In the Matter of:

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

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

v. **DATE: March 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 (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.

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1 18 U.S.C. §§ 1341, 1343 (2012).

2 18 U.S.C. § 1514A (2012).

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.

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 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.

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4 R. D. & O. at 13.

5 *Id.* at 75.

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.").

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 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

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

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.*

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 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

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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.

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.

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.

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

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[21] R. D. & O. at 74.

[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.*

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.

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

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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.

[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

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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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, 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,

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]

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.

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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 [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).).

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 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]

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[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).

[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.

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 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

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[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").

[39] R. D. & O. at 15.

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

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[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 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

of 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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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 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.

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

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[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.

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, 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

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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.

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 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-

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[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.

[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.").

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 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

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[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.").

[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

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 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

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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.").

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").

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 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.

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[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.

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

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 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

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[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)).

[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).

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.

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

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[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 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).

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]

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?

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[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 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

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 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

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that [Cypress's] stated reasons for this memorandum are false, and support a finding of discriminatory motive.").

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, 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

[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).

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 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

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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).

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

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

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