



Issue Date: 05 June 2013

CASE NO.: 2010-SOX-00049

In the Matter of:

**DINAH R. GUNTHER,
Complainant,**

v.

**DELTEK, INC.,
Respondent.¹**

SUPPLEMENTAL DECISION AND ORDER AWARDING DAMAGES

On July 31, 2012, I issued a Decision and Order in this matter, finding that Deltek, Inc. (“Respondent”) terminated Dinah Gunther (“Complainant”) in violation of the Sarbanes-Oxley Act (“SOX”) because she disclosed information, which she reasonably believed showed that her employer 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. This Supplemental Decision and Order addresses the damages portion of the case.

PROCEDURAL BACKGROUND

The Procedural Background is summarized in my Decision and Order Granting Claim in Part and Dismissing Individual Respondents of July 31, 2012 [hereafter “Original Decision”], which is incorporated by reference herein. As previously agreed, the issue of damages was bifurcated, so my decision did not resolve the damages issue.

The Original Decision did, however, finally dismiss the individual respondents and, for that reason, included a notice of appeal rights. Both Complainant and Respondent appealed, but the Administrative Review Board (“ARB” or “Board”) determined that the appeals were premature as the decision was interlocutory and asked the parties to show cause why the appeals should not be dismissed. Inasmuch as the ARB has found the decision to be interlocutory, I will reissue the portion dismissing the individual respondents (with the exception of Respondent Showalter, who was voluntarily dismissed during the hearing). The damages portion of this case has, however, proceeded only against the corporate respondent, Deltek, Inc.

¹ Deltek, Inc. is now the sole Respondent. Individual Respondents Jerry Lee Evans, Jr. and Kay M. Robinson were dismissed by my Decision and Order Granting Claim in Part and Dismissing Individual Respondents of July 31, 2012. Respondent’s counsel advised by letter of December 11, 2012 that all of the stock of Deltek, Inc. had been acquired but that Deltek, Inc. remained an independent corporate entity doing business in its own name.

Following a conference call held on August 28, 2012, I issued an order on August 30, 2012 clarifying that the damages portion of the case would be heard on the written record according to the following schedule: Complainant's evidence would be submitted within 90 days; Respondent's evidence would be submitted 60 days thereafter; both parties would file simultaneous initial briefs 30 days thereafter; and both parties would file simultaneous responses 30 days after that.

On December 5, 2012, Complainant submitted Complainant's Proof of Damages along with briefing. Respondent submitted its Exhibits Relating to Damages on January 29, 2013 and its Memorandum Concerning Damages and Other Relief on February 28, 2013. On March 29, 2013, Respondent submitted a Supplemental Memorandum Concerning Damages and Other Relief. Complainant then submitted her Reply to Respondent's Memorandum Concerning Damages and Other Relief on April 4, 2013. The evidence and briefing were therefore complete.

On April 29, 2013, however, Complainant filed a Supplemental Proof of Damages Brief and Complainant's Reply to Respondent's Supplemental Memorandum. Complainant explained that she has suffered additional damages since submitting her previous brief and she also noted that there was new case law from the Administrative Review Board addressing non-pecuniary damages under SOX. This same day, Respondent filed a motion to strike Complainant's supplemental brief, which I treated as an opposition to the motion to file.

On May 7, 2013, I issued an order denying Complainant's motion to file supplemental briefing; however, I noted that I would consider the new authority cited (*Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-5 (ARB March 15, 2013)) in my decision on the damages portion of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS/EVIDENCE

The Facts are generally summarized in my Original Decision, which is incorporated by reference herein. With respect to individual categories of damages, they are discussed in context below.

Expert Witness Testimony

Initially, some clarification concerning my ruling on expert witness testimony is necessary. In footnote 3 on page 3 of Complainant's Proof of Damages filed on December 5, 2012, Complainant stated: "For the record, Complainant sought to introduce testimony from an economist and vocational expert, medical expert, and an expert on the reasonableness of attorney's fees, representative fees and litigation costs." That is simply untrue, however.

In a telephone conference of August 28, 2012 [“TC”], Complainant sought to retain the services of an economic expert and did not mention the need for a medical or vocational expert.² At the conference, I specifically asked Mr. Gunther what he wanted to ask the expert witness:

JUDGE LAKES: All right, but you still haven’t answered my question. What would you have the expert witness ---

MR. GUNTHER: And so these relate to economic damages and mitigation.

JUDGE LAKES: Right, so what are you going to ask him about?

MR. GUNTHER: Well, I’ll give one example, Your Honor. During the period of time that Mrs. Gunther was denied her salary and benefits, she had to make up for that to continue to pay bills and mortgage and avoid losing the house. She had to withdraw money from her IRA and by doing so, she was subject to penalties and additional taxes and lost opportunities to earn retirement income. So, we need to be able to establish and we might be able to do this through stipulation if Deltek is in a hurry, we might be able to reach some accommodations there, but we’re simply trying to help the court to establish what the appropriate measure of damages is going to be.

JUDGE LAKES: Okay, so you contemplate what, an economist or somebody like that?

MR. GUNTHER: Yes. In fact we have spoken to both experts from *Calcunte* [*Kalkunte v. DVI Financial Services, Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009).] They have both expressed an interest in assisting Mrs. Gunther with her case, however, we cannot reach any definitive agreement with them until we know that we’re entitled to designate an expert. We think at this point that we need leave from the court to be able to do that.

(TC at 9-10, 11-12). After Respondent stated its objections, I again questioned Mr. Gunther about the need for an expert witness and asked him what I would be unable to determine on my own based upon my review of the exhibits and arguments, and he responded:

MR GUNTHER: Well, your Honor, could we maybe understand better how you would accept Mrs. Gunther proving that she had to withdraw money from her retirement account as a consequence of Deltek’s conduct and suffer a penalty in terms of, for example, ten percent early withdrawal? How would you be able to evaluate what her correct tax rate was? How would you be able to evaluate what her lost opportunity was in terms of investing? I mean, she has 100 percent depleted her retirement account in order to fund the litigation, first of all and second of all, to fund her costs of living.

(TC at 19). A discussion of when these damages occurred vis-a-vis the hearing and whether that was actionable followed, inasmuch as posthearing damages were not contemplated at the time that I bifurcated the hearing. In order to prevent extensive delays, I initially ruled that the damages would be decided on a paper record, with the understanding that if there were road

² The conference call was set up for the purpose of clarifying the reason I issued the appeal notice, which was that the decision was final [mistranscribed as “filed”] with respect to the two individuals who were dismissed. (Transcript of August 28, 2012 Telephone Conference [“TC”] at 4.)

blocks, the issue could be revisited. (TC at 23-24). Complainant was, however, specifically authorized to retain an expert witness to assist her in calculating and presenting the damages portion of this case, but she chose not to do so. Complainant did not offer medical expert witness testimony or vocational expert witness testimony or make a showing that live economic expert witness testimony was necessary for resolution of the issues before me.

Evidentiary Record on Damages

Complainant's Proof of Damages was filed on December 5, 2012, including a supporting memorandum, exhibits, and an affidavit. The affidavit and exhibits have been marked as C250A, C250, C251, C252, and C253.

To supplement her hearing testimony, Complainant submitted an "Affidavit of Dinah R. Gunther – Damages," which is signed but undated, that was included with Complainant's Proof of Damages filed on December 5, 2012. The document is unmarked and I have marked it as C250A for identification purposes. Although it includes a space for notarization dated "this ___ day of November, 2012," the document was not notarized but included the handwritten statement that it was attested under penalty of perjury. C250A is ADMITTED. SO ORDERED.

In the affidavit, Complainant indicated that as a result of the financial devastation and other tumult caused in her life by Respondent's conduct, she has been forced to sell her home in Virginia and will likely have to move to another state where she can find a lower cost of living. (C250A ¶ 4.) She indicated that her salary was \$68,000 at the time of her discharge from Deltek, Inc. and she subscribed to "a host of premium employee benefits including regular bonuses, retirement matching contributions, vacation accruals, sick leave credits, health and welfare benefit(s) coverage contributions, college tuition payments, and other employment benefits and entitlements." *Id.* ¶ 5. She further indicated that her compensation was suspended on September 15, 2009 and her compensation and benefits terminated on October 27, 2009. *Id.* She stated her belief that she would have to "strive for a minimum of ten (10) years from the date of any Final Order in this matter to regain the professional status and the career momentum [she] enjoyed" at the time of her discharge. *Id.* ¶ 8. She then discussed each of the elements of damages sought. C250A ¶ 9 to ¶ 30. Complainant indicated that in February 2009, when she was still employed by Respondent, she needed to add her husband and children to her benefits plan because her husband lost his job. *Id.* ¶ 22. She indicated that she had experienced "profound mental anguish and suffering" with related physical injuries as a result of the discharge, including stress related fatigue and loss of hair, lack of sleep, nightmares and flashbacks, migraines, ulcers, and jaw pain from nervous grinding. *Id.* ¶ 29. She also asserts that her life was less enjoyable as a result of her discharge, and she continued to experience loss of career aspirations, deteriorating health issues, financial distress (including inability to prepare for retirement and education of her children), loss of leisure time (due to litigation), inability to continue personal hobbies (such as martial arts), and loss of relationships (particularly with co-workers at Deltek, Inc.) *Id.* ¶ 30. Complainant also expressed fears about further discrimination if she were to return to work with Respondent (which is no longer publicly traded) and asserted that she had made reasonable efforts to mitigate damages. *Id.* ¶ 31, 32. Finally, she asserted that David Schwiesow had directed her to gather evidence of her April 20, 2009 charges against Respondent and she had complied; that she never stole documents; that she never broke her confidentiality or non-

compete policies agreements with Respondent; that she made reasonable efforts to comply with Respondent's published policies; and that at all times she has endeavored to act in the best interests of Respondent, its employees and shareholders. *Id.* ¶ 33-38.

Complainant's Proof of Damages, filed on December 5, 2012, also included the following exhibits: C250 (a tabular summary of damages sought); C251 (a printout summarizing future lost wages and benefits); C252 (a summary of litigation expenses and other expenses with receipts, including Attorney's Fees under Tab A;³ Lay Representative Fees under Tab B; Litigation Costs with receipts under Tab C; Out of Pocket Medical Expenses under Tab D; Penalties & Taxes Due to Early Withdrawal from Retirement Accounts under Tab E; Loss of Economic Opportunity Due to Early Withdrawal under Tab F; Loss of Economic Opportunity Due to Employer's Failure to Maintain Regular 401K Contributions under Tab G; Injury to Personal Credit Ratings under Tab H; Ongoing Injury to Professional Reputation under Tab I; Mental Anguish & Suffering, including Personal Injuries under Tab J; Loss of Enjoyment of Life under Tab K; and Personal Humiliation under Tab L); and C253 (a listing of the amount sought for Punitive Damages (capped)). These documents will be admitted and considered to the extent that they have probative value, and, to the extent that they are not evidentiary in nature, will also be considered as argument by the Complainant's lay representative. Accordingly, C250, C251, C252, and C253 are ADMITTED. SO ORDERED.

In footnote 2 on page 3 of Complainant's Proof of Damages, Complainant moved for the admission of C189, C189A, and C190 "for in camera review and be subject to a protective order."⁴ Although Complainant's lay representative is entitled to some latitude, I have previously advised him that motions should be made in the form of a motion. Moreover, C190 is not present in the record and was not identified or offered at the hearing;⁵ C189A appears in a separate binder and includes redacted documents, and it was identified but never offered; and C189, which includes a roster of expenses, was also identified but not offered, in view of my decision to bifurcate. (Tr. 1123-1132.) Although acknowledging that the receipts were redacted (as I had requested), Mr. Gunther stated: "I would also note that these are marked confidential because, even though they are redacted, there is still a risk that they contain personal information." (Tr. 1124). Having reviewed C189 and C189A, I do not find that they include significant personal information and there is no need for them to be reviewed in camera (as copies have been provided to Respondent), but the receipts in the binder may be maintained subject to predisclosure notification if Complainant wishes. Accordingly, C189 and C189A are ADMITTED, C189A will be maintained in a separate folder subject to predisclosure notification, and Complainant's footnote motion is otherwise DENIED.⁶ SO ORDERED.

On the issue of damages, on January 29, 2013, Respondent has designated four exhibits marked as R72, R73, R74, and R75; however, as Complainant noted in her Reply of April 1,

³Specific tabs in C252 may be referenced as C252 followed by the tab letter (e.g., C252F).

⁴A binder entitled "Complainant's Litigation Expenses Working," marked as C189A, was identified at the hearing but not admitted, and a roster of damages was marked as C189 but not admitted. (Tr. 1124-25).

⁵C190 is merely identified as Special Damages (For In Camera Review) on the Complainant's Exhibit List in the binder. No additional information has been provided in Complainant's footnote motion.

⁶Complainant's reconsideration footnote motion appearing in footnote 58, relating to C229A, is likewise denied. (Tr. 475-508). The exhibit was identified but not admitted; however, inasmuch as a witness (Reza Farnood) addressed the same matters, its admission would be cumulative. SO ORDERED.

2013, those exhibit numbers have been assigned to different exhibits. Accordingly, I have marked those exhibits as DR72, DR73, DR74, and DR75 (indicating Damages Exhibits for Respondent) for identification purposes. In her Reply of April 1, 2013, Complainant objects to these exhibits on grounds of authenticity, foundation, relevance, and hearsay; she notes that these exhibits involve company documents that, in some instances, are contrary to those she actually received. Thus, DR72 and DR73 involve COBRA continuation coverage notices dated 11/13/2009 and 11/03/2009, respectively, but Complainant asserts that she did not receive them (although she acknowledges receiving the COBRA notice appearing as C155, dated 9/14/2009), and she disputes the content of the exhibits. With respect to DR74, Vacation Scheduling Policy (dated July 30, 2007) and Tuition Reimbursement policy (©2009) from Deltek Human Resources, she indicates that the items she received were designated as C20 and C21, the latter of which is in evidence (Tr. 798); C20 will therefore be admitted. For DR75, "Your Employee Benefits" for 2009, Complainant indicates that she never received it and it was not produced during discovery. Inasmuch as the documents in DR72 to DR75 appear to be official company documents and were offered by counsel as an officer of this tribunal within the established evidentiary limits, they will be admitted but the objections will go to their weight. Accordingly, DR72, DR73, DR74, and DR75 and C20 are ADMITTED. SO ORDERED.

In connection with Complainant's Reply filed on April 4, 2013, Complainant offered four attachments (collectively marked as C250B), designated as Exhibit A (an update of Complainant's affidavit, with a notary date of April 1, 2013), Exhibit B (excerpts from Kay Robinson's deposition), Exhibit C (excerpts from Complainant's Deposition), and Exhibit D (a copy of C21, which is already in evidence, and C20, which is admitted above.) Inasmuch as the deadline for submitting evidence had already expired at the time these additional exhibits were offered, they are not admissible absent further order, and Complainant has not sought leave of court to submit these additional exhibits outside of the evidentiary deadlines established. Although C20 could likewise be rejected, it was an exhibit presented at the hearing, although not formally offered, and its admission is a housekeeping matter. The remaining exhibits (collectively marked as C250B and individually as C250BA through C250BC) will be considered to the extent that they constitute rebuttal or argument. The updated affidavit, which is notarized, will be considered along with the original (C250A), with which it is largely duplicative, apart from its omission of the third page (paragraphs 15 to 23) and the inclusion of additional paragraphs 39 through 46 (C250BA). In paragraph 46, Complainant denies receipt of COBRA notices except for C155 and asserts that she had full medical coverage. (C250BA ¶ 46.). SO ORDERED.

For the same reason, discovery responses attached as Exhibits A and B to Respondent's Memorandum Concerning Damages and Other Relief (marked as DR 76) will be considered only to the extent that they constitute rebuttal or argument. Portions of these discovery responses are already in evidence. SO ORDERED.

As noted above, on April 29, 2013, Complainant sought to submit additional evidence and argument, and I denied her motion to do so on May 7, 2013. The record is closed. SO ORDERED.

DISCUSSION

Damages under SOX

The whistleblower protection provisions of the Sarbanes-Oxley Act provide for the following damages:

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

18 U.S.C. § 1514(A). Implementing regulations for the Sarbanes-Oxley Act appearing at 29 C.F.R Part 1980, as amended, 76 Fed. Reg. 68084 (Nov 3, 2011), contain a similar provision:

(d)(1) If the ALJ concludes that the respondent has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees. Interest on back pay will be calculated using the interest rate applicable to underpayment.

29 C.F.R. §1980.109(d)(1).

In *Kalkunte v. DVI Financial Services, Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009), the administrative law judge found that, while reinstatement was the preferred remedy, reinstatement was impossible in the case before him because the employer was no longer in business; he therefore awarded back and front pay. On appeal, the ARB limited the award of back and front pay to the period of time that the company's law office was in business because the dissolution of the company was a superseding intervening cause that cut off the employee's entitlement to back or front pay. The ARB also noted that "uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party." *Kalkunte*, citing *McCafferty v. Centerior Energy*, 1996-ERA-6, slip op. at 26-27 (Sec'y Sept 24, 1997). Although agreeing with the employer that damage to credit may not be legally compensable, the ARB nevertheless upheld the award of \$22,000 in damages for Kalkunte's "pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation that she suffered." *Kalkunte*, *supra*, slip op. at 14. Finally, the ARB noted that, as prevailing party, Kalkunte was entitled to costs and attorneys' fees. *Id.*

The Administrative Review Board recently considered the issue of damages under the Sarbanes-Oxley Act in *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-5 (ARB March 15, 2013). Noting that there was a split in the case law on the issue, the ARB determined that non-pecuniary damages could be awarded in SOX cases:

As a preliminary matter, we reject Halliburton's argument that non-pecuniary compensatory damages are unavailable under SOX. As the ALJ recognized, the ARB has awarded non-pecuniary compensatory damages in SOX cases. Department of Labor precedent has countenanced damage awards for emotional distress and reputational injury under the SOX whistleblower statute. In *Kalkunte v. DVI Fin. Servs., Inc.*, ARB No. 05-139, ALJ No. 2004-SOX-056, slip op. at 15 (ARB Feb. 27, 2009), we affirmed the ALJ's award of \$22,000 in damages for mental anguish and humiliation suffered by the complainant as a consequence of retaliation. Recently, in *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049 (ARB Feb. 28, 2011), we affirmed without comment the ALJ's award of \$75,000.00 in compensatory damages for emotional pain and suffering.

Menendez, slip op. at 19. In *Menendez*, the ARB found that the Complainant was entitled to \$30,000 for emotional and professional harm, even though he did not sustain financial loss, based upon intangible professional damage resulting from exposure of his status as a whistleblower.

Whether the Doctrine of After-Acquired Evidence Cuts off Respondent's Liability

In my Original Decision, I found that Respondent violated SOX when it terminated Complainant after she reported concerns about securities fraud to the SEC. Despite this finding, Respondent argues that the doctrine of "after-acquired evidence" cuts off its liability to pay Complainant back pay and reinstate her or provide her with front pay. Under this doctrine, reinstatement or front pay is inappropriate if an employer discovers evidence of misconduct after it has wrongfully terminated an employee if the misconduct, standing alone, would have justified terminating the employee had the employer known of it at the time of discharge. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). In such an instance, an employer is only liable for back pay from the date of unlawful discharge to the time this new evidence is discovered. *Id.*

Respondent asserts that Complainant engaged in numerous acts of pre-termination and post-termination misconduct which would have warranted her termination had Deltek known about them at the time of her discharge and her misconduct would therefore negate her entitlement to damages based upon back pay or front pay. Specifically, Respondent asserts that, following Complainant's termination on October 27, 2009, it discovered three distinct types of pre-termination wrongdoing by Complainant: (1) Complainant's surreptitious recordings of Deltek business meetings; (2) the theft of Deltek documents, including confidential and proprietary information; and (3) the sending of instant messages that repeatedly disparaged Deltek and its employees (particularly Complainant's superior, Kay Robinson). With respect to

post-termination actions, Respondent asserts that Complainant was guilty of misconduct when she and her husband sent allegedly threatening and aggressive letters to Holly Kortright (Vice President for Human Resources) and Kevin Parker (CEO). Respondent argues that due to this alleged misconduct, Complainant was subject to dismissal due to violation of company policy, including the provisions of her “Confidential and Proprietary Information, Assignment of Inventions and Non-Competition Agreement” (R4); the Deltek Employee Handbook (C67); and Deltek’s “Code of Business Conduct and Ethics” (R10). I will therefore address each of the categories of alleged misconduct.

Surreptitious Recording of Business Meetings

Initially, I find no merit to Respondent’s argument that Complainant was subject to dismissal under the after-acquired evidence rule due to her surreptitious recordings. Respondent has cited no company policy or law prohibiting employees from tape recording meetings and has relied upon General Counsel Schwiesow’s testimony that this kind of action would not be tolerated, which is insufficient to establish that she would have been terminated on those grounds alone.⁷ *See McKennon, supra*. As this was done in furtherance of Complainant’s case, and it was these tapes which revealed that Respondent’s reasons for terminating Complainant were pretext, I find that it would be inappropriate to cut off Deltek’s liability on this basis even if the taping would otherwise be sufficient grounds for her termination. *See Hoffman v. Netjets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007 (ARB March 24, 2011) (noting that “lawful taping of conversations to obtain information about safety-related conversations is a protected activity and should not subject an employee to any adverse action”); *Mosbaugh v. Georgia Power Co.*, 1991-ERA-1 and 11 (Sec’y Nov. 20, 1995) (finding that it was inappropriate to terminate a whistleblower who surreptitiously recorded meetings at the request of the Nuclear Regulatory Commission in furtherance of his nuclear safety complaint). In *Hoffman*, citing *Mosbaugh*, the ARB acknowledged that “tape recording to gather evidence of activities that are protected under the whistleblower statutes is also protected,” but found that the protection did not extend to “indiscriminate and excessive recording of topics unrelated to air safety.” *Hoffman*, slip op. at 9. In this instance, Complainant’s recordings were all made in furtherance of her whistleblower claims and therefore constitute protected activity.

Disclosure of Confidential Documents

I also reject Respondent’s argument that Complainant was subject to dismissal for disclosure of confidential documents. In that regard, Respondent states that shortly after Complainant’s termination, it conducted a forensic review of her laptop and learned that she had forwarded numerous confidential documents to her husband’s email address. Respondent alleges that Complainant would have been terminated for sharing company documents if Respondent had been aware of the unauthorized disclosure. Specifically, Respondent argues that this disclosure violated Deltek’s Confidential and Proprietary Information, Assignment of Inventions and Non-Competition Agreement and its Code of Business Conduct and Ethics.

⁷ Although Schwiesow testified that an employee would be terminated for making secret recordings, he later clarified that there was no specific policy with respect to taping but that he found it “incomprehensible” that someone would secretly tape a meeting without telling coworkers. (Tr. 359, 379).

Respondent first points to the following emails retrieved from Complainant's computer, which it alleges she forwarded to a personal email account she shares with her husband:⁸

- An email chain from early May 2009 with attached charts that detailed (1) Deltek's capital expenditures for the IT Department and the Facilities Department for the first quarter of 2009; and (2) the current capital expenditures for the same departments for the second quarter of 2009. (R38)
- An email chain from late March 2009 concerning "write-offs" and the depreciation analysis for 2008 with a detailed spreadsheet attached. (R39).
- A series of email chains and spreadsheets from April 2009 detailing the depreciation costs for "Deltek University," Deltek's training facility. (R8).
- An email chain from late April 2009 relating to Deltek's payment history with Verizon with a detailed 19-page spreadsheet attached. (R37).

All of these documents appear to have been authored, at least in part, by Complainant and relate to her SOX complaint.

Respondent also cites to a number of other documents to support its point, including twelve supporting exhibits Complainant attached to her August 4, 2010 appeal of the Secretary's findings, and the following additional documents, which were produced at the hearing: C10 (vendor invoice disputes); C13 (Verizon/Deltek Billing Dispute Escalation); C14 (Verizon Account Discussion); C33 (spreadsheet detailing new hires, temporary employees, and departing employees); C35 (13-page spreadsheet detailing projects for the IT Department); C36 (January 2009 email chain concerning 2000 IT and Facilities Forecasts); C38 (four pages of organizational charts); C39 (organizational chart); C40 (February 2009 email chain concerning Q1 goals for IT Department Business Planning and Control Office); C51 (organizational chart related to Costpoint Workstreams); C57 (April 10, 2009 Report of "Combined Open/Closed Items" with Verizon); C93 (April 2009 email chain concerning dispute with Verizon); C119 (May 2009 email chain re work order for General Counsel's Office with work order attached); C147 (August 2009 email chain re Deltek Insider Trading Policy). While these documents are also relevant to her SOX complaint, it is clear that Complainant did not author some of these exhibits: for example, the Verizon Account Discussion powerpoint in C14 was prepared by "IT BPC" on September 17, 2008, which was prior to when Complainant began working with Respondent.

For the same reason that I found Complainant's surreptitious taping to be protected activity, I find her forwarding of documents in furtherance of her whistleblower activities to be protected activity that cannot form the basis for an adverse action, notwithstanding the breach of any confidentiality agreement. *See Hoffman, supra; Mosbaugh, supra.* In *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697 (E.D. VA 2007), the District Court for the Eastern District of Virginia noted that an employee concerned that potential document shredding would frustrate his Sarbanes-Oxley Act claim "might be justified in retaining documents, or 'surreptitiously

⁸ Complainant has disputed the authenticity of these exhibits and questions whether they were sent to her husband. (Tr. 1301-10; 1977-81). For purposes of this discussion, I have accepted the evidence suggesting that she did, in fact, email the bulk of these documents to her husband's home email address, which is generally consistent with her testimony at the hearing.

copying' them, if there were a sufficiently persuasive showing that the documents would be destroyed" but "Sarbanes-Oxley is not a license to steal documents or break contracts." *JDS Uniphase*, 473 F.Supp.2d at 703, 704 (finding that the employee's retention of documents following discharge was a breach of his proprietary information agreement that was not protected by the Sarbanes-Oxley Act).⁹ Similarly, in *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011), a False Claims Act case, the Court of Appeals for the Ninth Circuit acknowledged that a public policy exception may be appropriate for whistleblowers who disclose confidential information in contravention of confidentiality agreements; however, the court found no need to decide whether to adopt it because such an exception would not cover Cafasso's "vast and indiscriminate appropriation of [the company's] files." *Cafasso*, 637 F.3d at 1062 (finding violation of company's confidentiality agreement when the employee copied almost eleven gigabytes of data in furtherance of her claim, totaling tens of thousands of pages).¹⁰

Here, in contrast to the employees in *JDS Uniphase* and *Cafasso*, who indiscriminately misappropriated documents containing proprietary information, all of the documents Respondent highlights appear directly relevant to Complainant's SOX complaint and she was reasonably concerned about their potential destruction. Accordingly, I find that Complainant's appropriation of these documents should not preclude her ability to recover back pay and front pay because they were taken in furtherance of her whistleblower claim and her use of the documents is protected for the same reason that her recordings are protected. *See, e.g., Mosbough, supra.*

In a recent SOX case, the ARB acknowledged the inherent tension between a company's legitimate business policies that protect confidential information and the whistleblower programs created by Congress. *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011). In that case, the employee claimed protected activity actionable under SOX as a result of confidential information that he disclosed to the IRS under a bounty program. The Board noted that, similar to the IRS bounty program, there was a fund pursuant to which SOX whistleblowers could be compensated for providing original information to the SEC relating to violations of the securities law. *Id.* at 16 (citing 15 U.S.C. 78u-6). The Board noted that the final rule implementing this program contained a provision which prohibited employers

⁹The Court recognized that confidentiality agreements were unenforceable if contrary to public policy but was concerned that the public policy argument made by the employee (Jennings) would allow employees "to haul away proprietary documents, computers, or hard drives, in contravention of their confidentiality agreements, knowing they could later argue they needed the documents to pursue suits against employers under a variety of statutes protecting employees from retaliation for publicly reporting wrongdoing, such as Sarbanes-Oxley. . ." *JDS Uniphase*, 473 F. Supp. 2d at 701 n. 6, 702. "Indeed, were courts to adopt Jennings' argument, litigation would likely blossom like weeds in spring: for every legitimate whistleblower aided by this rule, many more disgruntled employees would help themselves to company files, computers, disks, or hard drives on their way out the door to use for litigation leverage or for mere spite." *Id.* at 702-03. In contrast, the documents concerned here were taken for legitimate purposes.

¹⁰ The Ninth Circuit noted that if it were to adopt a public policy exception to confidentiality agreements, those asserting protection would need to justify why removal of the documents was reasonably necessary to pursue a False Claims Act claim. *Cafasso*, 637 F.3d at 1062. "Although courts perhaps should consider in particular instances for particular documents whether confidentiality policies must give way to the needs of FCA litigation for the public's interest, Cafasso's grabbing of tens of thousands of documents here is overbroad and unreasonable, and cannot be sustained by reference to a public policy exception." *Id.* Here, in contrast, the forwarding of documents was neither overbroad nor unreasonable, and was in furtherance of Complainant's SOX claim.

from enforcing a confidentiality agreement to prevent whistleblowers from cooperating with the SEC. *Id.* at 17 (citing 17 C.F.R. § 240.21F-17(a)).¹¹ Reversing the administrative law judge's finding that Vannoy's reporting of information was not protected by SOX because he violated his company's confidentiality policy when he procured this information, the Board remanded the case for a determination as to whether the information Vannoy provided to the IRS was the kind of "original information" Congress intended to be protected under the IRS or SEC whistleblower programs. *Id.* at 16-17.¹² Inasmuch as no bounty program is involved here, whether the documents constitute the type of original information the Board recognized in *Vannoy* is not the determinative factor in assessing whether Complainant's document disclosures constituted protected activity. Rather the issue is whether the actions taken were reasonably necessary in furtherance of her whistleblowing activities, and in particular whether she was reasonably concerned that the documents would be destroyed.

Complainant alleges both that Schwiesow, the General Counsel, directed her to collect the information as part of Deltek's internal investigation and that she also did so to maintain crucial documents for the SEC because she feared that Deltek would shred these documents. At the hearing, Complainant testified that she was concerned about original source documents being shredded.¹³ She further testified that she was directed by Schwiesow to collect relevant documents, as she reiterated in her affidavit (C250A). In her reply brief, Complainant stated that "she transmitted the information to her personal e-mail account as a matter of necessity, to protect herself and to protect the integrity of the internal investigation; and she testified that nobody, not even Mr. Gunther, looked at those e-mails and attachments." See Complainant's Reply to Respondent's Memorandum Concerning Damages and Other Relief at 11. Regardless of whether Schwiesow directed her to retain these documents, it is clear that Complainant forwarded these documents in an effort to support her SOX allegations, as she has maintained:

Complainant only took reasonable steps to gather and preserve evidence at the direction of Deltek's general counsel. (Tr. 973, 1576) However, even if, *arguendo*, Complainant did not receive such direction from the general counsel, her evidence gathering and preservation actions – based on her reasonable belief of wrongdoing (RX-72) – are still reasonable and cannot constitute "grave misconduct" justifying immediate discharge for cause.

¹¹ Section 240.21F-17(a) provides:

(a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

¹² The Board noted that the Dodd-Frank Act defines original source information as information that: (i) "is derived from the independent knowledge or analysis of the whistleblower;" (ii) "is not known to the SEC from any other source, unless the whistleblower is the original source of the information;" and (iii) "is not derived exclusively from another allegation contained in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media, unless the whistleblower is a source of the information." *Vannoy, supra*, at 16 (citing 15 U.S.C. 78u-6(a)(3)).

¹³ Complainant testified that she witnessed documents being shredded contemporaneous with her raising concerns (as discussed in more detail in the Decision and Order of July 31, 2012.) Respondent maintains that the shredded documents were copies, not originals, as Schwiesow testified. (Tr. 377-79).

For example, the record demonstrates that documents relevant to Complainant's report to the audit committee were being shredded. (Tr. 377-78, 879-82, 938-42, 971-73, 981-82, 1250-51, 1287, 1576, 1981-82, 2335) Complainant had a legitimate interest – even a duty – to protect and preserve information that she reasonably believed related to “*illegal and unethical business practices*” by Respondent. (CX-72) Consistent with Complainant's duty, Complainant reported her reasonable belief of Respondent's “*illegal and unethical business practices*” to the SEC and she gathered information consistent with that duty and her obligation to comply with Schwiesow's directive.

See Complainant's Reply to Respondent's Memorandum Concerning Damages and Other Relief at 34-35. It is worth noting that the auditors who conducted the internal audit commented upon the lack of documentation for the earlier period, giving some credence to Complainant's concerns. (C141). Thus, as Complainant only took documents relevant to her SOX complaint and did so for fear they would be shredded, I find that she was justified in doing so and cannot be terminated on these grounds because her collection, retention, and forwarding of the documents constitute protected activity.

As a final matter, I note that there are strong policy reasons for permitting whistleblowers in SOX cases to take necessary actions to protect relevant documents from being destroyed, as long as the employee's actions are necessary, reasonable, and not overbroad. Given that SOX covers publicly traded companies, it is likely that other companies that fall under the Act's jurisdiction would have confidentiality agreements similar to that held by Respondent. If a company were able to avoid liability by pointing to a confidentiality agreement when a whistleblower took documents with the express purpose of preventing their destruction, the Act's whistleblower protection provisions would be ineffectual. Of course, whether these policy considerations were to come into play would depend upon the specific facts of each case, and an indiscriminate misappropriation of proprietary documents would not be protected. Here, however, I find that a public policy exception is warranted, for Complainant took these documents for the sole purpose of preserving evidence relevant to her whistleblower complaint and alleged violations under SOX.

Derogatory Instant Messages

In addition, Respondent cites to derogatory instant messages Complainant sent to another coworker in which she poked fun at Kay Robinson, her supervisor. I find the derogatory instant messages were trivial in nature and would constitute insufficient grounds for terminating Complainant. In that regard, to rely on the after-acquired evidence doctrine, an employer must show that the wrongdoing was of such severity that the employee would have been terminated on those grounds alone had it known about the wrongdoing at the time of the discharge. *McKennon*, 513 U.S. at 362-63. Respondent has failed to show that these petty instant messages mocking Robinson's weight and generally griping about her job rise to this level.

Post-Termination Letters

Finally, Respondent complains of Complainant's post-termination conduct, specifically, the letters she and her husband respectively sent to Holly Kortright, Human Resources officer,

and Kevin Parker, Deltek's CEO, which it characterizes as "very threatening [and] very aggressive." See, e.g. *Sellers v. Mineta*, 358 F.3d 1058, 1063-64 (8th Cir. 2004) (holding that a complainant's post-termination conduct can also bar his/her ability to collect front pay if it would be impossible to reinstate the complainant based on this conduct). However, I find these allegations lack merit.

Having reviewed Complainant's letter to Kortright, I find nothing in the letter that was either threatening or aggressive. In that regard, on November 18, 2009, Complainant sent a letter to Kortright noting that she found her termination letter, dated October 27, 2009, very misleading with respect to the way Kortright characterized Complainant's behavior on the morning she was terminated. (R29). She addressed the letter to "Kortright-Fudge" at her home address, using Kortright's married name and address, which she obtained from public records. While perhaps annoying to Kortright, the use of her married name in that manner is too trivial to constitute a basis for dismissal. In her letter, Complainant simply requested that Kortright retract the mischaracterizations she made in the termination letter, disputed statements made by Deltek, Inc. in response to her SOX complaint, and sought damages. (R28). In my Original Decision, I determined that Kortright mischaracterized Complainant's behavior on October 26, 2009 and that Deltek's alleged reason for terminating Complainant was pretextual. Accordingly, I agree with the substance of Complainant's letter and I do not find it to be a basis for barring Complainant's recovery.

Nor is the second letter at issue, sent by Complainant's husband to CEO Parker on November 19, 2009, a basis for barring any of Complainant's damages. That letter also complains about Kortright's letter [misidentified as October 28] and other alleged harassment. (R29). Complainant testified that her husband sent it himself and she could not recall whether she knew he was going to send it. (Tr. 1507). The letter suggests that Respondent harassed Complainant through phone calls, hacking her computer, and surveillance, and states: "I am writing to put you on notice that I will not tolerate this activity, these attacks on my family must cease immediately." (R29). It further states, "[b]eams of bright light will shine on every corporate misdeed I know about, and I will find them all. Neither you, nor any Deltek official will ever make a public appearance without being challenged for trying to crush brave whistleblowers." *Id.* According to Schwiesow, the letter reflected "a level of paranoia that's extremely concerning." (Tr. 352). The tone of the letter was inappropriate, and perhaps paranoid, and it was vaguely threatening, suggesting that Complainant's husband would seek to embarrass company officials in the future. Although there were no specific threats, Parker may have found it to be unsettling, in that it was sent to him personally. Nonetheless, I find that Respondent would not have been justified in terminating Complainant based on a letter her husband sent on his own, after Complainant's termination, the gravamen of which simply was to ask Deltek to refrain from harassing his wife. Accordingly, this letter will not cut off Respondent's liability.

Back Pay

As noted above, the remedies provided for by SOX aim to make the employee whole, and back pay is an element of damages specifically provided for by SOX. 18 U.S.C. § 1514(A). As a general rule, a back pay award should be based on the earnings Complainant would have

received but for the termination. *See generally Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4 (Sec'y Oct. 30, 1991)). Back pay generally extends until an employer has made a bona fide offer of reinstatement. *See Michaud v. Assistant Sec'y of Labor for OSHA*, ARB No. 97-113, ALJ No. 1995-STA-29 (ARB Oct. 9, 1997) *rev'd on other grounds sub nom. BSP Trans, Inc. v. United States Dept. of Labor*, 160 F.3d 38 (1st Cir. 1998)) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982)). Complainant has the burden of establishing the appropriate amount of back pay. *Pillow v. Bechtel Construction, Inc.*, 1987-ERA-35 (Sec'y July 19, 1993). However, because back pay promotes the remedial purpose of making the victims of discrimination whole, courts have recognized that unrealistic exactitude is not required in calculating damages, and uncertainties regarding what an employee would have earned but for the retaliation should be resolved against the employer. *See generally EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976), *cert denied*, 430 U.S. 911 (1977), quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975).

Here, Complainant seeks to recover compensation for her base salary with normal annual increases, lost bonuses, retirement matching contributions, vacation accruals and sick leave credit, Respondent's contributions to health and welfare benefits, and her lost tuition reimbursement. Where the parties have presented evidence of Deltek's current benefits or Complainant's future earnings or benefits, I have relied on it; otherwise, I have based my findings on what Complainant was receiving at the time of her termination, or alternatively, the best available data.

Complainant attests that her annual base salary at the time of her discharge was \$68,000, which is supported by her offer letter dated October 9, 2008. *See* C250A [Affidavit of Dinah R. Gunther – Damages] at 1; C17. Accordingly, I will rely on an annual base salary of \$68,000 (which translates to a monthly salary of \$5,666.67), for the purpose of calculating Complainant's back pay.

As Respondent has not made a *bona fide* offer of reinstatement, which would typically cut off its liability, I find that Complainant is entitled to back pay from the time of her termination until the date of this decision. Complainant was terminated in late October 2009; as such, she is entitled to roughly three years and seven months of back pay, or \$243,667. I find Complainant is entitled to back pay for the salary she lost between October 27, 2009 [the date of her termination] and the date of this decision, totaling \$243,667.

Annual Increases

Complainant also seeks to recover compensation for the annual increases she would have received but for her termination. The Board has recognized that back pay should include any salary increases that reasonably would have occurred after the complainant's discharge. *Mosbaugh v. Georgia Power Co.*, 1991-ERA-1 and 11 (Sec'y Nov. 20, 1995).

Respondent's Employee Handbook states the following with respect to salary adjustments:

Salary adjustments are generally made on an annual basis, the date of which is dependent upon the organization within which you work, and is generally in concert with Deltek's annual performance appraisal process. These salary adjustments are not automatic and are not guaranteed. A salary adjustment does not alter, modify, or amend the at-will employment relationship between you and the Company. The following are some of the factors that are generally considered in determining whether a salary increase will be granted:

- Individual performance;
- The Company's ability to pay; and
- Comparison with other similarly situated employees in the industry.

(C67 at 18). In an August 21, 2009 email to all Deltek staff, Kevin Parker, Respondent's CEO, noted that merit pay increases and 401(k) matching would be suspended for the year given the current economic climate. (C142). Complainant has not presented any evidence regarding the wages of similarly situated employees subsequent to her termination.

Accordingly, I find that it would be too speculative to award Complainant annual salary increases, for these increases were not guaranteed and Respondent had suspended them at the time of her termination.

Lost Bonuses

Complainant also seeks to recover for her lost annual bonuses. Complainant's offer letter, dated October 9, 2008, specified the following:

BONUS PLAN:

You are eligible to participate in our Employee Incentive Compensation Plan. Your bonus target percentage for 2008 would be 5% of your base salary to be paid each quarter. As with all performance based bonuses, the actual bonus payment will be a function of individual and corporate performance, and you must be a Deltek employee at the scheduled time of disbursement. All bonuses are subject to the appropriate withholdings.

(C17).

At the hearing, Complainant submitted an explanation of the Employee Incentive Compensation Plan, which states the following:

The EICP plan is discretionary based on the quarterly achievement of our business and individual objectives and the approval of our Board of Directors. Following one month of employment, you will be eligible to participate in this Employee Incentive Compensation Program. Bonus payments will be made quarterly and will be calculated in the following manner:

Plan Structure

- **Bonus Target Amount** is a percentage of your annual salary, which increases based on your level of responsibility. For example, with a \$40,000 annual salary at the 5% bonus level, your bonus target amount would be \$2,000 per year or \$500 per quarter.
- **Corporate Performance:** Deltek's performance on its revenue and profit goals impacts the total bonus pool for the company, based on what percentage of these two targets we achieve. In this example, if we achieve at a level where the bonus pool is only funded 90% in Q1, then your Bonus Pool Amount would only be \$450. At a 110% funding level in Q2, your Bonus Pool Amount would be \$550.
- **Personal Performance:** Your performance on your SMART goals determines what percentage of the Bonus Pool Amount you receive. For example, at 80% Personal Performance of your goals in Q1, you would receive 80% of your Q1 Bonus Pool Amount. At 120% in Q2, you would receive 120% of your Q2 Bonus Pool Amount.
- **Quarterly Bonus Calculation:** Bonus Target Amount x Corporate Performance Percent x Personal Performance Percent = Payout. Continuing this example and looking at Q1, Bonus Target Amount of \$500 x 90% Corporate Performance x 80% Personal Performance = \$360 Payout. For Q2, Bonus Target Amount of \$500 x 110% Corporate Performance x 120 % Personal Performance = \$660.

(C22). Complainant testified that her bonuses were based on 100% personal performance. (Tr. 2416-18).

Complainant was employed with Respondent for four quarters: Q4 of 2008, Q1 of 2009, Q2 of 2009, and Q3 of 2009 (when she was on medical leave).¹⁴ Complainant was terminated in October 2009, the fourth quarter of 2009; however, the evidence reflects that she did not receive her bonus for Q3 of that year. (C146, Tr. 2419). There is evidence of two bonuses that she did receive, however, for Q4 of 2008 and Q2 of 2009.

The hearing exhibits reflect that during Q4 of 2008, Complainant's individual achievement was 100% and the company's achievement was 75%. (C45). No evidence was presented regarding Complainant or Respondent's performance in Q1 of 2009; however, Complainant testified that she believed her personal performance was 100%. (Tr. 2417).

On August 21, 2009, Kevin Parker, Respondent's CEO, sent an email to the company announcing that the company-wide Earned Income Compensation Plan ("EICP") would be 85% for Q2 of 2009. (C142). A few days prior, on August 19, 2009, Complainant received an email from Holly Kortright of Human Resources notifying her that she would receive her EICP for the second quarter (Q2 of 2009) the following day, which was based on 100% individual achievement and 85% company achievement, in accordance with Parker's letter. (C146).

Neither party has presented evidence regarding the company's performance after Complainant was terminated; however, Parker's August 21, 2009 email made clear that Deltek intended to continue awarding bonuses. (C142). For the two quarters for which information was

¹⁴ Deltek's Q1 includes January, February and March; Q2 includes April, May, and June; Q3 includes July, August, and September; and Q4 includes October, November, and December. (Tr. 2418).

available (Q4 of 2008 and Q2 of 2009), Respondent's performance was 75% and 85%, respectively.

Based on the evidence before me, I find that it is more likely than not that Complainant would have continued to perform at 100% had she remained with Respondent and that Respondent would have continued to pay bonuses at the rate of between 75% and 85%; accordingly, I will average the amounts and use a corporate performance level of 80% in calculating back pay. Thus, I find it is appropriate to award Complainant a bonus based on 100% personal performance and 80% corporate performance.

Using the formula above, I find that Complainant is entitled to a quarterly bonus of \$680, totaling \$2,720 annually. As Complainant's bonus target percentage was 5% of her base salary, or \$3,400 ($\$68,000 \times 5\% = \$3,400$), her quarterly bonus target amount was \$850 ($\$3,400 / 4 = \850). Based on an average company performance of 80%, her quarterly bonus payout would be \$680 ($\$850 \times 80\% \text{ company performance} \times 100\% \text{ personal performance}$.)

Accordingly, I find that Complainant is entitled to bonus back pay for Q3 of 2009 and for each of the quarters that followed between the time of her termination and the date of this decision. She is thus entitled to a quarterly bonus of \$680 for Q3 and Q4 of 2009, totaling \$1,360. I also find that she is entitled to \$2,720 (four times \$680) for each of 2010, 2011, and 2012, totaling \$8,160. As this decision is issued in what corresponds to the Q2 of 2013, Complainant is also entitled to her bonus for Q1 of 2013, totaling \$680. Based on the aforementioned calculations, she is entitled to an additional \$10,200 ($\$1,360 + \$8,160 + \680) in back pay to represent the quarterly bonuses she would have received between the date of her termination and this decision.

Respondent's 401K Matching

In addition, Complainant seeks to recover the monetary value of the contributions Respondent would have made to her 401(k). Respondent's Employee Handbook notes that the percent Deltek contributes to employee retirement accounts is at the discretion of its Board of Directors; however, the company was currently contributing 4% of eligible wages up to \$100,000 per year.¹⁵ (C67 at 51). The handbook notes that Respondent's contribution is made regardless of whether employees contribute a portion of their own salary. *Id.*

Respondent's Employee Benefits Guide from 2009 states the following with respect to company contributions:

The Deltek 401(k) Plan has a discretionary company profit-sharing contribution. The contribution is determined at the end of each quarter and is paid to those employees who have met the initial waiting period and who have worked at least 250 hours during the quarter. In addition, an employee must be employed on the final working day of the quarter to be eligible to participate in the profit-sharing contribution. Deltek's company contribution is 4% of your base quarterly salary to a maximum of \$4,000 per year...

¹⁵ Under "4.4.1.2 Company Contribution," the Employee Handbook specifically states: "The percent contributed by Deltek is at the discretion of the Deltek Board of Directors." (C67 at 51).

(DR75 at 20).¹⁶ As Complainant's base salary was \$68,000, her base quarterly salary was \$17,000, 4% of which was \$680, totaling \$2,720 in company contributions to her 401(k) over the course of a year. However, in his August 21, 2009 email to all staff announcing the Q2 2009 EICP results, Parker wrote that due to the current economic situation, Deltek had decided to temporarily suspend its contributions to employee retirement plans for Q2, Q3, and Q4 of 2009. (C142). He wrote, "[w]e will use the next few months to...redesign our 401(k) plan for planned rollout in 2010." *Id.*

As Respondent suspended its 401(k) contributions prior to Complainant's termination, I find that it would be speculative to award her 4% of her base salary based upon projected contributions. Respondent's Employee Benefits Guide from 2009 makes clear that the company's contributions were discretionary and Complainant was not receiving them at the time of her discharge. (DR 75, C142).

In view of the above, I find that it would be speculative to award any damages based upon loss of contributions to Complainant's 401(k) Plan.

Health and Welfare Benefit Contributions

Complainant also seeks to recover for Respondent's lost contributions to her health and welfare benefits. A former employee may be entitled to the net value of health insurance an employer would have paid on the employee's behalf if he or she had not been wrongfully terminated. *See Michaud, supra*. Respondent's Employee Benefits Guide from 2009 reflects that Deltek and the employee pay the following monthly premiums for employees who elect health insurance under its plan, respectively: \$312 by Deltek and \$98 by the employee for the employee only; and \$846 by Deltek and \$465 by the employee for family plans.¹⁷ (DR75 at 6). The employee's share per pay period is half of the monthly share (i.e., \$49 for an employee only, and \$232.50 for a family.) *Id.* The Guide notes that if a family also has insurance under the plan of an employee's spouse, the two plans coordinate their benefits. *Id.* For employees who choose to use Deltek's dental plan, Deltek and the employee pay the following monthly premiums: \$23.28 by Deltek and \$17.00 by the employee for the employee only and \$52.39 by Deltek and \$76.00 by the employee for a family. (DR75 at 9.) The employee's share per pay period is half (\$8.50 for the employee only and \$38 for the family plan.) *Id.*

Complainant states that at the time of her discharge, she, her spouse, and her children "subscribed to the full complement of health and welfare benefits offered to Deltek, Inc. employees." *See* C250BA ¶46; *Complainant's Proof of Damages* at 16-17. However, Respondent submitted two COBRA notices respectively dated November 3, 2009 and November 13, 2009, (DR73; DR72), which reflect that Complainant was receiving dental coverage for her whole family but was only receiving medical coverage for herself.¹⁸ In her Reply to Respondent's Memorandum Concerning Damages and Other Relief, Complainant asserts that

¹⁶ Complainant has objected to the exhibit but has not offered another version of the Employee Benefits Guide.

¹⁷ Although Complainant has objected to the exhibit, she has not provided an alternative document. The Employee Handbook discusses Medical/Dental Insurance but does not provide specifics. (C67 at 48).

¹⁸ As noted above, Complainant has disputed the authenticity of those documents.

these exhibits contain incorrect information and that the only COBRA notice she received is in C155, which is dated September 14, 2009 and does not reflect the coverage she had elected. Aside from her own affidavit, Complainant has presented no evidence that she subscribed to family medical benefits.

To the contrary, Complainant's pay records reflects that she did not subscribe to the family health benefits plan, apart from the dental plan. Specifically, her pay stub from the period of September 16, 2009 through September 30, 2009 reflects that \$49.00 was deducted from her net pay for "TRI EE," which correlates with the employee cost per paycheck of medical insurance for the employee only ["EE"]. (C158; DR75 at 6). This pay stub also reflects that \$38 was deducted for "DelDenFa," which correlates with an employee's cost per paycheck for family ["Fa"] dental coverage. (C158; DR75 at 9). These amounts accord with the coverage found in the COBRA notices submitted by Respondent.

Accordingly, I find that Respondent must compensate Complainant the net value of medical and dental health insurance of \$364 per month (\$312 for the employee only health insurance + \$52 for family dental insurance). As approximately three years and seven months have passed since Complainant was terminated, I find that she is entitled to an additional \$15,652 in back pay, reflecting the net value of her health and welfare benefits between October 27, 2009 and the date of this decision.

Lost Vacation and Sick Leave Accrual

Complainant also seeks to recover for lost vacation and sick leave. According to Respondent's Employee Benefits Guide from 2009, full-time employees with less than 4 years of service earn 5.7 hours of Paid Time Off ("PTO") per pay period for a total of 17 days per year, increasing to 7.3 hours per pay period and 22 days yearly after four years. (DR75 at 22). Deltek's Employee Handbook, which was revised in May of 2008, contains essentially the same provisions. (C67 at 40-41). PTO can be used for vacation, sick time, or time away to take care of personal matters. (DR75 at 22; C67 at 40). An employee can carry 240 hours of PTO over to the next calendar year and, upon termination, all employees will be paid for earned, unused vacation up to the 240-hour maximum (except for employees who have worked for Deltek for over 10 years, for whom a 260-hour cap is applicable). (C67 at 40-41).

The Administrative Review Board has held that when it is the practice of an employer to pay an employee for unused vacation time, a discharged complainant should receive both wages and vacation pay for the same period. See *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), *aff'd* No. 01-10916 (11th Cir. Sept. 20, 2002)(unpub.) The Board noted that this rationale is consistent with case precedent under Title VII, which holds that back pay includes not only one's salary, but also overtime and fringe benefits such as vacation and sick pay. *Hobby*, citing *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1562 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986). However, the Board has held that where "an employee must take his vacation or lose it, the addition of vacation pay to a back pay award of straight salary for the same period would compensate the complainant for more than he lost as a result of the employer's illegal discrimination." *Hobby*, *supra*.

As Respondent's leave policy reflects that employees will only be paid for unused PTO up to the 240-hour maximum, I find that Complainant is entitled to the cash value of 240 hours (or six 40-hour weeks) of paid leave. At the time of her termination, Complainant was earning 5.7 hours of leave for each pay period and Respondent's leave policy reflects that full-time employees will begin to accrue 7.3 hours of PTO per pay period after 4 years of service. (C67 at 40). Between her termination on October 27, 2009 and the date of this decision, Complainant would have earned nearly 500 hours of PTO; however, the 240-hour cap is applicable. Assuming a yearly salary of \$68,000, which would amount to a weekly salary of approximately \$1,307.69 (payable for six weeks), that would amount to \$7,846 in PTO. Accordingly, Complainant is entitled to an additional \$7,846, reflecting the cash value of her lost annual and sick leave.

Tuition Reimbursement

Complainant also seeks to recover the lost tuition reimbursement payments she was receiving from Respondent. Under Respondent's Tuition Reimbursement Policy, Deltek will reimburse employees who have been working fulltime for at least 6 months for the cost of courses or programs related to an employee's position. (C21; DR74). Employees are reimbursed for 100% of the tuition for a class upon completion with a grade of a "B" or better. However, Respondent does not reimburse employees for the cost of books, travel, and parking fees. *Id.* For undergraduate classes taken in the United States, Respondent provided an annual tuition reimbursement in 2008 of \$7,500 for undergraduate courses and \$10,000 for graduate courses. *Id.*

Complainant testified that she was encouraged to work towards her undergraduate degree when she was hired; she was told that once she got her degree, she would be promoted to a senior financial analyst. (Tr. 775-784). She testified that she enrolled in a two-year associate's degree program at Northern Virginia Community College in January 2009 and enrolled in classes such as accounting and business. (Tr. 775; 1280).

In addition, to the above, as is more fully discussed below, I have found that the best way to ensure that Complainant is made whole on a professional level would be to enable her to obtain a degree in accounting or finance.

As Respondent provides tuition reimbursement as part of its compensation package, as Complainant took advantage of this program, and as Complainant would require the degree to pursue her career plans as a financial analyst, I find that she is entitled to the cash value of Respondent's contribution towards her undergraduate degree. Although Complainant was enrolled in a two-year program, as she is currently residing in Florida,¹⁹ she will be unable to re-enroll in the same program. Furthermore, as a four-year undergraduate degree is much more common, I find that it is likely Complainant would need a standard four-year undergraduate degree to be rehabilitated to the point at which she could find similar work. Accordingly, I find that Complainant should receive the full tuition reimbursement of \$7,500 annually for four years, totaling \$30,000. Although the record reflects that Complainant was reimbursed for \$573.60 on

¹⁹ On March 12, 2013, Complainant submitted a Notice of Change of Address reflecting that she is now living in Florida.

July 15, 2009 for her Spring 2009 classes at the Northern Virginia Community College, it is unclear whether she was reimbursed for the classes she took in Summer 2009 or whether she will be able to transfer these credits into a new degree program. (C144, C148, C150). Accordingly, I find that Complainant should receive the full \$30,000 in tuition reimbursement for four years.

Mitigation

Respondent does not argue that Complainant failed to mitigate damages; rather, it argues that she is not entitled to any back pay or front pay because she engaged in misconduct prior to her termination, which, alone, would have justified her termination had Respondent been aware of this misconduct at the time it terminated her. After a plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts that would mitigate its liability. *See, e.g., Hobby, supra; Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998). Although Respondent does not provide any evidence or argument on this topic, I find that it is appropriate to reduce Complainant’s back pay award by her acknowledged interim earnings to avoid a windfall in recovery. *See Jones, supra.*

Complainant does not provide any pay stubs or W-2s; however, she provided the following summary of her earnings since her termination on October 27, 2009:

Tax Year	VEC	RMGS, Inc.	TKC	Complainant’s Reportable Income
2010	\$13,702	\$8,552.13		\$22,254.23
2011			\$26,738.66	\$26,738.66
2012			\$55,982.10	\$55,982.10
Total				\$104,974.99

See Complainant’s Proof of Damages at 32. No supporting data was provided.

In her brief on damages, Complainant concedes, “once the Court finds the total Back Pay, Respondent may be entitled to a permissible offset for Compensation earned from other employment in the amount of \$91,272.89, which does not include income from the VEC.” *Id.* That amount reflects the total in the table above less the amount from the VEC [Virginia Employment Commission] (for unemployment compensation).

A decision from the Appeals Examiner in the Virginia Employment Commission (VEC) reflects that on May 14, 2010, Complainant was awarded unemployment benefits effective November 8, 2009. (C161). Although the opinion notes that Complainant was earning \$68,000 annually at the time of her termination, it does not note how much she was awarded in unemployment benefits. Complainant indicates that she received unemployment compensation for the period from 10/27/2009 to 7/16/2010, but she only provided data for 2010 (\$13,702). *See* Complainant’s Proof of Damages at 32. Nonetheless, Complainant asserts that any award of back pay should not be offset by the unemployment insurance she received because Virginia law will require her to repay her unemployment benefits. She cites to VA Code § 60.2-634, which provides:

Whenever the Commission finds that a discharged employee has received back pay at his customary wage rate from his employer after reinstatement such employee shall be liable to repay any benefits paid to such person during the time he was unemployed. When such an employee is liable to repay benefits to the Commission, such sum shall be collectible without interest by civil action in the name of the Commission.

I agree that Complainant's award should not be reduced based upon her unemployment benefits. As a general rule, unemployment benefits are not offset from an award of back pay. *See Williams v TIW Fabrication & Machining, Inc.*, 1988-SWD-3 (Sec'y June 24, 1992). Moreover, if Complainant were required to reimburse the Virginia Employment Commission for any unemployment benefits she received, it would be inappropriate to offset her award of back pay for these benefits.

However, Complainant's award should be reduced by her acknowledged interim earnings following her termination as reflected by the above table, which constitutes an admission. Complainant concedes to a permissible offset of \$91,272.89, after subtraction of the alleged unemployment compensation of \$13,702. As there is no other evidence of the amount of unemployment compensation that she received, I find that her back pay award should be offset by \$91,272.89, which appears to reflect her interim earnings since her termination without unemployment compensation. As it is Respondent's burden to prove facts that would mitigate its liability, I find that it is appropriate to reduce Complainant's award by this amount, as Respondent has failed to provide evidence to the contrary.²⁰ *See, e.g., Hobby, supra.*

Interest

The Sarbanes-Oxley Act makes clear that interest shall be paid on awards of back pay. 18 U.S.C. § 1514A(c)(2)(B). This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest for any period between the issuance of this Decision and Order and the payment of the award. Interest is calculated using the rate that is charged for underpayment of federal taxes under 26 U.S.C. § 6621(a)(2). Interest shall be calculated at the time of payment.

Front Pay in Lieu of Reinstatement

Although reinstatement is the presumptive and preferred remedy in whistleblower retaliation cases when an employee has been wrongfully discharged, front pay (i.e., pay for the period postdating the decision) may be awarded when reinstatement would be inappropriate. *See Hobby, supra.* For example, front pay may be awarded as a substitute when the parties have demonstrated the impossibility of having an amicable relationship or when there are no longer jobs available for which the complainant is qualified. *Hobby, supra.* However, the possibility

²⁰ In her Supplemental Proof of Damages Brief and Complainant's Reply to Respondent's Supplemental Memorandum, Complainant also notes her earnings from 2013. However, as I did not admit this brief except for Complainant's arguments regarding recent ARB case law on compensatory damages, I will consider her admissions in her initial brief regarding her interim earnings. Furthermore, as noted above, it is Respondent's burden to produce evidence that would mitigate its liability to pay back pay.

of some hostility should not normally preclude reinstatement. *Hobby, supra, citing Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322, 1339-40 (11th Cir. 1999).

Here, neither party currently advocates reinstatement. Complainant argues that front pay is more appropriate than reinstatement because she has been forced to move due to her family's financial difficulties following her termination.²¹ I reject Complainant's argument that her current location has any bearing upon whether she may be reinstated, and I would not hesitate to order reinstatement if Respondent were to make a bona fide offer of reinstatement and reinstatement were otherwise feasible. My preference would be to order reinstatement as that is the preferred result under the statute and the one most likely to restore a complainant to her status prior to engaging in whistleblowing activities. Nevertheless, Respondent also indicates that reinstatement is not appropriate. Given the apparent animosity between the parties, and as their agreement that reinstatement is not feasible, I find that this form of relief would be inappropriate in this instance.

Complainant asserts that it will take her a minimum of ten years to regain her professional status, and accordingly, she should be awarded front pay for this period. In support, she explains that by the time a decision is rendered, she will have lost approximately four years of experience as an IT Financial Analyst along with the opportunity to earn a college degree in accounting or financing. She alleges that the market is significantly more distressed than when she accepted her position with Deltek, and she alleges that future employers will rely on her credit when making hiring decisions. She also cites to the fact that she is four years older than when she was hired by Respondent.

Complainant relies upon *Hagman v. Washington Mutual Bank, Inc.*, ALJ No. 2005-SOX-00073 (Dec. 19, 2006), *appeal dismissed*, (ARB May 23, 2007)] in which an administrative law judge awarded ten years of front pay to a SOX whistleblower. Although decisions of other administrative law judges are not precedential, they may be relied upon to the extent their reasoning is persuasive, and the decision in *Hagman* was clearly well reasoned and persuasive. However, the facts in that case, which involved egregious wrongdoing by bank managers, are very different from those in the instant case. Although, like Complainant, the employee in *Hagman* had started as a support person, she had worked for over a decade in the financial industry as an assistant vice president or vice president at various financial institutions before working for Washington Mutual Bank, and she had worked for Washington Mutual for several years prior to her discharge. Here, in contrast, Complainant was in a support position with some financial duties at the time she started with Deltek and she worked for Deltek for less than a year. Quite simply, Hagman was a senior employee on a fast track who was derailed whereas Complainant, despite her experience with finance, was essentially an entry level employee in a new field.

Following her discharge, Complainant was unable to secure a position as a Financial Analyst and instead returned to an administrative support position, which is more similar to the work she did prior to working for Respondent. The only reason that she was able to obtain employment as a financial analyst with Respondent in the first place was that Respondent was willing to give her a chance that her employer at the time was unwilling to give her absent a

²¹ As noted in footnote 19 above, Complainant is now living in Florida.

degree in accounting. Unfortunately, however, Complainant is now unlikely to obtain employment in her chosen field without the degree, as she did not work for Respondent for a sufficient period of time to obtain on-the-job qualifications.

In view of the above, I find that, in order for her to be made “whole” as required by the statute, Complainant will need to be provided with the opportunity of completing her undergraduate degree. I therefore find it is reasonable to expect that Complainant can recover her professional status after four years, which is the amount of time generally required to obtain a Bachelor’s degree. Above, I have ordered Respondent to compensate Complainant at its full tuition reimbursement rate for four years so that she may obtain an undergraduate degree in accounting or finance. Once Complainant has obtained this degree, it is reasonable to expect that she should be able to obtain a position similar to the one she held with Respondent.

In order to allow Complainant to pursue her studies full time, Respondent is being required to pay front pay for four years beginning from the date of this decision, to be paid in addition to four years of tuition reimbursement. *See Michaud, supra* (awarding two years of front pay based on the medical evidence submitted at trial which indicated the complainant could work again after that period); *Doyle v. Hydro Nuclear Services*, No. 1989-ERA-22 (ARB Sept. 6, 1996), *vacated on other grounds*, 285 F.3d 243 (3d Cir. 2002), *cert den.*, 537 US 1066 (2002), *reh. den.*, 537 US 1180 (2003) (affirming award of five years of front pay because it would take five years to make the complainant employable again through psychotherapy, training, and education).²² As Complainant was earning \$68,000 at the time of her termination, this would amount to \$272,000 over four years.

With respect to fringe benefits, I find that Complainant would be entitled to \$10,880 in bonuses (\$2,720 annually for four years) and \$17,472 in health and welfare benefits (\$364 monthly for four years) for an additional \$28,352. *See Michaud, supra* (awarding the complainant the net value of health insurance costs for the period during which he received front pay).²³

Although front pay is typically mitigated by future earnings, I find that Complainant should be able to attend a university full-time, without working, if she so chooses. If she chooses to continue to work and attend school part time, she will receive the same amount, however, as it is the amount necessary to make her “whole.”

Typically, front pay awards are discounted to present value to account for the fact that interest may be earned on lump sum payments, resulting in unjust enrichment. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537 (1983) (citing *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485 (1916)); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000), (citing *Michaud v. BSP Transport, Inc.*, ARB No.

²²The *Doyle* case had a lengthy procedural history spanning over more than a decade, leading to decisions by the Secretary of March 30, 1994 and by the Administrative Review Board of May 17, 2000 that were vacated by the U.S. Court of Appeals for the Third Circuit on March 22, 2002; certiorari was subsequently denied.

²³ As I have already awarded Complainant the cash value of the maximum amount of paid leave (PTO) for which Respondent pays its employees, it is inappropriate to include the value of additional PTO among the fringe benefits Complainant will receive with her front pay.

97-113, ALJ No. 1995-STA-29, slip op. at 6 (ARB Oct. 9, 1997), *rev'd on other grounds sub nom. BSP Trans, Inc. v. United States Dept. of Labor*, 160 F.3d 38 (1st Cir. 1998)). However, the need to discount an award to present value can be obviated when future salary increases are not included in the calculation of the front pay award. See *Stratton v. Dep't for the Aging for the City of New York*, 132 F.3d 869, 882 (2d Cir. 1997); *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 680 (6th Cir. 2008); *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-30 (ARB June 27, 2007); *aff'd sub nom. Indiana Michigan Power Co. v. USDOL*, No. 06-4426 and 07-3928 (6th Cir. May 20, 2008) (unpub.) Furthermore, where neither party provides competent evidence of the inflation rate or discount rate, it is appropriate to award a lump sum that is not adjusted for either factor. *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 (9th Cir. 1982); *Miller v. Union Pacific Railroad Co.*, 900 F.2d 223, 226 (10th Cir. 1990).

Under the specific circumstances presented here, I do not find a basis for applying a discount rate to the lump sum award for front pay. Above, I declined to include annual salary increases in my award of back pay, for I found salary increases were speculative given that they are not guaranteed and Respondent had suspended merit increases (but not bonuses) at the time of Complainant's termination. As Complainant was employed by Respondent for less than a year, there was also no historical data regarding raises she typically received. Furthermore, neither party has presented any evidence regarding the appropriate inflation or discount rate, or even whether it is significant. Complainant does not address this issue and Respondent contests Complainant's entitlement to front pay. I will therefore award a lump sum amount that is not discounted to present value.

Thus, in addition to four years of tuition reimbursement, I find that Complainant is entitled to four years of front pay (including fringe benefits) that need not be mitigated or reduced to present value, in the total amount of \$300,352.

Special Damages

In addition to back pay and front pay, Complainant seeks various forms of special damages. Under its listed remedies, the Act provides for "compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 18 U.S.C. § 1514A(c)(2)(C). Below, I discuss each of the forms of special damages requested by Complainant.

Out-of-pocket Medical Expenses and Alternate Health Benefits

Complainant seeks to recover the cost of alternate health benefits and out-of-pocket medical expenses she and her family incurred after losing her health insurance through Deltek in the amount of \$50,905.47. (C250A ¶20; C252D). Complainant argues there were periods of time during which her family had no health coverage or limited coverage and she was forced to pay for medical, dental, orthodontic, vision and other care out of pocket.²⁴

²⁴ In her affidavit, Complainant stated that on or about February 2009, she advised Kay Robinson and Joan Prosac that her husband was laid off from Sprint and was losing his benefits, and she added her husband and children to her benefits plan. (C250A ¶ 22). In Complainant's Proof of Damages, Complainant indicates that her husband's

I find that it would be inappropriate to hold Respondent liable for these out-of-pocket medical expenses or for the cost of alternate health benefits, for Respondent sent Complainant notice of her COBRA rights, albeit prematurely, and it was her responsibility to follow up. Complainant has suggested that Respondent intentionally withheld information regarding COBRA, but there is no evidence of that; in fact, her allegations are belied by her acknowledgment that she received at least one notice of her COBRA rights. In addition, it would constitute double recovery to order Respondent to pay the value of health insurance premiums, as I have done above, and also require it to reimburse the Complainant for her family's out-of-pocket medical expenses and health insurance costs. *See Michaud, supra.*²⁵

Damage to Complainant's Credit

Complainant asserts that she is also entitled to recover for the damage to her credit rating caused by her termination. Specifically, she states that as a result of her termination, she fell behind on debt payments, which had a negative impact on her personal credit rating; in August 2009, her score was approximately 800 (Very Good) but it was only 654 (Fair) at the present time. (C250A ¶ 12, 13). She also states that she is now unable to secure credit and she has incurred additional costs of \$1,500 yearly as a result. *Id.* ¶ 26. Complainant asserts that it will take her seven years to recover the damage to her credit rating, for the negative information will then be removed from her credit report, and she requests that she receive an annual injury award of \$1,500 for seven years, totaling \$10,500, for this element of damages. *Complainant's Proof of Damages* at 25. Complainant does not provide any information as to how she arrived at this figure or provide supporting documentation. (C252H [blank except for noting \$1,500 for 7 years, totaling \$10,500]).

In *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998), the complainant sought to recover for injury to his credit rating after he was terminated, pointing to his credit reports, which showed many defaults following his termination. *Id.* slip op. at 22. The Administrative Review Board found that the deterioration in his credit rating, together with his testimony that he was unable to obtain a loan for the business he opened after he was terminated, would typically be sufficient to merit compensation; however, the back pay award he received would fully compensate him for the years he was unable to take a salary or earn any profit from his business. *Id.* Accordingly, the Board did not award separately for injury to his credit rating but stated that it would consider this loss in awarding damages for pain and suffering.

In a recent SOX case, the Board expressed skepticism in awarding damages for injury to one's credit:

benefits were terminated on June 30, 2009 but that she and her children became eligible under his current employer's benefits plan in October 2010. *Complainant's Proof of Damages* at 17 n. 37. She did not, however, address those facts in either version of her affidavit. (C250A, C250BA).

²⁵ Furthermore, as discussed above, the evidence reflects that only Complainant was covered by her medical plan at the time of her termination so reimbursement for her out-of-pocket medical expenses would be limited to her own expenses and not that of her family except with respect to dental insurance.

The ALJ also awarded \$22,000 in damages for Kalkunte's 'pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation she suffered.' R. D. & O. at 65. Although we agree with [the respondent] that the damage to credit may not be legally compensable, the balance of the award is supported by the evidence, is not clearly erroneous, and within the ALJ's discretion.

Kalkunte v. DVI Fin. Servs. Inc., ARB Nos. 05-139 & 05-140, ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009).

Complainant has failed to establish a basis for compensating her due to damage to her credit rating. Whereas the complainant in *Jones* testified that he was denied a loan because of his poor credit, Complainant did not provide any specifics about the damage she has suffered nor has she provided a current credit report or one from prior to her termination. The only evidence Complainant provides is her own general statements which are nonspecific and, even if accepted, amount to little more than speculation.²⁶ Absent any concrete proof of an actual loss based upon her diminished credit rating, I find that these damages are too speculative, particularly where, as here, a portion of any credit damage is likely attributable to her husband's termination (discussed below). Furthermore, the award of back pay and front pay will fully compensate Complainant for any potential injury to her future job prospects, and her claim for pain and suffering and other nonpecuniary damages is addressed below.

Penalties and Taxes for Early Withdrawal from Retirement Accounts

Complainant also seeks to recover \$48,691.62 in penalties and taxes she and her husband were required to pay for prematurely withdrawing money from their retirement accounts. Although Complainant includes statements from Fidelity reflecting her husband's withdrawals, she does not provide any statements regarding her own withdrawals or any tax statements reflecting the taxes and penalties owed; rather, she simply provides a chart in which she calculated the penalty and federal and state taxes owed. *See* C252E.²⁷

The Secretary has previously denied compensatory awards for early withdrawal from a retirement account. In *Creekmore v. ABB Power Systems Energy Services, Inc.*, 1993-ERA-24 (Sec'y Feb. 14, 1996), the Secretary found it would be inappropriate to award a complainant compensation for these penalties because it was his choice to voluntarily remove this money from his retirement account. Nonetheless, the Secretary awarded \$40,000 in compensatory damages, in part due to the complainant's panic that caused him to withdraw this money, which was "an indication of the emotional turmoil that resulted from his discriminatory layoff."²⁸ *But see Hobby, supra* (affirming reimbursement for penalties when the complainant was required to withdraw from his retirement fund given that he was out of work for more than three years).

²⁶ In her brief, Complainant has incorporated a print screen reflecting that her credit score from Equifax was 654 on November 19, 2012. *See Complainant's Proof of Damages* at 25. That is not evidence but even if it were, it does not establish an actual loss based upon the diminished credit rating.

²⁷ As noted above, Complainant sought to retain the services of an economist but did not show how that was necessary. The problem here is not the absence of an expert but, rather, the absence of underlying documentation and testimony establishing the compensability of the amounts sought.

²⁸ This award also compensated the complainant for his embarrassment and pain and suffering.

Based on the specific circumstances presented here, I find Complainant is not entitled to compensation for the penalties she was charged for withdrawing from her 401(k). In that regard, it is unlikely that Complainant and her husband would have needed to withdraw such a large amount—\$114,912.51 between June 11, 2009 and March 15, 2010—had he not lost his job as well between February and June, 2009.²⁹ Although Complainant asserts that her income amounted to nearly 80% of their total household income when she was discharged, her husband withdrew \$51,334.04—more than half of the total \$92,618.51 he withdrew—by June of 2009, approximately four months before Complainant lost her job. Under these circumstances, I will not order Respondent to reimburse Complainant for those penalties. Whether Complainant is entitled to compensatory damages for pain and suffering or humiliation is discussed below.

Loss of Interest on Retirement Investments

Complainant also seeks to recover the interest she and her husband would have earned on their retirement investments had they not withdrawn funds or had Respondent continued to contribute 4% to Complainant's retirement account, which she alleges would amount to \$18,960.56 (based upon \$3,678.51 for her own account and \$15,282.05 for her husband's account). (C250A ¶ 24, 25; C252F). In her brief, she argues that together, the combined major stock indexes gained an average of nearly 33% between September 15, 2009 and November 23, 2012. Accordingly, Complainant asserts that a "reasonable analysis assumes only approximately 50% of that rate of return," and she seeks to recover 16.50% interest for the \$114,912.51 she and her husband collectively withdrew from their retirement accounts, amounting to \$18,960.50.

I agree with Respondents that awarding Complainant damages on this basis would be speculative. There is no rationale for compensating Complainant for her husband's withdrawals, particularly since he withdrew significant amounts prior to her termination, as discussed above. As with respect to her claim for reimbursement for penalties and taxes based upon these withdrawals, it would be speculative to award Complainant any damages for lost investment opportunities. There is also no rationale for compensating Complainant for Respondent's 4% contributions because, as also noted above, Respondent suspended its 4% contributions to employee retirement accounts even prior to Complainant's termination. Moreover, as I have awarded Complainant pre- and post-judgment interest on her back pay at the appropriate rate, awarding her for a potential loss of interest on her retirement investments would be duplicative.

Non-Pecuniary Damages

Complainant also seeks to recover compensatory damages for various forms of emotional harm she endured, including mental anguish and suffering, injury to her reputation, humiliation, and loss of enjoyment, i.e. loss of career aspirations, financial distress, and loss of leisure time in preparing for this litigation. *See* Complainant's Proof of Damages at 26-30. As noted above, the Administrative Review Board recently held that these forms of compensatory damages are

²⁹ In her affidavit, Complainant stated that on or about February 2009, she advised Kay Robinson and Joan Prosac that her husband was laid off from Sprint and was losing his benefits, and she added her husband and children to her benefits plan. (C250A ¶ 22). In Complainant's Proof of Damages, Complainant indicates that her husband's benefits were terminated on June 30, 2009. *Complainant's Proof of Damages* at 17 n. 37.

recoverable under SOX. *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-005 (ARB March 20, 2013).

Complainant seeks to recover between \$162,000 and \$182,000 in non-pecuniary damages, reflecting \$132,000 in damages for ongoing injury to her professional reputation, \$10,000 for personal humiliation, \$10,000 or \$30,000 for mental anguish and suffering,³⁰ and \$10,000 loss of enjoyment of life.³¹

Loss of Professional Reputation

The bulk of the non-pecuniary damages that Complainant seeks are for an alleged loss to her professional reputation, for which she claims \$132,000. In support, Complainant points to the false accusations in her termination letter, and she notes that she has received negative employment references from Respondent, which has hindered her ability to find a new job.

Here, I find that the damage to Complainant's professional reputation will largely be rectified by the resolution of this case. In my initial decision, I found that Respondent's reasons for terminating Complainant were pretext, and I have now (below) ordered Respondent to provide a neutral reference in the future, and, to ensure that she will be made whole, I have enabled her to obtain an undergraduate degree in her chosen field. Any alleged damage to her professional reputation has not prevented her from finding administrative work similar to the type she held previously, and she was unable to obtain a job as a Financial Analyst before Respondent hired her, giving her a chance that her employer would not, as discussed above.

Accordingly, I find that Complainant has not established a loss of professional reputation and, to the extent that her professional standing has been adversely affected by Respondent's actions, she has already been fully compensated.

Mental Anguish and Suffering, Loss of Enjoyment, and Personal Humiliation

Complainant also seeks \$30,00 to \$50,000 in additional non-pecuniary damages, based upon \$10,000 to \$30,000 for mental anguish and suffering (including personal injuries), \$10,000 for loss of enjoyment of life, and \$10,000 for personal humiliation. With regard to mental anguish and suffering, Complainant asserts that she has experienced stress-related fatigue and loss of hair, lack of sleep, nightmares and flashbacks, migraines, ulcers, and jaw pain from nervous grinding. (C250A ¶29). Also, she feels she should be compensated for loss of enjoyment of life due to loss of career aspirations, deteriorating health, financial distress, loss of leisure time preparing for this litigation, inability to pursue hobbies, and loss of relationships.

³⁰In her Proof of Damages Exhibits (C250, C250J), Complainant seeks \$30,000 for Mental Anguish & Suffering, Including Personal Injuries; however, in the body of her brief (Complainant's Proof of Damages at 29), she seeks \$10,000 for this element of damages.

³¹ In her Supplemental Proof of Damages Brief and Complainant's Reply to Respondent's Supplemental Memorandum, Complainant asserted that she was now entitled to \$484,000 in non-pecuniary damages, reflecting \$264,000 in damages for ongoing injury to her professional reputation, \$30,000 for personal humiliation, \$160,000 for mental anguish and suffering, and \$30,000 loss of enjoyment of life. However, in my Order dated May 7, 2013, I rejected her motion to file a supplemental brief and evidence and have only considered the new case law regarding pecuniary damages to which she referred.

(C250A ¶30). She also claims that she was personally humiliated as a result of the discharge and “other conduct.” (C250A ¶28).

As noted above, Complainant has not offered the testimony or statement of a medical practitioner or expert witness. Although the testimony of health professionals can strengthen a complainant’s case for compensatory damages, it is not required. *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (citing *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert denied*, *Burkee v. Busche*, 454 U.S. 897 (1981)). Rather, a complainant need only show “that [s]he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress.” *Jones, supra* (citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992)). Nonetheless, a complainant must prove the existence and magnitude of her emotional distress with “competent evidence.” *Smith v. Esicorp, Inc.*, ARB No. 97-065, ALJ No. 1993-ERA-16 (ARB Aug. 27, 1998) (citing *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978)). Furthermore, the severity of the retaliation is relevant in determining the appropriate amount of compensatory damages owed. *Smith, supra*.

Here, I find that it is appropriate to award Complainant \$10,000 for the mental anguish and stress she has suffered. In reaching that figure, I have considered the range of compensatory damages awarded in similar whistleblower cases, taking into account that not all of her anguish was attributable to the wrongful discharge.³² *Smith, supra* (noting that recent Secretary and ARB decisions awarding compensatory damages for emotional distress are instructive). Complainant credibly attested to the mental anguish she suffered after her termination; however, much of her stress was likely attributable to the fact that her husband was laid off prior to her own termination or was the result of the nonactionable hostile work environment claim, which led to her taking medical leave prior to her termination. Undoubtedly the loss of her job was stressful

³² In making my determination, I have considered the following cases:

Van der Meer v. W. Ky. Univ., ARB No. 97-078, ALJ No.1995-ERA-38 (ARB Apr. 20, 1998) (awarding \$40,000 for humiliation after the respondent made a statement to a local newspaper questioning the complaint’s mental competence); *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-24, (Sec’y Feb. 14, 1996) (awarding \$40,000 for emotional pain and suffering when complainant showed that layoff caused emotional turmoil and disruption of family because he had to accept temporary work away from home and suffered humiliation in having to explain why he had been laid off after 27 years with one company); *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-29 (ARB Oct. 9, 1997) (awarding \$75,000 where report from a licensed social worker and psychiatrist showed that complainant suffered from major depression and where there was also evidence that the complainant had lost a lot of money in savings and lost his home in foreclosure); *Smith v. Littenberg*, 1992-ERA-52 (Sec’y Sept. 6, 1995) (awarding \$10,000 for mental and emotional distress when psychiatrist attested that complainant was depressed and had post-traumatic problems); *Dutkiewicz v. Clean Harbors Envtl Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034 (ARB Sept. 23, 1997), slip op. at 6, *aff’d on other grounds*, 146 F.3d 12 (1st Cir. 1998) (affirming award of \$30,000 based on severe emotional distress due to relocation, concerns for family’s survival, difficulties with marriage, and ongoing peptic ulcer disease); *Murray v. AirRidge, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034 (ARB Dec. 29, 2000) (affirming “modest award” of \$20,000 when complainant gained weight from depression and stress, had trouble sleeping, and had damaged self-esteem); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) (affirming finding of \$4,000 for emotional distress even though testimony was unsupported by professional counseling or medical evidence); *Lederhaus v. Paschen*, 1991-ERA-13 (Sec’y Oct. 26, 1992) (awarding the complainant \$10,000 for mental distress when he was unemployed for five and a half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and his wife at her job and her employer threatened to lay her off, and his family life was disrupted); *Smith v. Esicorp*, ARB No. 97-065, 1993-ERA-16 (Aug. 27, 1998) (awarding \$20,000 when complainant did not lose his job or incur financial losses but there was evidence of emotional injury based on his own testimony).

and added to the stress attributable to those other factors, but Complainant has offered little in terms of corroboration to substantiate her claims. There is no evidence of record establishing that she required medical treatment due to the stress from her termination or associating any of her symptoms with the termination. Under these circumstances, I find that the amount of \$10,000 is adequate to compensate her for this category of damages.

To the extent that they are not subsumed within the mental anguish and suffering claim, I find that the personal humiliation and loss of enjoyment claims do not warrant additional compensation. With respect to any personal humiliation, apart from the termination itself (for which I have awarded damages based upon the associated stress), Complainant largely points to actions that formed the basis of her hostile work environment claim (including the Pulp Fiction meeting), which I found was not actionable. Furthermore, by awarding Complainant tuition reimbursement and four years of front pay so that she may earn an undergraduate degree, I find that Complainant should be able to achieve her dream of becoming a Financial Analyst, addressing the bulk of her loss of enjoyment claim.

Punitive Damages

Finally, Complainant seeks to recover \$250,000 in punitive damages. However, punitive damages are not available for whistleblower claims under SOX. *See, e.g., Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1332 (S.D. FL 2004). More importantly, however, even if punitive damages were available under SOX, I would not award them in this case. Although Complainant prevailed in her hearing, I dismissed the majority of her claims alleging a hostile work environment and found that she could only prevail with respect to her termination. In making its decision to terminate Complainant, Respondent relied upon the reports of two or three individuals (Ahmad, Kortright, and possibly Kortright's assistant), which were not inherently implausible, and Respondent's reliance on their (albeit inaccurate) statements does not warrant punitive measures. In short, I do not find Respondent's decision to terminate Complainant so egregious as to warrant this type of damages.

Expunging of Personnel Records

The Administrative Review Board has previously held that where a whistleblower was awarded back pay and front pay, it was also appropriate to expunge the employee's personnel records of all negative information relating to his protected activity and that activity's role in his termination. *Michaud, supra*. I find that similar action is warranted in this instance. Accordingly, I am requiring that Respondent expunge from Complainant's personnel records all information relating to her protected activity and termination. Further, I am requiring Respondent, if contacted for a reference, to provide a neutral reference verifying employment.

Attorneys' Fees for The Employment Law Group

Although Complainant proceeded *pro se* (with her husband acting as a lay representative) in the current action, she also seeks to recover attorney's fees for a law firm she retained from May 2009 through November 2009, which helped negotiate the unsuccessful settlement agreement. Complainant states that she was forced to dismiss The Employment Law Group on

November 16, 2009 due to diminished financial resources following her termination on October 27, 2009. Respondent argues that Complainant is not entitled to attorney's fees because she rejected the settlement agreement the parties reached and drafted her own; accordingly, the work of The Employment Law Group was lost. Furthermore, Respondent argues that Complainant has not presented evidence regarding the reasonableness of the attorney's fees she seeks, both regarding the hourly rates charged and number of hours expended on her case.

The Fourth Circuit, within whose jurisdiction this case arises, has held that a lawyer does not need to serve as counsel of record at the time of trial to recover attorney's fees; rather, a former lawyer is entitled to fees if his/her work contributed to the claimant's success. *Mammano v. The Pittston Company*, 792 F.2d 1242, 1245 (4th Cir.1986). In *Mammano*, the Coal Employment Project assisted the claimants in a Title VII claim brought before the EEOC while another lawyer assisted them with a tort action filed in district court. *Id.* at 1244. The Coal Employment Project assisted the other counsel with depositions and trial preparation and later became counsel of record; however, they withdrew shortly thereafter due to problems with the other lawyer. *Id.* The claimants ultimately won their Title VII claim but did not win their tort claims. *Id.* As the Coal Employment Project had sole responsibility for the initial investigation and administrative processing of the EEOC charges, which was a prerequisite to filing the Title VII suit, the Fourth Circuit found it was appropriate to award them attorney's fees. *Id.* at 1245; *but cf. Ward v. Tipton County Sheriff Dep't*, 937 F. Supp. 791 (S.D. Ind. 1996) (declining to award attorney's fees to first set of attorneys because the second attorney did not use their complaint and because the first attorneys entered a contingency agreement with the complainant, and there was no evidence he was required to pay them).

Although The Employment Law Group was discharged shortly after settlement negotiations fell apart, bill summaries sent to Complainant reflect that they helped her draft her complaint (which she later amended *pro se*) and also engaged in discovery. (C252A). I determined that Respondent did not engage in adverse action prior to Complainant's dismissal; however, these actions taken by The Employment Law Group still contributed to Complainant's success. Furthermore, the billing statements reflect that Complainant paid her attorneys for this work. (C252A). Accordingly, I find that it is appropriate to award Complainant attorney's fees; this will not result in an unjust enrichment given that she was required to pay The Employment Law Group for their services and, in fact, did so. *See Rhoads v. FDIC*, 286 F. Supp. 2d 532 (D. MD. 2003) (holding in ADA/FMLA case that attorney's fees were inappropriate because the complainant admitted she did not owe her former counsel anything, and awarding them may have resulted in a windfall given that she had a malpractice suit pending).

Nonetheless, as Complainant rejected the settlement agreement her attorneys drafted, I find that it would be inappropriate to award her attorney's fees for this work, for it did not contribute to her success, and she was the one who derailed the settlement negotiations. The billing statements sent by The Employment Law Group reflect that the settlement negotiations began on September 1, 2009; accordingly, I will not allow Complainant to collect attorney's fees for any work done on or after this date. (C252A). However, I find the remaining number of hours expended by Complainant's counsel to be reasonable. I also find that the hourly rates charged are reasonable. The billing statements submitted by The Employment Law Group note

the employees that worked on Complainant's case by their initials but do not indicate their positions; the firm billed at rates of \$130/hour, \$225/hour, and \$345/hour.

Based on the aforementioned discussion, I find that Complainant is entitled to reimbursement of \$24,863³³ in attorney's fees, which reflect the amount she was charged for professional services before she entered into the unsuccessful settlement negotiations.

Litigation Costs for The Employment Law Group

Complainant also seeks to recover \$3,751.96 in litigation expenses charged by The Employment Law Group, supported by periodic listings of expenses without receipts. As with the attorney fees, the allowable expenses will be limited to the period prior to September 1, 2009. However, only \$4.64 of these expenses were incurred after September 1, 2009, leaving \$3,747.32 potentially allowable.

The bulk of the expenses consists of two charges: \$2,555.00 on May 26, 2009 for consultation with an expert and \$910.00 on July 10, 2009 to "Jury Solutions" for litigation support relating to a telephone interview with Complainant. As expert witness fees are specifically allowable under SOX, even though a witness is not called, I find those fees, which were paid by Complainant, to be compensable. On the other hand, it is not clear why there would be charges for an interview with Complainant, and the \$910.00 is disallowed.

I also find that most of the remaining charges either are for overhead costs, which are not reimbursable, or for expenses that are not adequately explained as necessary litigation costs, such as a credit check for Complainant. The Board has previously found that charges that are part of a firm's overhead are not separately recoverable absent an extraordinary need. *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-30 (ARB Dec. 18, 2008) (citing *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 623 n.7 (4th Cir. 1978)). *But see Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989) (Longshore case) (allowing certain photocopying costs when not part of overhead, as well as the direct cost of producing trial exhibits, ordering transcripts, and obtaining medical reports); *Encarnacion v. Dep't of the Navy*, BRB Nos. 02-0321 and 02-0398 (Jan. 15, 2003)(unpub. Longshore case) (finding necessary and reasonable travel costs and associated fees in excess of overhead to be compensable). Accordingly, I will disallow fees for postage, for telephone and internet, and for use of various databases (Westlaw, IrbSearch, Pacer), as these expenses have not been shown to be separate from overhead.³⁴ It is unclear whether the bulk of these were case associated fees or were an attempt to pass a portion of the firm's overhead to the client. No receipts were provided. I

³³ The billing statements issued on June 3, 2009; June 29, 2009; August 4, 2009; and September 2, 2009 reflect total charges of \$24,759 for professional services. Furthermore, the October 7, 2009 billing statement reflects three charges prior to when Complainant entered into settlement negotiations—a \$13 charge for .10 hours of reviewing documents on August 18, 2009; a \$78 charge for .60 hours of reviewing documents on August 28, 2009; and a \$13 charge for .10 hours of reviewing documents and a team meeting on August 31, 2009. Together, these charges of \$104 plus the previous charges of \$24,759 total \$24,863 in attorney's fees. See C252A.

³⁴ For example, the firm billed Complainant for the cost of online legal research for May 2009 based upon a disbursement to West Payment Center dated 04/30/09—before Complainant retained the firm. (C252A). These prepaid research fees were clearly part of overhead.

likewise find that these charges are likely overhead for which no explanation has been provided and cannot be reimbursed.

Finally, The Employment Law Group has charged on various occasions for parking and mileage with little or no explanation. Although these charges are minimal, Complainant has not shown how these costs are related to and reasonably necessary to prosecution of this case. As no receipt or other explanation has been included, I will disallow these costs. *Id.*

Based on the aforementioned discussion, I find that Complainant is entitled to reimbursement for the litigation expenses that she paid to the Employment Law Group in the amount of \$2,555 (for expert witness fees).

Attorney's or Lay Representative's Fees for Mr. Gunther

Complainant also seeks to recover attorney's fees for her husband, who represented her as a lay representative. As a general rule, employers cannot be held liable under fee-shifting statutes for work performed by lay representatives. *Kuhn v. Kenley Mining Co.*, (unpub.) (No. 01-2255) (4th Cir. 2002); *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *see also Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001). In *Todd Shipyards*, the Ninth Circuit rationalized that attorney's fees were not appropriate because the Longshore Act only makes reference to "an attorney at law" when mentioning attorney's fees. 545 F.2d at 1181. The same is true of SOX: Section 1514A(c)(2)(C) provides "compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable *attorney* fees." (emphasis added).

Here, I find that it would be inappropriate to award fees to Mr. Gunther as Complainant's lay representative. In *Rickley v. County of Los Angeles*, 654 F.3d 950 (9th Cir. 2011) (*en banc*), the Court of Appeals for the Ninth Circuit held that it was permissible to award attorney's fees to an attorney who represents her spouse in litigation. As Mr. Gunther is not an attorney, however, I find that he is not entitled to attorney's fees.

Litigation Expenses

As noted above, special damages under SOX whistleblower cases specifically include litigation costs and expert witness fees. In addition to the litigation costs relating to work performed by The Employment Group, Complainant also seeks to recover litigation expenses her husband incurred while representing her. Complainant's pro se status does not preclude the award of litigation costs. *See Nolan v. AC Express*, 1992-STA-37 (Secy. Jan. 17, 1995) (awarding pro se complainant repayment of his costs in bringing this case, including witness fees and registered mail fees). *See also Hobby, supra*. However, with respect to Title VII fee shifting, district courts have limited reimbursable expenses for pro se litigants to court costs (as would be awarded under 28 U.S.C. §1920) and not "out-of-pocket expenses incurred by attorneys in the course of providing legal services, such as copying costs and travel expenses." *See Rainone v. Potter*, 388 F.Supp.2d 120 (E.D. NY 2005) and cases cited therein. *See also Hyland v. Xerox Corp.*, 2011 WL 806419 at *4 (D. Md. 2011) (unpublished Title VII case)

(granting the claimant expert witness fees but denying her litigation expenses for postage, copies, office supplies, mileage, parking, ink cartridges, notarization of documents, hotel rooms, airfare, a document scanner, jury consulting services, jury focus groups, a laptop, LexisNexis research, and a replacement computer, among other things, as not falling under 28 U.S.C. §1920). Complainant argues that fee-shifting statutes are inapplicable because “litigation costs” and “expert witness fees” are listed as separate elements of special damages under SOX. I agree that the Title VII cases in district court are not controlling and that 28 U.S.C. §1920 does not apply here; however, SOX cases that have addressed the issue have treated the provision as a fee-shifting provision (*e.g.*, *Kalkunte, supra*), so other fee-shifting cases may provide guidance in what are deemed to be allowable costs. To the extent that allowable costs are included, I find Complainant may be reimbursed. These reimbursable costs should include out-of-pocket expenses for reasonable and necessary litigation costs. *See Nolan, supra*.

Complainant seeks reimbursement for the following litigation expenses incurred by her lay representative, listed in C252C and supported by some receipts (at tabs 1 through 11):

1. Expert fees	\$ 0.
2. Consultant & Investigator Fees	2,810.85
3. Court Reporting & Transcripts	13,302.10
4. Facilities for Depositions	401.00
5. Research, Database, Reference	409.54
6. Copies, Postage & Express Delivery	1,395.57
7. Court Filing Fees (writ of Mandamus)	58.00
8. Trial & Deposition Meals	361.45
9. Mileage, tolls, parking, taxi	1,267.31
10. Lodging for Trial & SEC Meeting	2,157.91
11. Office Hardware/Software & Supplies	<u>3,543.27</u>
	\$ 25,807.00 ³⁵

A review of this roster and accompanying receipts reflects that Complainant is seeking reimbursement for some expenses that are not related to this case, such as court filing fees for a writ of mandamus in state court and lodging for attending an SEC meeting. These are disallowed. There may be instances in which meals and lodging expenses while attending a hearing would be allowable but inasmuch as the Gunthers lived in the suburbs of Washington, DC, I find those expenses were for their convenience and are not allowable as costs. For the same reason, travel costs for mileage, tolls, parking and taxi (including unexplained Amtrak fees) are disallowed. The consultant and investigator fees have not been shown to be necessary expenses and are disallowed. Also, Complainant’s attempt to pass off charges for setting up a home office are also rejected. Likewise, I cannot award online legal research fees to a pro se litigant. “Where an individual litigant elects to undertake legal research, or factual research, or other case-related tasks, even in order to save counsel fees, the litigant should not expect to have the costs of his or her efforts included in any determination of litigation expenses.” *Rhoads, supra*, quoting *Clarke v. Parkinson*, 225 F. Supp. 2d 345, 355 (S.D.N.Y. 2002). Those fees are also disallowed.

³⁵According to Complainant’s roster these fees total \$26,208.00; however, the actual total is \$25,807. (C252C). Apparently, she included the \$401 charge twice.

After reviewing the roster, arguments, and receipts, I find that Complainant should recover her costs for court reporting and transcripts (\$13,302.10); deposition facility fees (\$401.00); and case-associated costs for copies, postage, and express delivery (\$1,395.57). These litigation costs total \$15,099 and they are allowed; however, I am denying Complainant's request for the additional amounts.

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 in the July 31, 2012 Decision and Order in this matter, and Respondent Deltek, Inc. is liable to the Complainant for damages under the Act as set forth above; and

IT IS FURTHER ORDERED that, in accordance with the July 31, 2012 Decision and Order, individual Respondents Jerry Lee Evans, Jr. and Kay M. Robinson are **DISMISSED**; and

IT IS FURTHER ORDERED that the Respondent Deltek, Inc. shall pay to Complainant:

- A. \$138,692 in back wages (with interest as calculated below) (reflecting \$243,667 in back wages from October 27, 2009 through the date of this decision based on an annual rate of \$68,000, less interim earnings of \$104,975);
- B. \$10,200 in lost quarterly bonuses (with interest as calculated below) (reflecting expected quarterly bonuses based on 100% personal performance and 80% company performance between the time of her termination and the date of this decision);
- C. \$15,652 for the net value of her lost health insurance through the date of this decision (with interest as calculated below);
- D. \$7,486 for accrued paid time off (PTO) (with interest as calculated below) (reflecting the cash value of 240 hours (six weeks) of annual and sick leave);
- E. \$30,000 for tuition reimbursement (reflecting four years of tuition at the maximum annual rate of \$7,500);
- F. \$300,352 for front pay and fringe benefits from the date of this decision through and continuing for four years (reflecting front pay in the amount of \$272,000 (based upon \$68,000 annually for four years) plus \$10,880 for bonuses (based upon \$680 quarterly for four years) and \$17,472 for health and welfare benefits (based upon \$364 monthly for four years);
- G. \$27,418 for attorney's fees and costs based upon payments made to Complainant made to her former attorneys, The Employment Law Group (consisting of \$24,863 in attorney fees and \$2,555 in costs); and
- H. \$15,099 as reimbursement for Complainant's out-of-pocket litigation costs; and

IT IS FURTHER ORDERED that (1) pre-judgment interest shall be paid on the aforementioned back pay award and associated fringe benefits, calculated in accordance with 26 U.S.C. § 6621; and (2) Respondent shall immediately expunge from Complainant's personnel records all information relating to her protected activity and termination and if contacted, shall provide a neutral reference verifying employment.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, 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.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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 no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).