calendar event, scheduled for April 11, 2013, concerning a meeting on the Design Governing Spec, Design Bonus Spec, and RYW-553, organized by David Still.

RX-38*

This is an internal correspondence from Ryan Wellsman to Paul Keswick, dated December 10, 2012.

RX-39

This is a set of Manager Annual Performance Evaluations for January through December 2012, for employees in Oregon, India, and Washington, and Mr. Dietz's 90 day performance evaluation.

RX-40*

This is an excerpt of the TR20005 (2Mb FRAM) New Product Plan, version 001-85975 *B.

RX-41

This is a letter, dated May 6, 2013, from Paul Keswick, Cypress's Executive Vice President, to an unidentified senior design engineering manager, and a letter to an electrical design engineering principal. According to the letter, an investigation revealed that there were a series of issues ranging from business process gaps to extremely poor judgment. As a result, the manager's focal increase was reduced by 25%. The employee was also expected to write a memo on what he did wrong and what should have been done. This memo had to be signed off by both the EVP of New Product Development and the EVP of Human Resources. The memo and this letter were to be held in the employee's personnel file for one year.

RX-42*

This is a copy of Cypress's 2012 Staffing Correspondence and Spreadsheets.

RX-43

This is an internal correspondence from Mr. Nulty to Ajoo Cherian, dated July 8, 2012. Mr. Nulty wanted Mr. Cherian to establish a meeting on managing weekly audit problems and late goals.

RX-44

This is a July 1, 2013 letter from Ms. Valenzuela to Mr. Dietz. Ms. Valenzuela informed Mr. Dietz that, in response to his June 5th memo, he was entitled to Ramtron stock acceleration because he was a former Ramtron employee who resigned within one year, and not because of his proffered legal theory.

With respect to Mr. Dietz's allegation of adverse employment action based on Mr. Nulty's disciplinary memo, Ms. Valenzuela wrote that Mr. Dietz may have jumped to conclusions:

> The nature and tone of Jim's memo is completely consistent with the type of feedback that Jim regularly provides to his direct reports. I understand that you are relatively new to Cypress, but we are a Company that is open and candid about feedback. I can assure you that neither Cypress, nor Jim Nulty, has taken

> any adverse action toward you as a result of you voicing concerns about the Design Bonus Program. In fact, Jim himself asked me to work with you to ensure your concerns were addressed, and to follow-up with him so he could ensure you were fully satisfied with the information you received. To that end, I reported back to him that you and I had a frank and productive discussion about the Design Bonus Program, your concerns as a manager and the advice that I provided to you on messaging. I certainly welcomed your feedback as did Jim. As a result of our conversation, we learned that more information with respect to the Design Bonus Program is needed for our employees in Colorado, and that training has been scheduled. From our perspective and Jim's, the results of your feedback and our legal discussion were extremely positive.

(RX-44 at 1).

Lastly, Ms. Valenzuela reminded Mr. Dietz of his obligation to maintain confidentiality and attorney-client privilege, even after his resignation. She emphasized that any communication in which he sought legal advice from any attorney representing Cypress was subject to the privilege (*Id.* at 2).

RX-45

This is an email exchange between Mr. Dietz and Mr. Nulty. On May 21, 2013, Mr. Dietz asked Mr. Nulty for permission to take leave to attend his Colorado bar admission ceremony and whether he should submit a PTO request. Mr. Nulty responded, "No, you can owe me the time:)". Mr. Dietz replied by thanking Mr. Nulty.

RX-46

This is Mr. Dietz's employment questionnaire, completed after Cypress's acquisition of Ramtron. According to the questionnaire, Mr. Dietz's last evaluation while at Ramtron (2012) was positive. Mr. Dietz outlined several examples of conflict management with staff and supervision.

RX-47*

This is a memo from Mr. Nulty to Paul Keswick, dated June 14, 2013.

RX-49[19]

This is a copy of a document entitled "Ramtron FAQs" dated October 16, 2012.

RX-50

[19] RX 48, Mr. Dietz's deposition transcript, was marked for identification only.

This is an email from Mr. Dietz to Mr. Nulty on May 9, 2013, with the subject line "Colorado Bar Exam Results." In the email, Mr. Dietz included the link to the state's recent bar pass list.

RX-51

This is a printout of Colorado labor law statutes and applicable caselaw citations.

RX-52

This is a set of Mr. Dietz's performance reviews at Intel.

ISSUES

The following issues are presented for resolution:

1. Whether Mr. Dietz engaged in protected activity under the Act.
2. If so, whether the Respondent was aware of Mr. Dietz's protected activity.
3. Whether Mr. Dietz suffered adverse employment action.
4. If so, whether Mr. Dietz's protected activity contributed to the adverse employment action.
5. Whether the Respondent had a legitimate non-discriminatory reason for any adverse employment action, or whether such reason was pretextual.

DISCUSSION

The Sarbanes-Oxley Act states in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - -
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 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, when the information or assistance is provided to or the investigation is conducted by - -

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

18 U.S.C. § 1514A (a)(1); see also 29 C.F.R. § 1980.102(a), (b)(1).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). Because of its recent enactment, the Sarbanes Oxley Act lacks a developed body of case law. As the whistleblower provisions of Sarbanes-Oxley are similar to whistleblower provisions found in many federal statutes, it is appropriate to refer to case authority interpreting these whistleblower statutes.

The Parties Are Covered under the Sarbanes-Oxley Act

The Respondent, Cypress Semiconductor Corporation, delivers high-performance, mixed-signal, programmable solutions for a large span of products including touch screens, USB controllers, and multimedia handsets. The Respondent has locations in the United States and internationally. The Respondent is a company within the meaning of the Act, as it has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934. Mr. Dietz, the Complainant, was hired by the Respondent on November 12, 2012. There is no dispute that the Respondent and Mr. Dietz are covered under the provisions of SOX.

Merits of the Claim

In a Sarbanes-Oxley whistleblower case, the Complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity as defined by the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. *Macktal v. U.S. Dep't of Labor,* 171 F.3d 323,327 (5th Cir. 1999). The foregoing creates an inference of unlawful discrimination, and with respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation.

When a whistleblower case proceeds to a formal hearing before an Administrative Law Judge, a complainant must demonstrate by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable action alleged in the complaint. *See, Trimmer v. U.S. Dep't of Labor,* 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Dysert v. Sec'y of Labor,* 105 F.3d 607, 609-10 (11th Cir. 1997). Once a complainant meets this requirement, he is

entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.

In *Marano v. Dep't of Justice,* 2 F.3d 1137 (Fed. Cir. 1993), interpreting the whistleblower protections of 5 U.S.C. § 1221(e)(1), the Court observed:

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

Id. at 1140 (citations omitted).

If the Complainant meets this burden of proof, the Respondent may avoid liability by presenting evidence sufficient to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. *Yule v. Burns Int'l Security Serv.,* Case No. 1993-ERA-12 (Sec'y May 24, 1995). While there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is higher than a preponderance of the evidence, but less than beyond a reasonable doubt.

If the Respondent is able to meet this burden, the inference of discrimination is rebutted. In order to prevail, the Complainant must show that the rationale offered by the Respondent was pretextual, i.e., not the actual motivation. *Overall v. Tennessee Valley Auth.,* Case No. 1997-ERA-53, ARB Nos. 98-111, and 128 (ARB April 30, 2001). As the Supreme Court noted in *St. Mary's Honor Ctr. V. Hicks,* 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination.

Protected Activity

"Protected activity," as defined under the Act and regulations, includes providing to an employer information regarding any conduct which the employee reasonably believes constitutes a violation of various fraud provisions of Title 18 of the U.S. Code (18 U.S.C. §§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. The statutory language makes it clear that the Complainant is not required to show that the reported conduct actually constituted a violation of the law, but only that he reasonably believed that the Respondent violated one of the enumerated statutes or regulations. The standard for determining whether the Complainant's belief is reasonable involves an objective assessment.

In this case, Mr. Dietz alleges that he engaged in protected activity because he had a reasonable belief that the Respondent's Design Bonus Plan (DBP) violated federal mail and wire fraud statutes, and he raised his concerns about the DBP to his supervisor, Mr. Nulty, as well as

Respondent's legal department. It is clear from the evidence and Mr. Dietz's testimony that he firmly believed the Respondent's DBP was illegal in Colorado and California. It is not dispositive, as argued by the Respondent, that Mr. Dietz did not characterize this plan as "fraud" or "fraudulent." It is the nature of the conduct complained of that is determinative – that is, an employee need only identify the specific conduct that he believes to be illegal. No magic words are required. *See, e.g., Gladitsch v. Neo@Ogilvy*, 2012 WL 1003513 at * 4-8 (S.D.N.Y. 2012) (holding that allegation of fraud is not a necessary component of protected activity under Section 1514A and that plaintiff "has alleged sufficiently that she reasonably believed that the pricing scheme, which overcharged IBM, violated an enumerated category of misconduct under SOX," and "her communications with supervisors ... identifies specifically the overcharges ... she believed to be unlawful."); *Lockheed Martin v. Adm. Review Bd., USDOL*, No. 11-9524 (10th Cir. 2013) (complainants who report violations of 18 U.S.C. §§ 1341, 1343, 1344, and 1348 are not required to also establish that such violations relate to fraud against shareholders). Indeed, a complainant is only required to identify a specific type of conduct he believes to be illegal. *See Ashmore v. CGI Group Inc.*, 2012 WL 2148899 at *6 (S.D.N.Y. 2012), ("the fact that [the plaintiff] did not specifically inform [the employer] ... of his belief that the scheme involved mail or wire fraud, or his reasons for thinking so, does not mean that the information he communicated was insufficiently specific to count as activity protected by § 806.").

Here, Mr. Dietz specifically identified the conduct that he believed to be illegal, and he cited to state statutes that he believed were on point. His memorandum to Mr. Nulty, and his discussions with Ms. Valenzuela and Ms. Joaquin leave no doubt that he was questioning the legality of the DBP.

SOX brings within its ambit fraud that is reasonably believed to involve the use of interstate mail, wires, or banks; in other words, the federal jurisdictional component.[20] Mr. Dietz clearly believed that Respondent was carrying out a fraudulent scheme by violating state laws on payment of wages to its employees, a scheme that necessarily implicated interstate mail, wires, and banks. Mr. Dietz was not required to specifically allege a "federal" crime; he was only required to identify the specific conduct he believed to be illegal. Again, no magic words were required.[21]

Nor is it all relevant that Mr. Dietz did not raise his concerns about the DBP directly to the Audit Committee, and it does not follow, as the Respondent argues, that because Mr. Dietz

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[20] As I noted in my Order denying the parties' cross motions for summary judgment, while the use of the mails or wires in furtherance of an alleged fraudulent scheme is an essential jurisdictional element to establish the offense of wire or mail fraud, these elements are expansive, and encompass virtually any connection to the mails or wires. One need only mail or cause to be mailed some matter or thing for the purposes of executing the scheme to defraud. A defendant need not actually mail anything him or herself; a mere reasonable anticipation that mail will be used suffices. Indeed, it suffices to establish that mailing is a sender's regular business practice. The mails need not be used as an essential element of a fraudulent scheme; it is sufficient that mailing be incident to an essential part of the scheme. Nor is it required that false representations themselves be transmitted by mail. Similarly, telephone calls, faxes, and emails may qualify as jurisdictional wire communications. The jurisdictional wire communication element can be inferred from circumstantial evidence, such as evidence that the defendant had a fax machine.

[21] There is no question that the use of the mails and wires, as well as banks, was implicated in the Respondent's administration of its DBP. The Respondent conducted training over the internet, communicated over the telephone and internet, sent communications by mail, and made direct deposits of employee's pay, minus the DBP deductions, to banks.

did not do so, he could not have believed that any fraud was occurring. Mr. Dietz observed the requirements of the Respondent's own Global Whistleblower specification, which instructs employees to raise their concerns to their supervisor, HR, or the Legal Department. Mr. Dietz chose to raise his concerns with his immediate supervisor, in accordance with this specification.[22]

Not only did Mr. Dietz identify the specific conduct he believed to be illegal, the compulsory deductions under the DBP, as well as the state statutes that were implicated, he made his complaints under the auspices of the Respondent's own Code of Business Conduct and Ethics, and Global Whistleblower Policy. It is hard to understand how the nature of his complaint could have been any clearer.

The Respondent's attempts to characterize Mr. Dietz's complaints as anything but fraud are not persuasive. Thus, the Respondent states that

> The second supposed basis for a belief that fraud was occurring is an innovation introduced only after Complainant's asserted protected conduct. Complaint's affidavit confirms that the issue of the offer letters arose only during Complainant's April 22, 2013 conversation with Ms. Valenzuela, and Complainant investigated the issue only after that conversation.

Respondent's Brief at 6. There is no dispute that the offer letters to the Ramtron employees did not disclose the mandatory application of the DBP to certain of those employees. During Mr. Dietz's meeting with Ms. Valenzuela, she told him that the DBP was described in letters offering employment to new employees, and indeed Mr. Dietz found "boilerplate" language to that effect in the Respondent's specifications. It is not clear when Mr. Dietz learned that the offer letters *actually* given to the Ramtron employees did not include that "boilerplate" language, or any description of the DBP. But whether he knew of this deception at the time he made his April 12, 2013 whistleblower complaint or later is entirely irrelevant to the question of whether he believed that the Respondent's use of the DBP was fraudulent. If anything, it confirmed his suspicions.

The Respondent's claim that Mr. Dietz "did not act as though he believed fraud was occurring" is nonsensical. See Respondent's Brief at 7. It is true, as claimed by the Respondent, that Mr. Dietz interpreted the Respondent's Whistleblower Policy as assigning responsibility for handling any complaints regarding fraud to the Audit Committee. But this did not require Mr. Dietz to make *his* complaint directly to the Audit Committee, nor does the fact that Mr. Dietz made his complaint to his supervisor, an option specifically provided by the Respondent's Policy, signify that he did not believe fraud was occurring. Nor is it significant that he did not "reach out" to the Audit Committee "even when" he alleged that he was suffering retaliation. Again, the Respondent's own Whistleblower Policy provides several methods for employees to lodge complaints; Mr. Dietz chose one of them. The next step was up to the Respondent, and it was Mr. Nulty and Mr. Surrette who chose to direct Mr. Dietz's complaints to the Legal Department as opposed to the Audit Committee.

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[22] As Mr. Dietz observed, the specification places the responsibility of forwarding an employee's report to the Legal department or to the Audit Committee on the person receiving it, which in this case was Mr. Nulty.

The Respondent argues that Mr. Dietz's proposed solution for making the DBP legal had nothing to do with correcting a "misrepresentation;" the problem he identified was the compulsory deductions, and his solution was to eliminate them, and he "did not suggest further disclosure concerning the Design Bonus Plan or state wage laws nor any other action that would cure fraud." Respondent's Brief at 7-8. I am at a loss as to how to interpret this argument, other than as a suggestion that because Mr. Dietz did not identify any type of "misrepresentation," or suggest any cure for such a "misrepresentation," he could not have believed fraud was occurring. Again, this argument is simply nonsensical.

In the same vein, the Respondent argues that, because Mr. Dietz did not believe that any of the FAQs contained a misrepresentation, he could not have believed there was any fraud going on. Respondent's Brief at 8. According to the Respondent, if Mr. Dietz's problems with the DBP were that the FAQ misrepresented that Cypress would follow the law, any such concerns should have been completely resolved when Ms. Valenzuela told him they had a "legal opinion" that it did comply with the law. But Mr. Dietz's concerns were not limited to the narrow issue of whether the Respondent "misrepresented" the applicability or legality of the DBP, in its FAQs or otherwise. His concerns clearly were with the existence of the plan itself.

I note that the Respondent takes Mr. Dietz to task for not being satisfied with "this evidence," that is, Ms. Valenzuela's representation that there was a legal opinion, of its "good faith" regarding its representation that the DBP complied with the law, but continuing to state "again and again" that the Respondent had not explained to him how the deductions were legal. As discussed *supra*, the Respondent's protestations of "good faith" based on the existence of a "legal opinion" are entirely unpersuasive. There has been *absolutely no explanation as to why the compulsory deductions are legal*, which is the core of Mr. Dietz's concern. It would not seem to be a difficult question to answer, especially if there were a "legal opinion" specifically addressing the issue. The fact that it has not speaks volumes.

I also find that Mr. Dietz's complaint was objectively reasonable. After months of discovery, almost four days of hearing, and extensive briefing, there is yet to be any explanation from the Respondent as to how the provisions of its DBP comport with applicable laws, and is not a plan that illegally takes money from its employees in order to spur productivity. That is all that Mr. Dietz was asking, and the answer has never been provided.

Under the Respondent's DBP, employees subject to the plan automatically forfeit ten percent of their pay until after the completion of a project, when the bonuses can be tallied up. This is not a "salary reduction" that is allowable because Colorado is an "at will" employment state, nor is it a "voluntary contribution" to any sort of defined benefit program.[23] It is a substantial portion of the employee's pay that is withheld by the Respondent, contingent on the

[23] If the "contribution" to the DBP was accurately characterized as a "salary reduction," as opposed to a deduction, and an employee had a salary of $100,000 at the start of a project, his salary would be "reduced" to $90,000. Absent some sort of "raise," at the start of the next project, presumably his "reduced" salary would then be again "reduced," to $81,000. After a few more projects, his salary would be "reduced" to nothing at all. Although it is not entirely clear, apparently everything "resets" at the conclusion of a project, with the 10% "pay reduction" being restored. CX 47.

end performance on the project. The employee has no say in whether to "contribute" to this plan – it is a condition of employment. Nor does the employee have control over the end result, which is judged on the project as a whole. One non or underperforming employee who causes the project to fail or to come in late means that all of the employees on the project can forfeit their contributions. If an employee leaves before the completion of the project, he or she also forfeits his or her deductions to the Respondent.

The DBP was not designed to benefit Respondent's employees; it was designed for the purpose of increasing earnings by the Respondent. It is a bonus plan that forces the Respondent's employees to gamble their own money ("skin in the game") for the possibility of a higher return in the form of a bonus, calculated in a fashion that is unpredictable and incomprehensible to the average employee. The Respondent benefits if this gamble pays off, in the form of increased productivity; if it does not, the employees lose their money. An employee who leaves the Respondent before the quarterly payouts forfeits his or her entire wage deduction to the Respondent.

In attempting to establish that Mr. Dietz's concerns about the legality of the DBP were, as Mr. Surrette put it, a "non-event," the Respondent has conquered a number of straw men. Of course, the salaries of the former Ramtron employees that were identified in their offer letters were not "earned income" at the time the offers were made, and Mr. Dietz never claimed that they were. But they established these employees' starting rate of pay. As the employees earned their income at the stated rate of pay, the Respondent made the compulsory deductions, withholding a percentage of the agreed salary from their "earned income."[24] There can be no dispute that these are, in fact, as characterized by the Respondent itself, "deductions." Indeed, there would be no "skin in the game" if they were not.

Mr. Dietz was clearly concerned about not only the legality of the plan as it applied to all of Respondent's employees, but also about the fact that the Respondent did not disclose the existence of the DBP to the Ramtron employees when it made offers of employment to them.[25] As Mr. Surrette admitted, the offer letters to the Ramtron employees did not include any language about the DBP. Nor did any of the information provided to the Ramtron employees put them on notice that their salaries would be subject to mandatory deductions under the DBP. Nor did the Respondent mention the DBP during its new employee orientation for former Ramtron employees.

The Respondent's attempts to support its claim that there is no evidence that it concealed the DBP plan from the Ramtron employees are misleading, and mischaracterize the testimony. See Respondent's Response at 16. Thus, Mr. Still testified that he explained to the Ramtron employees that they should probably know about the DBP, and started explaining it to them, *after* they started working for Cypress and reporting to him – not "*when* they started with

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[24] Nor is it all relevant whether this deduction is pre-or post-taxes.

[25] I note that the Respondent's DBP FAQs state that the offer letter for a design engineer will reflect the "higher base salary, with a clear explanation of what will happen when an employee participates in the DBP, which will result in higher variable pay." The FAQ indicates that it is important to communicate the total compensation potential in order to attract high performers. CX 47, § 5.2. Apparently it was not important to communicate this to the former Ramtron employees.

Cypress," or before they were "enrolled."[26] Nor is it relevant that the former Ramtron employees, who were hired in November 2012, were required to sign off on the Design Governing Specification before their project launched in March 2013, or that they were invited to formal training on the DBP in April 2013. And while the Respondent challenges Mr. Dietz's testimony that employees complained to him about the terms of the DBP elsewhere in its briefs, it then claims that these complaints also "clearly impl[y] that the terms were disclosed to the employees." Respondent's Response at 16. Of course, they do no such thing.

Mr. Dietz testified that he heard concerns and complaints from a number of the Ramtron employees, who were not advised about the DBP when they were offered positions.[27] Mr. Still acknowledged that he discussed these concerns with Mr. Dietz on multiple occasions, and that Mr. Dietz had concerns about the legality of concealing the DBP, and then invoking it after the offers of employment were made and accepted by the Ramtron employees.[28]

Concerns about the legality of the DBP are not erased by the fact that all employees subject to the DBP sign off on the applicable terms every time a project is launched. As Mr. Dietz points out, the terms of the DBP are not comprehensible. It is "complicated and confusing" (Tr. 120; 4-16; 5-10), and Mr. Nulty, who serves on the Design Bonus Review Board, and Mr. Still, who has participated for years in the DBP, and lost thousands of dollars working on several projects, do not fully understand how the 55-page DBP works.[29]

The fact that the employees sign off on the DBP, on condition of losing their jobs otherwise, does not mean that they knowingly consent to its application to their pay. Nor, as the Respondent seems to argue, would the employees' full and knowing consent to participation in the DBP make it legal.

The Respondent argues that any concerns Mr. Dietz had about the legality of the DBP were completely resolved once Ms. Valenzuela informed Mr. Dietz that the Respondent had obtained a "legal opinion" for the plan. Mr. Dietz was not required to take Ms. Valenzuela's

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[26] Mr. Still's testimony made it clear that the former Ramtron employees, who started in November 2012, were not assigned to a project subject to the DBP until March 2013 (Tr. 140). Perhaps this is when they were "enrolled."

[27] It is not relevant, as the Respondent seems to believe, that Mr. Dietz did not identify any specific person who raised any concerns about the DBP. Respondent's Response at 13. It is clear that the complaints and concerns Mr. Dietz was hearing from former Ramtron employees were part of the catalyst that led him to look further into the DBP.

[28] Again, the Respondent's claim that "There was no concealment of the Design Bonus Plan" is demonstrably false – the existence of the DBP was concealed from the Ramtron employees until *after* they accepted their offers of employment. See Respondent's Response at 3, fn. 1. Additionally, the Respondent's claim that Mr. Still testified that he *tried to explain* to Mr. Dietz why the DBP was not illegal is a mischaracterization of the record. Mr. Still testified that Mr. Dietz was concerned that it was illegal to invoke the DBP when it was not in the offer letter, which was a contract. Mr. Still did not recall his exact response, but stated that he made a comment to the effect of, why would this be illegal, or any different than a company cutting your salary when they get into trouble, or terminating you because you are an at-will employee. He conceded that he probably did not understand the law, but to him, it did not seem like it was illegal. Tr. 143-144. There is nothing in the record to suggest that Mr. Still "tried to explain" to Mr. Dietz why the DBP was not illegal. Nor did he offer any such explanation at the hearing.

[29] On other projects, Mr. Still has earned substantial bonuses.

word on this, especially since she offered not a scintilla of reasoning as to **why** the DBP was legal, something she could have easily done without implicating any attorney client privilege.[30]

The Respondent's representations to Mr. Dietz about its efforts to vet the legality of the DBP were not in good faith, and were misleading. Up until Ms. Valenzuela's testimony at the hearing, the clear inference fostered by the Respondent was that it had obtained a *written* legal opinion specifically addressing the legality of the DBP. But this was not true. As became clear at the hearing, the Respondent did not obtain a *written* legal opinion on the legality of the DBP, and to the extent that Ms. Valenzuela conveyed this impression to Mr. Dietz during their April meeting, it was misleading.[31] Ms. Valenzuela testified at the hearing that, on reading Mr. Dietz's memo, she had to go back to her notes and memos of conversations, and the back and forth correspondence from 2010, to reconstruct for herself the basis for her understanding that the DBP was legal.

It is not necessary for this Court to make a determination as to the legality of the Respondent's compulsory deductions from its employees' pay under the DBP. Mr. Dietz has raised serious and considered concerns about the legality of this plan, based on his research and analysis of the plan, and what he has identified as applicable state laws.[32] The Respondent's only response is that Mr. Dietz should trust the Respondent, because it obtained advice (which was never reduced to a formal written opinion) from attorneys that it was legal. While this Court is not in a position to conclude that the operation of the DBP is illegal, neither is the Court able to conclude that it is not. For whatever reasons, the Respondent has chosen to remain silent on this issue.

I find that Mr. Dietz has established by an overwhelming preponderance of the evidence that he had a subjectively and objectively reasonable belief that the Respondent was engaged in fraud through its compulsory DBP deductions from its employees' salaries. As this suspected fraud necessarily implicated the use of the mails, wires, and banks, it is properly characterized as protected activity under the Act.

Respondent's Knowledge of Complainant's Protected Activities

There is no dispute that the Respondent was aware of Mr. Dietz's concerns about the legality of the DBP. Mr. Nulty, Mr. Dietz's supervisor, and Ms. Valenzuela and Ms. Joaquin, from the legal department, were provided with a copy of Mr. Dietz's memo setting out his

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[30] At the hearing, Ms. Valenzuela testified that she did not have any hesitation in talking about the legality of the plan, and was willing to be transparent and walk someone through it. She did no such thing during her meeting with Mr. Dietz. Again, it bears repeating that no one, including Ms. Valenzuela, has yet "walked" anyone through the legality of the DBP.

[31] Ms. Valenzuela's testimony about who provided the legal advice on the DBP, or whether that advice actually addressed the legality of the compulsory deductions, was vague and ambiguous. Thus, she testified that the Respondent used "outside counsel" to advise them and "scour" the DBP for compliance. She did not explicitly state that "outside counsel" advised the Respondent that the DBP was legal, and that it complied with applicable state laws. While Ms. Valenzuela's statement that the firm of Paul Hastings helped with "implementation" of the DBP might on its face convey the impression that Paul Hastings provided an opinion on the legality of the DBP, Ms. Valenzuela did not specifically say that.

[32] Indeed, the Respondent must allow its employees in Ireland to opt out of the DBP, because the compulsory salary deductions are illegal.

concerns. Mr. Dietz raised his concerns about the legality of the DBP repeatedly with Mr. Still. I find that Mr. Dietz has established that the Respondent was aware of his April 12, 2013 memo raising questions about the legality of the DBP.

Adverse Action

The Respondent argues that Mr. Dietz did not suffer an adverse employment action, because he voluntarily resigned. Mr. Dietz argues that his resignation was a constructive discharge, that is, he resigned because he reasonably concluded that the Respondent intended to fire him.

Mr. Dietz also argues that he suffered adverse action under the Act when the Respondent discriminatorily disciplined him by way of Mr. Nulty's June 4, 2013 memorandum.[33] This memo reflects on its face that it was "disciplinary," and warns Mr. Dietz that it would be placed in his personnel file to serve as the basis for "further" discipline, up to and including termination. It described his "infractions," and ordered him to confess what he did wrong. Viewing the four corners of the memorandum, it is simply not possible to characterize it as anything other than disciplinary.[34]

The Respondent's attempts to downplay the significance of this memorandum are not persuasive, and rely on subtle (and not so subtle) mischaracterizations of the evidence and testimony. The Respondent's characterization of this memorandum as "trivial" and consisting of "standard," garden variety language ignores the surrounding circumstances, and flies in the face of the Respondent's actions in the past.

As Mr. Dietz points out, Mr. Nulty, Mr. Surrette, and Ms. Gustafson all specifically stated that the wording of this memorandum was "standard language." The implication is that the wording in this memorandum was used routinely by the Respondent in "coaching" memoranda, and that Mr. Dietz was not singled out for any reason. Yet the Respondent submitted *not a shred of evidence* that it had employed such "standard language" at any time, for any reason, before Mr. Dietz submitted his April 12, 2013 memorandum, invoking the Respondent's whistleblower policy.

The only evidence of the Respondent's use of this "standard language" consists of two memoranda, dated May 6, 2013, that were drafted after the conclusion of a formal investigation by an executive vice president and human resources, after a series of interviews and executive management review. These memoranda reflected that they would be held in the employee's personnel file for one year. They reassured the recipients that there were no "core value violations" that were grounds for termination, and expressed the Respondent's appreciation for the employees' good work.

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[33] The Respondent argues that Mr. Nulty raised the performance issues in his May 29 memorandum to prepare Mr. Dietz for the criticism he would face at the NPRD meeting scheduled for June 3. This begs the question of why he then issued this memorandum in final form, after consulting with HR, on June 4.

[34] As Mr. Dietz notes, the Administrative Review Board has recently affirmed a determination that the issuance of such a memorandum (which was almost identical to Mr. Nulty's memorandum to Mr. Dietz) constituted adverse action. *Fordham v. Fannie Mae*, ARB No. 12.061 (October 9, 2014).

In contrast, Mr. Dietz was denied the opportunity to explain or challenge the allegations in Mr. Nulty's memorandum; nor was there any type of investigation of those allegations.[35] Mr. Dietz was not given any assurances that his "wrongdoing" was not grounds for termination, or any assurances of appreciation for his work. Indeed, he was explicitly threatened with termination, based on the disciplinary memo being held in his personnel file, not for one year, but indefinitely.

For his part, Mr. Nulty claimed that he had sent similar memoranda to his subordinates, and that he had provided these memoranda to Respondent's attorneys. No such memoranda were offered as exhibits by the Respondent, and I make the rational inference that either they do not exist, or they do not support the Respondent's claim that the language in Mr. Nulty's June 4, 2013 memorandum was "standard," and "trivial."

For her part, Ms. Gustafson initially testified that she added language from the "Operations and Standards of Conduct Warning Spec." In fact, this language comes from the "Misprocess and Operations Standards of Conduct for Employees at Wafer Fabs," a document that specifically excludes Mr. Dietz. Nor has the Respondent submitted any specification that applied to Mr. Dietz, and which included such "standard language."

Viewing the evidence as a whole, the rational inference to be drawn is that Ms. Gustafson, Mr. Nulty, Ms. Gustafson, and Ms. Kubiak cobbled together the June 4, 2013 memorandum from bits and pieces of specifications that did not even apply to Mr. Dietz. They did not rely on any "standard" language used in the past, or the results of any investigations or interviews, but pieced together the memorandum with language plucked from inapplicable specifications. The purpose of inserting this language was clear – it put Mr. Dietz on notice that he had been charged with "infractions," that he needed to plead guilty, and that he would be on probation indefinitely.

Mr. Surrette claimed that the language of Mr. Nulty's memorandum was a "fairly common performance management tool" used at Cypress in the past. (Tr. 839). Again, the Respondent has offered no evidence that such a "performance management tool" was actually used by Cypress in the past. Indeed, the fact that it had to be cobbled together with language from specs that did not even apply to Mr. Dietz suggests otherwise.

In fact, the Respondent has a system for dealing with performance issues – its Performance Gap (P-Gap) procedure. Mr. Surrette described this as a "performance improvement tool" used by HR, an opportunity for an employee to learn and improve, to respond and resolve an issue. According to Mr. Surrette, the PGAP is more severe than the memo that was sent to Mr. Dietz; there is much more rigor, and financial consequences. The memo is kept in the employee's file, with other sources, as documentation gathered over an entire year, and

[35] Mr. Dietz did not, as claimed by the Respondent, "accept Mr. Nulty's May 29 email as appropriate." Respondent's Brief at 14. Mr. Dietz testified that Mr. Nulty did not provide him an opportunity to dispute his charges during the May 29 phone call; Mr. Nulty himself was at a loss as to how Mr. Dietz should have responded if he disagreed with Mr. Nulty's charges.

when it is time to do performance reviews, the managers have access to get a proper perspective on performance over the entire year, not just recently.

But as Mr. Dietz testified, he would have welcomed the Respondent's use of its own P-Gap system, as opposed to Mr. Nulty's memorandum and its requirement that he confess wrongdoing, because it would have given him a chance to respond, and to save his career. In contrast, Mr. Nulty's memorandum, and its requirement that Mr. Dietz prepare a response admitting his alleged mistakes for indefinite inclusion in his personnel file, was career ending.

The Respondent's attempt to characterize Mr. Nulty's memo as routine, garden variety "coaching" falls flat. Based on his past experience with performance issues as a supervisor, and the systems he previously worked in, Mr. Dietz did not view this memorandum as "coaching." Nor, despite Mr. Nulty's claims, is there any evidence to suggest the Respondent ever used this type of memorandum as "coaching." It was by its own terms a disciplinary memorandum meant to be held over Mr. Dietz's head for future use.

I find that Mr. Nulty's June 4, 2013 memo constituted adverse action under the Act.

I also find that Mr. Dietz has established by a preponderance of the evidence that his resignation was a constructive discharge. The question of whether a constructive discharge occurred is a question of fact. A "constructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." The standard for proving a constructive discharge is objective, and neither the employer's subjective intent, nor the employee's subjective views are relevant. Whether a constructive discharge occurred is a question of fact, based on the totality of the circumstances. *Lockheed; see also Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224, 1228 (10th Cir. 2009); *Narotzky v. Natrona Cnty, Mem'l Hosp.*, 610 F.3d 558, 565 (10th Cir. 2010).

Mr. Dietz submitted his memorandum to Mr. Nulty, challenging the legality of the DBP, and invoking the protections of the Respondent's whistleblower spec, on April 12, 2013. He met with Ms. Valenzuela on April 22, 2013, but did not receive any answers to the questions he raised in his memorandum. Nor was he advised that any investigation, as required in the Respondent's Whistleblower Policy, had been conducted, or even commenced.

Around that time period, Mr. Dietz was undercut by Mr. Groat and Mr. Hoehler, who removed resources from the TR 20005 project without his knowledge or approval, a clear violation of the Respondent's policies. Mr. Dietz was the subject of Mr. Hoehler's wrath for issuing a shutdown warning in connection with this project, which was necessitated by the removal of resources.

When Mr. Hoehler and Mr. Groat did it again just a short time later, Mr. Dietz again took the appropriate steps to resolve the issue and get the project back on track. But even as he was meeting with Mr. Groat to work out the details, he received the disciplinary memorandum from Mr. Nulty, ordering him to confess fault for alleged performance shortcomings, and

advising him that his written confession would be held in his personnel file.[36] Mr. Nulty did not give Mr. Dietz the opportunity to challenge or rebut the allegations. His only option was to admit fault, which would result in a memorandum in his personnel file that could be used as the basis for further disciplinary action, including termination, or to refuse to admit to Mr. Nulty's charges, thereby being insubordinate, and incurring further disciplinary action, up to and including termination.

I find that, given the circumstances, Mr. Dietz was entirely reasonable in viewing Mr. Nulty's request as the first step in laying the foundation for his termination, by requiring him to draft a memorandum admitting misconduct. Mr. Dietz testified that, in his experience in the IT industry, and based on his experience as a manager and supervisor, such a memorandum in an applicant's personnel file would be an automatic disqualification for hiring. I find his testimony wholly credible on this issue, and indeed the Respondent has not offered anything to rebut this perception.[37]

Believing that he had no choice, Mr. Dietz submitted a memorandum indicating his intent to resign, effective July 1, 2013. Mr. Dietz relied on what he reasonably perceived to be the Respondent's own policy, which states that every attempt should be made to retain a valued employee who threatens to quit, including immediate action by the Employer's supervisor. Indeed, while Ms. Valenzuela testified that this "turnaround process" was a "philosophy," and not a "policy," she stated that the Respondent has a specification based on this "philosophy. This "philosophy," as set out in Dr. Rodgers' article, requires the supervisor to reach out immediately on notification of a resignation, meet with the employee immediately, and notify his supervisor as well as Dr. Rodgers within an hour.

But the next day, June 6, Mr. Nulty ordered Mr. Dietz to attend a meeting on the following day, June 7, 2013. Mr. Nulty did not indicate the purpose of the meeting, nor was Mr. Dietz able to get Mr. Nulty on the phone to find out. The attendees were Mr. Nulty, his supervisor, Mr. Hoehler, a manager (with whom he had already had hostile interaction), and Ms. Ratliff, a local human resources representative. Ms. Ratliff told Mr. Dietz that she did not know the purpose of the meeting.

I find that, under the circumstances, given Mr. Nulty's June 4, 2013 memorandum, the complete lack of any response to the questions Mr. Dietz had raised about the legality of the DBP, which was inconsistent with the Respondent's own policies for handling whistleblower complaints, and the lack of any response to Mr. Dietz's June 5, 2013 memorandum, charging retaliation and announcing his prospective resignation, followed by Mr. Nulty summoning him to a meeting with no stated agenda, attended by his supervisor, a manager, and an HR representative, it was objectively reasonable for Mr. Dietz to conclude that he faced imminent discharge, and a stain on his career that would adversely affect his future employment.[38]

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[36] Mr. Dietz also confirmed that Mr. Nulty had issued no memoranda marked "confidential," as this one was, corresponding to other stale reports in the system.

[37] I had the opportunity to observe Mr. Dietz's demeanor and testimony during the hearing, and I found him to be a fully credible witness. He was forthright, and professional and courteous even in the face of aggressive and often hostile questioning.

[38] The Respondent's claim that the 24 hour period before the June 7 meeting request was not an adverse action focuses on a misrepresentation of Mr. Dietz's claims. Respondent's Brief at 19-21. Mr. Dietz has never claimed

Although the Respondent's subjective intent is not relevant, I find that the conflicting accounts of the purpose of the June 7, 2013 meeting support the conclusion that it was objectively reasonable for Mr. Dietz to believe that it was to fire him. Ms. Ratliff testified that when she called Mr. Nulty to find out the purpose of the meeting, he told her it was to accept Mr. Dietz's resignation.[39] According to Mr. Nulty, the purpose was to review Mr. Dietz's response to his June 4, 2013 memorandum. Mr. Surrette thought that the purpose was to listen to and understand Mr. Dietz's "concerns" more clearly and find a resolution. For her part, Ms. Valenzuela suggested that the purpose was to proceed with the turnaround process.

The Respondent claims that it fully complied with the management policy calling for immediate reaction and preparation of a strategy for responding to a resignation. But details are sorely lacking. Mr. Surrette verified that the "turnaround process," documented in Dr. Rodger's earlier writings, describes the best practices for "maximizing the potential for retention" when a valued employee resigns. (Tr. 856). Part of this process involves putting together a strategy to retain the employee. Mr. Surrette acknowledged that he did not give "explicit instructions" to Mr. Nulty about reacting immediately, because Mr. Nulty already was doing so, as a matter of routine, and people were "reacting promptly, gathering data, integrating with Legal and following the spirit of the process." (Tr. 857). Ms. Valenzuela indicated that the "internal team" met on June 6 and decided to set the June 7 meeting with Mr. Dietz. (Tr. 951-956).[40] But no one described any strategy for retaining Mr. Dietz, or the data that was being gathered, or how the "spirit of the process" was being followed. Nor is it clear why a representative from HR would be necessary for this process.

Viewing the totality of the evidence, I find that a reasonable person in Mr. Dietz's situation would conclude that quitting was his only option. Thus, I find that Mr. Dietz's June 7, 2013 resignation was a constructive discharge, and an adverse action under the Act.

Contributing Factor

Here, as in most cases of discrimination or retaliation, there is no direct evidence of intent. However, a complainant is not required to demonstrate specific knowledge that the respondent had the intent to discriminate against him. Instead, a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *See, Frady v. Tennessee Valley Authority,* 92-ERA-19 and 34 (Mar. 26, 1996); *Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1162 (9th Cir. 1984).

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that this time period constituted an "adverse action." The thrust of Mr. Dietz's claim is that the complete lack of any response to his June 5, 2013 memo, raising claims of retaliation to the Executive Vice President for Human Resources, followed more than a day later by a meeting notice with no agenda, caused him to be concerned about the purpose of the June 7 meeting.

[39] Ms. Ratliff testified that when she got the email scheduling the meeting, she had already received Mr. Dietz's email stating that his last day would be June 7. Because there was nothing in the email to indicate the purpose of the meeting, she called Mr. Nulty, who told her that it was to accept Mr. Dietz's resignation. Tr. 32-33.

[40] It is not clear from Ms. Valenzuela's testimony whether the "decision to sit down and set a meeting with Tim" was to proceed with the turnaround process. (Tr. 954).

The Board has noted that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact-finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action. The Board noted that there will seldom be eyewitnesses to an employer's mental process, and that fair adjudication of whistleblower complaints requires a full consideration of a broad range of evidence that may prove or disprove a retaliatory animus, and its contribution to the adverse action. *See, Timmons v. Mattingly Testing Services,* 95-ERA-40, 5-7 (ARB June 21, 1996). This circumstantial evidence may include temporal proximity, evidence of pretext, inconsistent application of the employer's policies, and shifting explanations for the Respondent's actions. *Sylvester*, ARB No. 07-123; *Kester v. Carolina Power & Light Co.*, ARB No. 01-007 (September 30, 2003).

The Secretary has noted that, when addressing a complainant's proof of a *prima facie case,* one factor to consider is the temporal proximity of the adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.,* 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Instant Oil Change, Inc.,* 91–SWD-4 (Sec'y Jan. 5, 1993). Findings of causation based on closeness in time have ranged from two days (*Lederhaus v. Dona Paschen Midwest Inspection Service, Ltd.,* 91-ERA-13 (Sec'y Oct. 26, 1992), to about one year (*Thomas v. Arizona Public Service Co.,* 89-ERA-19 (Sec'y Sept. 17, 1993). On the other hand, the lack of temporal proximity is a consideration, especially where there is a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply Sys.,* 95-ERA-52 (ARB Jul 30, 1996).

Furthermore, the complainant need not proffer direct evidence that unlawful discrimination was the real motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc*, 120 S.Ct. 2097, 2108 (2000).

In this case, as in many similar cases, there is no direct evidence that Mr. Dietz's protected activity was a contributing factor to the issuance of the June 4, 2013 memorandum, or his constructive discharge, and indeed, the Respondent's witnesses categorically denied that it was. But I find, considering all of the evidence and the rational inferences that can be drawn, Mr. Dietz has established that his protected activity was a contributing factor to these actions.

Mr. Dietz was hired by Respondent from Ramtron, and assigned as program manager for the TR 20005 project. His first performance review, in February 2013, was very positive, and he exceeded expectations in most categories. He also earned 80% of his target bonus in May 2013.

But shortly after Mr. Dietz began work on the TR 20005 project, he was undercut around April 24, 2013 when resources were taken from his project by Mr. Groat, a "kids soccer event," without his knowledge or consent. This was completely contrary to the Respondent's policy. When he learned of this, Mr. Dietz straightened it out and got the project back on track. But just weeks later, the same thing happened again – Mr. Groat removed resources from the project without saying anything to Mr. Dietz, or going through the appropriate channels, at the direction of Mr. Hoehler. Mr. Dietz specifically tasked the Test Engineering group (Mr. Groat's group) to come up with an action plan to address schedule slips on the project; he only found out about this

second incident by asking around about why he had received no response from the Test Engineering group, and where his resources were. He was attempting to work through the system to resolve the situation created by Mr. Groat and Mr. Hoehler.

There is no indication whatsoever that Mr. Groat or Mr. Hoehler, employees of Respondent, not new Ramtron hires who might be unfamiliar with the rules, and who violated explicit company policy not once, but twice within a five week span, ever suffered any kind of discipline or "coaching" in connection with these incidents. But Mr. Dietz, who had a little over a month earlier submitted his whistleblower memorandum to Mr. Nulty, and expressed his concerns to Ms. Valenzuela and Ms. Joaquin, was called on the carpet by Mr. Nulty and directed to fall on his sword for delaying reporting of the second "kids soccer event."

I find that the totality of the evidence, and the reasonable inferences it supports, establishes not only that, as discussed below, Mr. Nulty's June 4, 2013 memorandum was pretextual, but that the Respondent's stated reasons for this memorandum are false, and support a finding of discriminatory motive.

Mr. Surrette, who was involved in the preparation and approval of Mr. Nulty's June 4, 2013 memorandum, testified that the memorandum was "completely fact based," and based on data "objectively available" on the Respondent's systems. But he did not indicate what this "objective data" was, nor did the Respondent produce any of the "facts" or "objective data" that Mr. Surrette claimed he relied on.

Indeed, Mr. Nulty himself confirmed that his memorandum was triggered not by a review of "objective data" on the Respondent's systems, but on "performance issues" that he claimed came to light during the May 29, 2013 meeting. According to Mr. Nulty, Mr. Dietz admitted these performance shortcomings during this meeting. Mr. Dietz categorically denies that he did so.

Conspicuously absent at the hearing were Mr. Groat and Mr. Hoehler, who, if the Respondent's claims were correct, could have supported or corroborated a number of the Respondent's claims, but especially Mr. Nulty's version of what happened in the May 29, 2013 meeting.[41]

But setting aside the fact that Mr. Nulty's disciplinary memorandum was based, not on an objective review of any of Respondent's systems, but rather on his subjective rendition of the May 29, 2013 meeting, I find that Mr. Nulty's claims of performance shortcomings are not credible.

Mr. Nulty first claimed that Mr. Dietz allowed the TR 20005 project status to go stale, resulting in his automatic lockout from the PM system. At his deposition, however, Mr. Nulty testified that he did not verify that Mr. Dietz *was in fact actually* locked out of the NPDIS

[41] I note that the Respondent accuses Mr. Dietz of "inventing" a conversation with Mr. Groat on May 29. Respondent's Response at 6. The Respondent had the option of calling Mr. Groat as a witness to contradict Mr. Dietz, but chose not to do so. Mr. Dietz is the only witness to provide "actual testimony" about his conversation with Mr. Groat on May 28. See Respondent's Response at 7.

system; he only "verified" that after 10 days, if a project manager does not file a status report, he is locked out (CX 66 at 96). But Mr. Dietz testified that he was not locked out of any project for any reason. Mr. Dietz updated the system on May 10, 2013. The status report for May 18, 2013 shows that the system made an automatic update on that date. Accepting Mr. Nulty's logic, Mr. Dietz would have been automatically locked out on May 20, or 10 days after he filed his previous update. But Mr. Dietz made an update on May 22, the same day that he escalated the three week schedule slip, when he was, according to Mr. Nulty's logic, supposedly "locked out." He also made updates on May 24 and May 30, 2013, and thus could not have been locked out of the program manager system as a result of any failure to make proper updates.[42] Nor has the Respondent presented any evidence of a causal connection between routine lockouts, which occurred for a wide variety of reasons, and any failure by Mr. Dietz to update the PM system. There is simply no evidence to support Mr. Nulty's claim that Mr. Dietz was automatically locked out of the PM system because he allowed his project status to go stale.[43]

Mr. Nulty's second basis for his disciplinary memorandum was his claim that Mr. Dietz did not timely escalate a kids soccer event. Mr. Dietz was able to resolve the problems created by Mr. Groat the first time he removed one of the engineers, at the direction of Mr. Hoehler, from the TR 20005 project in April 2013. On May 22, 2013, Mr. Dietz learned about a potential slip of the tapeout date, and he advised Mr. Nulty by email, and immediately issued a pre-shutdown warning, tasking the Test Engineering team, specifically, Mr. Groat's group, to develop an action plan to recover from the schedule slips.

Mr. Groat did not respond to Mr. Dietz's email directing him to come up with an action plan, and there was no indication that he was doing anything to resolve the schedule slip or develop an action plan, nor could Mr. Dietz find him before the Memorial Day weekend. Without Mr. Groat's input, Mr. Dietz was not able to resolve the tapeout slip. Mr. Dietz, whose testimony I found to be fully credible, testified that late in the week before the Memorial Day weekend, when he was looking for members of the test engineering team to find out why they had not responded to his request for an update, he heard talk in the hallway suggesting that Mr. Dale, one of the members of the test engineering team, may have been reassigned to work on RMAs. He attempted to locate members of the Test Engineering team to follow up, but was unable to do so. When he returned to work after the Memorial Day weekend, Mr. Dietz located Mr. Groat, who still had not responded to Mr. Dietz's instructions or taken any action to resolve the schedule slip. Mr. Dietz asked him where he and the other team members had been the previous week, and why the Test Engineering team had not prepared an action plan for recovering the schedule. Mr. Groat told him that they did not prepare the requested action plan, because a test engineer had been pulled off the TR20005 project, with the approval of Mr. Hoehler.

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[42] Mr. Dietz updated the PM system on May 22, 2014, with a warning that some tasks were slipping and could affect milestones; he updated the PM system on May 24, 2013, to reflect a projected slip in the tapeout milestone by three weeks, and to warn that the test engineering tasks were pushing the schedule. CX 41 and 42. Mr. Nulty did not respond to those warnings.

[43] Nor has the Respondent produced any evidence to support Mr. Nulty's claim that the project was stale; it did not appear on the Respondent's May 29, 2013 Stale Schedule Report. And as Mr. Dietz has pointed out, there is no evidence that the program managers of the 28 stale projects on this report were ever disciplined or "coached."

Mr. Dietz immediately raised this issue with Mr. Hoehler, Mr. Nulty, and Mr. Todoroff, and scheduled a meeting with them, as well as Mr. Groat, for the following day, to resolve the kids soccer event he had just learned about, and to discuss personnel assignments for completing the assigned tasks.

Mr. Groat did not respond to Mr. Dietz's instructions or take any action to resolve the schedule slip until he was brought into the May 29, 2013 meeting. It was Mr. Groat who caused the schedule slip, at the direction of Mr. Hoehler, by removing Mr. Dale from the project for the second time, and concealing this from Mr. Dietz.[44] It was not until he got Mr. Groat into the May 29, 2013 meeting that Mr. Dietz was able to resolve the slip.

Mr. Nulty's testimony about when he learned of this second kids soccer event is inconsistent. At the hearing, he testified that he first learned of it during the May 29, 2013 meeting. On being confronted with his deposition, he admitted that although, at the time of the hearing, he did not recall hearing of the kids soccer event on May 28, he said that in his deposition.[45] Mr. Nulty also testified that Mr. Dietz reported, during the May 29, 2013 meeting, that he became aware of the second kids soccer event about Wednesday or Thursday of the preceding week. In fact, Mr. Dietz has consistently stated that, although he began hearing hallway talk about the possibility that resources had been removed from his project the preceding week, he was only able to confirm that the second kids soccer event occurred on Tuesday, May 28, 2013, when he was finally able to pin down Mr. Groat and question him about it. Mr. Dietz stated that he wanted to investigate the situation before raising red flags, which he did when he confirmed what had happened with Mr. Groat. I find Mr. Dietz to be fully credible on this issue.

I also note that, once again, the other attendees at the May 29, 2013 meeting, Mr. Hoehler and Mr. Groat, were not called as witnesses by the Respondent. Presumably, if Mr. Dietz had in fact admitted during the May 29, 2013 meeting that he because aware of the kids soccer event the Wednesday or Thursday of the preceding week, these witnesses could have corroborated Mr. Nulty's claim. That the Respondent chose not to call them raises the rational inference that they would not have done so.[46] There is nothing to suggest that Mr. Groat or Mr. Hoehler received any kind of discipline or "coaching" for their role in twice causing a kids soccer event, and concealing it from Mr. Dietz, the project manager, a clear violation of the Respondent's policies.

I find that Mr. Nulty's claim that Mr. Dietz did not properly escalate the second kids soccer event is not credible.

The third basis for Mr. Nulty's June 4, 2013 memorandum is his claim that Mr. Dietz was unable to adequately explain details behind a tapeout delay, and did not know the critical path

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[44] Mr. Hoehler was openly hostile to Mr. Dietz over his April shutdown warning.

[45] The Respondent's selective citations to the evidence to support its claim that Mr. Nulty was not aware of the kids' soccer event until May 29 are disingenuous. Respondent's Brief at 7-8. Viewing Mr. Nulty's deposition and hearing testimony as a whole, it is clear that he was advised of the kids soccer event by Mr. Todoroff on May 28. Tr. 731-734; CX 66 at 97-98.

[46] As Mr. Dietz notes, even if Mr. Nulty was correct, and he knew conclusively about the second kids soccer event on May 24, 2013, under the Respondent's policy, it was acceptable to delay escalating it until the next working day. Indeed, Mr. Nulty knew about this event on May 28, 2013, but did not consider it sufficiently urgent to address immediately.

during the May 29, 2013 meeting. Mr. Dietz was baffled because the claims in Mr. Nulty's memorandum did not bear any relationship to the meeting they had just concluded.[47] But especially puzzling was Mr. Nulty's claim that he was not able to adequately explain the project's "critical path." Mr. Dietz explained that it was not possible to view tasks in the critical path on paper; it required access to a computer, and a Webex connection for the participants.[48] This could have been set up ahead of time, but it was not; nor was it listed on the meeting agenda. Mr. Dietz's offer to set up a subsequent meeting to examine the critical path, to do a "deeper dive" on the critical path, was rejected by Mr. Nulty.

In essence, Mr. Nulty was criticizing Mr. Dietz for failing to perform a task that was not possible. Indeed, as Mr. Dietz testified, he had no idea what Mr. Nulty meant by this allegation. Mr. Nulty offered no further clarification about the basis for his claim, on June 4, 2013, that Mr. Dietz was not able to "adequately explain" the details behind the tapeout delay during the May 29, 2013 meeting.

I find that Mr. Nulty's justifications for his "coaching" memorandum are not supported or credible, and raise the rational inference that the real motivation for this memorandum was discriminatory.

It is also significant that the Respondent did not follow the requirements of its own Global Whistleblower Policy with respect to Mr. Dietz's query, which explicitly invoked the protections of that Policy. That Policy requires, *inter alia*, that the Respondent conduct a prompt and thorough investigation into the allegations by either the Audit Committee or the appropriate internal department. While the Respondent may be correct, that its Policy does not explicitly require that the person who made the complaint be notified of the progress or outcome of the required investigation, it was certainly reasonable for Mr. Dietz to expect some type of acknowledgement that his complaints were in fact being investigated, and some type of notification of the outcome, so that he could make a decision as to whether he wished to further pursue his complaints.[49]

In further support of its claim that Mr. Dietz had no reasonable expectation of receiving any further communication to "close" his concern about the DBP, the Respondent cites to Section 8.2.4 of its Whistleblower policy, which requires written documentation of the results of the investigation, with distribution limited only to the individuals with a "need to know" of the results. Respondent's Brief at 13-14. The memorandum is to be treated as privileged. Of course, this might have more significance if there was *any evidence* to suggest that the Respondent in fact conducted the prompt and thorough investigation required by its Policy, or that such a written memorandum, again as required by the Policy, was actually prepared. There is none.

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[47] It is not at all clear what the Respondent claims Mr. Dietz "got" when he received Mr. Nulty's May 29 email. See Respondent's Brief at 15.

[48] Mr. Nulty himself admitted that project managers are not expected to have the voluminous specifications of a project memorized; the TR 20005 project file with the embedded critical path covers sixteen pages.

[49] As Mr. Dietz has pointed out, it would have been difficult for the Respondent to conduct any type of investigation of his complaints without interviewing him as part of the investigation. And it is reasonable to assume that a "transparent" company would tell an aggrieved employee that his concerns were being investigated. Complainant's Brief at 19.

There is not a shred of evidence in the record that anyone from Respondent took even the first step to conduct any sort of investigation of Mr. Dietz's claims, as required by its own Policy, or take any sort of remedial action. Instead, all that was offered by Ms. Valenzuela was more training for the former Ramtron employees on how the DBP worked.[50] The Respondent's silence in the face of Mr. Dietz's allegations was deafening.

Nor is it accurate to characterize Mr. Dietz's meeting with Ms. Valenzuela and Ms. Joaquin as an "investigation" of Mr. Dietz's claims. After dismissing Mr. Dietz's concerns with her claim that the Respondent had obtained a legal opinion about the DBP, Ms. Valenzuela diverted the focus to further education of the Ramtron employees on how the DBP worked. Indeed, Ms. Valenzuela had not read the statutes Mr. Dietz had cited in his memorandum. There was no discussion at that time, or at any time since, addressing Mr. Dietz's concerns about the legality of the compulsory salary deductions under the DBP. The only "investigation" that appears to have been conducted was Ms. Valenzuela's attempt to find further information on the "Tim dynamic."

I find that the preponderance of the credible evidence, and the rational inferences that may be drawn therefrom, establishes that Mr. Dietz's April 12, 2013 memorandum questioning the legality of the Respondent's DBP was a contributing factor in Mr. Nulty's issuance of the June 4, 2013 disciplinary memorandum, as well as Mr. Dietz's constructive discharge.

Legitimate Nondiscriminatory Rationale for Adverse Action

I find that Mr. Dietz has demonstrated that his protected activity contributed to the Respondent's adverse employment actions, and thus the Respondent has the burden to produce evidence that the adverse actions were motivated by legitimate, nondiscriminatory reasons. Mr. Dietz cannot prevail if the Respondent shows by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of any protected behavior.

In this case, for all of the reasons discussed above, I find that the Respondent has failed to meet its burden to show by clear and convincing evidence that it would not have issued the June 4, 2013 memorandum that was the catalyst for Mr. Dietz's resignation, which I have concluded was a constructive discharge, in the absence of Mr. Dietz's protected activity. Thus, Mr. Dietz is entitled to relief under the Act.

REMEDIES

The Sarbanes-Oxley Act provides that any employee who prevails in an action under the whistleblower provision of the statute shall be entitled to all relief necessary to make the employee whole. Relief under the Act includes reinstatement, back pay with interest, and compensation for any damages sustained, including litigation costs, expert witness fees, and reasonable attorney fees. Title 18 U.S.C. § 1514A(c)(2)(A)-(C); 29 C.F.R. § 1980.109(b).

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[50] As Mr. Dietz pointed out, it was the Respondent's responsibility for following up on Mr. Dietz's complaint, not Mr. Dietz's. Complainant's brief at 17-18.

Mr. Dietz seeks an award of back pay, based on his salary of $148,500 a year at the time of his constructive discharge on June 7, 2013; this amount does not include the Respondent's benefits, which include health, life, and vision insurance. He also seeks immediate vesting of 3,512 shares of Cypress stock, and 2,041 shares of Cypress stock options.

Mr. Dietz also seeks reinstatement with Cypress, and an Order prohibiting further retaliation against him, and barring Mr. Nulty and Mr. Surrette from supervising him.

The Respondent has not addressed the issue of damages, other than to argue that Mr. Dietz is not entitled to any.

Based on my determination that the Respondent has violated the whistleblower provision of the Act, Mr. Dietz is therefore entitled to back pay with interest payable at the rate established by the Internal Revenue Code. The total amount of that back pay to the date of this Decision and Order is $220,105.85 (541 days multiplied by $406.85 a day).

Mr. Dietz is also entitled to reimbursement for the benefits provided by Cypress, for health, life, and vision insurance, which total $31,199.08 (541 days multiplied by $41.71 a day) as of the date of this Decision and Order.

I note that Mr. Dietz testified that, although his solo practice law firm has generated a very modest profit, he has not paid himself, but has rolled the profits back into the firm's operating account. There is no indication that Mr. Dietz has had any earnings through the end of 2014 that would offset the back pay amount.[51]

I find that Mr. Dietz is entitled to immediate vesting of the 3,512 shares of Cypress stock and 2,041 shares of Cypress stock options that he would have received but for the termination of his employment with the Respondent.

The Respondent will be required to reinstate Mr. Dietz to his previous position, which will not require him to report to Mr. Nulty or Mr. Surrette. The back pay will continue to accrue at the rates set out above until the Respondent reinstates Mr. Dietz.

Mr. Dietz credibly testified that leaving the Respondent completely derailed the long term plans of himself and his wife; their plan was that he would work for about five years for the Respondent, and then re-evaluate. This would have put them in a very strong financial position, possibly with their house paid off, so that Mr. Dietz could retire, and possibly start a solo law practice or some other business such as a software development corporation, and they could live on his military retirement.

In the event that the Respondent determines that it is not practical or possible to reinstate Mr. Dietz under these conditions, the Respondent will pay to Mr. Dietz the sum of $654,906, representing front pay (salary and benefits) for a period of four years.

[51] Mr. Dietz receives a military pension, but that is not properly considered as an offset to a back pay award.

Finally, as a prevailing party, Mr. Dietz is entitled to recover his litigation costs and expenses, including witness fees and reasonable attorney's fees. An itemization of such costs and expenses, including supporting documentation, must be submitted by the Complainant within thirty days from the date of this order. Respondent shall have fifteen days thereafter within which to challenge payment of the costs and expenses sought by the Complainant.

ORDER

IT IS HEREBY ORDERED that the Respondent, Cypress Semiconductor Corporation, Inc., shall:

1. Immediately reinstate Mr. Dietz to his former position, with the caveat that he not be required to report to Mr. Nulty or Mr. Surrette.

2. Pay to Mr. Dietz back pay in the amount of $220,105.85, together with interest on said sum at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621.[52]

3. Pay to Mr. Dietz the sum of $31,199.08, representing lost health, life, and vision insurance benefits, together with interest on said sum at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621.

4. Grant to Mr. Dietz immediate vesting of 3,512 shares of Cypress stock and 2,041 shares of Cypress stock options.

5. In the event that the Respondent determines it is not practical or possible to reinstate Mr. Dietz to his former position, the Respondent will pay to Mr. Dietz front pay in the amount of $654,906.00.

6. In the event that the Respondent does not reinstate Mr. Dietz to his former position, the Respondent will provide Mr. Dietz with a neutral employment reference.

7. Pay to Mr. Dietz the reasonable costs and attorney fees incurred in prosecuting his claim, to be determined as discussed above.

[52] Back pay and benefits will continue to accrue until such time as the Respondent reinstates Mr. Dietz, or makes a determination that reinstatement is not practical or possible.

SO ORDERED.

Digitally signed by Linda Chapman
DN: CN=Linda Chapman, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE: Pursuant to ¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002), authority and assigned responsibility to act for the Secretary of Labor has been delegated to the Administrative Review Board ("ARB") in review or on appeal of cases arising under the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. The Sarbanes-Oxley Act employee protection provision provides that complaints filed with the Secretary of Labor shall be governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b). Regulations directly governing Sarbanes-Oxley Act whistleblower complaints, however, have not yet been promulgated by the Department of Labor. In light of the absence of clearly governing regulations, the parties are advised that they should preserve their rights of appeal by filing in writing with the ARB, within ten business day of the date of this Decision and Order, any petition for review by the ARB. The ARB's address is Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave, Washington DC 20210. The petition should be served on all parties and on the Chief Administrative Law Judge.

ATTACHMENT 5

U.S. Department of Labor
Occupational Safety and Health Administration
Cesar Chavez Memorial Building
1244 Speer Boulevard, Suite 551
Denver, CO 80204
Main: (720) 264-6550 Fax: (720) 264-6585

Certified Mail: 7012 3050 0000 4949 3818

September 9, 2013

Timothy Dietz
5805 Rowdy Drive
Colorado Springs, CO 80924

Re: Cypress Semiconductor Corp. / Dietz / 8-0600-13-139

Dear Mr. Dietz;

This is to advise you that we have completed our investigation of the above-referenced complaint filed by you, Timothy Dietz (Complainant), against Cypress Semiconductor Corp. (Respondent), on August 14, 2013, under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A (SOX). In brief, you alleged you were constructively discharged on June 7, 2013, in retaliation for voicing concerns regarding the company's corporate design bonus program.

Following a limited investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region VIII, finds there is no reasonable cause to believe that Respondent violated the above statute and issues the following findings:

Secretary's Findings

Respondent is a company within the meaning of 18 U.S.C. §1514(A) in that it has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). Complainant is an employee within the meaning of 18 U.S.C. §1514A. Complainant and Respondent are covered under the provisions of the above-mentioned Act.

Respondent is engaged in delivering high-performance, mixed-signal, programmable solutions for a large span of products to include touch screens, USB controllers and multimedia handsets. Respondent has locations in both the United States and Internationally. Complainant was hired on November 12, 2012, as a new product program manager. Complainant's job duties included the responsibility for new product development.

Complainant resigned his position with Respondent on June 7, 2013; then, filed a complaint with the Secretary of Labor on August 14, 2013, alleging Respondent discriminated against him in violation of the above listed statute. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

On April 12, 2013, after researching what Complainant felt to be illegal activity regarding the corporate design bonus program, Complainant sent an email to his supervisor requesting a meeting. Complainant stated he believed the requirement of mandatory participation in the corporate design bonus program was against Colorado and California state law.

On April 22, 2013, as a result of Complainant sending the email to his supervisor, a meeting was scheduled that included Complainant and two of Respondent's attorneys. During this meeting, Complainant explained why he felt the bonus program was illegal; however, at the conclusion of the meeting Complainant felt nothing was accomplished.

On April 24, 2013, Complainant met with his supervisor and voiced his concerns (the same supervisor to whom he initially emailed the complaint); however, Complainant stated he felt nothing was accomplished as a result of this meeting.

On May 29, 2013, Complainant and management gathered for a meeting where Complainants performance issues were addressed between Complainant and the upper management team. After the meeting, Complainant's supervisor presented a list of performance issues and requested that Complainant respond to them in writing. Complainant's supervisor stated these performance issues would be placed into his personal folder along with a memo provided by Complainant.

On June 4, 2013, Complainant and his supervisor met to discuss Complainant's memo regarding the performance issues; however, Complainant refused to address any misconduct or errors in his job duties.

On June 5, 2013, Complainant provided his resignation letter to his supervisor with an effective date of July 1, 2013.

On June 6, 2013, Management requested Complainant attend a meeting which included his supervisor, the business manager, and the human resources manager; however, Complainant believed he was going to be terminated and resigned effective immediately.

Although Complainant raised issues with his supervisor about alleged illegal activity regarding the Corporate Design Bonus Program, the evidence did not support an inference that Complainant had an objectively reasonable belief that Respondent engaged in wrongdoing that would violate wire fraud, bank fraud, securities fraud, an SEC rule or violation or any provision or Federal law relating to fraud against shareholders. Thus, the complaint does not constitute protected activity under Title VIII of the Sarbanes-Oxley Act of 2002.

In addition, there is insufficient evidence to establish Complainant was subjected to an adverse employment action because he provided his resignation after a meeting was scheduled with the upper management team. Furthermore, the resignation does not meet the threshold of constructive discharge as there is insufficient evidence to show that Respondent deliberately created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.

Accordingly, even if it could be established that Complainant did engage in protected activity, the evidence indicated Complainant was not subjected to an adverse employment action. Therefore, a prima facie allegation has not been established. Consequently, this complaint is hereby dismissed.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
Suite 400N, Techworld Building
800 K Street NW
Washington, D.C. 20001-8002
Phone (202) 693-7542; Fax (202) 693-7365

With copies to:

Cypress Semiconductor Corporation
198 Champion Ct
San Jose, CA 95134

Gregory J. Baxter, OSHA Regional Administrator
1244 Speer Blvd.
Suite 551
Denver, CO 80204
(720) 264-6585 fax; (720) 264-6550 office

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue NW, N2716
Washington, D.C. 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an ALJ, in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under SOX.

A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. The rules and procedures for the handling of SOX cases can be found in Title 29, Code of Federal Regulations Part 1980, a copy of which was sent to you earlier, and may be obtained at www.osha.gov.

Sincerely,

for Gregory J. Baxter
Regional Administrator, VIII

cc: Chief Administrative Law Judge, USDOL
Deputy Director, Division of Enforcement, Securities Exchange Commission
Department of Labor, Associate Solicitor
Cypress Semiconductor Corporation, Respondent