



Issue Date: 31 July 2012

**CASE NO.: 2010-SOX-00049**

**In the Matter of:**

**DINAH R. GUNTHER,  
Complainant,**

**v.**

**DELTEK, INC.;**  
**JERRY LEE EVANS, JR.; and**  
**KAY M. ROBINSON,<sup>1</sup>**  
**Respondents.**

**DECISION AND ORDER GRANTING CLAIM IN PART  
AND DISMISSING INDIVIDUAL RESPONDENTS**

Appearances:

Dinah Gunther, Pro Se; Jim Gunther, Lay Representative, Reston, VA  
For Complainant

Elisha A. King, Esq., Charles B. Wayne, Esq., DLA Piper, LLP, Washington, DC  
For Respondents.

BEFORE: Pamela J. Lakes  
Administrative Law Judge

The instant case has been brought under the employee protection (whistleblower) provisions of the Sarbanes Oxley Act of 2002 (“SOX” or “the Act”), 18 U.S.C. §1514A, with implementing regulations appearing at 29 C.F.R Part 1980.<sup>2</sup> The Act generally prohibit retaliatory or discriminatory actions by publicly-traded companies (and their subsidiaries or agents) against employees who either (1) provide information to their supervisors, federal

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<sup>1</sup> Individual respondent Bruce Showalter was dismissed by agreement at the hearing in this matter on March 11, 2011, and I now formally adopt the Order of Dismissal I made on the record. **SO ORDERED.**

<sup>2</sup> The whistleblower provisions appearing at title VIII of the Sarbanes-Oxley Act (the Corporate and Criminal Fraud Accountability Act of 2002) amended title 18 of the United States Code by adding a new section 1514A, *Civil action to protect against retaliation in fraud cases*. As used herein, “the Act” references those provisions.

regulatory or law enforcement agencies, or Congress, relating to activities that they reasonably believe to constitute violations of federal criminal statutes relating to fraud, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in investigations or proceedings relating to such activities. For the reasons set forth below, I find that Complainant has established by a preponderance of the evidence that she engaged in protected activity that played a part in her termination, and I further find that Respondents have failed to establish that Complainant would have been terminated for a legitimate, nondiscriminatory reason absent her protected activity. She has therefore established entitlement to relief under the Act. I also find that the other claimed adverse employment actions were not actionable and neither of the individual Respondents violated the provisions of the Act. As proceedings in this case were bifurcated, there will be additional evidentiary development on the issue of damages.

### PROCEDURAL BACKGROUND

On or about May 22, 2009, Complainant Dinah Gunther [“Complainant”], through counsel, filed a complaint against Deltek, Inc. [“Deltek” or “Respondent”], Lee Evans [“Evans”], Kay Robinson [“Robinson”], and Bruce Showalter [“Showalter”] [collectively, “Respondents”]. (C124).<sup>3</sup> In the complaint, she alleged that she had been demoted or otherwise retaliated against because “she disclosed information and participated in investigations about conduct that she reasonably believed violated, *inter alia*, rules of the Securities and Exchange Commission (‘SEC’), and federal laws, rules and regulations relating to securities fraud and fraud against shareholders.” *Id.* Specifically, she alleged that she was retaliated against because she reported, and investigated, efforts by the named respondents to (1) hide a large budget variance; (2) manufacture frivolous grounds for disputing legitimate invoices from vendor Verizon, in order to avoid timely payment, thus risking interruption of critical services; and (3) obfuscate the true financial conditions within the IT [Information Technology] Department by failing to maintain adequate financial controls and circumventing established corporate processes. *Id.* She sought, *inter alia*, reinstatement to her position as Financial Analyst, compensatory damages, and attorneys fees and costs. *Id.*

While the case was pending before OSHA, on October 27, 2009, Complainant was terminated. She subsequently amended her complaint, alleging retaliation based upon the termination. (C175). At that point, she was no longer represented by counsel. She filed a second amended complaint in May 2010. (C76).

On July 6, 2010, the Assistant Regional Administrator of the Occupational Safety and Health Administration (OSHA) issued the Secretary’s findings, which found that there was no reasonable cause to believe that the respondents violated SOX. Complainant filed her notice of objection to the findings and request for a de novo hearing before an administrative law judge on August 5, 2010. Thereafter, the case was assigned to the undersigned administrative law judge.

There were extensive prehearing motions and proceedings. A transcribed telephone conference was held on October 7, 2010 to address discovery and other issues. On October 26,

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<sup>3</sup> References to the hearing transcript appear as “Tr.” followed by the page number. Exhibits will be identified as “C” for Complainant’s Exhibits and “R” for Respondents’ Exhibits followed by the exhibit number.

2010, I denied Complainant's motion to have a witness examined under Rule 35 of the Federal Rules of Civil Procedure and I denied Complainant's motion to have an attorney allowed to represent her as a lay representative. A motion for default judgment was denied by my Order Denying Motion for Default Judgment and Denying Motions to Compel without Prejudice of October 27, 2010. On November 5, 2010, I issued protective orders that incorporated the agreement of the parties.

On November 4, 2010, a transcribed Prehearing Conference was held in open court, at which discovery and other issues were discussed. Although Complainant had opposed the Respondents' prior motion to continue the hearing and it was denied, Complainant moved for a continuance of 30 days (over Respondent's objection), and that motion was granted to allow Complainant additional time to review documents.

The hearing in the instant case was held over 12 days from December 16 to 17, 2010, from January 18 to 21, 2011, and from March 11 to 18, 2011.<sup>4</sup> Additional evidentiary rulings were issued in court. Testimony was provided by Holly Kortright (Tr. 53), David Schwiesow (Tr. 252), Chris Reynolds (Tr. 407, 509), Reza Farnood (Tr. 498), Lydia Rigsby (Tr. 1592), Bruce Showalter (Tr. 1808), Rick Lowrey (Tr. 2119), Lee Evans (Tr. 2153), Kay Robinson (Tr. 2198), Salman Ahmad (Tr. 2274), and Complainant (Tr. 716, 1543, 2415). Also, the deposition testimony of Darrell Goetz and Joan Prosack was admitted. (C214, C217).<sup>5</sup> The issue of damages was deferred.

At the end of the hearing, the parties were allowed until May 26, 2011 to file simultaneous initial briefs/proposed findings of fact and conclusions of law, which would also address any evidentiary issues; responses were due to be filed on or before June 27, 2011. Both parties timely filed their proposed findings of fact and conclusions of law. Complainant made reference to previous motions and requested that I take judicial notice of other legal and administrative matters. Respondents' Opposition to Complainant's Proposed Findings of Fact and Conclusions of Law was timely filed on June 27, 2011. On June 27, 2011, Complainant timely responded to Respondents' Proposed Findings of Fact and Conclusions of Law, and in the body of that response, Complainant made several additional motions. On July 8, 2011, Respondents filed a motion to deny or strike Complainant's untimely motions or, in the alternative, motion for leave to respond.

In an Order of December 7, 2011, I denied all pending motions (including a Complainant's motion for judicial notice, motion to strike Respondent's case in chief or for summary judgment, motions to strike testimony and exhibits, and motion to reconsider accepted stipulations) and allowed the parties until January 20, 2012 to submit supplemental briefing, which was to be confined to (1) evidentiary issues and (2) the impact, if any, of recent

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<sup>4</sup> Complainant was not represented by counsel at the hearing but her husband acted as a lay representative. Although he did a good job for someone that was not a lawyer, some of the testimony was repetitive and in some instances the same exhibit number was assigned to two exhibits. Both parties submitted binders that included exhibits that were never offered; however, the transcripts indicate which exhibits were received into evidence and I also kept my own record.

<sup>5</sup> Joan Prosack's deposition transcript was initially misidentified at C224. (Tr. 1710, 1713).

Administrative Review Board rulings on the issues in this case. Both parties filed timely supplemental briefs.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **FACTS**

#### ***Deltek, Inc.***

Respondent Deltek, Inc. (“Deltek”) (a Virginia-based public corporation) is a leading provider of enterprise applications software and related services to government contractors and other organizations. (C7, C46, C192). Deltek’s stock is publicly traded. *Id.* As required by the Securities and Exchange Act, Deltek electronically files annual reports with the United States Securities and Exchange Commission (SEC). *Id.*<sup>6</sup>

#### ***Background***

In October 2008, Complainant Dinah Gunther accepted a job as a financial analyst with Deltek, reporting to Respondent Kay Robinson, who was a senior director. (C17; R1-R4; Tr. 784). At the time, Robinson reported to Respondent Lee Evans, who headed the Information Technology (IT) Department at Deltek as a Vice President, and Evans reported to Rick Lowrey, Executive Vice President. (Tr. 419-20, 797, 2119, 2157). Complainant interviewed with several senior employees including Darrell Goetz, Robinson and Evans. (Tr. 777-78, 792, 823). She also met with Bruce Showalter, who reported to Robinson and was to be her colleague, and she recalled that he told her that her “experience with telecommunications, invoices and that sort of thing would be really helpful to him because he was having a difficult time at that time with the Verizon invoicing” (referring to Verizon, one of Deltek’s vendors) (Tr. 796). Complainant was excited to accept the position as she had always wanted to work full time as a financial analyst. (Tr. 791). Although Complainant had extensive experience as an executive assistant and workflow manager in the IT industry, including work in the area of financial analysis, she was essentially serving in a support capacity while performing those functions, and she was unable to get a position in the finance department of her previous employer because she lacked a college degree. (C16; C27; Tr. 757-61, 771, 775). Her understanding was that at Deltek, she would be working in Business Planning and Control, and she would be collecting and providing input into the long range estimates (LRE) used by the IT Department, along with other ad hoc responsibilities. (Tr. 784, 807). With respect to the Verizon invoicing, she understood that she would “assist in bringing some organization to it and cleaning up some of the issues that they had.”<sup>7</sup> (Tr. 796). She also understood, based upon her interview with Evans, that once she obtained her college degree, she would be promoted to senior financial analyst, which was actually the position that was advertised. (Tr. 776, 779). Evans told her that Deltek had a tuition

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<sup>6</sup> Respondents have not disputed that Deltek is subject to the Sarbanes-Oxley Act.

<sup>7</sup> Robinson denied that Complainant was hired to perform any work with regard to reconciling Verizon invoices; rather, she was hired “to primarily to do the forecasting, help us with budgeting, do research, accounting transactions, entries that were posted to the system.” (Tr. 2202). Evans testified that Complainant was hired as a financial analyst, “[t]o process invoices, help get budgets and forecasts together.” (Tr. 2183).

reimbursement program, and she took advantage of that program to work toward a degree by enrolling in NOVA [Northern Virginia Community College]. (Tr. 784, 787).

Almost from the start, Complainant was critical of her department in view of its disorganization and the apparent lack of clear processes and procedures. (Tr. 823). The problems did not come as a surprise to Complainant as Robinson had alluded to them at the interview. (Tr. 822). However, she was surprised when a coworker asked her a very basic question about invoices on her first day there. (Tr. 822). She believed the eight hours of training (“knowledge transfer”) she received from her predecessor was inadequate. (Tr. 823). In November, she was asked to perform an invoice reconciliation for an invoice from the preceding year for Washington Consulting Group and she learned that there were no time cards attached to the invoice, which she believed to be an irregularity (Tr. 830-31). Upon further inquiry, she learned from Goetz that he had been instructed by Evans not to obtain time cards from Washington Consulting.<sup>8</sup> (Tr. 832). As there was no supporting documentation, she was concerned because the charges exceeded the amount of hours for the work week; however, when she brought her concerns to Robinson, she was told that it was inconsequential because they could have worked overtime. (Tr. 835). According to Complainant, when she brought a problem concerning how assets were added to the subledger to Robinson’s attention, Robinson’s response was that she knew the process was flawed so that was not an issue. (Tr. 837). Through the rest of the year, continuing into January and February, she continued to have concerns. She explained:

There was no document control in that department. Where you have no processes and procedures, you have no control over the documents that are being provided. You have no control over the steps that they go through. There’s really no way that you can validate or verify the information within the department. I encountered problems with the LRE processes. When I started working on the LRE’s there, I was providing data into everything except the telecom piece.

The telecom piece was Mr. Showalter's area, so I was not provided with data. Mr. Showalter provided the data and input that data into the LRE’s. But yet I was going to be accountable for the LRE as a whole. And that concerned me because the costs were exceeding the budget.

(Tr. 836).

### ***Deltek’s Awareness of Existing Problems***

In fact, as Robinson reportedly advised Complainant, Deltek was aware that there were invoice problems. Likewise, as Showalter advised Complainant, Deltek was aware of problems concerning the Verizon invoices and, according to Evans, that was one of the reasons that Robinson’s group was set up. (Tr. 2171, 2199, 2203).

With respect to the Verizon invoices, Evans testified that he began working for Deltek in June 2006. (Tr. 2153). As Vice President of IT, he had an annual budget of \$16 million. (Tr.

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<sup>8</sup> This testimony was admitted for Complainant’s state of mind but not for the truth of the matter stated.

2157). When he got there, Deltek contracted with multiple providers for telecommunications services, and he put out a contract bid to transfer most of the work to Verizon, which was implemented during an 18-month transition period. (Tr. 2157; RX 5). However, Evans discovered several problems with the Verizon billing, including failure to provide discounts, billing for circuits that were turned off, recurrence of billing problems that were supposedly fixed, crediting of payments to the wrong account, both premature invoices and delays in submitting invoices, fees for services negotiated to be free, and other clerical errors. (Tr. 2165). Under the terms of the contract with Verizon, Deltek was allowed to dispute the invoices when incorrect. (Tr. 2170). The largest amount in dispute at any time was about \$1.3 million (Tr. 2170).<sup>9</sup>

The contract between Deltek and Verizon specifically provides, with respect to “Payment” (¶ 8), that Deltek will pay all invoices within 30 days except for “Disputed Amounts.” (C229). “A ‘Disputed Amount’ is one for which [Deltek] has given Verizon written notice, adequately supported by bona fide explanation and documentation.” *Id.* Under ¶ 18, there is a dispute resolution process involving the negotiation between responsible executives and, if unsuccessful, binding arbitration. *Id.*

On July 15, 2008, according to Evans, he met with Verizon leadership to address the Verizon billing issues, and they agreed to commit more resources to get the disputes closed out. (Tr. 2172-75; C12). Robinson commented that Verizon “acknowledged their billing systems are a mess” and there had been a PowerPoint presentation on the topic in August of 2008. (Tr. 2203). She testified that during the period from October 2008 through April 2009, close to \$1 million in disputes were logged and Deltek received credit for \$800,000. (Tr. 2204). According to Robinson, Complainant was not hired to perform any work with regard to reconciling Verizon invoices. (Tr. 2204).

### ***January Meeting with Lowrey***

Complainant also testified that she was advised by Chris Morgan, from the Finance Department, that the data her group was generating would be utilized in the financial statements reported to the SEC. (Tr. 838-39). She was concerned about the integrity of the data that was being reported to upper management, and specifically Lowrey, the senior vice president. (Tr. 840). In that capacity, Lowrey managed a budget of approximately \$50 million and a workforce of about 400 employees. (Tr. 2121).

On or about January 6, 2009, Complainant attended a financial review meeting (biweekly forecast meeting) with Lowrey, Evans, Robinson, and Showalter. (Tr. 840, 854, 2149, 2185). According to Evans, Complainant had prepared the forecast but he had not had time to review it before the meeting, so she was asked to attend so that she could answer any questions. (Tr. 2185). Prior to the meeting, according to Complainant, she had expressed concerns to Robinson about the telecom costs far exceeding the budget because Deltek had lost a significant dispute with Verizon. (Tr. 851). When she asked Robinson what Deltek’s liability was, because she wanted to understand how much that liability was going to be and how much of it had already

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<sup>9</sup> With respect to one voucher, Evans joked to Robinson that “maybe we ought to dispute it just for fun or old time’s sake.” (C28).

been incurred, Robinson told her she did not need to be concerned with that as it was Showalter's area and he had it under control. (Tr. 852). As she was dissatisfied with that response, she went above Robinson's head to Evans, who also dismissed her concerns. (Tr. 853-54). At the meeting, according to Complainant, Lowrey was "extremely upset" and raised his voice, and he told Evans that he did not understand how Evans "could not keep control of his budget" and he wanted to know Deltek's full liability. (Tr. 855). According to Complainant, she asked Lowrey, "so your concern is this, this, and this, and he said yes" and asked her to work with Showalter. (Tr. 855). She left with Showalter and Evans and Robinson stayed behind momentarily. (Tr. 856).

Lowrey's recollection of the meeting was different from Complainant's. Although he described himself as a "passionate kind of guy" who liked to "drill into data," he did not agree with her characterization of him as "extremely upset." (Tr. 2124). He did not think she added value to the meeting and he did not recall asking her to work with Showalter. (Tr. 2125). After the meeting, he asked Evans and Robinson to stick around because he was "curious" as to why Complainant was participating. (Tr. 2124-25). According to Evans, Lowrey expressed the feeling that there was "no strategic value" for Complainant to attend that type of management meeting. (Tr. 2189). Evans also testified that Complainant did not reveal any irregularities or wrongdoing on the part of anyone at the meeting; however, the Verizon invoices, biweekly forecasts, and fixed asset depreciation issues were addressed. (Tr. 2186-87).

After their discussion with Lowrey, Robinson advised Complainant that she would no longer be attending the meetings with Lowrey. (Tr. 857, 2212). Robinson and Evans verified that Lowrey was being updated with financial information every two weeks and it was not necessary for Complainant to participate in that endeavor. (Tr. 2188-89, 2213). Likewise, Lowrey verified that he was receiving those updates and no large budget variance had been hidden from him. (Tr. 2135).

Complainant testified as to her belief that Robinson and Evans had not provided Lowrey with accurate information and she was being shut out of the process. (Tr. 858). She described Robinson as "extremely upset" with her after the meeting. (Tr. 857). When she subsequently sought information concerning the Verizon contract from Robinson, she was told that the meeting had nothing to do with the Verizon liability, and Lowrey was upset due to her lack of preparation and use of incorrect fonts and format for the LRE's. (Tr. 858-59).

From that point forward, Complainant's relationship with Robinson deteriorated and she felt that Robinson "became increasingly public about her feelings" toward Complainant. (Tr. 860-61). In mid-January, shortly after the meeting with Lowrey, when she conveyed a request from Leslie Bard of the finance department, Complainant said that Robinson started cursing at her and using expletives. (Tr. 865). She felt humiliated at the time. (Tr. 867). She also stated that Robinson became "hostile in staff meetings." (Tr. 860).

### ***Costpoint Training***

At one staff meeting, there was discussion about Costpoint training, which was to be a several day event relating to a reimplementation project. (Tr. 860). According to Claimant,

Robinson said to everyone, raise your hands if you are going to Costpoint training, and everyone (Bruce, Caryn, Sarah, and Asma) raised their hands except for Complainant, at which point Robinson said, “that’s right, Dinah, you’re the only one who’s not going.” (Tr. 860). Complainant felt that she was being singled out and she was “most definitely treated differently than everybody else, there’s no doubt.” (Tr. 861). Subsequently, the rest of the group went to Costpoint training, and Complainant had to rely on individuals in the department with Costpoint expertise when she had questions. (Tr. 861). Claimant explained that Costpoint was a financial tool that everything was going into at Deltek, and one would need to understand Costpoint to be able to do the job of financial analyst. (Tr. 862). Also, she was concerned because one of her goals (upon which her earnings would be based in part) included Costpoint training, yet Robinson had directed her not to take it. (Tr. 876).

### ***Change in Work Status***

On February 18, 2009, Robinson told Complainant that she and Asma Azam would be reporting to Showalter. (Tr. 983; C42). Complainant felt she was being reassigned because of the concerns she raised at the meeting with Lowrey. (Tr. 983). According to Robinson, Complainant was requiring support and direction, in contrast to her predecessor, so she made the assignment to free up some of her own time. (Tr. 2208-09). The appointment was a promotion for Showalter rather than a demotion for Complainant. (Tr. 2209). Showalter testified that he was given the responsibilities of an IT manager in February 2009 but his title did not change until April, when the promotion became official. (Tr. 1991-92). He also testified that when he supervised Complainant, he found that she made basic mistakes using spreadsheets, and “tended to be overly focused on specific details and would therefore often miss the bigger picture.” (Tr. 1901.)

In March 2009, Complainant took offense when Showalter allegedly “shoved” her hand out of the way in order to take control of her computer mouse, to show her something on the screen. (Tr. 1409-10). Showalter credibly explained how he moved the mouse to show her something, and the incident was inconsequential. (Tr. 1987).

There was also a subsequent change in Complainant’s position due to job slotting (“Career Structure Roll-Out”), a phased process that had started before Complainant joined Deltek but was not implemented in her case until April 20, 2009, effective May 1, 2009 (after she had filed the complaint with the SEC, discussed below). (Tr. 993-96; C99, C101, C217). Complainant’s title was changed to IT business analyst I; she considered the action to be a demotion to an entry level position. (Tr. 994-95, 1000-01; C99). At a meeting of May 1, 2009 (which Complainant recorded) with Robinson and Joan Prosack, senior HR representative, she indicated her disagreement with the slotting (Tr. 995, C217; R45). At the hearing, Robinson explained the slotting process and she testified that Complainant’s slotting was not performance based. (Tr. 2266).

### ***Review of Verizon Invoices***

Christopher Reynolds was initially charged with the responsibility of reviewing the invoices, due to his telecommunications experience (as he was a former Verizon employee);

however, he soon became overwhelmed, according to Evans.<sup>10</sup> (Tr. 418, 2166). Showalter was then given the responsibility for the Verizon invoices, from May to June 2008 until July 2009. (Tr. 2173). Evans testified that Showalter did a “fantastic” job. (Tr. 2173).

When he started working for the IT business office (under Robinson), Reynolds described his role as “to manage the partner relationship with Verizon and the contract and other telecommunications providers that worked under the Verizon umbrella,” and, with respect to billing, to ensure that the terms of the contract aligned with Deltek’s requests, to ensure continuity of service, and to minimize risk to the business. (Tr. 420, 424, 449). If a bill was disputed, Reynolds testified that he provided a framework to match the bills against the services, so that the invoice would come back to him if there was a discrepancy; however, there was no formal process related to disputing bills. (Tr. 426-27). Reynolds was under the impression that he was the only one with official authority to dispute the bills, and he indicated that Verizon representatives came out once a week and he worked directly with them. (Tr. 428). However, he discovered that disputes would be registered, and he would not always be advised, because there were no formal controls over access to the dispute log and anyone could enter a dispute. (Tr. 435-38). Specifically, he disagreed that Showalter, Robinson, Evans, and Caryn Armstrong should have been able to register disputes.<sup>11</sup> (Tr. 438; C10).

Of six disputes marked as “Closed – No Credit” (appearing in C10), Reynolds disagreed with five of them (logged by Showalter from June 2008 to January 2009) but thought that the sixth (logged by Armstrong in July 2008) was possibly warranted (Tr. 443-46; C10). Showalter testified with regard to each of the invoices, and explained the legitimate reasons why each dispute was raised. (Tr. 1878-84.)

During the period from April 10 to 19, 2009, Complaint discussed the Verizon invoices with Reynolds and she testified as to her belief that they had uncovered massive fraud and a pattern of abusing the dispute process as to the Verizon invoices. (Tr.1412-14; Tr. 568-73).

A dispute log printed as of April 23, 2009, which was a snapshot of the reconciliation process as of the date of the printout, reflects that Deltek had a success rate of between 75% to 80%, covering the period between July 2008 through the date of the printout. (R33; Tr. 1855-60; see also Tr. 2203-04.) Showalter testified that Deltek’s success rate would have been approximately the same if it had measured the more limited time period between Complainant’s start date, October 27, 2008, through the date of her complaint, April 20, 2009. (Tr. 1860). The April dispute log reflected the following amounts:

- \$711,946 Verizon agreed to credit, and credit was posted to Deltek account
  - \$124,407 Verizon agreed to credit, but credit had not yet posted
  - \$240,250 Deltek lost dispute, no credit issued
  - \$322,692 Still an active dispute, no decision yet
- (R33; Tr. 1855-60.)

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<sup>10</sup> Reynolds explained that telecommunications expenses were the largest expenditures for all of Deltek but there were other IT services. (Tr. 422).

<sup>11</sup> At his deposition, Darrell Goetz testified that Evans and/or Robinson would be responsible for disputing the Verizon invoices. (C214).

In addition to a dispute log, Robinson's group prepared a quarterly accrual list for the IT Department, which was intended to ensure that any expenses that were incurred in the quarter but were not paid were booked as expenses in that quarter. (Tr. 1864-65; R34). On the accrual lists, the IT Department considered its success rate in ongoing disputes to calculate the amount of risk on currently outstanding disputes, in order to determine how much to accrue as an expense. (Tr. 1868.) Showalter explained how these accruals reflected the expenses and services under the contract with Verizon and were reported to the finance department on a quarterly basis. (Tr. 1852-69).

### *Threatened Suspension of Services*

Although both agreed that there were problems with the Verizon bills, Reynolds and Showalter disagreed as to how to handle the invoices, as reflected by emails between the two in April 2009. (C54). Reynolds asked for Complainant's assistance in working on the Verizon bills in an email of April 7, 2009.<sup>12</sup> *Id.* The following day, he said that he was "getting the disputes whittled down" but with regard to payment for certain equipment, he advised Showalter to "keep in mind we are at risk of Contract Breach and are obligated to pay undisputed amounts currently due."<sup>13</sup> *Id.* Showalter responded that not making the payment on one invoice was Robinson's call, not his, but that if Verizon got them "an acceptable SONET amendment by COB tomorrow," it would not be a problem. *Id.* In an email of April 10, 2009, Reynolds said Complainant had been "a god send" working with him in "making sense of Verizon's billing hierarchy and how Verizon internally handles AR [accounts receivable]." *Id.* Showalter responded the same day that if Reynolds was "trying to understand how Verizon has applied our payments," that was not a "fruitful endeavor" because he cared how much Deltek thought it owed Verizon "based on contract prices and services and equipment that has actually been delivered," not how much Verizon thought Deltek owed it. *Id.* Reynolds replied that he was "missing the point" because Verizon had been crediting the payments to the oldest bills and not the bills for which they were intended, so it was impossible to look at individual bills. *Id.* Reynolds concluded:

This is not a posturing exercise Bruce. I am simply identifying our findings and communicating them. I've been in this business 22 years and have run multi-million dollar programs, so I have a pretty good understand [sic] when I see potential red flags.

*Id.*

While Reynolds was overseeing the day-to-day management, on April 15, 2009, a lower level employee at Verizon threatened a suspension of services due to outstanding invoices. (Tr. 2175-76.) Evans explained that Verizon had placed a hold on the account that would have

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<sup>12</sup> Complainant subsequently worked with Reynolds on the invoices. (Tr. 1968).

<sup>13</sup> In an email of March 18, 2009, Verizon's representative, Rick Brunetti advised Reynolds that Deltek had paid \$2,034,041.17 and \$451,918.22 on two accounts but as both accounts "do not just bill CPE," he had no way of determining what amounts were actually for CPE; in addition, the payments went all the way back to the middle of 2007. (C54).

barred Deltek from purchasing any further services or equipment because the Verizon services person had not properly updated the Verizon finance person (Tr. 2176). The problem was quickly remedied when Evans sent an email to Jim Kilmer, the account manager's boss at Verizon, the same day, asking, "What the hell is this?" (R42; Tr. 2178-80.) On April 16, 2009, a Verizon senior manager, Chris Dinapoli, apologized to Evans, and no suspension was ever implemented. (R42; Tr. 2180).

### ***Complaint to Audit Committee and SEC***

On April 20, 2009, late in the day, Complainant hand-delivered a letter complaint to the office of Deltek's General Counsel, David Schwiesow. (C72; Tr. 259.) The same letter was submitted to Deltek's Audit Committee, and the "cc" on the letter indicated that a copy had been sent to the U.S. Securities and Exchange Commission (SEC). (C72). Complainant also submitted her complaint on Deltek's online EthicsPoint program. (Tr. 145, 259, 331-32.) In the letter, Complainant reported the following:

- A systematic coordinated effort by Evans, Robinson, and Showalter to hide a large budget variance from Deltek senior management, Deltek auditors, Deltek shareholders and the SEC, among others.
- A deliberate campaign by Evans, Robinson, and Showalter to manufacture grounds for disputing legitimate invoices from Verizon, in order to avoid timely payment of all fees properly due. Furthermore, multiple acts to deprive Verizon of its monies were perpetrated using the U.S. Postal system, the Internet, and involved interstate communications.
- A systematic coordinated effort by Evans, Robinson, and Showalter to obfuscate true financial conditions within the IT department by failing to maintain adequate financial controls, circumventing established corporate processes and by thwarting [Complainant's] ongoing efforts to follow appropriate document control procedures.

(C72, R20.) In the body of the letter, she complained that she was ignored, punished and demoted when she raised issues concerning her department's depreciation and accounting practices and a conflict of interest between Evans and the Washington Group. *Id.* She also questioned her assignment to prepare financial reports with insufficient time and documentation and the assignment of other employees who lacked qualifications to report financial data. *Id.*

A similar letter complaint was filed by Reynolds. (R20). Despite almost identical language in the portion of the letter listing the main issues, Reynolds and Complainant denied that they had exchanged drafts, but stated that they had similar concerns or issues. (Tr. 666-74, 1443-44).

### ***Investigation***

Upon receipt of the complaint, Deltek's General Counsel, David Schwiesow, took immediate action, informing Deltek's Chief Executive Officer of the complaints, and then

meeting separately with Reynolds and Complainant. (Tr. 337-38). He informed them that the company took the allegations seriously, that the CEO was appreciative of their report, and that they would not be retaliated against in any manner. (Tr. 337-38). He assembled a team to conduct the investigation, including Salman Ahmad, the Vice President, Legal and Associate General Counsel, and Holly Kortright, who was the Director of Human Resources. (Tr. 271-73, 2274). Interviews of other employees ensued thereafter, and about twelve employees were interviewed. (Tr. 2274, 2281).

Schwiesow testified that he discussed the complaint with Complainant on April 21 and had detailed interviews with her and Reynolds the following day, after which he spoke to the individual Respondents. (Tr. 337). Showalter testified that he did not learn about the complaint until the late afternoon of April 23, 2009, when Schwiesow (the General Counsel) told him about it (as Schwiesow confirmed). (Tr. 1976; Tr. 337). At that time, Showalter was advised that it was to be “business as usual” and he should not discuss the allegations with her. (Tr. 1987). According to Robinson, she did not learn about the complaint until Monday, April 27, 2009, when Schwiesow had a similar conversation with her (as also confirmed by Schwiesow). (Tr. 3132-33). Evans testified that he did not recall the specific date when he learned about the SEC complaint, but that it was some time after April 22, 2009 (the date of the Pulp Fiction meeting), when Schwiesow called him up to the conference room with Kortright and told him about the complaint. (Tr. 2195-96). According to Schwiesow, he advised Evans about the SEC complaint on April 24. (Tr. 337).

The investigation was generally divided into two components: (1) investigation of the finance-related allegations; and (2) investigation of the work environment; the financial portion was conducted first. (Tr. 333-34, 335). With respect to the financial aspect, Ahmad stated “We wanted to make sure that any accruals that needed to be made with respect to the bills were being properly accrued and that nobody was hiding any information that had to be presented.” (Tr. 2281-82). Ahmad testified that they concluded that there was no improper activity. (Tr. 2282; see also C141).<sup>14</sup> As indicated, the investigation did not find any improper activity based on any of the allegations, and it found that there had been no retaliation against Gunther or Reynolds. (C141). It attributed delays in processing and paying telecommunications invoices to the IT Department’s need to better understand the invoices and resolve errors or to other reasonable business practices, and it found no attempt to hide the true budgetary condition of the IT Department. (C141). It also found that the Verizon invoices were properly accrued for the fourth quarter of 2008 and the first quarter of 2009; however, the internal auditors remarked upon data challenges and inadequate details for the period prior to the fourth quarter of 2008. (C141).

### ***Document Shredding Allegations***

On April 21, when Complainant met with Schwiesow, he asked her to go and gather information. (Tr. 969-70). When she returned to her desk, she saw Ms. Janeczko shredding documents and she was concerned. (Tr. 970-74).

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<sup>14</sup> The investigative report was admitted but is being maintained in a separate folder, subject to my protective order and to prediscovery notification. (C141).

On the 23rd, she spoke with Schwiesow and asked him what he was doing to retain the integrity of the documents; he said he would speak to Finance. (Tr. 981-82). Apparently dissatisfied, she sent an email to Showalter, with a copy to Mark Wabschall, who was then CEO. (Tr. 982). Showalter was concerned because, by copying the CEO, Complainant “skipped numerous levels of management in reporting” the “inappropriate shredding of documents, which is a fairly serious charge.” (Tr. 2047). On that same date, which was a Thursday, Showalter alerted Robinson and provided her a copy of that email. (Tr. 2233). They both discussed the matter with Human Resources; because Robinson was out on Friday, she did not discuss it with Schwiesow until Monday, April 27, at which time Robinson learned about the complaint. (Tr. 2233-34).

Schwiesow investigated the allegation of document shredding, and specifically Complainant’s contention that the office’s property manager, Mike Gill, was shredding original source documents; he determined that Gill was simply cleaning his office and shredding copies, not any original documents. (Tr. 377-79).

### ***Cupcake Meeting***

On April 21, before Robinson had learned of Complainant’s allegations against her, Deltek’s Chief Executive Officer sent a message to all of the company’s employees, entitled “Thriving in Tough Times.” (CX 77). The message announced that employees would be required to use part of their accrued Paid Time Off (PTO) during the second quarter of the year. *Id.* Robinson testified that she was concerned that her team might react negatively to the new policy, as they would be unable to take summer vacations, so she stopped to pick up ice cream cupcakes for a team meeting which were intended to be a “pick me up” for the team. (Tr. 2236-37.) Complainant claims that Robinson said the cupcakes were “in Dinah’s honor” and she interpreted the comment as “an insinuation that I ‘take the cake’ for what I did.” (Tr. 980.) Robinson did not recall saying that the cupcakes were in Complainant’s honor (Tr. 2238). However, Reynolds, who also attended the meeting, recalled “a very cavalier comment surrounding that this in honor of Mrs. Gunther,” which “seemed like an attempt of calling somebody out.” (Tr. 611).

### ***Pulp Fiction Meeting***

On April 22, two days after Complainant submitted her letter to Deltek and the SEC, a business meeting was held between Evans, Robinson, Showalter, and Complainant in Evans’ office (although, according to Complainant, the meetings usually took place in the conference room). (Tr. 974-76). Although Complainant contends that her supervisors knew of her April 20 complaint when the meeting was held, all three of them, and Schwiesow, testified that Schwiesow had not yet advised them of the complaint or that he would be conducting an investigation. (Tr. 336-37, 1975-76; 2191-92; 2232-34.) Complainant had secretly recorded the meeting and an audio recording was played at the trial and admitted as an exhibit (C86); Respondents’ transcript was admitted as R46.<sup>15</sup>

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<sup>15</sup> I listened to the recording several times and, although the transcript is essentially accurate, there are a few minor discrepancies. The quality of the recording was poor and portions are not audible. The audible portion of the tape

The recording begins while the meeting is going on, apparently right after Complainant entered the room, at which point, making reference to a prior comment, Evans made a joking reference to waterboarding being ineffective as torture and, after suggesting that they rent Pulp Fiction, referenced a comment to “getting medieval” as revenge.<sup>16</sup> (C86, R46). The transcript, which is fairly accurate, reflects that Robinson laughed when, in response to a question from Evans about log charts, Showalter joked that he was “[p]retty familiar with them, yes.” (R 46 at 3). Then Evans suggested that he do one for the budget, to which Robinson, laughing, asked whether he was “being funny.” *Id.* After some further discussion on that point, the following conversation took place:

MS. ROBINSON: Oh, that is so funny.

MR. EVANS: (Inaudible) we were talking about waterboarding. I told you it’s not effective, so I had the You Tube video from – from “Pulp Fiction.” Have you ever seen—

(Showalter and Robinson groan)

MS. GUNTHER: Uh-uh (negative).

MR. SHOWALTER: No, I haven’t.

[MR.] EVANS: Go rent “Pulp Fiction”?

MS. ROBINSON: Oh, wait.

MR. SHOWALTER: I’m familiar with the scene from “Pulp Fiction” you’re referring to.

MR. EVANS: Yeah. Remember about (inaudible) go get a couple pipe hitters and blow torches and pliers --.

MR. SHOWALTER: Oh.

MR. EVANS: -- and ‘get medieval.’

MR. SHOWALTER: Get medieval, he said.

MS. ROBINSON: Okay. So I’m confused. So if I look at the wage review (inaudible)?

*Id.* at 3 to 4. At that point, the participants discussed the budgetary issues. *Id.*

Complainant testified that Evans looked right at her while making the Pulp Fiction comments and she interpreted it as a threat. (Tr. 976). The comments were particularly troubling to Complainant in view of a personal experience she had had years earlier. (Tr. 977). After the joking reference to Pulp Fiction, the meeting continued and there was discussion about ways to stay within budget as, for example, by buying supplies only when necessary (and not stockpiling them). (C86, R46).

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did not reflect any discussion of Complainant’s April 20 complaint, and Evans did not say he was going to “get medieval on [Complainant’s] ass” as alleged in her complaints in this case. (C124, C175, C76).

<sup>16</sup> Respondents have suggested that Evans was jokingly comparing the monotony of preparing a particular financial report to a torture scene in the movie, and giving the tedious assignment to Showalter. Although there was no testimony to that effect, the subject matter of the meeting is consistent with that interpretation, as well as with Complainant’s interpretation. Respondents’ Proposed Findings of Fact and Conclusions of Law (“FAC”) at 22.

### ***Aftermath of SEC Complaint***

While the complaint was being investigated, in late May, Complainant was called into the office of Holly Kortright, Vice President for Human Resources, who told her that she was meeting with everybody to make sure that everybody was being professional in the way they conducted themselves and being responsive to emails and communications. (Tr. 1001-02). Complainant believed that someone was making complaints to Human Resources about her. (Tr. 1003-04). She recorded the meeting, and the recording and a transcript of it were admitted. (C113, R43). Kortright testified that she met individually with all of the employees in the IT Department, to counsel them on the need to continue “work as usual,” while the investigation continued. (Tr. 209-10).

Prior to filing the SEC complaint, Complainant sought another position within Deltek; however, she was not selected for the position. (Tr. 361-62). According to Schwiesow, she was not selected because she lacked the qualifications.<sup>17</sup> *Id.*

Complainant also claims to have made a sexual harassment complaint to Prosack on April 20, based upon a remark she overheard at a meeting and that she was treated differently because her allegations were not investigated. (Tr. 951, 1661-62).

Complainant also testified that she was berated in an email from Robinson because she did not attend cost-free training because she was indisposed. (Tr. 1020; C125). According to Robinson, Deltek had to pay a no show fee.

### ***Leave of Absence***

On May 18, 2009, Complainant had a second meeting with Kortright, at Complainant’s request, to tell Kortright that she was experiencing stress and other medical issues that were making it difficult to work. (Tr. 113-14.) In response, Kortright offered to allow Complainant to take a paid, temporary leave of absence. (Tr. 113). After giving the matter some thought, Complainant sent Kortright an email outlining the terms of a leave that she would be interested in taking. (Tr. 139-40, C129). The email specified the following terms:

1. By mutual agreement, this is a voluntary paid leave of absence (“The Leave”) for an unspecified period of time, and I do not relinquish any former, current or future rights and privileges, nor does my acceptance of The Leave alter in any way the existing employment relationship between me and Deltek.
2. I will continue to collect 100% of my compensation and benefits packages from Deltek, on time and with only normal deductions.
3. I will continue to accrue vacation, PTO and seniority during The Leave.
4. All of my Deltek benefits (including medical and disability) will remain in full force and effect, including the changes in benefits I am presently making in response to a recent change in family status.
5. This agreement alone will be sufficient documentation of the terms and conditions of The Leave.

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<sup>17</sup> Complainant attributes her non selection to her protected activity but has offered no evidence in support.

6. Deltek or its employees will make no disparaging statements (internal or external) regarding The Leave, nor will Deltek or its employees in any way use The Leave, or my acceptance of it, to denigrate my performance or my commitment as a Deltek Employee.

(C128). In an email dated May 19, 2009 (the following day), Kortright agreed to the terms. (C128). Subsequently, Complainant began her paid leave of absence, with the expectation that she would be out on leave until the investigation was completed. (Tr. 1033).

### ***OSHA Complaint***

As noted above, Complainant, through counsel, filed a complaint with OSHA against Deltek, Evans, Robinson, and Showalter on or about May 22, 2009 (“OSHA complaint”), while she was on leave. (C124). As a pro se litigant, she subsequently amended it twice, after her termination. (C175, C76).

### ***Settlement Discussions***

Complainant’s counsel negotiated with Deltek’s outside counsel concerning a proposed settlement during the first week of September 2009, while she and her husband were out of the country. (Tr. 1051). They were, however, unable to reach an agreement on some of the terms and conditions. (Tr. 1051-1057). According to Complainant, she was given three options, consisting of (1) identifying a position she could come back to (because Deltek could not identify anything suitable); (2) taking a settlement offer; or (3) returning to an entry level position. (Tr. 1051). Schwiesow testified that Complainant was given the option of returning to her job, which had not been filled (as opposed to an entry level position). (Tr. 342-43).

In late September 2009, Complainant received a notice of COBRA continuation coverage rights, dated September 14, 2009 and postmarked September 22, 2009. (Tr. 1038-39; C155). She did not expect to receive it, because she did not expect her benefits to be terminated. (Tr. 1039).

There had been a previous problem with her timesheet for one of the pay periods that her counsel had ostensibly corrected with Deltek’s counsel on September 17, 2009. (Tr. 1042-43; C156). However, a check deposited to her account by Deltek on October 5, 2009, relating to the September 16 to 30, 2009 pay period, was reversed on October 6, 2009. (Tr. 1044-45, 1047; C158).

On October 12, 2009, in an email to Kortright (subject relating to Summer Semester Tuition Reimbursement),<sup>18</sup> Gunther stated:

The payroll deposited into my account for the last pay period was withdrawn on October 6th. I received no notice this was going to happen and this has caused financial problems.

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<sup>18</sup> Kortright and Gunther communicated by email concerning her tuition reimbursement. (R25).

(R25). Schwiesow responded to this email, stating that “our counsel with respect to the pending settlement will be contacting your counsel re your inquiry.” *Id.*

On October 23, 2009, Complainant advised her counsel that the last draft settlement was rejected, settlement negotiations were over, she wanted back pay, and Deltek should expect her back in the office on Monday (and she would notify HR). (Tr. 1058-60; C164 ).

On Saturday, October 24, at 5:31 p.m., Gunther sent the following email to Kortright (same subject):

Ms. Kortright,

I will be reporting to the office at 9:00 AM on Monday, October 26, 2009 for work assignments.

Deltek has failed to properly process any of my payroll and bonus checks for the past few pay periods and has not yet reimbursed tuition expenses that I submitted months ago. In addition, Deltek is in arrears on some of my employee benefits. This all must be corrected immediately.

Regards,  
Dinah Gunther

(C165; R25). Schwiesow responded late Sunday evening (12:18 a.m. on Monday October 26) that as she was represented by legal counsel concerning her employment at Deltek, they could have no discussions with her regarding these matters and would be unable to do so if she were to come to Deltek. *Id.* Complainant testified that she did not recall reading that email before she returned to work on October 26. (Tr. 1481).

### ***Attempted Return to Work***

On Monday, October 26, 2009, Complainant drove herself to Deltek, with her husband following her in a separate vehicle. (Tr. 1481, 717-18). Complainant secretly recorded her activities at Deltek that morning, and a recording of the events was played at the trial; both parties submitted transcripts of the recording. (C221 [tape]; C221-B [transcript]; R49 [extended transcript]). Complainant testified that her security badge was still active. (Tr. 721).

Once inside Deltek’s offices, Complainant went to the Human Resources department to see Kortright, and Kortright’s administrative assistant, Valerie Parker, advised Complainant that Kortright was not yet at the office, and invited her to take a seat in the conference room (as there was no seating outside of Kortright’s office). Instead, Complainant stood in the hallway outside Kortright’s office for about 15 to 20 minutes, facing Parker. (Tr. 81-84). Kortright testified that Parker told her that she was “scared” by Complainant because she “kept on staring” at her, and she “didn’t know what else to do.” (Tr. 82-83.)

When Kortright arrived, she asked Complainant to wait in a conference room until Deltek's in-house counsel, Ahmad, arrived at the office and could meet with them both. (C221; C221-B; R49.) Kortright testified that Deltek had "a policy that, once an employee is represented by outside counsel, the conversation needs to go between the outside counsel and our general counsel." (Tr. 70). Ahmad repeatedly advised Complainant that he did not feel it was ethical for him to engage in discussions with her about her employment status or pay, because she was represented by counsel. (C221; Tr. 70, 73.) He asked her to have her attorney contact Deltek's outside counsel. (Tr. 73, 2314). Complainant asked Ahmad several times whether she still had a job at Deltek, and he told her that yes, she still had a job, but she was on administrative leave. (C221; R49). Ahmad explained that the company had not expected Complainant to return that morning, and that they were not ready to have her back; there was no work for her to perform that day. *Id.* Ahmad further explained that the company had hired a new Chief Information Officer who was starting that morning, so it was not a good day for Complainant to suddenly appear. *Id.* Eventually Complainant left the building, at which point she responded to questions from a man (her husband), who was holding a five-inch video camera. (R49; C221; C222 [copy of photo of video camera]; Tr. 97-99). According to Kortright, the camera was large compared with her flip video camera. (Tr. 98).

Kortright testified that Complainant was confrontational to Ahmad because she repeated her questions, she was "demanding in getting an answer," and she "challenged him over and over." (Tr. 73). She also testified that Complainant used a "strong tone," but that Ahmad was "very clear and very calm in his reply." (Tr. 73)

On the audio recording, both Complainant and Ahmad were soft spoken and polite to each other. (C221; Tr. 494-95).<sup>19</sup> Based upon my listening to the recording, I find there was no basis for asserting that Complainant was confrontational and she did not use what I would characterize as a "strong tone." I agree, however, that Ahmad was "very clear and very calm in his reply."

Upon exiting the building, Complainant walked out toward a red Hummer SUV that was parked close to the front of the building, not in a parking space. (Tr. 76, 80). According to Kortright, the Hummer was partially blocking the way for other cars that were trying to park in the lot. (Tr. 80). As Complainant approached the vehicle, a man stepped out of the Hummer with a video camera, and Complainant stood in front of the camera, speaking to the camera, as other employees walked by. (Tr. 77-81; 2410). Kortright and Ahmad watched Complainant from Kortright's window – a large plate-glass window on the first floor, that was in close proximity to the Hummer outside. (Tr. 77).

Kortright testified that, as the top-level executive in Human Resources, she found Complainant's conduct disruptive and very concerning and that Complainant was acting "out of the norm of how [employees] operate in a workplace." (Tr. 81-82). Based on the presence of the Hummer and the videotaping, Ahmad concluded that Complainant had not returned to Deltek with the intention of working. (Tr. 2314). Kortright decided to terminate Complainant's employment due to her conduct that day. (Tr. 179). Before making the decision to terminate Complainant's employment, Kortright did not consult with Evans, Robinson, or Showalter. (Tr.

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<sup>19</sup> In fact, Ahmad is so soft spoken that it was difficult to hear him in court.

213). She testified that the complaint regarding accounting improprieties at Deltek filed by Complainant did not play any role in the termination decision because at the time she was making the decision, she was concerned for the safety of the employees at Deltek, based on Complainant's "erratic and illogical behavior." (Tr. 213-14.)

When Kortright was asked about the basis for her decision, she gave the following testimony:

Q Is there a progressive disciplinary process that leads up to termination for employee misconduct?

A It depends on the situation. So, you know, we have to look at each individual situation, if there's behavior or conduct that's not appropriate for the workplace, and determine what is the appropriate level of disciplinary that goes with that. Sometimes there's multiple steps, sometimes it's straight to termination. It just depends on the severity of the issue.

Q And in Mrs. Gunther's case were there multiple steps taken before her termination?

A No.

Q So she was summarily fired, is that what --

A She was terminated based on her behavior on October 26th.

Q So just exclusively the behavior on October 26th?

A Yes.

Q And that was the only option you felt appropriate for Mrs. Gunther?

A Based on the egregious nature of the behavior and concern over the safety of the rest of the employees at the company, yes.

(Tr. 179-180.)

### ***Termination***

Complainant was terminated the following day, October 27, 2009. In a letter of October 27, 2009, Holly Kortright, Senior Vice President, Human Resources, advised that as a result of her conduct the day before, Deltek had decided to terminate her employment. (C172). In the letter, Kortright advised that Complainant had been on leave status since May and it was Deltek's understanding, based upon discussions with her counsel, that she wanted to separate from Deltek upon negotiation of a mutually acceptable separation package. *Id.* She further advised that it was agreed Complainant would not return to the office while the terms of her departure were finalized; however, she arrived at the office without giving any advance notice (except for an email sent on Saturday), and her supervisors were not prepared to have her back and had no work to give her. *Id.* A new Chief Information Officer had started on that date, which, Kortright indicated, "made it a particularly difficult morning for [Complainant's] abrupt appearance at the office." *Id.* Kortright then stated:

You were advised by our Associate General Counsel, Salman Ahmad, that you should return home, and that the company's outside counsel would continue

working with your lawyer to finalize your separation package, or if no resolution could be reached, to discuss your return to work at a time that was mutually acceptable. Mr. Ahmad explained to you that because you are represented by counsel on these matters, he was ethically bound not to engage in discussions with you without your lawyer present.

You were confrontational with Mr. Ahmad, and persisted in challenging him, despite Mr. Ahmad's repeated explanation that he could not discuss these matters with you without the presence of your counsel. Mr. Ahmad escorted you out of the building, and saw that you had arranged for a person to wait for you outside Deltek's front door in a Hummer SUV with a large video camera. The SUV was parked in such a way that it was difficult for others to drive past it. When you got closer to the SUV, you began speaking to the camera on Deltek's premises, while other employees were walking and attempting to drive past. Your actions and demeanor were disruptive and very concerning.

It is clear that you have not been acting in good faith, and that your expressed desire to return to Deltek was not genuine. Your employment is being terminated today, October 27, 2009. . . .

*Id.* Complainant was advised that she would receive information concerning continuation of benefits from H.R., her personal items would be shipped to her, and she was required to return her company-issued computer and Blackberry, and any other company property in her possession. *Id.* Kortright testified that she consulted with the General Counsel in preparing this letter. (Tr. 62).

Robinson testified that she played no part in Complainant's termination. (Tr. 2231). Evans was terminated in October 2009 and his replacement started work the day prior to Complainant's termination. (Tr. 2156-57).

### ***Subsequent Events***

Deltek subsequently contested Complainant's right to unemployment compensation based upon the allegation that she was discharged due to misconduct. (C187). She was not eligible for rehire. (C129).

On November 18, 2009, Complainant wrote a letter to Kortright in which she complained that the termination letter was defamatory. (R28). Her husband complained to the CEO of Deltek that their family had endured threatening behavior, including harassing phone calls, apparent surveillance, and computer hacking. (R29).

After Complainant's employment ended, Deltek discovered that Complainant had taken and retained company documents during her employment, contrary to the agreement that she signed with Deltek, which would have been a terminable offense, according to General Counsel Schweisow; it would also be contrary to Deltek's business code and employee handbook. (RX 4, 10, 67; Tr. 353-54).

## LEGAL BACKGROUND

The Sarbanes-Oxley Act provides whistleblower protection for employees of publicly traded companies who provide information or participate in an investigation relating to violations of certain criminal code provisions relating to fraud (including “fraud and swindles”; “fraud by wire, radio, or television”; bank fraud; and securities fraud), rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders, when the information is provided to the employee’s superior, law enforcement or regulatory personnel, or members of Congress or when the employee has participated in proceedings relating to the violation.” 18 U.S.C. § 1514(A). Implementing regulations for the Sarbanes-Oxley Act appear at 29 C.F.R Part 1980 and were recently amended, 76 Fed. Reg. 68084 (Nov 3, 2011).

Under the Act, complaints filed with the Secretary of Labor are to be governed by the rules and procedures set forth in 49 U.S.C. §42121(b) [the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as “AIR 21.”] 18 U.S.C. §1514A(b)(2)(A).<sup>20</sup> Congress in turn modeled the AIR 21 employee protection provisions in part on the corresponding “whistleblower” provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, as amended in 1992 (Pub. L. No. 102-486, 106 Stat. 2776). The burdens of production and persuasion in whistleblower cases are based on the framework applied under Title VII of the Civil Rights Act of 1964. *Odom v. Anchor Lithkemko*, ARB No. 96-189, ALJ No. 1996-WPC-1 (Admin. Review Board Oct. 10, 1997), slip op. at 3. *See also Bartlik v. U.S. Department of Labor*, 73 F.3d 100, 103 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding “slight variation,” in that “the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination”).

To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew that the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-41 (ARB Sept. 30, 2009). *See also Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006), slip op. at 6, *citing Getman v. Southwest Securities, Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), *recon. denied* (ARB March 7, 2006); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (AIR21 case); *Bauer v. U.S. Enrichment Corp.*, ARB No. 01-056, 2001-ERA-9 (ARB May 30, 2003) (ERA case). “A determination that a violation has occurred may be made only if

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<sup>20</sup> The section-by-section analysis of Section 806 (Whistleblower protection for employees of publicly traded companies) provides: “This section would provide whistleblower protection to employees of publicly traded companies. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. If the employer does take illegal action in retaliation for lawful and protected conduct, subsection (b) allows the employee to file a complaint with the Department of Labor, to be governed by the same procedures and burdens of proof now applicable in the whistleblower law in the aviation industry. . .” Congressional Record of July 26, 2002 at S7418 (reported on the Office of Administrative Law Judges website, [www.oalj.dol.gov](http://www.oalj.dol.gov).)

the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1980.109(a).

If a complainant proves the elements of his or her case by a preponderance of the evidence, the respondent may still avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. § 1980.109(b); *Halloum*, slip op. at 6.

## DISCUSSION

### *Protected Activity*

The first element, that the employee establish that he or she has engaged in protected activity, has been satisfied. The protected activity consisted of Complainant filing a complaint with management and the SEC in April 2009 (“SEC complaint”) and her filing of a complaint with OSHA in May 2009 (“OSHA complaint”) and participating in that proceeding. 18 U.S.C. § 1514(A) (discussed above); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5 (ARB Sept. 13, 2011) (finding that filing of complaint with the SEC, the audit committee, and supervisors claiming that Halliburton was not in compliance with accounting standards relating to revenue recognition constituted protected activity.)

In her initial complaint, Complainant asserted that (1) section 13 of the Securities and Exchange Act and its implementing regulations require Deltek to maintain controls and procedures designed to ensure accurate financial reporting; and to devise and maintain a system of internal accounting controls; and (2) section 10(b) of the Act and its implementing regulations prohibit a company from taking certain actions, including employing any device, scheme or artifice to defraud; making any untrue statement of material fact; or engaging in fraud or deceit in connection with the purchase or sale of any security. (C116). Complainant alleges that she engaged in protected activity when she provided information to management that Evans, Robinson, and Showalter were (1) hiding a large budget variance from Deltek’s senior management, its auditors, its shareholders, and the SEC; (2) manufacturing frivolous grounds for disputing legitimate invoices from Verizon in order to avoid timely payment of all fees properly due; and (3) obfuscating the true financial conditions within the IT Department by failing to maintain adequate financial controls, circumventing established corporate processes, and thwarting Complainant’s ongoing efforts to follow appropriate document control procedures.<sup>21</sup> *Id.* Complainant further asserted that she reasonably believed that the information she provided involved violations of SEC rules and federal laws, rules, and regulations relating to securities and shareholder fraud. *Id.* In her first and second amended complaints, Complainant alleged essentially the same protected activity. (C175, C76).

The Administrative Review Board recently discussed this element in *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011):

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<sup>21</sup> Although Complainant did not specifically assert that reporting these concerns to the SEC was protected activity, the SEC complaint was provided to management at the same time as it was filed.

The SOX's plain language provides the proper standard for establishing protected activity. To sustain a complaint of having engaged in SOX-protected activity, where the complainant's asserted protected conduct involves providing information to one's employer, the complainant need only show that he or she "reasonably believes" that the conduct complained of constitutes a violation of the laws listed at Section 1514. 18 U.S.C.A. § 1514A(a)(1). The Act does not define "reasonable belief," but the legislative history establishes Congress's intention in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that "a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts [Citation omitted]."

Both before and since Congress enacted the SOX, the ARB has interpreted the concept of "reasonable belief" to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable, "i.e. he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee's] circumstances having his training and experience." *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000) [Citations omitted].

To satisfy the subjective component of the "reasonable belief" test, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law. *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). "[T]he legislative history of Sarbanes-Oxley makes clear that its protections were 'intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise.'" *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009)(citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002)). "Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law.'" *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (quoting *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008)). In this regard, "the plaintiff's particular educational background and sophistication [is] relevant." *Id.*

The second element of the "reasonable belief" standard, the objective component, "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." *Harp*, 558 F.3d at 723. "The 'objective reasonableness' standard applicable in SOX whistleblower claims is similar to the 'objective reasonableness' standard applicable to Title VII retaliation claims." *Allen v. Admin. Rev. Board*, 514 F.3d 468, 477 (5th Cir. 2008) (citing *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007)). Accordingly, in *Parexel Int'l Corp. v. Feliciano*, 2008 WL 5467609 (E.D. Pa. 2008), the court found the complainant's reliance upon the employer's representations reasonable in light of the complainant's limited education, noting that had the complainant

been, for example, a legal expert, a higher standard might be appropriate. *See also Sequeira v. KB Home*, 2009 WL 6567043, at 10 (S.D. Tx. 2009) (“The statute does not require, as Defendants suggest, that the whistleblower have a specific expertise.”) [Emphasis added].

*Sylvester*, slip op. at 14-15. The Board went on to note that it was not necessary for the complainant to convey the reasonableness of his or her belief to the management or the authorities. *Id.* at 15. It also was not necessary for a complainant to establish shareholder fraud.<sup>22</sup> *Id.* Although the Board did not specifically overrule the “definitively and specifically” requirement set forth in prior Board decisions, it backed away from that standard, focusing instead on the reasonableness of the complainant’s belief that there was a violation of one of the specific categories of fraud or the SEC regulations.<sup>23</sup> *Id.*

In *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 & n.1 (4th Cir. 2008), the Court of Appeals for the Fourth Circuit concluded that employees will only receive whistleblower protection under SOX if they report violations that are adverse to shareholders’ interests and that in order for an employee to obtain SOX whistleblower protection for communicating a violation of SEC rules or regulations, the employee must also show that this violation constituted fraud. The court argued that “[t]o conclude otherwise would absurdly allow a retaliation suit for an employee’s complaints about administrative missteps or inadvertent omissions from filing statements.” *Id.*

Here, Complainant has alleged protected activity that began with her reporting concerns to Senior Vice President Lowrey at the January 2009 meeting and extended through April 2009, when she filed her complaint with the Deltek General Counsel, the Audit Committee, and the Securities and Exchange Commission, and thereafter, when the complaint was investigated. Her earlier concerns were about problems of which management was well aware, such as the lack of documentation supporting certain expenses and the problems with Verizon’s billing, and they advised her they were aware of those problems; the reporting of those concerns cannot therefore constitute protected activity. However, those concerns led to her related concerns about the validity of some of the Verizon bill disputes and about the hiding of a large budget variance from upper management, which, after her consultation with Reynolds, formed the basis for her SEC complaint (which was made to management, the audit committee, and the SEC).

Although Respondents have not disputed that the filing of a complaint with management or the SEC would constitute protected activity, Respondents question whether, given Complainant’s limited education and lack of experience in the area of telecommunications

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<sup>22</sup> The Fourth Circuit appears to require allegations relating to some kind of fraud or violations that are adverse to shareholder interests, as discussed below. *See Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir. 2008). The protected activity involved here satisfies that requirement, based on Complainant’s allegation that the allegedly fraudulent billing disputes could have lead to a disruption in services, which in turn could have affected operations and ultimately affected shareholder earnings.

<sup>23</sup> *See, e.g., Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27(Admin. Review Bd. Sept. 29, 2006), *aff’d sub nom Platone v. United States Dept. of Labor*, 548 F.3d 322 (4th Cir. 2008), *cert. den.*, 130 S.Ct. 622, – U.S. – (2009) (requiring that the allegations must “definitively and specifically” relate to the listed categories of fraud or securities violations).

invoices, she had sufficient knowledge to formulate a belief that there had been a violation.<sup>24</sup> In support, Respondents rely upon *Day v. Staples, Inc.*, 573 F. Supp. 2d 336 (D. Mass. 2008), in which the court contrasted the plaintiff in that case from those in other SOX cases who possessed the experience and expertise to recognize the reported fraud. Respondents also argue that Complainant produced no evidence substantiating her claims of falsely disputing invoices, and intentionally concealing information from upper management, including a supposed large budget variance. Respondent's FAC at 37 to 39. However, "an employee's reasonable but mistaken belief in employer misconduct may constitute protected activity." *Menendez, supra*. In their supplemental brief at pages 3 to 4, Respondents also argue that Complainant's actions were not reasonable when she made no effort to question the individuals she implicated or anyone knowledgeable about the financial issues, and she failed to contact Lowrey, the person she felt was being deceived. However, her concerns were not taken seriously when she raised them to her superiors in the past, she consulted with Reynolds (who represented himself as knowledgeable concerning the Verizon issues), and she raised her concerns to upper management contemporaneously with her filing of the complaint with the SEC.

It is true that Complainant lacked adequate education and experience to assess whether there was accounting fraud as a professional and, as Respondents argue, Complainant failed to establish fraudulent activity and failed to consult knowledgeable persons concerning her suspicions. However, while the issue is a close one, I find that she engaged in protected activity under SOX when she reported her concerns that the named Respondents fraudulently disputed Verizon invoices and withheld information concerning budget variances to management and to the SEC ("the SEC complaint"). I further find that both the subjective and objective tests have been satisfied.

It is clear that Complainant had a subjective belief that there were accounting irregularities that involved fraud, and specifically that her superiors were trying to hide budget shortfalls by disputing invoices without a basis for doing so. When she first arrived at Deltek, she reasonably questioned the lack of supporting documentation for some bills and both Robinson and Showalter advised her that there were problems with the Verizon invoices, providing some support for her concerns. Her beliefs were in some ways misguided and unreasonable. She interpreted Robinson's repeated instructions to not worry about the Verizon invoices because Showalter had the situation under control as an attempt to keep her from uncovering fraudulent activity. However, Showalter's testimony makes it clear that he did, in fact, have the situation under control, despite the recognized issues concerning Verizon's billing and dispute resolution process. Likewise, she interpreted her exclusion from future meetings with Lowrey as a means to keep her from getting to the bottom of the discrepancies and reporting them to Lowrey when, in fact, Lowrey was being fully informed about the budgetary situation on a biweekly basis and wanted her to be excluded from future meetings. Her suggestion of a conspiracy that involved not only the individual Respondents but also the General Counsel has no basis in fact and, as Respondents indicate, she failed to contact the appropriate personnel to investigate the issues. Nevertheless, based upon her testimony and the

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<sup>24</sup> As Respondents note in their supplemental brief (at page 2), "at the time of her alleged discovery of 'massive fraud,' Complainant (1) had only a high school education; (2) lacked experience in telecom billing, which is complicated; (3) had worked for Deltek for less than six months; and (4) held a position at Deltek that did not involve the review of financial statements." See also Respondent's Proposed FAC at 38.

other evidence of record, I find that she subjectively believed that Respondents had violated the law and engaged in fraudulent activity that could have had an effect upon Deltek's financial position, as reported to shareholders.

The objective reasonable issue is a much closer one. Had Complainant been acting solely upon her own limited background, I would be inclined to agree with Respondents that the objective standard has not been satisfied. However, Complainant had extensive dealings with Reynolds. Like Complainant, Reynolds lacked advanced education, but he had extensive experience in Verizon's invoicing. He was a credible, convincing witness at the hearing (despite his credibility being somewhat undermined by his working at home when he was receiving disability benefits from Deltek and by his failure to concede that he and the Complainant had worked on their almost-identical complaints together). Showalter was also a credible witness (whose credibility has not been undermined) and he convincingly explained the basis for the disputes questioned by Reynolds and responded to Reynolds' testimony, and Robinson pointed out that Deltek prevailed in 80% of the billing disputes with Verizon. However, even accepting Showalter's testimony over that of Reynolds would leave open the possibility that a portion of the 20% of the disputes that Deltek lost were not supported.<sup>25</sup> Also, even if each and every dispute was valid, Reynolds spoke authoritatively on the subject based upon his extensive experience, which he touted to Showalter when he said in an email, "I've been in this business 22 years and have run multi-million dollar programs. . ." (C54). He expressed his concerns to Complainant and filed an almost identical complaint to the one she filed. (C72, R20). In view of her dealings with Reynolds, I find that Complainant had an objectively reasonable basis for her belief that there was a violation when she filed her SEC complaint.

Although not specifically alleged, Complainant was also engaged in protected activity when she commenced and participated in whistleblower proceedings under the Sarbanes Oxley Act. She filed the initial OSHA complaint while she was still employed by Deltek (but on paid medical leave, while the investigation was continuing), essentially based upon an alleged demotion and a hostile work environment prior to her departure. Inasmuch as the complaint was filed prior to her termination, it would constitute protected activity with respect to the allegation in her amended complaints that she was terminated in retaliation for engaging in protected activity. 18 U.S.C. § 1514(A).

### ***Respondent's Awareness of Protected Activity***

The second element, that Respondents were aware of the protected activity, has also been satisfied. Complainant was very vocal about her concerns almost from the beginning of her employment, and she submitted her SEC complaint to Deltek management as well as to the SEC (although, as discussed below, the individual Respondents testified that they were unaware of the SEC complaint at the time of the Cupcake Meeting and the Pulp Fiction meeting).

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<sup>25</sup> In an email to Reynolds, Robinson, and Darrell Goetz of November 11, 2008 (subject "NEC Travel Costs – Pass Thru"), Evans joked, "I'll sign, but maybe we ought to dispute it, just for fun or old times sake." (C26). Given Evans' tendency to joke (as discussed further below), I do not find the email to constitute evidence that invoices had been fraudulently disputed in the past.

As Deltek and the individual Respondents were named in the initial OSHA complaint and were consulted in connection with that complaint, it is clear that they were aware of the Complainant's protected activity in filing the initial OSHA complaint prior to her termination. The SOX provision specifically includes an employee's participation in proceedings relating to the alleged SOX violation.

### ***Adverse actions***

With respect to the third element, the termination (dismissal) is clearly an adverse action, and it is specifically listed as such in the complaints. However, I find that other allegations, made in the first complaint, do not rise to the level of adverse actions.

In *Menendez*, the Administrative Review Board recently articulated the standard for establishing an adverse action under SOX, which is more liberal than the tangible consequences standard set forth in other types of whistleblower cases.<sup>26</sup>

SOX Section 806's plain language states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." By explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. [Footnotes omitted].

*Menendez*, slip op. at 15.

Here, there are several actions predating the termination that Complainant has alleged were retaliatory in nature. As I have not found protected activity predating the filing of the SEC complaint, any actions taken before she filed the complaint (as, for example, her reassignment to report to Showalter and her exclusion from Costpoint training) do not constitute adverse actions. Likewise, although Complainant's job was reclassified after the complaint was filed, there was considerable testimony and documentation substantiating that the classification process began even before Complainant was hired and the results were consistent with that process.

There were two specific alleged adverse actions that occurred after Complainant filed her SEC complaint, relating to allegedly retaliatory comments made to her at the Cupcake Meeting and the Pulp Fiction Meeting. However, both Robinson and Evans testified that they first learned about the SEC complaint after those meetings, and their testimony was corroborated by Schwiesow. Complainant could not refute their allegations based upon her subjective belief as to the genesis of those comments. Robinson's testimony as to when she first learned of the SEC complaint, in particular, was persuasive as it was based upon specific details that she recollected. As the comments were made by Robinson and Evans before they learned of Complainant's protected activity, they could not be retaliatory in nature.

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<sup>26</sup> E.g., *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). See also *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB March 30, 2001); *Martin v. Dept. of Army*, ARB No. 96-131, ALJ No. 1993-SDW-1 (ARB July 30, 1999).

Even if Robinson's comments at the Cupcake Meeting could be deemed to have been made at a time when she was aware of Complainant's protected activity, they were too inconsequential to constitute an adverse action, even under the expansive definition of the SOX provision as interpreted in *Menendez*. It is clear that Robinson and Complainant had difficulties. Robinson was ostensibly frustrated by Complainant's need for detailed direction and failure to follow instructions while Complainant felt that Robinson was keeping her out of the loop. It is unclear what Robinson intended by the remark. However, in the context of their existing relationship, I find that the single remark about the cupcakes being in Complainant's honor, while perhaps demeaning, is not an adverse action.

While the question is a closer one, I find that the reference by Evans to torture at the Pulp Fiction Meeting, even if he had made it after he learned of the Complainant's protected activity, would not constitute an adverse action. Complainant's subjective belief that she was being threatened was not unreasonable under the circumstances, and the remark certainly appeared to be inappropriate for a staff meeting relating to budget. However, there were gaps in the recording, the meeting was already in progress at the time Complainant entered, and it continued with a discussion of the budgetary problems. There was testimony as to Evans' propensity to joke, sometimes at the expense of others (as, for example, when he joked about firing his subordinates, Tr. 1631-32), and it is unclear what point he was trying to make when he made the joke about torture.<sup>27</sup> Respondents have suggested that Evans was jokingly comparing the monotony of preparing a particular financial report to a torture scene in the movie, and giving the tedious assignment to Showalter, which is a plausible explanation for the comment. In sum, there are too many questions concerning the context in which those comments were made for them to constitute an adverse action.

There was little if anything that could be considered an adverse action following those meetings, as shortly thereafter Complainant accepted the offer of paid administrative leave due to medical issues.<sup>28</sup> During that period, Complainant expressed concerns about document shredding, but any reaction by Showalter and Robinson to those concerns was premised upon the fact that she inappropriately raised the issue to the CEO of Deltek. Robinson did not learn of the SEC complaint until after Complainant did so. Complainant's job slotting was not completed until April 20 and implemented on May 1, 2009, but there was ample evidence establishing that the process predated the protected activity and had its genesis even prior to Complainant's employment at Deltek. Likewise, Complainant and Azam were already reporting to Showalter but the assignment was not made formal until April 2009. During that short period (from April 20 to May 18, when her voluntary leave of absence was approved), Deltek handled the investigation of the SEC complaint professionally and treated the allegations by Complainant and Reynolds seriously. Although Kortright met with Complainant to discuss the need for her to remain professional, Kortright met individually with all of the employees in the IT Department,

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<sup>27</sup> Lydia Rigsby, the former director of IT services, testified, "Lee [Evans] would always walk through my office and if he was on a rampage say, okay, today's the day I'm going to fire you." (Tr. 1631). She continued: "It was just kind of a running joke in our department" that "if Lee was having a stressful day he would pop into the next office and say, okay, you know what, I'm going to fire you today." (Tr. 1632).

<sup>28</sup> Nor has Complainant established that she was subjected to a hostile work environment. As the Supreme Court noted in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (in the context of a title VII sex discrimination case), a hostile work environment is one that is "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."

to counsel them on the need to continue “work as usual,” while the investigation continued. (Tr. 209-10.)

The only other question is whether Complainant was constructively discharged when her pay was terminated or when she was given a COBRA (continuation of insurance coverage) notice. However, those actions were taken in the context of settlement negotiations and Ahmed verified that Complainant was still employed by Deltek when she attempted to return to work the day prior to her termination.

In view of the above, I find that the only actionable adverse action was Complainant’s termination.

### ***Causal Relationship***

The final element is whether the complainant has established a causal relationship by a preponderance of the evidence, and both direct and circumstantial evidence may be used to satisfy that burden. *See Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003) [ERA case], slip op. at pages 3 to 6 and n. 19. Proximity in time is sufficient to raise an inference of causation under the pertinent regulations relating to the investigation of complaints under the Act. 29 C.F.R. §1980.104(b). The same rule is applicable in whistleblower cases decided on a full record developed at a hearing. *See Halloum*, slip op. at 7-8. In establishing this element it is unnecessary for a complainant to establish that the respondent had a retaliatory motive; rather, the issue is whether the protective activity contributed to the adverse personnel action. *Melendez*, slip op. at 28 to 32. The Administrative Review Board recently stated:

. . . Nothing in Section 806 requires a showing of retaliatory intent. The statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer. Proof of “retaliatory motive” is not necessary to a determination of causation.

*Melendez*, slip op. at 31.

Under the general framework of whistleblower cases, once an employee has established a prima facie case of discrimination, the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. *See Guttman v. Passaic Valley Sewerage Comm’rs v. Department of Labor*, ALJ No. 1985-WPC-2 (1992), *aff’d sub nom, Passaic Valley Sewerage Comm’rs v. Department of Labor*, 992 F.2d 474 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993). *See also Dysert v. United States Sec’y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) [ERA case]. The complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but was a pretext for retaliation. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993). Once the employee has shown that illegal motives played some part in the discharge (or other adverse action), which may be established by either direct or indirect evidence, the employer must prove that it would have taken the same actions in regards to the employee even if he had not engaged in protected conduct. *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31

(ARB Sept. 30, 2003) [ERA case], slip op. at pages 3 to 6 and n. 19. In such “dual motive” cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. *Pogue v. U.S. Department of Labor*, 940 F.2d 1287 (9th Cir. 1991).

Based upon a review of all of the evidence, I find that Complainant has established a causal connection between the protected activity and her termination. Here, I have found that the protected activity consisted of (1) Complainant’s filing of a complaint with Deltek management, the audit committee, and the SEC (the SEC complaint); and (2) Complainant’s participation in proceedings resulting from that complaint (the OSHA complaint and its investigation). The sole adverse action that I have found is Complainant’s termination. Her termination resulted after her return from a leave of absence that was precipitated by an investigation into the matters raised by the SEC complaint, and she was terminated after the failure of settlement negotiations relating to the OSHA complaint, which encompassed her claim of retaliation based upon her filing of the SEC complaint. Had neither complaint been filed, she would not have been offered the medical leave or entered into the settlement negotiations, she would not have returned to work on the day that she did, and she would not have been terminated based upon her actions at the time she returned. Accordingly, Complainant’s termination was causally related to the protected activities.

I also find that Deltek’s explanation as to the basis for terminating Complainant is pretextual. In that regard, Kortright, who actually terminated Complainant, testified that she was terminated exclusively based on the “egregious nature” of Complainant’s behavior on October 26th, 2009 and her “concern over the safety of the rest of the employees at the company.” (Tr. 179-80). In the termination letter, Kortright accused Complainant of being “confrontational with Mr. Ahmad” and being persistent “in challenging him,” despite his repeated explanation that he could not discuss these matters without her counsel present, and that when Ahmad escorted her out of the building, a person in a Hummer SUV with a large video camera was “parked in such a way that it was difficult for others to drive past it” and she “began speaking to the camera on Deltek’s premises, while other employees were walking and attempting to drive past.” Kortright further stated that Complainant’s “actions and demeanor were disruptive and very concerning.” She concluded that Complainant had not been acting in good faith, and that her expressed desire to return to work was not genuine (C172).

Having listened to the tape more than once, I do not agree with Kortright’s characterization of Complainant’s actions on October 26th. At all times, Complainant was calm, quiet, and (although she repeated herself) polite.<sup>29</sup> Although the inference could be drawn from her actions and the use of a recorder and video camera that she did not expect to be permitted to return to work and wanted to document it, that does not mean that she did not have the desire to work or that she was acting in bad faith. The timing of her return was ill advised, as she did not give Deltek sufficient advance notice and did not have her counsel contact Deltek’s counsel in advance, nor did she obtain permission from anyone to return. Under those circumstances, Ahmad appropriately told her to leave and escorted her from the building; however, that does not mean that Deltek had a basis for terminating her employment due to her premature return alone, nor has it made such an argument. There was no testimony or other evidence that the Hummer

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<sup>29</sup> Complainant is a petite woman who did not appear in any way intimidating during the proceedings before me. At all times, she was respectful and maintained an appropriate demeanor for a courtroom setting.

was actually blocking traffic or that any personnel were hampered in their efforts to walk or drive past Complainant and the Hummer. The only employee who apparently felt intimidated was Kortright's assistant (Parker), who advised Kortright that she was "scared" because Complainant was apparently staring at her while waiting for Kortright outside her office. As Parker did not testify, it is unclear what she meant by the remark. While Kortright appropriately considered her assistant's comments, there was no basis for her to draw the inference that other employees were in actual danger based upon the evidence before me. There is no evidence that Complainant ever took any actions in the workplace toward other employees that were inappropriate or threatening. In the termination letter, Kortright did not assert that Complainant had violated any company policy or that she had committed any other offenses. Kortright's explanation at the hearing as to why there were no progressive disciplinary proceedings, due to the egregious nature of Complainant's actions on October 26th, was not convincing. The statements Kortright made in the termination letter were not supported by the tape; indeed, they were contradicted by the tape. Kortright's testimony, and the testimony of Ahmad, did not remedy the deficiency. In sum, I find the basis asserted by Kortright for the termination, which Deltek adopted, to be pretextual.

Nor can Deltek escape liability based upon any misplaced reliance upon the accounts given by Kortright and Ahmad as to the events of October 26th. In *Chen v. Dana-Farber Cancer Institute*, ARB No. 09-058, ALJ No. 2006-ERA-009 (ARB, March 31, 2011) (Royce, J. dissenting), an ERA case, the dissenting judge noted that the administrative law judge "appeared to apply reasoning consistent with the 'cat's paw' theory of liability recently approved by the Supreme Court" in *Staub v. Proctor*, 131 S.Ct. 1186 (2011), which "held that an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus." *Chen* (Royce J., dissenting), slip op. at 17-18.<sup>30</sup>

Considering all of the evidence, I find that Deltek has not demonstrated that there were legitimate, nondiscriminatory grounds for its actions in terminating Complainant. While there may have been legitimate reasons for terminating Complainant, in view of her difficulty performing the work of a financial analyst and the layoff of employees during the pertinent period, no alternative reasons have been offered.

Moreover, even if Complainant's actions on October 26th were deemed to be part of the reason for her termination (*i.e.*, there were mixed motives), the nondiscriminatory reasons cannot be separated from the discriminatory ones. Thus, Deltek would still be liable. *See Pogue, supra*.

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<sup>30</sup> The Supreme Court explained the derivation of the principle in note 1 of its decision in *Staub*:  
The term "cat's paw" derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. [Citation omitted.] In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward.

### ***Clear and Convincing Evidence***

Once a complainant meets the burden of establishing the elements of his or her case (set forth above), the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. 29 C.F.R. 1980.109(b). While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the “beyond a reasonable doubt” standard. *Remusat v. Bartlett Nuclear, Inc.*, No. 1994-ERA-36 (Sec’y Feb. 26, 1996) *citing Yule v. Burns International Security Service*, No. 1993-ERA-12 (Sec’y, May 24, 1995). *See also White v. Turfway Park Racing Association*, 909 F.2d 941, 944 (6th Cir. 1990), *citing Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Brune v. Horizon Air Industries Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) slip op. at 14, n. 49, *citing BLACK’S LAW DICTIONARY* at 577.

Here, Respondents have not demonstrated by clear and convincing evidence, or even by a preponderance of the evidence, that they would have terminated Complainant in the absence of her protected activity. They have relied exclusively upon an explanation that I have found to be pretextual.

### ***Individual Respondents***

Individual respondents may be named in addition to corporate respondents under the Act, which applies to a publicly traded company “or any officer, employee, contractor, subcontractor, or agent of such company.” 18 U.S.C. § 1514(A). As amended, the regulatory definition of covered person includes “any company, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any nationally recognized statistical rating organization, or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization.” 29 C.F.R. § 1980.101(a). When the original implementing regulations were adopted, the Department of Labor noted that the definition of named person “includes the employer as well as the company and company representative who the complainant alleges in the complaint to have violated the Act.” 69 F.R 52104, 52105 (Aug. 24, 2004).

For the reasons set forth above, I have found that the only actionable adverse action was Complainant’s termination. Inasmuch as Evans and Robinson did not participate in the termination, based upon their testimony and the testimony of Kortright, the actions against them are dismissed. The action against Showalter was already dismissed.

### ***Conclusion***

In view of the above, Complainant has established by a preponderance of the evidence that she engaged in protected activity that was a contributing factor in the adverse employment action taken against her (the termination). Further, Respondents failed to establish by clear and convincing evidence that Complainant was terminated for legitimate, nondiscriminatory reasons

unrelated to the protected activity. Accordingly, Respondent Deltek is liable to Complainant under the employee protection provisions of the Sarbanes-Oxley Act. However, Respondents Evans and Robinson are being dismissed as they played no part in Complainant's termination.

### *Damages*

By agreement, the issue of damages was bifurcated and will be addressed in a supplemental order, and I will retain jurisdiction for that limited purpose. Upon a review of the record, it does not appear that additional testimony is necessary. Accordingly, Complainant shall have thirty days to offer exhibits on the issue of damages resulting from Complainant's termination, after which Respondent Deltek shall have thirty days to submit any exhibits on the damages issue. The parties may identify exhibits previously submitted and need not submit new copies. Upon completion of the record, the parties shall have thirty days to brief the issue of damages resulting from Complainant's termination.

The parties are free to attempt to reach an agreement on the damages issue or to propose an alternative schedule for addressing the damages issue.

### **ORDER**

**IT IS HEREBY ORDERED** that the claim by Dinah R. Gunther for relief under the Sarbanes-Oxley Act be, and hereby is, **GRANTED** to the extent set forth above, and Respondent Deltek is liable to the Complainant for damages as set forth in the Act;

**IT IS FURTHER ORDERED** that individual Respondents Jerry Lee Evans, Jr. and Kay M. Robinson are **DISMISSED**; and

**IT IS FURTHER ORDERED** that the parties shall address the issue of damages resulting from the Complainant's termination as set forth above, and the issue of damages will be addressed in a supplemental order.

**A**

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.