In the Matter of:

HEIDI FUNKE, **ARB CASE NO. 09-004**

COMPLAINANT, **ALJ CASE NO. 2007-SOX-043**

v. **DATE: July 8, 2011**

FEDERAL EXPRESS CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Curtis D. McKenzie, Esq.; ***Augustine & McKenzie, PLLC,*** **Boise, Idaho**

For the Respondent:
Barak J. Babcock, Esq.; ***Federal Express Corporation,*** **Memphis, Tennessee**

Before: E. Cooper Brown, ***Deputy Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge***

FINAL DECISION AND ORDER OF REMAND

Heide Funke, a courier for Federal Express Corporation (FedEx), alleged FedEx violated the whistleblower protection provisions of the Sarbanes-Oxley Act (SOX),[1] by suspending her in

[1] 18 U.S.C.A. § 1514A (Thomson/West 2010).

retaliation for alerting local law enforcement that FedEx customers were using its services to engage in suspected mail fraud. After a hearing, a U.S. Department of Labor Administrative Law Judge (ALJ) ruled against Funke, concluding she "presented insufficient evidence that she held a reasonable belief that Respondent was engaging in 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."[2] For reasons explained below, we reverse and remand the case for findings consistent with this opinion.

BACKGROUND

Heidi Funke began working as a courier for FedEx on August 25, 1992.[3] She maintained an exemplary employment record and was held in positive regard by her supervisors until the events surrounding her suspension without pay, which began on November 7, 2006, and lasted through November 9, 2006.[4]

In the years leading up to the events at issue, Funke worked a rural delivery route covering southwestern Idaho and eastern Oregon. Her daily responsibilities included maintaining communication with FedEx dispatchers throughout the day.[5] As a FedEx courier, Funke received training for identifying suspicious packages and had been instructed to notify her dispatchers about any such suspicions.[6]

Over the course of her fifteen-year tenure with FedEx, Funke had notified her dispatcher approximately twenty-three times regarding suspicious packages.[7] On one such occasion in September 2005, after she and her dispatcher were unable to process thirty-seven overnight letters from the same sender (hereinafter, "Ms. K"), Funke suspected fraud and delivered the suspicious packages directly to the Malheur County Sheriff's Department (Sheriff's department).[8] Afterwards, she notified her dispatcher. A co-worker had previously warned Funke that the sender of these packages, Ms. K, was involved in dubious activity.[9] The

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2 Recommended Decision and Order (R. D. & O.) at 8.

3 R. D. & O. at 2; Transcript (Tr.) at 31.

4 R. D. & O. at 2-5; Tr. at 141-144.

5 R. D. & O. at 2.

6 R. D. & O. at 3; Tr. at 39, 41-42.

7 Tr. at 46.

8 Tr. at 49; R. D. & O. at 3.

9 Tr. at 55; R. D. & O at 3.

following day, a FedEx security specialist (Scott Avery) contacted Funke and together they returned to the Sheriff's department where they retrieved the letters and learned that they contained fraudulent money orders.[10] Avery opened an investigation and later notified Funke that he and a federal agent had talked with Ms. K and warned her about her involvement in possible mail fraud.[11]

About a year later, on October 19, 2006, another courier, Ron Clure, showed Funke a FedEx package and stated "looks like she's up to no good again" – implying that the recipient of the package (Ms. K) might be involved in another mail scheme.[12] Clure attempted to deliver the package but Ms. K refused delivery.[13] The next day, Funke contacted the FedEx dispatch and customer service departments (as well as the vendor, Cingular) and asked them to research the suspicious package. The dispatcher, Tom Cafferty, warned her to stop asking questions and deliver the package.[14]

Not long thereafter, Funke once again encountered several suspicious packages addressed to Ms. K. Funke immediately contacted dispatch (Cafferty) and asked that security be alerted. Cafferty declined to contact the security department on her behalf because he said he was not allowed to contact security over "matters like these." He also told Funke he was not allowed to give out the contact telephone number for the fraud department.[15]

On November 1, 2006, after the volume and frequency of deliveries to Ms. K increased, Funke again notified the dispatcher and asked him to contact the fraud or security department.[16] Dispatch again refused to phone the fraud or security departments.[17] Uncomfortable with the prospect of delivering suspect packages, Funke went to the Sheriff's department and informed them of her suspicions.[18] A deputy sheriff reviewed Ms. K's file, noted her history of misconduct, and then accompanied Funke to Ms. K's home.[19] Ms. K was not there so Funke did

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10 Tr. at 52.

11 Tr. at 52-53; R. D. & O. at 3.

12 Tr. at 56.

13 Tr. at 57.

14 Tr. at 61; R. D. & O. at 3.

15 Tr. at 63; R. D. & O. at 3.

16 Tr. at 65-66.

17 Tr. at 66; R. D. & O. at 3-4.

18 Tr. at 68, 72; R. D. & O. at 4.

19 Tr. at 72, 74; R. D. & O. at 4.

not deliver the packages. Funke informed dispatch that the deputy sheriff had accompanied her to Ms. K's residence.[20]

The next day, November 2, Funke called Cingular and spoke with someone in the fraud department who said the scam sounded like "bobsledding" and asked her to stop delivery on a number of Cingular's shipments to Ms. K.[21] She notified dispatch of this.[22] Later that day she delivered an unrelated package to Ms. K, at which point Funke informed her that Cingular had confirmed the likelihood of fraudulent activity and requested Ms. K return several earlier shipments.[23] Ms. K broke into tears and asked Funke to accompany her into her home where she showed Funke about thirty packages, which Funke offered to deliver to the Sheriff's department.[24] Ms. K assented and told Funke she did not know what was going on and thought she was legitimately employed.[25] Funke helped Ms. K (along with Ms. K's husband and son) load the packages into her FedEx truck. Funke notified dispatch of these events and then took the packages straight to the Sheriff's department.[26] On November 4, Funke notified her manager, Craig Taylor, that she had taken Ms. K's packages to the Sheriff's office and that Cingular had requested return of a number of their shipments.[27]

After her shift on November 6, Funke met with Craig Taylor, her manager, and Steve Bostrom, Boise operations manager. Taylor asked her on the spot to write a quick statement of the events at Ms. K's residence on November 2. Additionally, Taylor wrote out several questions for Funke to answer including the question, "Why did you take it upon yourself to work with the Sheriff's office?"[28] After she had completed writing the answers, Taylor handed her a memorandum stating that she was being suspended with pay pending investigation of a potential violation of the FedEx "Acceptable Conduct Policy."[29]

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[20] Tr. at 75; R. D. & O. at 4.

[21] Tr. at 78.

[22] Tr. at 79-80.

[23] Tr. at 81; R. D. & O. at 4.

[24] Tr. at 81-82; R. D. & O. at 4.

[25] Tr. at 82; R. D. & O. at 4.

[26] Tr. at 84; R. D. & O. at 4.

[27] Tr. at 95; R. D. & O. at 5.

[28] Tr. at 114-117; R. D. & O. at 5.

[29] Tr. at 121; CX 7.

On November 7, Funke called Taylor as required by the suspension memo, and Taylor informed her that FedEx's policy, written or not, prohibited her from notifying law enforcement regarding suspected illegalities encountered in the course of her duties.[30] When she called Taylor as instructed on November 9, he told her that her job was at stake, but that it was out of his hands because the issue had gone "out of the station, past the district and all the way to the top."[31] Two days later, Taylor told her to show up for work the following Monday. When she arrived on November 13, she met with Taylor and Jim Lennon, senior manager. Lennon chastised Funke for informing local law enforcement about FedEx operations; he explained that it opened FedEx up to civil and criminal liability.[32] Lennon revealed that the highest levels of security, human resources, and legal wanted to fire her for going to law enforcement but that her manager (Craig Taylor) had gone to bat for her.[33] He then handed her a warning letter that outlined three disciplinary grounds: (1) the Complainant's unauthorized possession of customer's property/packages, (2) the Complainant's actions were detrimental to the best interests of the Respondent and the Complainant, and (3) the Complainant's failure to notify management of her activities.[34] On these bases, Funke received a three-day disciplinary suspension without pay.

On January 16, 2007, Funke filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) alleging FedEx suspended her without pay for three days in retaliation for reporting mail fraud concerns.[35] OSHA dismissed her complaint concluding that reports of mail fraud allegedly perpetrated by a third party are not protected under SOX. Funke requested a hearing. On September 20, 2007, the ALJ denied FedEx's Motion for Summary Decision, finding the parties' arguments raised genuine issues of material fact. The ALJ presided over a hearing held in Boise, Idaho on November 14 and 15, 2007. On September 19, 2008, the ALJ issued his Recommended Decision and Order dismissing the complaint on the ground that Funke failed to prove protected activity. Funke timely filed a Petition for Review with this Board.

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30 Tr. at 123.

31 Tr. at 125.

32 Tr. at 131.

33 Tr. at 132.

34 CX 1; R. D. & O. at 5.

35 R. D. & O. at 1.

ISSUE

Whether Funke, a FedEx courier, engaged in activity protected under SOX, 18 U.S.C.A. § 1514A, when she alerted dispatchers, customer service representatives, her manager, and, finally, local law enforcement that a third party was using FedEx as a conduit for suspected mail fraud.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the Administrative Review Board (ARB or Board).[36] The Board reviews the ALJ's findings of fact under the substantial evidence standard[37] and reviews an ALJ's conclusions of law de novo.[38]

DISCUSSION

A. Governing Law

Congress enacted the SOX on July 30, 2002, as part of a comprehensive effort to address corporate misconduct and fraud. The SOX whistleblower protections were included in response to "a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity."[39]

The SOX whistleblower provisions (§ 1514A) are contained in Title VIII of the SOX, designated as the Corporate and Criminal Fraud Accountability Act of 2002. Section 1514A prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. That provision states:

> (a) Whistleblower Protection For Employees of Publicly Traded Companies.– No company with a class of securities registered

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[36] 29 C.F.R. § 1980.110(a) (2009). *See* Secretary's Order 1-2010 (Delegation of Authority and Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

[37] 29 C.F.R. § 1980.110(b).

[38] 5 U.S.C.A. § 557(b) (West 1996). *See Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

[39] Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, at 5 (May 6, 2002).

> 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. 78*o*(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–
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> (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 section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], 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); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.[40]

To prevail on a § 1514A claim, a complainant must prove by a preponderance of the evidence that: (1) she engaged in activity or conduct that § 1514A protects; (2) the respondent took an unfavorable personnel action against her; and (3) the protected activity was a contributing factor in the adverse personnel action. However, relief may not be granted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.[41]

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[40] 18 U.S.C.A. § 1514A. During the pendency of this appeal, on July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010). Sections 922(b) and (c), and 929A of the Dodd-Frank Act amended Section 806 of the SOX, but those amendments are not relevant to this case.

[41] 29 C.F.R. § 1980.109(a).

As noted above, the ALJ dismissed the case on the ground that Complainant Funke failed to demonstrate that she reasonably believed that Respondent FedEx engaged in a violation of one of the laws or regulations enumerated in § 1514A. For the reasons discussed below, we conclude that the ALJ made several substantive legal errors in reaching this conclusion, and we reverse as explained below.

B. Complainant Proved Protected Activity under § 1514A

The ALJ ruled that under § 1514A protected activity "occurs where an employee reports *conduct by the employer* which the employee reasonably believes constitutes a violation of the laws and regulations *related to fraud against shareholders*."[42] The error in this overly narrow definition is two-fold. Protected activity is not limited to disclosures pertaining only to misconduct by the employer nor must the misconduct necessarily relate to fraud against shareholders.

1. Protected Activity under § 1514A Includes Disclosures of Third-Party Fraud

Citing no authority, FedEx contends that § 1514A does not cover reporting "third party" fraud.[43] FedEx argued, and the ALJ so held, § 1514A applies strictly to whistleblowers who report violations of law by their employers. However, the plain language of the statute contains no express requirement that the reported misconduct be committed by a complainant's employer. Section 1514A protects an employee who provides information "regarding *any* conduct which the employee reasonably believes constitutes a violation" of one of six enumerated laws or regulations contained therein.[44] As a matter of statutory construction, use of the term "any" preceding the clause indicates that Congress intended "any conduct" to be interpreted broadly to extend the scope of coverage.[45] The statute on its face does not limit its application to reported misconduct of the employer or any other particular perpetrator.[46] Two recent federal district court cases have adopted this construction of § 1514A, holding that disclosure of third-party fraud may be covered under the statute.[47]

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42 R. D. & O. at 6 (emphasis added).

43 Responsive Brief of Respondent Federal Express Corporation ("FedEx Resp. Br.") at 5.

44 18 U.S.C.A. § 1514A(a)(1) (emphasis added).

45 *See United States v. Thompson*, 685 F.2d 993, 996 (6th Cir. 1982); *Hill v. Tenn. Valley Auth*., ALJ No. 1987-ERA-023, -024, slip op. at 2 (Sec'y May 24, 1989).

46 The starting point for interpretation of a statute is the text of the statute itself. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

47 *Feldman v. Law Enforcement Assocs. Corp*., No. 5:10-CV-08-BR, 2011 WL 891447, at *12 (E.D.N.C. Mar. 10, 2011); *Sharkey v. J.P. Morgan Chase & Co.*, No. 10 Civ. 3824, 2011 WL

Further, Department of Labor (DOL) precedent has repeatedly recognized that the language of many whistleblower statutes, including §1514A, expands coverage beyond discrimination of a current employee by a current employer. In several "refusal to hire" cases, the Secretary of Labor has sustained cases against prospective employers where the subject of the initial protected activity involved an entity independent of the prospective employer, for example, a third-party former employer.[48] OSHA's implementing regulations for SOX codify this independence. The regulation at 29 C.F.R. § 1980.101 reads in relevant part:

> *Employee* means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

By explicitly defining "employee" to include former and prospective employees, the regulations implicitly extend the scope of protected activity to include persons who report violations of law by third parties.

In drafting § 1514A, Congress pointedly expanded traditional employer-employee definitions by subjecting additional entities to liability for retaliation, not only publicly traded companies, but "any officer, employee, contractor, subcontractor, or agent of such company."[49] Congress understood that to effectively address corporate fraud, the law needed to extend to entities *related* to public companies – accounting firms, law firms, and the like – which may themselves be involved in performing or disguising fraudulent activity.[50] Employees of these

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135026, at *5-6 (S.D.N.Y. Jan. 14, 2011) (language and legislative history of § 1514A support finding that report of third-party fraud is protected under the statute).

[48] *See Levi v. Anheuser Busch Co, Inc*., ARB 08-086, ALJ No. 2008-SOX-028, slip op. at 5 (ARB Sept. 25, 2009); *Hasan v. Florida Power & Light Co*., ARB No. 01-004, ALJ No. 2000-ERA-012, slip op. at 3 (ARB May 17, 2001) ("In this case, Hasan alleged that, while working for another employer, he reported safety concerns to the Nuclear Regulatory Commission. That allegation is sufficient to establish the first element of a prima facie case."); *Hill v. Tenn. Valley Auth*., ALJ No. 1987-ERA-023, -024, slip op. at 6 (Sec'y May 24, 1989) ("the Secretary of Labor has held that applicants for employment and former employees are protected from discrimination by their prospective and former employers, although no employer-employee relationship existed at the time of the alleged discrimination.

[49] 18 U.S.C.A. § 1514A(a).

[50] See S. Rep. 107-146, as reprinted in 2002 WL 863249, at *4-*5 (May 6, 2002)(Congressional expression of concern with not only the misconduct perpetrated by Enron Corporation, a publicly traded company, but also the "accounting firms, law firms and business consulting firms [i.e., private contractors, subcontractors, and agents] who were paid millions to advise Enron."); *id*. at *11 (citing the serious misconduct in which Enron's contractors (e.g., its

non-public entities are also covered under § 1514A,[51] and by extension, their reports of misconduct by the related public company (not their employer) would be protected under the statute.[52]

Of course, § 1514A does not provide a remedy for every employee who identifies random third-party fraud and experiences adverse action; it remains the employee/complainant's burden to prove that reporting of the third-party fraud (i.e., the protected activity) was a causal factor in the alleged retaliation. Thus, while there is no express requirement that protected activity directly concern the employee's employer, in most cases the subject of an employee's whistleblowing and her employer will be one and the same.

Certainly in the case before us, FedEx had reason for concern about allegations that its customers were using FedEx as a conduit for mail fraud. While the company may not have been complicit in the fraud, FedEx operations were an integral aspect of the fraud Funke identified.[53] Indeed, FedEx was an essential participant in the mail fraud alleged and it is thus only technically accurate to refer to the subject of Funke's disclosures (i.e., customer mail fraud) as "third party" fraud. In any event, we hold that reports of third-party conduct, which an employee reasonably believes constitutes a violation of the laws listed under § 1514A, constitutes SOX-protected activity.[54]

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accounting firm Arthur Anderson) engaged, including stifling their own employees' attempts at "blowing the whistle," and noting that among the contributors to the fraud were "the well paid professionals who help create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns.").

[51] Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004) (codified at 29 C.F.R. § 1980)(" The statute thus protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies.").

[52] *See Johnson v. Siemens Bldg. Tech., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. at 17, 21-24 (ARB Mar. 31, 2011) (en banc).

[53] Suppose a FedEx employee discovers that FedEx is being used as a conduit for dirty money flowing in (and out) of the American financial system and was consequently facilitating illicit enterprise on a large scale. Whether or not FedEx officials were aware of the activity, disclosures pertaining to the suspected fraud would certainly fall under SOX coverage.

[54] Courts have supported this holding. Rejecting defendant employer's claim that SOX was limited to complaints about employer's wrongdoing, the Southern District of New York concluded that protected activity under SOX can include complaints against third parties. *Sharkey*, 2011 WL 135026 at *5-6.

2. The ALJ Erred by Concluding that the Reported Misconduct Must Relate to Fraud against Shareholders and Must Describe an Existing Violation of the Law

The ALJ's decision does not explicitly conclude that only disclosures "relating to fraud against shareholders" may be considered protected activity under SOX. Nevertheless, such an interpretation is implicit in the ALJ's opinion and constitutes error. Sitting en banc in *Sylvester v. Parexel Int'l LLC*, we recently explained that a § 1514A complainant may be afforded protection for reporting infractions that do not directly relate to shareholder fraud.[55] Section 1514A clearly protects a whistleblower's disclosures pertaining to any of the six enumerated statutes, including mail, wire, and bank fraud, regardless of whether the misconduct relates to shareholder fraud.

The ALJ also erred in his conclusion that the complainant must believe the reported violation is *ongoing*.[56] Again, as we explained in *Sylvester*, disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen.[57] Such a belief must be grounded in facts known to an employee, but an employee need not wait until a law has actually been broken to register a concern.[58]

3. Funke Did Not Waive Her Claim that She Engaged in Protected Activity when She Reported Suspected Third-Party Fraud to FedEx

Because the ALJ assumed that third-party fraud could never be the subject of protected activity, he entertained only Funke's alternative claim that FedEx was complicit in the fraud.[59] As a consequence, his R. D. &. O. became sidetracked and ignored entirely Funke's original claim that her reporting of suspected third-party mail fraud to FedEx and law enforcement was itself protected activity. Funke's appeal to this Board likewise barely discussed this claim in favor of focusing on proving FedEx's complicity in the fraud. Nevertheless, she properly pled the claim in her OSHA complaint and the parties litigated it. As explained below, we find that

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55 *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, -042, slip op. at 19-20 (ARB May 25, 2011).

56 R. D. & O. at 6.

57 *Sylvester*, ARB No. 07-123, slip op. at 16.

58 *See Yellow Freight Sys, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (protection under Surface Transportation Assistance Act not dependent upon whether complainant proves a safety violation*); Crosby v. Hughes Aircraft Co*., ALJ No. 1985-TSC-002, slip op. at 13, 14 (Sec'y Aug. 17, 1993).

59 R. D. & O. at 7 ("However well-meaning Complainant's actions may have been, underlying these actions is not an objectively reasonable belief that Respondent was assisting third party fraud but rather her belief that Respondent was not taking action within a timeframe of her liking.").

the ALJ made sufficient findings of fact to support a conclusion that Funke engaged in protected activity when she notified FedEx and law enforcement of suspected third-party fraud. Because we hold that disclosures of third-party misconduct may be covered under § 1514A, Funke did not need to prove FedEx's complicity in the fraud, and we do not address that allegation.

Funke's January 15, 2007 complaint to OSHA alleged in part as follows:

> Mrs. Funke provided, or caused to be provided, information, or otherwise assisted a law enforcement agency in an investigation regarding conduct which she reasonably believed to constitute a violation of §18 U.S.C. §§ 1341, 1343 or 1348. In furtherance of the investigation, she attempted to, and did, provide such information to a person with supervisory authority over her or such other employees working for FedEx with authority to investigate misconduct.[60]

Her OSHA complaint further details how she repeatedly reported her suspicions of mail fraud by FedEx customer, Ms. K, to her dispatchers, the fraud department of Cingular Wireless, and the Malheur County Sheriff's Department:

> On November 1, the Vale, Oregon address [Ms. K's address] received a third shipment of cellular phones. Mrs Funke again notified her dispatchers and requested to speak with FedEx's Fraud and Security Departments. Fed Ex took no action. Mrs Funke then reported the possible mail fraud to the Malheur County Sherriff Department (MCSD) for investigation by MCSD and federal law enforcement.[61]

In fact, OSHA clearly understood Funke's complaint to involve third party fraud. As the Regional Administrator's findings state, "Complainant's reports were of mail fraud allegedly being perpetrated by a third party – a customer of Respondents – rather than by Respondents themselves."[62]

Before the ALJ, Funke's Pretrial Statement explicitly alleged that her third-party fraud reports to FedEx were protected activity:

> Mrs. Funke, a well-reviewed employee of FedEx for over fifteen years, provided information to her managers regarding mail

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60 Letter from Curtis D. McKenzie to U.S. Department of Labor, OSHA, Boise Area Office, January 17, 2007 (Funke OSHA Complaint) at 1.

61 Funke OSHA Complaint at 2.

62 OSHA Regional Administrator's opinion letter of April 5, 2007.

> fraud, which is a violation of 18 U.S.C. § 1341. However, on April 5, 2007, the Secretary of Labor (the "Secretary") denied Mrs. Funke's complaint because the alleged mail fraud was perpetrated by a FedEx customer rather than by FedEx itself.
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> The Secretary's finding rests on two errors. First, the Secretary misread the statute, which must be applied as drafted. The plain language of the statute clearly applies to *any* violation of 18 U.S.C. §1341, regardless of perpetrator. Second, even if the protection of SOX only applied to malfeasance by corporate actors, the Secretary's overly simplistic finding ignored that FedEx deliberately closed its eyes to the existence of the fraud in order to financially benefit itself to the detriment of those suffering identity theft.[63]

Funke's Response to Respondent's Motion for Summary Judgment reiterated the third-party fraud claim:

> In this case, the protected activity took place at the beginning of November 2006, when Mrs. Funke informed her employer of possible identity fraud. FedEx immediately took negative employment action against Mrs. Funke by suspending her for four days beginning November 6, 2006, then issuing a letter of warning on November 13, 2006, and suspending her three more days without pay.[64]

The ALJ's decision, however, scarcely addressed the claim and appears to have assumed, without discussion, that reported misconduct is protected only if it is employer misconduct. The ALJ proceeded to address only Funke's alternative claim that FedEx's actions demonstrated complicity in the fraud. Responding to the ALJ explicit findings, Funke's brief to this Board likewise concentrated on the complicity claim. Nevertheless, she did not wholly abandon her initial claim of protection for reports of third-party fraud. Her brief to this Board alleges as follows:

> Accordingly, Funke's [sic] reasonably believed the mail fraud involving [Ms. K] constituted a violation of federal law as defined in 18 U.S.C. § 1514A.
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> SOX protects information provided to "a Federal regulatory or law enforcement agency . . . or 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)(A),(C). In

63 Funke Pretrial Statement, June 8, 2007, at 2.

64 Funke Resp. to FedEx's Mot. for Sum. J., September 17, 2007, at 21

> accordance with § 1514A, after FedEx refused to stop the on-going fraud, Funke provided information of the fraud to local law enforcement to be related to federal law enforcement.[65]

The record does not indicate that Funke waived this claim. Nor would her claim have been waived even if she had completely abandoned her initial allegation that reports of third-party fraud to management and law enforcement were protected. As long as an issue is adequately litigated below and part of the record, we are not necessarily bound by the legal theory of any party in determining whether a violation has occurred.[66] Because the third-party fraud claim was alleged before OSHA, reasserted in the Pretrial Statement to the ALJ, and fully litigated, there is no possibility of unfair surprise or lack of notice to FedEx.[67] Indeed, FedEx's brief before this Board argued the issue head on: "SOX does not protect employees who merely report the fraudulent conduct of a third party against non-shareholders."[68] Funke's claim, that reports to management and law enforcement of third-party fraud constituted protected activity, was fully litigated. FedEx knew exactly what conduct was at issue and had a full opportunity to present a defense; consequently, we find that Funke did not waive the claim before this Board.

4. Funke's Disclosures to Dispatch, Taylor and Local Law Enforcement Are Covered under § 1514A

FedEx argued that Funke's disclosures to her dispatchers are not covered by § 1514A because they had no supervisory authority over her.[69] However, § 1514A covers employees who

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65 Funke Initial Br. at 24-25.

66 *Ass't Sec'y & Moravec v. HC & M Transp., Inc*., 1990-STA-044, slip op. at 3 (Sec'y Jan. 6, 1992) ("That neither Moravec nor his counsel alleged specifically that Moravec was discriminated against because of his complaints as an over-the-road driver does not automatically preclude consideration of these complaints.*")*; *Richter v. Baldwin Assoc*., 1984-ERA-009, -012, slip op. at 6-7 (Sec'y Mar. 12, 1986) ("Complainants' failure to allege contact with the NRC or that their terminations were related to such contact does not preclude their presenting evidence at a hearing establishing such contact and establishing a nexus between that contact and their terminations."); *Flener v. Cupp*, 1990-STA-042, slip op. at 3 (Sec'y Apr. 9, 1991).

67 *Compare Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992), wherein the 6th Circuit declined to enforce the Secretary's final decision, based upon a finding that the Secretary had denied respondent *Yellow Freight* due process when, prior to the administrative hearing, the Secretary failed to give *Yellow Freight* adequate notice of a particular legal claim. Unlike the facts in *Yellow Freight*, the parties in this case fully litigated the issue so there is no implication of a failure of due process. As the Court in *Yellow Freight* explained "[n]otwithstanding the possible lack of notice prior to the administrative hearing, due process is not offended if an agency decides an issue the parties fairly and fully litigated at a hearing." *Yellow Freight*, 954 F.2d at 358.

68 Responsive Brief of Respondent Federal Express Corporation (FedEx Resp. Br.) at 5.

69 FedEx Resp. Br. at 11-12.

report misconduct not only to supervisors but also to "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct."[70] As Funke argued, FedEx's written policies direct a courier who encounters suspicious activity to "notify your manager or Dispatch" and "[y]our manager or Dispatch will notify security DG Admin and Security."[71] Although her dispatchers may not have had supervisory authority over Funke, the record suggests that they had the authority to further an investigation into the alleged misconduct by contacting the security or fraud departments as Funke repeatedly requested. Indeed, Funke had initiated an investigation into her suspicions of fraud in 2005 by calling her dispatcher, who had in turn notified FedEx security. As noted by the ALJ, "Complainant is well-acquainted with Respondent's security department and investigative procedures pertaining to suspected fraudulent deliveries, based on her experience the year prior to the events underlying Complainant's claim. . . . She also testified that in 2005 this same family had been investigated by Respondent's security department after she alerted Respondent's dispatch department regarding her suspicions."[72] It is also undisputed that Funke reported both the third-party fraud and her difficulty persuading FedEx to investigate the fraud, to her manager, Craig Taylor, on November 4, 2006.[73] She was suspended two days later on November 6, 2006. We hold that Funke engaged in protected activity when she contacted her dispatchers and Craig Taylor regarding her suspicions of third-party mail fraud.

FedEx also argues that Funke didn't satisfy the notice requirement of § 1514A because she reported Ms. K's suspicious activity to the Malheur County Sheriff's Department rather than "federal law enforcement" as dictated by the statute. Before addressing the ambiguity in the statute concerning disclosures to "law enforcement," we first note the facts support an alternative basis for coverage. Funke was aware that federal law enforcement had been involved in the investigation of Ms. K's misconduct in the past.[74] Indeed, after Funke reported the alleged third-party fraud to MCSD, she was explicitly informed by a detective that federal authorities would be involved.[75] While Funke did not directly provide information to federal law enforcement, by alerting local law enforcement she "caused information to be provided" to federal law enforcement since she reasonably believed that federal law enforcement would become involved as they had in the past.

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70 18 U.S.C.A. § 1514A(a)(1)(C).

71 Reply Brief of the Complainant (Funke Reply Br.) at 3.

72 R. D. & O. at 3.

73 R. D. & O. at 5.

74 R. D. & O. at 3; Tr. at 83-84.

75 Tr. at 83-85.

Further, we believe § 1514A protects reports of covered misconduct to local or state law enforcement, as well as federal law enforcement. The statute protects whistleblowers who provide information to "a Federal regulatory or law enforcement agency." It is unclear whether Congress intended for the adjective "Federal" to apply only to "regulatory agency" and not "law enforcement agency."[76] Regardless, we see such a discussion as a hypertechnical distinction that is inconsistent with the common sense view that Congress intended to protect disclosures to "law enforcement."[77] Funke clearly reported the alleged fraud to individuals who had the authority to investigate the misconduct. The remedial nature of § 1514A and the corresponding mandate to broadly construe it, bolster our conclusion that the scope of § 1514A coverage encompasses reports to state and local law enforcement.[78] It would be incompatible with the congressional intent to promote disclosures of corporate crime to narrowly construe the statute in such a way that its protection is limited to disclosures to federal authorities to the exclusion of state or local authorities.

In sum, we find that Funke's reports to her dispatchers, manager, and local law enforcement regarding her suspicions of mail fraud were protected activity under § 1514A. The ALJ erred in his assumption that third-party fraud could never be the subject of protected activity. As a consequence, he incorrectly placed an additional factual burden on Funke, that is, proof of FedEx complicity in mail fraud. Because we hold that § 1514A protects reports of third-party conduct, Funke did not need to prove FedEx's complicity in the fraud.

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[76] This phrase is subject to two plausible grammatical interpretations. *Compare Burlison v. U.S.* 533 F.3d 419, 429 (6th Cir. 2008)("[I]n a sequence of nouns such as the one in question, an adjective preceding two nouns that are separated by "and" will modify both nouns*."), with Watkins v. U.S.*, No. 02 C 8188, 2003 WL 1906176, at *4 (N.D. Ill., Apr. 17, 2003)("[I]t is uncommon to use a single-word adjective to modify separate nouns occurring in a series.").

[77] *See, e.g.*, 18 U.S.C.A. §1513 ("(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.").

[78] Whistleblower protection statutes "should be liberally interpreted to protect victims of discrimination and to further [their] underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation." *Fields v. Florida Power Corp.*, ARB No. 97-070, ALJ No. 1996-ERA-022, slip op. at 10 (ARB Mar. 13, 1998) (decision under the Energy Reorganization Act, 42 U.S.C.A. § 5851, *citing English v. General Elec. Co*., 496 U.S. 72 (1990)) and *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws").

ORDER

For the above-stated reasons, the ALJ's finding and conclusion that Funke's reports of suspected customer mail fraud did not constitute protected activity is **REVERSED.** This matter is **REMANDED** for further proceedings consistent with this Order.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge