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

REPLY BRIEF OF PETITIONER CYPRESS SEMICONDUCTOR CORPORATION

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GLOSSARY

ALJ:	Administrative Law Judge
AR:	Administrative Record
ARB:	Administrative Review Board
Cypress:	Cypress Semiconductor Corporation
DBP:	Cypress's Design Bonus Plan
OSHA:	Occupational Safety and Health Administration
Respondents:	Secretary of Labor and Timothy Dietz
SEC:	Securities and Exchange Commission
Secretary:	Secretary of Labor
Section 1514A:	18 U.S.C. § 1514A

INTRODUCTION

The Secretary of Labor and Timothy Dietz ("Respondents") ignore the elephants in the room: The Administrative Review Board ("ARB") held that the administrative law judge ("ALJ") made repeated errors. The majority affirmed only by relaxing the standard for constructive discharge, changing Dietz's theory of protected activity, and eliminating the employer-knowledge requirement of 18 U.S.C. § 1514A. Even then, its language was extraordinary, "accepting [a] seeming contradiction" in the ALJ's findings based on what "the ALJ must have believed" but "did not say." AR2394. The dissent simply found no substantial evidence of constructive discharge. AR2402.

The Secretary acknowledges none of this, while Dietz asks this Court to affirm on grounds that—he does not acknowledge—the ARB firmly rejected.

Respondents have good reason to dance around these facts. Dietz's June 5, 2013 letter declared, "I am terminating my employment at Cypress," accused Cypress of state wage law violations and "unlawful retaliation," "demand[ed]" money, and ended by identifying him as a lawyer admitted in four states. AR1409-14. *That* was Dietz's response to the June 4 memo from his supervisor, James Nulty, which the ARB found read "nothing like … a discharge (or future discharge) of any kind." AR2394 & n.60. The very next day, Nulty invited Dietz to a June 7 lunch meeting. AR747-48. But

hours before that meeting, Dietz made his resignation immediately effective and walked out the door to start his own law practice. AR1743.

A constructive discharge occurs only when intolerable working conditions compel a reasonable person to resign or where a person resigns "involuntarily" because of an explicit ultimatum to quit or be fired. Dietz faced no intolerable working conditions: only a disciplinary memo that the ARB found did not constitute a discharge, and (after he quit in protest) a meeting request sent without an agenda. That invitation plainly was neither an "intolerable condition" nor an explicit threat that he would be fired (which would have made no sense since he had already resigned). Only one conclusion has legal and substantial evidentiary support: the ARB erred in ruling for Dietz, and its orders should be reversed.

ARGUMENT

The Secretary is wrong to claim that this Court is reviewing "the ALJ's decision, as affirmed by the [ARB]." Secretary Br. 25. The ARB held that its "affirmance … should not be viewed as … adopting[] anything in the ALJ's [decision]." AR2381 n.3. Under the Secretary's own regulations, the ALJ's decision is "inoperative," 29 C.F.R. § 1980.110(b); only the ARB's orders are before this Court. *Sievers v. U.S. Dep't of Labor*, 349 F. App'x 201, 203 (9th Cir. 2009). As explained below, those orders contain many reversible errors.

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

A. Dietz voluntarily resigned before his alleged constructive discharge.

The Secretary does not dispute the ARB's holding that Dietz was not constructively discharged if he resigned on June 5. *See* Cypress Br. 27-28; Secretary Br. 47-48. Nor do Respondents deny that *Green v. Brennan*, 136 S. Ct. 1769 (2016), provides the standard to determine when Dietz resigned. *See id.*; Dietz Br. 25-27. Under *Green*, "an employee resigns when he gives his employer definite notice of his intent to resign." 136 S. Ct. at 1782.

The Secretary maintains that "definite notice" presents a question of fact. Secretary Br. 47. Here, it is answered as a matter of law. Dietz's June 5 letter said: "I am terminating my employment at Cypress." AR1413. The ARB found that the letter contained "no implication" that Dietz "would be willing to stay" under any circumstances. AR2394. Under *Green*, no "reasonable person" could accept the ARB's finding that Dietz's unequivocal June 5 letter was not a resignation. *Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1129 (10th Cir. 2013) (explaining substantial-evidence review).

Respondents argue that Dietz's letter implicitly attempted to invoke Cypress's turnaround process. Secretary Br. 47-48; Dietz Br. 25-27. Even if Dietz hoped Cypress would beg him not to resign, it does not matter. The question is whether Dietz gave Cypress "definite notice of his intent to resign." *Green*, 136 S. Ct. at 1782. He

told Cypress "I am terminating my employment at Cypress." AR1413. That is "definite notice" as a matter of law.

Dietz alone argues that his June 5 resignation letter was a constructive discharge, while simultaneously claiming that he "did not resign on June 5." Dietz Br. 25, 27-29. The ARB found those contradictory arguments "almost disingenuous," AR2394, and found that Nulty's June 4 memo read "nothing like" a "constructive discharge." AR2394 n.60. And the ARB recognized that Dietz was not constructively discharged on June 7 "if Dietz's June 5th letter was in fact a resignation." AR2393. Substantial evidence supports those findings.

Because Dietz resigned on June 5, he was not constructively discharged. AR2393; *accord* AR2402 (ARB dissent). Reversal is therefore warranted.

B. The ARB erroneously held that Dietz was constructively discharged on June 7.

1. The ARB applied the wrong legal standard.

This Court also should reverse because the ARB applied the wrong legal standard in finding a constructive discharge on June 7. It should have required Dietz to prove that he faced "'unendurable working conditions'" that were "'so intolerable that a reasonable person in [his] position would have felt compelled to resign.'" Cypress Br. 27 (quoting Supreme Court cases). Dietz should have had to "show that he had '*no other choice* but to quit.'" *Potts v. Davis County*, 551 F.3d 1188, 1194 (10th Cir. 2009) (affirming summary judgment).

The Secretary admits (Br. 40) that these are the "ordinar[y]" standards for constructive discharge and maintains that the ARB "appropriately recognized" them. But the ARB recognized them (AR2390) only to cast them aside. AR2391. The ARB never found that Dietz's working conditions were intolerable. Instead, it applied a novel "second way of finding a constructive discharge" so long as Cypress *implicitly* "'communicated to Dietz that he would be fired,'" even if Cypress was *not* "on the verge of firing him." AR2391 & n.48.

There is no support for the ARB's standard, which makes unnecessary both intolerable working conditions and an explicit threat of imminent termination. *See* Cypress Br. 31-36. Indeed, the cases Respondents cite underscore the ARB's departure from settled law. The Secretary invokes *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990); *Exum v. U.S. Olympic Committee*, 389 F.3d 1130 (10th Cir. 2004); and *Yearous v. Niobrara County Memorial Hospital*, 128 F.3d 1351 (10th Cir. 1997). Secretary Br. 40-43. Only *Spulak* found a constructive discharge. And the Secretary (Br. 50) overlooks the explicit threat in *Spulak*: the boss told the plaintiff, "I am going to fire you," gave him an "ultimatum either to be fired or to take early retirement," and warned that, if the plaintiff "tried to withdraw his retirement, [the boss] would find some other way to fire" him. 894 F.2d at 1153. As the ARB found, however, Cypress never explicitly told Dietz, "'Unless you resign, you'll be fired,'"

AR2396, and Nulty's June 4 memo did not "suggest[] a discharge (or future discharge) of any kind." AR2394 n.60.

Exum and *Yearous* found no constructive discharge, holding that the resignations were voluntary as a matter of law. *Exum*, 389 F.3d at 1135-36 (affirming summary judgment because resignation was "a free choice"); *Yearous*, 128 F.3d at 1356-57 (reversing jury verdict because resignations were "voluntary" despite "unpleasant and difficult" conditions). *Exum* further explained that an *explicit* ultimatum "between resignation and termination is not necessarily a constructive discharge, unless the employee's decision is, for some reason, involuntary." *Id.* at 1135. Dietz's resignation was voluntary as a matter of law: his June 7 email to his "[c]olleagues, mentors and most importantly, [his] friends" explained that he had "reflect[ed] on the work environment over the past two days" and "reached the conclusion" to resign. AR1743.

To these unsupportive cases, Dietz (Br. 31-37) adds *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569 (10th Cir. 1992), and *Burks v. Oklahoma Publishing Co.*, 81 F.3d 975 (10th Cir. 1996), which (as Cypress explained, Br. 33-34) likewise applied the intolerable-conditions standard and rejected the significance of any but the most explicit, unambiguous threats of discharge. He also cites *Lockheed Martin*, *supra*, and *Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224 (10th Cir. 2009), but they applied the intolerable-conditions standard, not the ARB's relaxed

alternative. *See Lockheed*, 717 F.3d at 1134 (ARB "explicitly" found "'intolerable'" conditions); *Strickland*, 555 F.3d at 1229 ("intolerable" conditions).

Conceding that the ARB's standard has been "questioned by the Eighth Circuit," Dietz also asks this Court to side with the Sixth and Seventh Circuits. Dietz Br. 34-36 (citing *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326 (7th Cir. 2002), and *Laster v. City of Kalamazoo*, 746 F.3d 714 (6th Cir. 2014)). But there is no split: the Seventh Circuit has since expressly rejected the ARB's legal standard, explaining that *Chicago Hospitals* involved intolerable conditions. *See* Cypress Br. 35-36. Sixth Circuit law also is squarely against Dietz. *Laster* affirmed summary judgment because the plaintiff failed to prove the employer had the specific intent of forcing him to quit (746 F.3d at 728), a standard Dietz never tried to meet. It also found no constructive discharge as a matter of law because the employer's decision-makers did not "directly" and "actually" tell the plaintiff "that he would be terminated," even though a non-decision-making employee told the plaintiff that he likely would be fired. *Id.* at 728-29. Here, no one told Dietz that he likely would be fired.[1]

[1] Respondents' citations to actual-termination cases are inapposite. *E.g.*, Dietz Br. 35. Dietz's claim admittedly rests on his "belie[f]" that "he was going to be fired" at a future meeting. *Id.* at 31. Actual termination does not involve fear of future termination. *See Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 88 (2d Cir. 1996) (employer wrote termination letter); *Thomas v. Dillard Dep't Stores, Inc.*, 116 F.3d 1432, 1432 (11th Cir. 1997) ("employer removed [employee] from her present position"); *EEOC v. Serv. News Co.*, 898 F.2d 958, 960 (4th Cir. 1990) (employer terminated employee in meeting).

Lacking support for the ARB's standard, the Secretary calls the standard "*dicta*." Secretary Br. 43. That clearly is wrong. As Dietz admits (Br. 34), "the ARB relied on the 'second way of finding' constructive discharge." Indeed, the ALJ applied the intolerable-conditions standard, and the parties argued under that standard before the ARB. *See* AR2391 n.48. Yet the ARB criticized the ALJ for "conflat[ing]" the law and called it "[b]affling[]" that Dietz "focus[ed] on the 'intolerable conditions' method." AR2391 & n.48. The ARB also repeatedly cited purported "second"-method cases in footnotes. *See* AR 2391-92, AR2395-96. It decided this case based on an erroneous legal standard.

Finally, Dietz urges this Court to adopt a standard that "knowing one faces imminent termination … turns an otherwise voluntary choice into an involuntary one." Dietz Br. 33. The Supreme Court and this Court have repudiated that subjective-knowledge standard, holding instead that "[t]he inquiry is objective," *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004), and "[a] plaintiff's subjective views of the situation are irrelevant." *Yearous*, 128 F.3d at 1356. Moreover, this Court found no constructive discharge even when an employee was given a week to decide whether to resign or face termination. *See Parker v. Bd. of Regents of Tulsa Jr. Coll.*, 981 F.2d 1159, 1162-63 (10th Cir. 1992). Dietz, in contrast, was never told to resign or face termination.

Because the ARB applied the wrong legal standard, this Court should reverse. *See* Cypress Br. 36 (citing cases).

2. The ARB's erroneous standard is not entitled to deference.

Respondents also ask this Court to grant *Chevron* deference to the ARB's misinterpretation of "discharge." Secretary Br. 51-53; Dietz Br. 37-40. But *Chevron* deference does not apply under Section 1514A. After this Court granted *Chevron* deference in *Lockheed Martin*, 717 F.3d at 1131, the Supreme Court declined to do so in *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014). As Justice Sotomayor noted in dissent, the majority "decline[d] to defer to a portion of the ARB's ruling." *Id.* at 1186 n.11 (joined by Justices Kennedy and Alito); *accord id.* at 1177 (Scalia, J., joined by Thomas, J., concurring in judgment) (disagreeing with ARB's interpretation of Section 1514A). Justice Sotomayor also demonstrated why *Chevron* deference is improper: Congress granted lawmaking power under Sarbanes-Oxley to the SEC, not the Secretary; the structure of Section 1514A is incompatible with *Chevron* deference; and the Secretary delegated any lawmaking power to OSHA, not the ARB. *Id.* at 1186-87.

No court of appeals has granted *Chevron* deference to the ARB under Section 1514A in the wake of *Lawson*. *See Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220 (2d Cir. 2014); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 809 (6th Cir. 2015). Because *Lawson* "*contradicts* or *invalidates*" *Lockheed Martin*, this panel also

is not required to apply *Chevron* deference. *United States v. Brooks*, 751 F.3d 1204, 1209-10 (10th Cir. 2014) (rejecting circuit precedent based on intervening Supreme Court decision that was "not directly on point" or "on all fours").[2]

Even if the *Chevron* (or *Skidmore*) framework applies, deference is not warranted because the proffered statutory interpretation is unreasonable. The "doctrine" of constructive discharge has been "solidly established in the federal courts" since the 1960s, and the requirement of "intolerable" conditions arose in the 1930s. *Suders*, 542 U.S. at 141-42. Congress "is presumed to have incorporated" this well-established meaning "absent an indication to the contrary in the statute itself." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013). Nothing in the text of Section 1514A suggests that Congress meant to depart from this settled meaning. In fact, the ARB neither attributed such an intent to Congress nor distinguished Section 1514A from other statutes. It claimed to apply the constructive-discharge law that operates "[i]n both the discrimination and the retaliation contexts"—nothing confined to Section 1514A. AR2391 n.43. And it based its standard on a misreading of this Court's precedents. AR2391 n.46. An agency's misinterpretation of case law deserves no deference. *Owen v. Bristol Care, Inc.*, 702

[2] Respondents cite *TransAm Trucking Inc. v. ARB*, 833 F.3d 1206 (10th Cir. 2016), which did not involve Section 1514A or consider *Lawson*. They also cite the summary order in *Unified Turbines, Inc. v. U.S. Department of Labor*, 581 F. App'x 16 (2d Cir. 2014), which likewise did not involve Section 1514A and addressed actual, not constructive, discharge. *See Nagle v. Unified Turbines, Inc.*, 2013 WL 3279777, at *2 (ARB 2013).

F.3d 1050, 1054 (8th Cir. 2013); *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002). Neither do "appellate counsel's *post hoc* rationalizations." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

In the absence of an explicit ultimatum to Dietz that he quit or be fired, the intolerable-conditions standard should have governed, and Dietz faced nothing approaching intolerable conditions when he quit.

3. Dietz did not face intolerable working conditions as a matter of law.

The ARB dissent correctly found no substantial evidence of a constructive discharge. AR2401. Indeed, as a matter of law, Dietz's workplace conditions were not "intolerable" or "unendurable"—which must be "more" than a hostile workplace. *Suders*, 542 U.S. at 141, 146-47. It is undisputed that:

- Cypress never demoted Dietz, lowered his salary, or reduced his responsibilities.
- Cypress never subjected Dietz to personal harassment.
- Cypress never told Dietz that he would be fired. AR2396.
- Cypress never asked Dietz to resign. *Id.*

It also is clear that Dietz freely chose to resign. Nulty's June 4 memo asked him to explain "[w]hat you did wrong and what you should have done." AR1401. Dietz could have admitted error or explained that he did nothing wrong. Instead, he wrote: "my response is that I am terminating my employment at Cypress." AR1413. When he

made his resignation immediately effective two days later, Dietz told the entire Colorado office—his "friends"—that he had "reflect[ed] on the work environment over the past two days" and decided that staying was "unworkable." AR1743. Dietz's actions leave no doubt that he chose to resign freely and voluntarily, which as a matter of law is not constructive discharge. *See* Cypress Br. 36-38.

Respondents point to immaterial issues:

Design Bonus Program ("DBP"). Dietz's argument that Cypress "essentially ignored Dietz's whistleblower complaints" is absurd. Dietz Br. 25. Nulty forwarded Dietz's email criticizing the DBP to Cypress's general counsel, Victoria Valenzuela, who spoke with Dietz for 20 minutes. AR648-49, AR652, AR1284-85, AR1695. Dietz argued that the DBP violates state law; Valenzuela disagreed. AR890. Valenzuela had Paul Hastings LLP's advice. AR1274. There was nothing for her to investigate, and she was not required to explain the law to Dietz.[3]

Groat's removal of resources. The Secretary argues that, after Dietz questioned the DBP, "Cypress remove[d] personnel from Dietz's project twice." Secretary Br. 11. Yet Dietz testified that, on the first occasion, it was "the right thing to do for Cypress" because the employee, John Groat, was trying to resolve customer complaints. AR667, AR671. And the Secretary correctly explains that, after Nulty

[3] Dietz's continuing claim that the DBP violated state wage laws (Br. 2 n.2) ignores the cases holding that an employer can prospectively reduce an at-will employee's salary after giving advance notice, exactly what Cypress did. *See* Cypress Br. 7 n.3.

learned about Groat's action, Nulty "commended" Dietz "for 'working to do the right thing.'" Secretary Br. 11. It is a strange theory of retaliation to blame Nulty for supporting Dietz *after* Dietz told Nulty that the DBP violated state wage laws.

The Secretary also recognizes that, on the second occasion, Dietz "overheard" on Thursday or Friday that Groat pulled resources off his project to resolve customer complaints, but Dietz did not report that fact until the following Tuesday. Secretary Br. 12. And as soon as Nulty found out, he scheduled a meeting "to ensure that Dietz's project had adequate" resources. *Id.* That meeting prompted Nulty's criticisms.

Nulty's memo. Nulty's June 4 memo was not an intolerable working condition. This Court has rejected the "facially dubious notion that, when required to sign an adverse performance review or disciplinary notice, an employee may simply elect to quit and claim a constructive discharge." *Rollins v. Am. Airlines, Inc.*, 279 F. App'x 730, 735 (10th Cir. 2008). Even "[r]epeatedly receiving poor evaluations," while "unpleasant for anyone, … does not rise to the level of such intolerable conditions that no reasonable person would remain on the job." *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197, 1201 (11th Cir. 2001).

Nulty's language was mild, as the ARB found. The memo read "nothing like" a "constructive discharge" and was not "tantamount to future termination"; indeed, "nothing on its face suggest[ed] a discharge (or future discharge) of any kind."

AR2394 & n.60. Nulty's statement that "future infractions will result in further disciplinary action, up to and including termination" (AR1156) is ubiquitous HR language that does not constitute a constructive discharge. *See Keller v. Crown Cork & Seal, USA, Inc.*, 491 F. App'x 908, 911, 915 (10th Cir. 2012); *Cosby v. Steak N Shake*, 804 F.3d 1242, 1244-46 (8th Cir. 2015); *Seeney v. Elwyn, Inc.*, 409 F. App'x 570, 574 (3d Cir. 2011); *Agnew v. BASF Corp.*, 286 F.3d 307, 308-10 (6th Cir. 2002). A contrary finding would transform every formal criticism into a firing.

Respondents' claim that Nulty's memo was "career-ending" overinflates its source: Dietz's testimony that it is "career-ending" simply to "admit misconduct." AR737. Dietz's arguments make clear that he did not consider the memo career-ending. Dietz asserts that, *after* Nulty's memo, "he 'expect[ed]' Cypress's executives" to aggressively persuade him not to resign. Dietz Br. 20. And he maintains that he resigned on June 7 to avoid "the first stain on his blemish-free record." *Id.* at 20-21. Each assertion is absurd if Dietz believed that Nulty's memo had ended his career.

Respondents also argue that Nulty's criticisms were "entirely baseless." Secretary Br. 48. But "unfair and unwarranted treatment is by no means the same as constructive discharge." *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1162 (3d Cir. 1993) (Alito, J.). "[B]eing reprimanded without reason" is "not intolerable." *Harriston v. Chi. Tribune Co.*, 992 F.2d 697, 705 (7th Cir. 1993).

Moreover, Dietz's actions confirm that Nulty's criticisms were justified. Dietz testified that Nulty expressed concerns about slips starting in April 2013. AR857. Dietz testified that, in late May 2013, Dietz forecast a three-week slip on a milestone far in the future (AR881), which could cost Cypress millions of dollars (AR966). Dietz admitted that the slip could even have prompted "legitimate" questions from Cypress's CEO. AR881. And the record is clear that, an hour after Nulty first criticized Dietz, Dietz reported that he had met with Groat and eliminated the slip. AR1715. An hour of attention resolved Dietz's multimillion-dollar false alarm.

Dietz also improperly likens his situation to the employees in *Lockheed Martin* and *Strickland*. In *Lockheed*, the employer sought to replace the employee before she quit and "strongly discouraged" her from applying for a job posting; then, when the position was filled, the employee "lost her title, office, [and] supervisory responsibilities" before resigning. 717 F.3d at 1134. In contrast, Cypress never demoted Dietz or sought to replace him.

In *Strickland*, the employee was subject to months of abuse, complained internally, and was denied a requested transfer after being told that "transfers were only available to 'successful' employees." 555 F.3d at 1226-27. In contrast, Dietz argues that Nulty's May 29 email was "the first time that Nulty had criticized Dietz."

Dietz Br. 14 n.9.[4] Dietz resigned the day after receiving Nulty's follow-up June 4 memo and made his resignation immediately effective two days later.[5]

Turnaround process. Dietz argues at length about Cypress's turnaround "Spec." *See* Dietz Br. 5-6, 8-10, 30. Notably, he does not quote the Spec, which he did not place into the record. He instead quotes a 30-year-old article published when Cypress was a tenth its current size. As the Secretary recognizes (Br. 16), the Spec is different. *See* AR1351 (Valenzuela: "That's an article … but the spec actually exists").

Moreover, Cypress complied with the spirit of the Spec. As Valenzuela testified, Dietz did not submit "a plain vanilla resignation" allowing Nulty to approach him immediately to talk. AR1348. Dietz's resignation accused Nulty of baseless criticism and "unlawful retaliation," demanded money, reminded Cypress that Dietz was a Colorado lawyer, and said that he would remain at Cypress for a few weeks. *Id.*; AR1409-14. Dietz's letter prompted immediate, "significant fact-finding," as

[4] Dietz's resignation letter, however, said that Nulty had accused Dietz of "intentionally misleading" him "as far back as January and February of this year," months before Dietz complained about the DBP. AR1412.

[5] Dietz also cites *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000). Dietz Br. 28, 37. There, the plaintiff was expressly and repeatedly told to resign because of his race and was told that he would never perform adequately. 219 F.3d at 652. Those facts bear no resemblance to Nulty's criticisms. Finally, Dietz (Br. 28) cites *Hopkins v. Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987), where the employee was "advised" to resign after being passed over for partnership, the "customary and nearly unanimous" practice at the company. Dietz was never advised to resign.

Cypress's executives worked through the night and following day to investigate Dietz's criticisms and determine whether "Nulty [could] continue to be involved" with Dietz. AR1250, AR1346.

Dietz argues that the turnaround process required Cypress to tell him that quitting was a mistake on "the second day [after the announced resignation]." Dietz Br. 30. But Dietz never gave Cypress the chance. Cypress scheduled a meeting two days after Dietz's June 5 resignation, yet Dietz declined to attend and resigned effective immediately rather than hear what Cypress had to say. AR436.

Meeting request. Respondents note that the calendar request for the June 7 meeting did not list an agenda, but they identify no evidence associating employee terminations with agenda-less meeting requests. *See* Cypress Br. 40. Nor do they deny that Dietz did not always include agendas in his meeting requests. *Id.* And they do not dispute that Diane Ratliff—whom Dietz called as a friendly witness at trial—testified that it was not atypical for meeting requests to lack agendas. *Id.* Regardless, an agenda-less meeting request hardly compels a resignation or confirms that Dietz "was *definitely* going to be fired." AR2395.

Dietz also does not dispute that he left no message for Nulty after calling him on the night of June 6. *See* Cypress Br. 40-41. Dietz misleadingly claims that Ratliff "ignored" him when he asked her about the purpose of the June 7 meeting. Dietz Br.

21. At trial, in contrast, Dietz testified that Ratliff did not know the answers to his questions (AR750), which she confirmed was accurate (AR417).

Regardless, even if Respondents are correct in all of their assertions, there still was no constructive discharge. Dietz received a memo criticizing his performance, quit, did not immediately hear back, received an agenda-less calendar meeting request, and then made his resignation immediately effective. As a matter of law, those facts do not approach "unendurable" and "intolerable" conditions that "compel[]" a resignation (*Suders*, 542 U.S. at 141) and leave the employee with "'*no other choice* but to quit'" (*Potts*, 551 F.3d at 1194).

4. Cypress did not effectively tell Dietz that he would be fired.

Even under the ARB's erroneous standard, no substantial evidence supports its finding that Cypress implicitly communicated to Dietz that "he was *definitely* going to be fired." AR2395. As the ARB dissent correctly found, "no substantial evidence … supports a *reasonable* inference that [Dietz] was going to be fired on June 7." AR2402.

The lack of substantial evidence is all the more clear because:

- Dietz admitted that there is no direct evidence that Cypress decided to fire him. AR921-22.
- Cypress's decision-makers uniformly testified that they did not plan to fire Dietz. AR1073, AR1241-42, AR1351-52.
- Cypress took no steps toward terminating Dietz before the June 7 meeting. AR1242. It did not cut off Dietz's account,

> prepare a final payroll statement, or cut him a check. *Id.* Nulty also invited Rainer Hoehler to the meeting, who would have been "absolutely excluded" from a termination meeting. AR1241.

Respondents ignore these undisputed facts. But substantial-evidence review "must be based on the record taken as a whole," including "whatever in the record fairly detracts" from the ARB's decision. *Washington v. Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994). These facts not only "fairly detract"; they conclusively show that Dietz was not going to be fired and could not have reasonably anticipated that he would.

Respondents offer only undeveloped footnotes (Secretary Br. 49 n.9; Dietz Br. 37 n.19) to answer Cypress's debunking of the ARB's finding that Cypress witnesses testified inconsistently. Cypress Br. 43-45. The Secretary also claims that it does not matter whether Cypress intended to fire Dietz because "the proper inquiry" depends on what "*the employee* reasonably believed." Secretary Br. 49. The Secretary thus asks the Court to rule for Dietz based on Dietz's *incorrect* fear that he would be fired. But Dietz had no reasonable basis for his mistaken conjecture, as "[a]n employee who quits a job in apprehension that conditions may deteriorate later is not constructively discharged." *Agnew*, 286 F.3d at 310.

The Secretary's standard would reward employees for resigning "at the first sign of dissatisfaction" rather than "let[ting] the process run its course." *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 333-34 (7th Cir. 2004) (Easterbrook, J.).

Dietz was not going to be fired, and he should not be handed more than $1 million for resigning out of a claimed fear that lacked any reasoned basis.

C. Dietz has no damages in the absence of a constructive discharge.

If this Court reverses on constructive discharge, it of course should reverse on damages. Only Dietz resists this conclusion. Dietz Br. 43-45. And he rests on the ALJ's "inoperative" opinion. 29 C.F.R. § 1980.110(b). The ARB ruled against him: "if there were no constructive discharge here, Dietz's damages would be minimal." AR2392 n.54.

The word "minimal" is an overstatement. Dietz's awarded damages—back pay, back benefits, front pay, vesting of stock and stock options, and interest—all flow from his resignation, not the three days between Nulty's June 4 memo and Dietz's exit. *See* AR2239 (awarding "stock options that he would have received but for the termination of his employment"). Dietz received full pay and benefits until he resigned. But for his resignation, there is no monetary harm.

Dietz's suggestion of waiver is absurd. *See* Dietz Br. 44. Cypress asked this Court to reverse the ARB's orders in full. Cypress Br. 58. And the ARB ruled for Cypress on this issue of causation of damages. If this Court finds no constructive discharge, Dietz should not recover any damages.

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

Independently, this Court should reverse the ARB's orders because Dietz did not engage in protected conduct under Section 1514A. The ARB correctly held that Dietz's allegations of state wage law violations were "insufficient to constitute protected activity" because they did not allege "fraud." AR2388. But it then erroneously transformed Dietz's theory of protected activity into something Dietz's complaint did not even mention. *See* AR2543. The ARB found protected conduct in Dietz's comment to Valenzuela that Cypress did not mention the DBP in its November 2012 employment offer letters to Ramtron employees. AR2389.[6] That theory of protected activity could transform every workplace dispute about wages into a federal case about wire and mail fraud.

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

Dietz could not reasonably believe that the offer letters were criminal frauds. "[A]n objectively reasonable belief" of "mail or wire fraud" requires "allegations" of "a scheme to steal money or property." *Nielsen*, 762 F.3d at 222 (affirming dismissal of Section 1514A claim). Dietz flunks that standard as a matter of law. *See* Cypress Br. 48-50.

[6] The Secretary (Br. 30) argues that Dietz also raised this complaint to David Still. The ARB did not find that to be protected activity, and Still lacked "supervisory authority over" Dietz. 18 U.S.C. § 1514A(a)(1)(C); *see* AR672-74.

Dietz argues that he did not know that Cypress paid an effective 27% bonus under the DBP. *See* Dietz Br. 48-49; AR1223. Yet it is undisputed that Dietz contemporaneously knew:

- Cypress paid former Ramtron employees the salary stated on their employment offer letters for at least nine months. AR642-43.
- Cypress held multiple meetings about the DBP with former Ramtron employees starting within a month of their hiring. AR630-33, AR1224.
- Cypress thoroughly described the DBP on its intranet. AR624, AR629.
- Cypress required all employees to acknowledge the DBP before it could affect their salaries. AR624, AR840.
- Cypress gave former Ramtron employees a year to quit and receive the same benefits they would have received had they initially declined employment at Cypress. AR1414.

No reasonable person knowing these facts could believe that Cypress's omission of the DBP in its offer letters to Ramtron employees was "a scheme to steal money or property" from them. *Nielsen*, 762 F.3d at 222.

Respondents argue that it does not matter that "Cypress tried to explain DBP" to former Ramtron employees in December 2012 because they "had already accepted their job offers under false pretenses." Dietz Br. 49-50; *accord* Secretary Br. 37-38. But they were paid at their stated salaries then and for the next eight months. Cypress also gave them a year to quit and retroactively receive their benefits. Knowing these

facts, no reasonable person could believe that Cypress "scheme[d] to steal money or property" from them. *Nielsen*, 762 F.3d at 222.

Dietz also asks this Court to reject *Nielsen*'s holding, seemingly because *Nielsen* used the word "steal" rather than "deprive" when it required allegations of a "scheme to steal money or property." *Id.*; *see* Dietz Br. 50. The word choice is irrelevant. Even using "deprive," Section 1514A required him to reasonably believe that Cypress schemed to deprive Ramtron employees of their money or property by failing to mention the DBP in its offer letters. *See* 18 U.S.C. §§ 1341, 1343 (requiring a "scheme" to obtain "money or property"); *Cleveland v. United States*, 531 U.S. 12, 18-20 (2000) (same). Indeed, *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003), which Dietz cites (Br. 50), held that mail and wire fraud require "a scheme or artifice to defraud or obtain property by means of false of fraudulent pretenses" and "an intent to defraud." Given the facts above, no reasonable person could believe that Cypress committed these crimes.

The Secretary tries to distinguish *Nielsen* because "Dietz believed that Cypress was using the DBP to take unlawful deductions from employees' pay." Secretary Br. 36-37. As the ARB held, however, Dietz's allegations of wage law violations were not protected activity because they did not allege concealment. AR2388. The ARB refocused Dietz's theory to fraudulent inducement of Ramtron employees to work at

Cypress. AR2389. But that theory is objectively unreasonable for the reasons above, and has nothing to do with state wage laws.

The Secretary finally argues that Section 1514A's reasonable-belief standard depends on the employee's "training and experience." Secretary Br. 32. But that *increases* Dietz's burden. Because Dietz practiced law for years, AR553-55, AR1414, he faced a *higher* standard than a typical employee lacking his legal knowledge. *See Sylvester v. Parexel Int'l LLC*, 2011 WL 2165854, at *12 (ARB 2011) (en banc) (for "a legal expert, a higher standard might be appropriate").

In short, the ARB erred in holding that Dietz reasonably believed that Cypress committed criminal fraud by failing to mention the DBP in its offer letters to Ramtron employees. Because Dietz did not engage in protected conduct, reversal is warranted.

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

As Cypress explained (Br. 52), the ARB's finding of protected conduct also fails because (in the ARB's words) there is no "explicit evidence in the record" that Dietz believed Cypress's offer letters had any connection to the mails or wires (AR2387 n.30).

Respondents offer no record citation showing otherwise. The closest they come is Dietz's testimony concerning the location of Cypress's servers. Dietz Br. 54. There, however, Dietz was discussing his April 12 email about Cypress's DBP (AR660-61), not the offer letters. Indeed, the Secretary asserts (Br. 38) that the "connections to the

mails and wires that Dietz identified here" did not involve the offer letters. And while Dietz argues now that the offer letters are "imbued with evidence of an interstate nexus" (Dietz Br. 53), he never made that argument at trial.

It is obvious why the record lacks evidence of Dietz's subjective belief about the connections between the offer letters and interstate mails and wires: Until the ARB issued its decision, Dietz's theory of protected conduct was not based on his complaint about Cypress's offer letters. Indeed, at trial, he did not recall making that complaint to Valenzuela. AR900.

Lacking evidence, Dietz claims that Cypress has waived this issue. Dietz Br. 51-52. But the ARB never found waiver. Rather, it considered and decided the issue on the merits, which precludes a claim of waiver. *See Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (no waiver when agency considers an issue "sua sponte").

Without any citation to the record, Dietz also argues that he "alleged" that the "fraudulent job offers merely set the hook," that Cypress "still had to reel in the line," and that Cypress's scheme did not "'reach[] fruition' until Cypress's bait-and-switch was revealed and the unlawful deductions began." Dietz Br. 55-56. Dietz never made that argument, which contradicts his claim, pages earlier, that the "fraud had been perpetrated" once Ramtron employees accepted employment at Cypress. *Id.* at 50. Moreover, his new theory of fraud is unintelligible. If the fraud ended when the DBP

was revealed, then it was over by December 2012, when Cypress "subsequently disclose[d]" the DBP to former Ramtron employees. Dietz Br. 11. That was *seven months before* the DBP ever could have affected their salaries.

Because there is no record evidence—let alone substantial evidence—that Dietz "actually believe[d]" that the offer letters had any connection to the mails or wires, reversal is required. *Lockheed Martin*, 717 F.3d at 1132.

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.

The Secretary concedes that the ARB eliminated employer knowledge as an element of Dietz's claim, in conflict with the decisions of this Court, other circuits, and the Secretary's regulations. Secretary Br. 55-56; *see* Cypress Br. 54-55.[7] The Secretary nonetheless argues that it is "unnecessary" to list employer knowledge separately because employer knowledge is not listed in the statute and is "often implicitly recognized" in the causation analysis. Secretary Br. 55-56.[8]

[7] The ARB's decision also conflicts with its own practice. *See Frederickson v. Home Depot U.S.A., Inc.*, 2010 WL 2158225, at *5 (ARB 2010) (holding that employer knowledge is "an essential element of [a Section 1514A] complaint").

[8] Neither the ALJ nor ARB found causation based on Dietz's complaints about the offer letters. The ALJ found that Dietz's "April 12, 2013 memorandum questioning the legality of [Cypress's] DBP was a contributing factor." AR2238. But that memorandum did not mention the offer letters. AR2389. And the ARB held that Dietz's "complaints about the bonus plan"—not the offer letters—were a contributing factor. AR2396. A finding of causation is no substitute for a finding that Cypress knew or suspected that Dietz was engaging in protected conduct.

Whether listed separately or subsumed within causation, employer knowledge is required. Because "an employer cannot engage in unlawful retaliation if it does not know that the employee has" engaged in protected conduct, *Petersen v. Utah Dep't of Corrections*, 301 F.3d 1182, 1188 (10th Cir. 2002), all retaliation statutes require employer awareness. *Lucio v. N.Y. City Dep't of Educ.*, 575 F. App'x 3, 5 (2d Cir. 2014). The employee's intra-corporate communications thus must "relate in an understandable way to one of the stated provisions of federal law" in Section 1514A so that employers can reasonably know that Sarbanes-Oxley protections apply. *Wiest v. Lynch*, 710 F.3d 121, 134 (3d Cir. 2013). Dietz did not satisfy that element.

Respondents argue that Dietz told Valenzuela that Cypress did not disclose the DBP on its offer letters to Ramtron employees. Secretary Br. 57; Dietz Br. 56-57. As Dietz notes, however, the "meat" of their conversation concerned state wage laws. Dietz Br. 56. There is no evidence that Valenzuela thought (or suspected) that Dietz was alleging federal wire or mail fraud. Indeed, it is undisputed that Valenzuela did not report Dietz's complaint to the Audit Committee, which would have been required if she believed that Dietz had alleged fraud. *See* Secretary Br. 57; Dietz Br. 57.

Dietz attributes a nefarious intent to Valenzuela. Dietz Br. 57-58. But Dietz himself failed to make the same connection. He did not mention the offer letters in his administrative complaint, which admitted that he never mentioned Section 1514A or

"fraud" to Cypress. AR2543. And he did not recall complaining to Valenzuela about the offer letters. AR900.

In addition, OSHA's Regional Administrator found that Dietz did not engage in protected conduct. AR3. And the ALJ found that Dietz's protected conduct consisted of his complaints about state wage law violations (AR2227), which the ARB held was wrong (AR2388). It is unreasonable to require Valenzuela to have discerned a connection between the offer letters and the federal criminal fraud statutes when Dietz, OSHA, and the ALJ all failed to make that connection.

Respondents also cannot distinguish *Villanueva v. U.S. Department of Labor*, 743 F.3d 103, 110 (5th Cir. 2014), which rejected liability under Section 1514A because the employer did not "kn[o]w that [the employee] engaged in a protected activity." The Secretary argues that the employee in *Villanueva* "alleged a violation of Colombian tax law, not a violation of one of the enumerated fraud statutes." Secretary Br. 57. But Dietz admittedly did not use the word fraud, let alone cite the enumerated fraud statutes. AR2543. Moreover, the employee in *Villanueva* alleged underreporting of Colombian taxes (743 F.3d at 110)—which, in contrast to Dietz's allegations about the offer letters, reasonably involves a scheme to deprive the victim of money. The employee in *Villanueva* also "repeatedly objected to the *conduct* of [the employer's] officials in Houston" (*id.*)—which, under the ARB's holding here, should be enough to "infer the necessary connection with either the mails or wires." AR2387 n.30. Yet

both claims should fail for the same reason: the employers had no idea, and could not reasonably have known, that the employee was alleging anything resembling federal mail or wire fraud.

III. The ARB's Awards of Attorneys' Fees And Costs Should Be Vacated.

There is no dispute that this Court should reverse the ARB's awards of attorneys' fees and costs if it finds that Dietz did not engage in protected conduct. *See* Cypress Br. 57-58; Dietz Br. 61.

Dietz argues that he is entitled to fees and costs if this Court finds no constructive discharge because Nulty's memo is an "independent adverse action." Dietz Br. 61. Dietz is wrong. As explained above, Dietz suffered no damages from the memo. *See supra* at 20. Dietz therefore is not a "prevailing" party and is not entitled to fees or costs. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (a plaintiff receiving "no relief" is not a prevailing party); *Villescas v. Abraham*, 311 F.3d 1253, 1262 (10th Cir. 2002) (reversing fee award after reversing compensatory damages award).

The ARB's orders should be reversed in full.

CONCLUSION

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

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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 1.231.550.0, last updated on October 27, 2016, and according to the program are free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,992 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 October 27, 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 October 27, 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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