



In the Matter of:

SHEILA J. KALKUNTE,

ARB CASE NOS. 05-139 & 05-140

COMPLAINANT,

ALJ CASE NO. 2004-SOX-056

v.

DATE: February 27, 2009

**DVI FINANCIAL SERVICES, INC. and
AP SERVICES, LLC,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**R. Scott Oswald, Esq., Nicholas Woodfield, Esq., Courtney R. Abbott, Esq.,
The Employment Law Group, PLLC, Washington, District of Columbia**

For the Respondent DVI Financial Services, Inc.:

**Thomas J. Barton, Esq., James K. Webber, Esq., Drinker, Biddle & Reath,
LLP, Florham Park, New Jersey**

For the Respondent AP Services, LLC,

**L.A. Hynds, Esq., Sheldon S. Toll, Esq., Jeanne M. Scherlinck, Esq.,
Honigman, Miller Schwartz & Cohn, LLP, Detroit, Michigan**

FINAL DECISION AND ORDER

This case arises from a complaint Sheila Kalkunte filed against DVI Financial Services, Inc. (DVI) and AP Services, LLC (APS). Kalkunte alleged that these

respondents violated the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX or Act), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations at 29 C.F.R. Part 1980 (2006), when they discharged her from employment with DVI in retaliation for disclosing and then inquiring into the progress of the investigation of what she reasonably believed were financial improprieties amounting to securities fraud. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he held that DVI and APS violated the Act, and awarded damages. We adopt the recommendation as to DVI's and APS's violations of SOX, but modify the damages award.

BACKGROUND

Kalkunte began employment with DVI as a contract attorney on June 4, 2001. R. D. & O. at 16; Hearing Transcript (T.) at 264-65. Her assignments included drafting documentation and negotiating provisions of loan agreements, lease agreements, guarantees, and security agreements. R. D. & O. at 16; T. at 265. Kalkunte became an in-house associate general counsel in December, 2002. R. D. & O. at 16; T. at 266. When Kalkunte began to draft opinion letters on behalf of DVI to address the securitization of the corporate finances in 2003, senior management changed her title in May of that year to assistant general counsel. R. D. & O. at 16; T. at 268-269. Her salary was \$130,000.00, plus \$10,000 bonus. R. D. & O. at 55; T. at 267-68.

In June of 2003, DVI's independent auditors, Deloitte & Touche, resigned abruptly. R. D. & O. at 17; T. at 269-70. The resignation caused a rapid decline in the price of DVI's stock, and an inquiry from the Security and Exchange Commission (SEC), which had already been questioning DVI's disclosure statements. R. D. & O. at 17; T. at 270.

On or about July 24, 2003, a DVI employee, Susan Gibson, advised DVI's board of directors that DVI's system for accounting for security interests was being tampered with surreptitiously. R. D. & O. at 19; T. at 48; Complainant's Exhibit (CX) 34 at 10-11). Around the same time, a member of DVI's board of directors, Jerry Cohen, informed Kalkunte that DVI hired the law firm of Latham & Watkins to assist DVI in restructuring or going into bankruptcy, and hired APS to negotiate with Fleet Bank and Merrill Lynch to secure operating funds. R. D. & O. at 18; T. at 272.

An August 25, 2003 letter from Mark Toney, an APS principal, to DVI memorialized the agreement between the parties. CX 19. Under this agreement, APS sent Toney, a specialist in turnaround operations and corporate restructuring, to work at DVI. R. D. & O. at 3-4; CX 19, 26 at 22. APS also dispatched Christine Clay to provide general management consulting services and several other individuals. R. D. & O. at 18; CX 19, 28 at 34-35.

By August of 2003, Kalkunte had become familiar with DVI's operations and litigation issues. She interacted regularly with DVI's board of directors and executives. T. at 286-91. Steve Garfinkel, DVI's chief financial officer, disclosed to Kalkunte that DVI's senior management had engaged in multiple improper activities. R. D. & O. at 18; T. at 272. At the same time, DVI credit and workout employees, Ray Fear and Joe Mallot, told Kalkunte that DVI senior management had changed the delinquency numbers that Fear and Mallot had prepared for the first quarter of 2003 SEC disclosure filings. R. D. & O. at 18; T. at 273-74.

On August 11 or 12, Kalkunte sought the advice of Steve Whalen, a friend and attorney at the law firm of Thacher Proffitt & Wood LLP. R. D. & O. at 18-19; T. at 274-75. Whalen and three of his partners at the firm told Kalkunte that, as associate general counsel, she had an obligation to report improprieties up the chain, first to the president of DVI, or, if that was futile, to the audit committee of DVI's board of directors.¹ R. D. & O. at 18-19; T. at 275-76; CX 50.

Following Whalen's advice, Kalkunte faxed a memorandum to members of DVI's board of directors' audit committee, Bill Goldberg, Nate Shapiro, and Jack McHugh, on August 18, 2003. Her memorandum detailed the financial improprieties that others had brought to her attention. R. D. & O. at 19; T. at 277-78; CX 7. She followed up with telephone calls to Goldberg and Shapiro, and another memorandum. R. D. & O. at 19; T. at 280; CX 32 at 47, 54. Specifically, she reported that DVI management had prepared improper delinquency reports and provided those altered reports to lenders, DVI's board of directors, and the SEC through its filings. R. D. & O. at 19; CX 32 at 42-46, 34 at 11-13. She also asserted that DVI employees were shredding documents. R. D. & O. at 19-21; CX 32 at 46.

That evening, Goldberg and Shapiro contacted Rick Meller, a partner at Latham & Watkins, about how to proceed with an investigation. R. D. & O. at 19; CX 32 at 48-49. They agreed to hire Washington counsel, Arnold & Porter, as special counsel. CX 32 at 51-52. Meller then called Toney in the evening on August 21, 2003. R. D. & O. at 20; T. at 560. He told Toney that Arnold & Porter would be investigating alleged improprieties that Kalkunte had reported to the board of directors, and that Toney should make key employees available, and in particular that he should coordinate a meeting between Kalkunte and Arnold & Porter. R. D. & O. at 20; T. at 560-61; CX 26 at 162-64.

An investigative team from Arnold & Porter arrived at DVI headquarters in Jamestown, Pennsylvania on August 22, 2003, and they met with Toney and then Kalkunte. R. D. & O. at 20; CX 26 at 172-74; CX 46 at 21, 35-36, 173-74. After August 22, Kalkunte heard nothing further about the progress of the investigation. R. D. & O. at

¹ See § 307 of SOX, requiring an attorney to report evidence of a material violation of securities law or similar violation by the company to the chief legal counsel or chief executive of the company, or, if that is unsuccessful, to the audit committee of the board of directors. 15 U.S.C.A. § 7245.

25; T. at 295. Likewise, neither Goldberg, Shapiro, nor the audit committee heard anything further from Toney or Arnold & Porter about the status or findings, if any, of the investigation. CX 34 at 30-31, 33. However, at a later date, the board of directors learned that the trustee in bankruptcy had objected to retention and payment of Arnold & Porter on September 25, 2003. DVI's Exhibit (EX) 33; CX 12.

On August 25, 2003, DVI filed for bankruptcy under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. R. D. & O. at 22; T. at 285; EX 33. At that time, DVI's president and chief executive officer, Michael O'Hanlon, resigned. T. at 286. Toney became the new CEO, and Clay assumed the duties of the chief administrative officer. R. D. & O. at 4-5, 22; T. at 286; CX 28 at 103-04. As CEO, Toney could hire and fire DVI employees, and supervised APS employees who were under the contract with DVI. However, APS continued to pay APS employee salaries and health benefits, to furnish e-mail accounts, and to reimburse expenses. R. D. & O. at 5, 22; T. at 240-242; CX 26 at 87, 107, 112, 116, CX 28 at 272-75.

On August 27, DVI eliminated more than ninety employee positions, giving those employees back pay and vacation pay. R. D. & O. at 22-23; T. at 293. Kalkunte and four other in-house counsel stayed on. Tony Turek, the chief credit officer for DVI, and Nancy Cascioli, a DVI human resources officer, assured Kalkunte that the attorneys would be needed following the bankruptcy. R. D. & O. at 22-23; T. at 294-95. In fact, after DVI filed for bankruptcy protection on August 25, 2003, Kalkunte had added responsibilities that included working with auditors, managing the litigation section, and reviewing bankruptcy filings. R. D. & O. at 24; T. at 290-92.

Kalkunte also processed "first day orders," which would allow the bankruptcy court to authorize DVI to retain and pay law firms during the bankruptcy proceedings. CX 42 at 32-34. Included was a first day order for Arnold & Porter as special investigative counsel. R. D. & O. at 26; EX 5. But unknown to Kalkunte, the filing format of Arnold & Porter's application was incorrect, and attorneys at Arnold & Porter worked with Latham & Watkins to draft a proper application over the next several weeks. Neither of those firms, the board of directors, nor Toney informed Kalkunte that this process was taking place. EX 6, 9, 17, 19, 20, 23, 25. So on September 10, 2003, Kalkunte sent an e-mail to Goldberg with a copy to Toney in which she said she needed to discuss the status of Arnold & Porter's investigation into her SEC violations report. R. D. & O. at 25; T. at 297-98; CX 24; DX 13.

Kalkunte did not receive a reply to her September 10 e-mail until September 12, but within four hours of her e-mail that was copied to Toney, David Heller of Latham & Watkins sent Toney an e-mail saying, "Suggestion: have her get you a 'job description' for the next two weeks and have her update it weekly – where she thinks she can add value. You can then 'yes/no' it and tell her you will task her with anything beyond that. Might work." R. D. & O. at 26; CX 24; DX 13. Toney then asked Clay to find out Kalkunte's tasks and responsibilities, although she never obtained similar information about the four other in-house lawyers. CX 26 at 22; CX 28 at 166.

On September 12, Toney asked Kalkunte to meet with Clay and him. R. D. & O. at 24; T. at 298. “[Y]ou work for me and I’m the CEO of the company,” Toney told Kalkunte. R. D. & O. at 27; T. at 298. With regard to the Arnold & Porter investigation, “There is no investigation going on right now . . . because they’re not getting paid.” T. at 299. Although Kalkunte thought the bankruptcy court had approved payment weeks earlier, Toney informed her that “there was no way in hell that the [bankruptcy] estate would pay for Arnold & Porter’s investigation.” T. at 300. Evidently referring to Kalkunte’s complaints of impropriety that Arnold & Porter was supposed to investigate, Toney added, “[a]t some point you’ll get your justice. It’ll be brought up by the Unsecured Creditors Committee or the U.S. Attorney’s Office[,] and they’ll look into these improprieties. But there is no benefit to the estate to have these improprieties looked into.” R. D. & O. at 27; T. at 300.

Toney testified that “this meeting helped Ms. Clay and me focus on the lack of a role for Ms. Kalkunte in the organization, hastening our inevitable decision to terminate her.” CX 47-7. Toney concluded that Kalkunte was no longer adding value to DVI. R. D. & O. at 21, 33; CX 26 at 190. Clay testified that Toney perceived Kalkunte’s actions as a “distraction from the crisis work that was at hand.” CX 24 at 207.

Following the September 12, 2003 meeting with Toney and Clay, Kalkunte conferred again with Whalen of Thacher Proffitt & Wood. They advised her that, if reporting her concerns to the CEO was pointless, she should go back to the board of directors. R. D. & O. at 29; T. at 302. So she contacted Goldberg and Shapiro and recounted her conversation with Toney. T. at 303. Shapiro said Toney’s comments were “inappropriate” and they said they would look into the situation “right away.” R. D. & O. at 29; T. at 303.

On September 15, DVI filed a motion with the bankruptcy court to retain Arnold & Porter to investigate Kalkunte’s and Gibbons’ allegations of fraud. EX 25. On behalf of the special committee of the board, Goldberg and Shapiro told Toney that Kalkunte accused Toney of wanting to withdraw the bankruptcy filing to retain Arnold & Porter as special counsel. R. D. & O. at 29, 44-55; T. at 271-73.

Then on September 18, 2003, Clay called Kalkunte into her office, and in the presence of Cascioli from DVI’s human resources department, informed her that her position was no longer necessary, and that she was being discharged as a part of a reduction in force. R. D. & O. at 30; T. at 25, 305; CX 143-146. Clay had Cascioli escort Kalkunte out of the building immediately, the only discharged DVI employee to have been treated in that fashion. R. D. & O. at 30; T. at 293, 671; CX 30 at 148-49.

In participating in the discharge decision, Clay consulted with some but not other outside counsel at Latham & Watkins about Kalkunte’s duties and responsibilities. R. D. & O. at 34; CX 28 at 146; CX 38 at 40:20-42; CX 42 at 11:24-12:5. In making the discharge decision, Toney told Clay to review Kalkunte’s position and duties, but Clay never met with her. T. at 286. Although Kalkunte was told her position was no longer

necessary, Robert DeCandia, a lawyer in DVI's executive department, took over her work, and early in 2004, transferred from the executive department to the legal department. R. D. & O. at 35-36; CX 18; CX 26 at 187; CX 28 at 270.

The only other discharge during September was of Rebecca Kolbe, an administrative assistant who had requested in August that she be laid off for personal reasons. R. D. & O. at 37; CX 44 at 11-15, 17. At trial, Toney testified that DVI gave a reduction in force as the reason for Kalkunte's termination, so that Kalkunte could collect unemployment and get another job. T. at 628. Kalkunte was also terminated for performance issues, he claimed. R. D. & O. at 32; T. at 628-28.

On September 19, the day after her discharge, Kalkunte left voice mail messages for Shapiro and Goldberg. T. 307-08; CX 51. Neither authorized her termination or was aware of it. R. D. & O. at 31; CX 51. Toney told board members that other lawyers could more competently handle the work, and that Kalkunte was part of the reduction in force. R. D. & O. at 31; T. at 99; CX 34 at 41. An attorney at Latham & Watkins told Goldberg that outside counsel could do better work at lower cost. R. D. & O. at 31; CX 32 at 97-98. However, between Kalkunte's August 18 whistleblower complaint to the board and her September 12 termination, less than a month had gone by.

On December 15, 2003, Kalkunte filed a complaint with OSHA alleging that DVI and APS terminated her employment with DVI in retaliation for her disclosing and then inquiring into the progress of the investigation into conduct that Kalkunte reasonably believed constituted securities fraud. On April 7, 2004, the Occupational Safety and Health Administration's (OSHA's) regional administrator determined on behalf of the Secretary of Labor that DVI and APS illegally discharged Kalkunte, and ordered payment of damages of \$100,000, plus interest, and expungement of adverse references from Kalkunte's personnel records.

DVI and APS appealed the Secretary's findings to an ALJ. The ALJ held a three-day trial between December 13, 2004, and December 15, 2004. He received depositions and other exhibits into evidence. On July 18, 2005, the ALJ issued his R.D. & O. holding that DVI and APS illegally terminated Kalkunte's employment, and awarded damages. DVI and APS then appealed to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110 (2007). Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's fact findings under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146

F.3d 12, 21 (1st Cir. 1998), (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party and even if we "would justifiably have made a different choice had the matter been before us de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews an ALJ's conclusions of law de novo. See *Getman v. Sw. Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

DISCUSSION

1. The Sarbanes Oxley Act

Section 806, the employee protection provisions of the SOX, generally prohibit covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations. That provision states:

(a) Whistleblower Protection For Employees Of Publicly Traded Companies.— No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

The SOX's employee protection provisions thus protect employees who provide information to a covered employer regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (fraud "in connection" with "any security" or the "purchase or sale of any security"), any rule or regulation of the Securities and Exchange Commission (SEC) (*see, e.g.*, 17 C.F.R. Part 210 (2007), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders.

Complaints filed under the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005).

18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) she engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 14-16 (ARB Sept. 29, 2006); *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, 36, slip op. at 9-10 (ARB June 2, 2006); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). *See also Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 20, 2004).

If the complainant establishes by a preponderance of the evidence that her protected activity was a contributing factor in the adverse action, then the respondent can only avoid liability by providing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Platone, slip op. at 16; *Harvey*, slip op. at 10; *Getman*, slip op. at 8. Cf. 29 C.F.R. § 1980.104(c). See § 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). See also *Peck*, slip op. at 10.

2. Respondents' violation of the Act

a. Coverage issues involving AP Services and Mark Toney

It is undisputed that Kalkunte was an employee of DVI, and that DVI was a publicly traded company subject to SOX. 18 U.S.C.A. § 1514A. Therefore, Kalkunte was an employee and DVI was an employer under the provisions of the Act.

Our work begins with whether Kalkunte can also hold APS liable under the SOX. The Act imposes liability on “any officer, employee, contractor, subcontractor, or agent” of the publicly held company for “discharge[ing]” (or “demot[ing], suspend[ing], threaten[ing] or in any other manner discriminating against . . .”) “an employee” because of the employee’s whistle blowing activity. 18 U.S.C.A. § 1514A(a). Under the SOX implementing regulations, “[N]o company or company representative may discharge . . . or in any other manner discriminate against any employee.” 29 C.F.R. § 1801.102. An employee is defined under those same regulations as “an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative.” 29 C.F.R. § 1801.101. A “company representative” is defined as “any officer, employee, contractor, subcontractor, or agent of a company.” 29 C.F.R. § 1801.102.

We agree with the ALJ and Kalkunte that, under these definitions, Kalkunte was “an employee” whose employment could be (and was) affected by APS, and that APS was a “company representative” of DVI, because it was its “contractor, subcontractor, or agent.” R. D. & O. at 3, 9.

DVI brought in APS to secure operating funds from Fleet Bank and Merrill Lynch. Mark Toney was an APS principal who specialized in turnaround operations and corporate restructuring. Under the August 25, 2003 letter agreement between DVI and APS, Toney agreed to work at DVI. APS also contracted to provide Christine Clay for general management services and several other individuals. After DVI filed for bankruptcy under Chapter 11 on August 25, 2003, Toney became CEO of DVI, and Clay its chief administrative officer. As CEO, Toney had authority to hire and fire DVI employees, and supervised the APS employees who were under contract with DVI. However, APS continued to pay the salaries and health benefits of Toney and other APS employees who worked at DVI, to furnish their e-mail accounts, and to reimburse their expenses.

Toney was the decision maker in eliminating more than ninety DVI employee positions on August 27, giving those employees back pay and vacation pay. It was Toney who, on or about September 12, 2003, determined that Kalkunte’s services were

no longer needed. And it was Clay, who on September 18, 2003, notified her of her discharge, effective that day.

On these facts, APS, was a contractor, subcontractor, or agent of DVI. As DVI's representative, through APS employees Toney and Clay, APS made decisions that affected Kalkunte's employment. R. D. & O. at 5, 7. If the facts establish a violation of SOX, APS can be held liable. Because Toney was also CEO of DVI and thereby an "officer" under the Act and regulations, he could have been held personally liable, but the ALJ held that Kalkunte waited too long to seek to add Toney as a party respondent, and therefore the issue of his personal liability is not before us. R. D. & O. at 13.

b. Kalkunte's protected activity

Kalkunte engaged in protected activity under the SOX and Toney, the decision-maker in this case, knew that. R. D. & O. at 42-45. SOX protection extends to employees who provide information to employers or participate in a proceeding regarding conduct the employee reasonably believes constitutes certain enumerated categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a).

Kalkunte learned that DVI's senior management had engaged in multiple improper activities. She heard from Fear and Mallot, DVI credit and workout employees, that DVI management had prepared improper delinquency reports and provided those altered reports to lenders, DVI's board of directors, and the SEC through its filings. She also found out that DVI employees were shredding documents. On August 18, 2003, Kalkunte brought that information to the attention of Goldberg, Shapiro, and McHugh of DVI's board of directors' audit committee.

The audit committee contacted Meller of Latham & Watkins, to learn how to proceed with an investigation, and they agreed to hire Arnold & Porter as special investigative counsel. Meller then let Toney know that Kalkunte had reported alleged improprieties to the board of directors, that Arnold & Porter would be investigating them, and that Toney should make Kalkunte and other key employees available to meet with investigators. A team from Arnold & Porter met with Toney and Kalkunte at DVI headquarters in Jamestown, Pennsylvania on August 22, 2003.

Thus, by August 22, Kalkunte had engaged in protected activity and Toney was aware of it. DVI and APS have so stipulated. R. D. & O. at 14, 43-44. But there is other evidence of protected activity and Toney's knowledge that is in dispute. Unaware of the delay in processing Arnold & Porter's application to the bankruptcy court to authorize DVI to retain and pay the firm, Kalkunte sent an e-mail to Goldberg with a copy to Toney on September 10, 2003, in which she said she needed to discuss the status of Arnold & Porter's investigation into her SEC violations report.

On September 12, Toney asked Kalkunte to meet with him and Clay. It was then Toney told her that that she worked for him, and inferentially not the audit committee. "There is no investigation going on right now," he said, "because they're not getting

paid.” Although Kalkunte thought the bankruptcy court had approved payment weeks earlier, Toney informed her that “there was no way in hell that the [bankruptcy] estate would pay for Arnold & Porter’s investigation.” The conclusions to be drawn from the conversation are that Kalkunte thought Toney was not supporting the investigation and Toney thought the investigation was none of her business.

Following the September 12, 2003 meeting with Toney and Clay, Kalkunte contacted Goldberg and Shapiro. She recounted her conversation with Toney. Describing Toney’s comments as “inappropriate,” Shapiro said they would look into the situation “right away.” Acting for the special committee of the board, Goldberg and Shapiro told Toney on September 15 that Kalkunte was accusing Toney of wanting to pull the bankruptcy filing to retain Arnold & Porter as special counsel.

We agree with the ALJ that Kalkunte’s inquiry into the status of Arnold & Porter’s investigation into DVI’s financial improprieties was protected under the SOX, and that the evidence shows Toney was aware of those inquiries. R. D. & O. at 42-45. DVI and APS dispute Kalkunte’s conclusion that Toney was delaying the Arnold & Porter investigation, but, because she was not aware of the role of the bankruptcy court in the delay, her belief was reasonable.

c. Protected activity as factor in discharge

To prevail on her SOX whistleblower complaint, Kalkunte had to prove by a preponderance of the evidence that her protected activity was a “contributing factor” in her discharge. *See* 18 U.S.C.A. § 1514A(b)(2)(C), adopting legal burdens of proof set forth in 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iii)-(iv). Substantial evidence supports the ALJ’s conclusion that it was. R. D. & O. at 45-47. We summarize the evidence:

There is temporal proximity between Kalkunte’s protected activity and her discharge, providing probative evidence of a causal relationship. Her disclosures of financial improprieties to the audit committee of the board of directors occurred on August 18, 2003, and Toney through Clay discharged her on September 18, 2003. She contacted Goldberg and Shapiro as members of the audit committee on September 10 to inquire about the status of the investigation into her report of SEC violations, and on September 12 to recount her conversation with Toney. On September 15, Goldberg and Shapiro told Toney that Kalkunte accused Toney of wanting to pull the bankruptcy filing. Toney discharged her on September 18, three days later.

There is also evidence of and pretext and retaliatory animus. R. D. & O. at 46-47. Although Toney built a case that Kalkunte’s services were no longer needed in DVI, or later that her performance was inadequate, there is evidence that those reasons were a pretext, and that the real reason for her discharge was her ongoing preoccupation with the status of the Arnold & Porter investigation.

After DVI filed for bankruptcy protection on August 25, 2003, Kalkunte had added responsibilities that included working with auditors, managing the litigation

section, and reviewing bankruptcy filings. On August 27, DVI eliminated more than ninety employee positions, but Kalkunte and four other in-house counsel stayed on. Tony Turek, the chief credit officer for DVI, and Nancy Cascioli, a DVI human resources officer, assured Kalkunte that the attorneys would be needed following the bankruptcy.

On September 10, 2003, Kalkunte sent an e-mail to Goldberg with a copy to Toney in which she said she needed to discuss the status of Arnold & Porter's investigation into her SEC violations report. Within four hours of her e-mail that was copied to Toney, David Heller of Latham & Watkins sent Toney an e-mail saying, "Suggestion: have her get you a 'job description' for the next two weeks and have her update it weekly – where she thinks she can add value. You can then 'yes/no' it and tell her you will task her with anything beyond that. Might work." Toney then asked Clay to find out Kalkunte's tasks and responsibilities, although she never obtained similar information about the four other in-house lawyers. The timing suggests that Kalkunte's future in the company was on a collision course with her drive for the investigation.

On September 12, Toney set up the meeting with Kalkunte and Clay. This was the meeting at which Toney told her she worked for him, because he was the CEO. The context suggests that she did not work for the audit committee and that her interest in following up on the Arnold & Porter investigation was outside her assigned duties and a source of irritation to him. There was no investigation, because there was "no way in hell" that the bankruptcy estate would pay for it. "At some point you'll get your justice," he told her.

Toney admitted that "this meeting helped Ms. Clay and me focus on the lack of a role for Ms. Kalkunte in the organization, hastening our inevitable decision to terminate her." Toney concluded that Kalkunte was no longer adding value to DVI. Clay testified that Toney perceived Kalkunte's actions as a "distraction."

In participating in the discharge decision, Clay consulted with some but not other outside counsel at Latham & Watkins about Kalkunte's duties and responsibilities. In making the termination decision, Toney told Clay to review Kalkunte's position and duties, but Clay never met with her. The surrounding circumstances clearly suggest pretext; that, notwithstanding legal work for her to do, Kalkunte had become a thorn in Toney's side, and he was devising a way to eliminate her.

Then on September 18, 2003, Clay called Kalkunte into her office, and with Cascioli from DVI's human resources department there, informed her that her position had become redundant, and that she was being discharged as a part of a reduction in force. Toney told board members that Kalkunte was part of the reduction in force and that other lawyers could more competently handle the work. An attorney at Latham & Watkins told Goldberg that outside counsel could do better work at lower cost.

At trial, Toney testified that DVI gave a reduction in force as the reason for Kalkunte's discharge, so that Kalkunte could collect unemployment and get another job. Kalkunte was also discharged for performance issues, he claimed. But the only other

position eliminated during September was that of Rebecca Kolbe, an administrative assistant who had requested in August that she be laid off for personal reasons. Although Kalkunte was told her position was no longer necessary, Robert DeCandia, a lawyer in DVI's executive department, took over her work, and early in 2004, transferred from the executive department to the legal department.

There is other evidence of animus. Clay had Cascioli escort Kalkunte out of the building immediately. She was the only discharged DVI employee to have been treated in that fashion.

Kalkunte need not show that her protected activity (in initiating and then following up on the Arnold & Porter investigation) was the only factor in her discharge, just that it was a "contributing factor." Substantial evidence supports the ALJ's conclusion that she has done so. R. D. & O. at 45-47.

d. Respondents' failure to prove that they would have taken the same action without protected activity

DVI and APS can only avoid liability in this case if they can prove by "clear and convincing evidence" that they would have discharged Kalkunte when they did, even if she had not engaged in protected activity. *See* § 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). Substantial evidence supports the ALJ's conclusion that Toney would not have discharged Kalkunte when he did, even if she had not disclosed and then inquired into the progress of the investigation of what she reasonably believed were financial improprieties amounting to securities fraud. R. D. & O. at 47-54. Much of the evidence has already been discussed, but it also bears on the question of DVI's and APS' burden of proof.

Because DVI filed for bankruptcy under Chapter 11, the last lawyer left in October of 2004, and DVI eventually closed its doors in December, DVI and APS can not defend on the ground that Kalkunte would have eventually lost her job. DVI and APS must prove by clear and convincing evidence that she would have been discharged in or around September 2003. There is no doubt that DVI was in financial trouble when it hired outside bankruptcy attorneys, Latham & Watkins, and Toney of APS as turnaround and restructuring specialist. Although DVI eliminated more than ninety employee positions on August 27, Kalkunte and four other in-house lawyers were not among them. After the bankruptcy filing, Kalkunte had added responsibilities. Only one other employee, Kolbe, an administrative assistant who requested to be laid off, was discharged in September, and the evidence is that none of the other in-house lawyers lost their jobs during the same time frame.

It was only after Kalkunte started pressing Toney for answers about the progress of the Arnold & Porter investigation that he began to question her value to the organization. She was evidently an irritant because she went over his head to the board of directors. But what to him was an irritant the law regards as protected activity. Toney offered shifting explanations for the decision to let Kalkunte go. She did not add value; she was no longer needed; outside counsel could do better work for lower cost. But then

another in-house lawyer took over her work. And all the other DVI in-house lawyers remained at least through April 2004, with the last leaving that October. T. at 233; 500-501; EX 40, 62. And finally, Kalkunte alone among all of the employees subjected to a reduction in force was unceremoniously escorted out of the building immediately after her discharge.

Kalkunte does not need to show that the reasons Toney gave are false. There may have been some truth to the need to downsize in view of the pending dissolution of the company. And Kalkunte may not have been a strong performer on the legal team. Yet the burden is on DVI and APS to provide evidence that those reasons were legally sufficient. The evidence is that in a few years Kalkunte progressed from contract attorney to associate general counsel to assistant general counsel who interacted with senior executives and the board of directors at a salary of \$130,000. The record does not contain evidence of performance-related issues until Kalkunte began her whistle blowing activity. Although DVI and APS proffered some evidence of legitimate non-discriminatory reasons for discharging Kalkunte, they failed to prove by clear and convincing evidence that they would have discharged her when they did had she not engaged in protected activity. R. D. & O. at 47-54. There is thus substantial evidence for the ALJ's decision on liability, and we affirm it.

3. Awardable damages

We disagree, however, on the ALJ's award of damages. R. D. & O. at 54-62. Remedies under the SOX can include reinstatement, back pay with interest, compensatory damages, and attorney's fees. *See* 18 U.S.C.A. § 1514A(c)(2)(A)-(C).

We begin with the issue of reinstatement. The ALJ noted that reinstatement is the preferred remedy, but that reinstatement was impossible in this case because DVI was no longer in business. R. D. & O. at 54. However, notwithstanding that fact, the ALJ ordered both back and front pay for a period of time long past when DVI had gone out of existence and had no employees. We agree with DVI that dissolution of the company is a superseding intervening cause that cuts off her entitlement to back or front pay. *See* Brief of DVI in Support of Appeal to Administrative Review Board at 6-8, and cases cited therein.

Because we disagree that Kalkunte would have been laid off in September 2003 notwithstanding her whistle blowing, we disagree with DVI that her back pay should end there. There are two relevant dates. One is October 2004, when the last member of the in-house legal department was terminated and the department closed its doors, or December 2004, when DVI terminated the very last of its employees. *See* DVI Reply Brief to ARB, at 9, citing Bankruptcy Court's confirmation order. When damages are difficult to calculate, "uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party." *McCafferty v. Centerior Energy*, 1996-ERA-006, slip op. at 26-27 (Sec'y Sept 24, 1997). In this case, we vacate the ALJ's award on back and front pay, and bonus, and award Kalkunte lost wages through December 2004 at the rate of \$130,000 per year, less interim earnings, plus interest.

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 that she suffered." R. D. & O. at 65. Although we agree with DVI 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. Accordingly, we affirm it.

We also note that, as prevailing party, Kalkunte is entitled to costs, including reasonable attorney's fees, both before the ALJ and the ARB. The fees awards will be the subject of separate decisions.

CONCLUSION

Substantial evidence supports the ALJ's ruling that Kalkunte proved by a preponderance of the evidence that her protected activity was a contributing factor in her discharge. Therefore, the Respondents, DVI and APS, violated the SOX. Substantial evidence also supports the ALJ's holding that DVI and APS did not prove by clear and convincing evidence that they would have discharged Kalkunte had she not engaged in protected activity. Accordingly, DVI and APS did not avoid liability for violating the SOX. In that regard as well, we affirm the ALJ.

However, we modify the ALJ's recommended decision as to remedies. We vacate the ALJ's award on back and front pay, and bonus and award Kalkunte lost wages through December 2004 at the rate of \$130,000 per year, less interim earnings during that period, plus interest as provided under 26 U.S.C. § 6621(a)(2). We also affirm the ALJ's award of \$22,000 in compensatory damages.

Kalkunte's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, DVI and APS shall have 30 days from their receipt of the fee petition to file a response.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge²

WAYNE C. BEYER
Administrative Appeals Judge

² Chief Administrative Appeals Judge Douglass resigned from her position at the Administrative Review Board, effective January 17, 2009. However, she signed this decision before her resignation became effective. The decision was issued subsequently to allow Judge Transue to write separately.

Administrative Appeals Judge Oliver M. Transue dissents and writes separately:

My colleagues have decided that DVI and APS discharged Kalkunte, at least in part, because she informed the audit committee about improper activities and inquired into the status of the Arnold & Porter (A & P) investigation. In so deciding, they found that substantial evidence supported the ALJ's critical causation and pretext findings. They define substantial evidence as that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³ Then, citing *Universal Camera Corp. v. NLRB*, they write, "We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party and even if we 'would justifiably have made a different choice had the matter been before us de novo.'"⁴

The substantial evidence standard does indeed govern our review.⁵ And *Universal Camera* is the leading authority on what the term "substantial evidence" means. But the majority's definition of that term suggests that applying the standard is an almost mechanical exercise. That is, if more than a mere scintilla of evidence supports the ALJ's finding, we must accept that finding. But applying the substantial evidence standard is not so cut and dried as the majority's shorthand version implies.

In *Universal Camera*, the Supreme Court reviewed the legislative histories of the Administrative Procedure Act and the Taft-Hartley Act to determine the standard of proof to be applied when reviewing National Labor Relations Board decisions. At that time, the APA required that after reviewing the "whole record," a court must set aside agency decisions "unsupported by substantial evidence." The corresponding section of Taft-Hartley required that the Board's findings be "supported by substantial evidence on the record considered as a whole."⁶ The Court noted that its earlier attempts to define substantial evidence in *Consolidated Edison* ("more than a mere scintilla. It is evidence that a reasonable mind might accept as adequate to support a conclusion.") had resulted in "inevitably variant applications" and the assumption that the standard was met "when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings."⁷ Therefore, the Court clarified the standard:

³ Majority opinion at 6, citing *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The quoted language first appeared in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

⁴ 340 U.S. 474, 488 (1951).

⁵ See 29 C.F.R. § 1980.110(b).

⁶ *Universal Camera*, 340 U.S. at 477-487.

⁷ *Id.* at 477-478.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation [i.e., the APA and Taft-Hartley] definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. . . .

Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.^[8]

Like the ALJ, my colleagues have applied a too narrow canvassing of the record. Since my examination of the whole record reveals overwhelming evidence that supports findings contrary to the ALJ's, I dissent. I now turn to those findings and explain why the majority should not have accepted them.

A. The ALJ's Contributing Factor Findings

1. Direct Evidence

Kalkunte must prove by a preponderance of the evidence that her protected acts contributed to Toney's decision to terminate her employment on September 18.⁹ The ALJ first found that Kalkunte met her burden because Toney's "admission that the September 12 meeting hastened the inevitable decision to terminate Ms. Kalkunte," "together with his remarks, tone and demeanor" at the meeting, "constitute direct evidence" of Toney's wish to stop Kalkunte from participating or assisting in the A & P investigation.¹⁰

⁸ *Id.* at 487-488. See also *Dalton v. U.S. Dep't of Labor*, 58 Fed. App. 442, 445; 2003 WL 356780 (10th Cir. 2003) citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989) (noting that whether substantial evidence supports an ALJ's decision "is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.").

⁹ See *Platone*, slip op. at 14-16.

I quarrel with this finding for three reasons. First, Toney’s “admission” was not an “admission” at all. Toney did not “admit” that he retaliated against Kalkunte. He simply testified that the September 12 meeting “helped focus Ms. Clay and me on the lack of a role for Ms. Kalkunte in the organization, hastening our inevitable decision to terminate her.”¹¹

Second, Toney’s so-called admission, remarks, tone, and demeanor at the meeting cannot be characterized as “direct evidence” that he wanted to squelch Kalkunte’s efforts to participate and assist in the investigation. Direct evidence of retaliation is “smoking gun” evidence. It is evidence that conclusively links the protected activity to the adverse action. Such evidence must speak directly to the issue of discriminatory intent and may not rely on the drawing of inferences.¹² “A statement that can plausibly be interpreted two different ways - one discriminatory and the other benign - does not directly reflect illegal animus, and, thus, does not constitute direct evidence.”¹³ Toney’s remarks, tone, and demeanor do not speak directly to the issue of whether he retaliated against Kalkunte. Moreover, in crediting Kalkunte’s testimony that Toney was “clearly angry” at her during the meeting, the ALJ ignored her deposition testimony that, throughout her time at DVI after Toney arrived, their relationship was cordial. “I don’t believe we ever had cross words to say to each other.”¹⁴

Third, and most significantly, is the fact that the record contains overwhelming evidence from multiple witnesses that, far from trying to inhibit the A & P investigation, Toney did everything he could to encourage, aid, and hasten that investigation. Pursuant to the audit committee’s instruction, he facilitated the initial meeting between Kalkunte and the A & P investigators on August 22.¹⁵ He testified that on or about August 25 he set up an 800 number so that employees could anonymously call the investigators, and he took precautions to secure electronic files.¹⁶ Toney testified that he wanted the investigation to proceed as quickly as possible because persons with knowledge of wrongdoing were being terminated as part of the reduction in force (RIF). Plus, the investigation was going to identify persons who could be held financially liable to the

¹⁰ R. D. & O. at 40.

¹¹ CX 47, para. 36.

¹² *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 13-14 (ARB May 24, 2007).

¹³ *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002).

¹⁴ RX 64 (Kalkunte Deposition) at 247.

¹⁵ T. at 244-245.

¹⁶ *Id.* at 562-563.

bankruptcy estate. This, of course, would help creditors to recover.¹⁷ A speedy and reliable investigation was in Toney's best interests because the investigative findings would help him fulfill his duty to liquidate the DVI estate on the best possible terms for creditors.

Toney testified, on cross-examination, that he told Kalkunte at the September 12 meeting that he, too, was frustrated that the investigation was proceeding slowly and that she should be patient. He explained that since the bankruptcy court had not yet approved A & P's retention application, the investigators were wary of spending significant time lest they not get paid.¹⁸ Kalkunte, however, testified that Toney told her that "there is no benefit to the estate to have these improprieties looked into."¹⁹ And the ALJ, without explaining why, credited Kalkunte's testimony that Toney also told her that there was "no way in hell the estate would pay for Arnold & Porter's investigation." The ALJ found that this comment demonstrates that Toney was resisting the investigation and was retaliating against her protected efforts to participate.²⁰

But the ALJ, and the majority here, view Kalkunte's testimony in isolation and ignore voluminous, credible, and uncontradicted evidence that Toney did all he could to facilitate the investigation. Heller, the bankruptcy specialist from Latham & Watkins, the law firm DVI hired to navigate it through bankruptcy, testified that neither Toney nor anyone else interfered with anything concerning the investigation.²¹ According to Clay, Toney was "unwavering" in insisting that the investigation be conducted impartially and thoroughly and "did nothing to impede" A & P from interviewing employees and gathering information.²² Latham & Watkins's Richard Meller, who acted as DVI's general counsel during the bankruptcy proceedings, testified that Toney was "on the forefront of getting Arnold & Porter in here and making sure that they had the tools for their job, and to do their job and conveying to other DVI personnel that it is their job to cooperate."²³ Likewise, Jeffrey Bromme, one of the A & P investigators, stated that Toney "urged us to come up and interview people, accelerate the pace of our investigation and to, you know, keep moving along. He was very desirous that we keep at it." According to Bromme, Toney was concerned that the RIF could cause the

¹⁷ *Id.* at 567-569.

¹⁸ *Id.* at 249-251.

¹⁹ *Id.* at 299.

²⁰ R. D. & O. at 40.

²¹ Heller Deposition at 14.

²² T. at 644-645.

²³ Meller Deposition at 46.

investigators to lose track of potential witnesses, and Toney did not want “the investigatory trail to go cold.” Toney was “eager” to investigate and “fully cooperative.” Bromme did not encounter any “resistance” or “obstacles,” as Toney wanted the investigation to proceed “quicker” because time was “critical.”²⁴

Other record evidence buttresses a finding that, rather than trying to torpedo an investigation, Toney was very active not only in trying to secure bankruptcy court approval that A & P be retained to investigate the improprieties at DVI, but also when the A & P application was denied. On September 15, Toney emailed Meller and Heller regarding the status of the application to retain A & P. He wanted the lawyers to more fully explain in the application why a conflict prevented Latham & Watkins from acting as investigative counsel and thus the need to hire A & P. He also wanted to make sure the creditors committee was aware of the need to retain A & P so as to avoid the bankruptcy court appointing an examiner. He wrote, “We need to move this forward to secure the situation with the SEC.”²⁵ Eventually, however, the bankruptcy court denied the A & P application because of a conflict A & P had with Deloitte and Teusch, previously DVI’s accountant. The court appointed an examiner to take over A & P’s investigation. According to the examiner, R. Todd Neilson, Toney provided “invaluable assistance and support” and “complete cooperation.”²⁶

To sum up, Kalkunte’s version of the September 12 meeting, standing alone, cannot constitute substantial evidence in the face of the record as a whole. Kalkunte’s testimony about what Toney said at the September 12 meeting, how he said it, and how he acted is not direct evidence of retaliation for her protected activity in reporting the improprieties and wanting to assist or participate in the A & P investigation. Toney disputes Kalkunte’s account of what happened at that meeting. But even if her version were not contested, her testimony certainly does not conclusively link her protected activity to retaliatory animus. Nor does the record as a whole permit even an inference that Toney wanted to retaliate against Kalkunte by preventing, interfering, or otherwise inhibiting the investigation. In light of the overwhelming evidence to the contrary, my colleagues mistakenly conclude that substantial evidence supports the ALJ’s finding that Toney’s “admission,” tone, remarks, and demeanor demonstrate that Kalkunte’s protected activity contributed to her termination.

2. Circumstantial Evidence

I do not quarrel with the ALJ’s finding that the proximity in time between Kalkunte’s protected actions and her termination on September 18 is circumstantial

²⁴ Bromme Deposition at 57, 65, 98, 133-138.

²⁵ RX 21.

²⁶ RX 37.

evidence that her protected actions influenced Toney's decision.²⁷ But while a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive.²⁸ For example, if, as here, the employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.²⁹

The ALJ also found that lead bankruptcy lawyer Heller's September 10, 2:10 p.m. email to Toney is circumstantial evidence of animus. This is the email wherein Heller tells Toney: "Suggestion: have her get you a 'job description' for the next two weeks and have her update it weekly - where she thinks she can add value. You can then 'yes/no' it and tell her you will task her with anything beyond that. Might work."³⁰ Earlier the same day, at 8:47 a.m., Kalkunte had emailed Heller, among others, and copied Toney and Goldberg, among others, wherein, at the very last line, she wrote, "Bill [i.e., audit committee member Bill Goldberg] - I need to discuss the investigation with you when you have time." For the ALJ, Heller's suggestion that Toney assign Kalkunte work in addition to what she thought she could do to add value to the estate "left the impression" that Heller and Toney were conspiring to terminate Kalkunte because she wanted to talk to Goldberg about the investigation.³¹

But Heller did not make the decision to discharge Kalkunte. Toney did. Thus, Heller's feelings toward Kalkunte are not relevant here. Moreover, the record as a whole does not support the ALJ's "impression" that Heller was against Kalkunte. Heller, in fact, was sympathetic toward Kalkunte. During the early, hectic days of DVI's reorganization, Kalkunte was very busy. In response to an email that she sent that listed the current officers and directors for all of the DVI organizations, Heller replied, "how you holding up? Hang in there."³² And in an email he sent to Kalkunte less than two hours before the supposedly nefarious "yes/no . . . task her with anything" September 10 email, Heller wrote, "We all appreciate the frustration you, in particular, and all of us for that matter, have experienced recently. . . . That said, we are still trying to understand our 'place' and the attendant protocols. . . . Please continue to bear with us, if possible. If

²⁷ R. D. & O. at 46-47.

²⁸ *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

²⁹ *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

³⁰ CX 24.

³¹ R. D. & O. at 47.

³² CX 9.

you have any material or other information it appears we lack, please reach out to Rick, Joe, or me to share it. Thanks.”³³ These positive, encouraging communications that emphasized team-play certainly belie any “impression” that Heller was antagonistic toward Kalkunte.

Furthermore, the email that Kalkunte sent at 8:47 a.m. on September 10, the last line of which was directed to Goldberg, was first and foremost a request that “you [Toney], the board, and David Heller should send me an email setting forth the things that you do not want me to be involved in and I will refrain from reviewing any such information or making inquiries into those issues.”³⁴ This request reflected an exchange of emails the day before in which Kalkunte had requested that “someone at Latham” fill her in on debtor-in-possession financing and other lender issues. Toney had responded that she should consult only Meller or Joe Athanas (also from Latham & Watkins) on those issues.³⁵ Thus, when Heller emailed Toney at 2:10 after reading Kalkunte’s 8:47 a.m. email asking for instruction as to her duties, he was simply responding, albeit to Toney, about how to determine Kalkunte’s duties. Heller testified that his email was a suggestion that Toney ask Kalkunte to “let us know everything she thought she could do and give it to Mark [Toney] and Mark make an analysis of what she should or shouldn’t be doing” so that Toney could understand how Kalkunte could add value to the estate and so that Toney could tell her exactly what he did and did not want her to be doing.³⁶

The ALJ found that the text of Heller’s “yes/no . . . task her with anything” email was not in accord with his testimony since it did not “leave the impression” that Heller was trying to assist Toney to determine Kalkunte’s duties. Instead, because the email suggested that Toney might assign Kalkunte duties beyond those which she felt were adequate to assist the bankruptcy estate, it “leaves the impression” that Heller and Toney were conspiring to force Kalkunte out.

But, again, the record does not support the ALJ’s “impression.” As just explained, the record as a whole reveals that in her 8:47 a.m. email, Kalkunte asked Toney and Heller to send her an email that clarified her duties. Heller, a sympathetic partner with Kalkunte in the hectic early days of the DVI reorganization, responded to Kalkunte’s request. A reasonable, objective reading of the email and his testimony demonstrates that Heller suggested that Toney, Kalkunte’s boss, meet with Kalkunte, ask her to describe her job duties, and update that description as to how she could be more valuable. Heller further suggested that Toney could then approve what Kalkunte had listed as her duties, or he could tell her that she had to do something further. Again, Toney was Kalkunte’s

³³ CX 24-1.

³⁴ CX 24(1)-CX 24(2).

³⁵ CX 24(2)-CX 24(3).

³⁶ Heller Deposition at 20.

boss. Certainly he had the authority to “task” Kalkunte with work in addition to what she considered to be sufficient to help DVI.

The ALJ’s finding that Heller’s email constitutes circumstantial evidence of retaliation is based on mere “impressions,” not hard evidence. And the ALJ did not discuss, much less weigh, evidence that contradicts his “impressions.” Therefore, since substantial evidence in the whole record does not support the ALJ’s “impressions,” the majority should not have accepted them.

B. The ALJ’s Pretext Findings

If Kalkunte proved by a preponderance of the evidence that the reasons Clay and Toney gave for discharging her were false, that is, they were a pretext for retaliating because of protected activity, she might prevail.³⁷ The ALJ found that she proved pretext. But like the ALJ’s findings pertaining to direct and circumstantial evidence of retaliation, his three pretext findings are not supported by substantial evidence in the record as a whole.

1. ALJ: DVI did not RIF Kalkunte.

DVI asserts that it terminated Kalkunte on September 18, 2003, as part of a necessary reduction in force (RIF) following the bankruptcy filing. The ALJ found that this was a pretext for several reasons. He found that Kalkunte was the only employee discharged in September, and a “RIF of one” supports an inference of pretext. Though DVI claimed that another employee, Rebecca Kolbe, had been discharged as part of the RIF (i.e. “rified”) in September, the ALJ found that Kolbe had voluntarily resigned. He also pointed to evidence that senior managers told Kalkunte in August that DVI would need its lawyers more than ever and not to worry about a lay-off. Nevertheless, because Kalkunte was terminated, but another in-house lawyer was not rified until April 2004, the ALJ was suspicious. Furthermore, the ALJ found that Nancy Cascioli, DVI’s Human Resources manager, did not provide Kalkunte with “the normal letter” she gave to other employees notifying them of the RIF. These facts, for the ALJ, tended to show that Kalkunte was not discharged as part of the RIF.³⁸ But once again, substantial evidence does not support these findings.

First of all, Kalkunte was not the only employee terminated in a “RIF of one” during a particular month. The record contains uncontested evidence that shows that one-person RIFs also occurred in October and December 2003.³⁹ Second, despite Kolbe’s

³⁷ See *Allen v. Stewart Enters., Inc.*, ARB 06-081, ALJ Nos. 2004-SOX-060, 061, 062 (ARB July 27, 2006) citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

³⁸ R. D. & O. at 48-49.

³⁹ RX 62.

testimony that she considered her separation from DVI on September 15 to have been a “termination without cause,” not a resignation,⁴⁰ and uncontested evidence that indicates that Kolbe was riffed on September 15,⁴¹ the ALJ nevertheless found that Kalkunte was the only person that DVI riffed in September 2003.⁴²

Third, Rich Miller, then President of DVI Financial, was the “senior management” who told Kalkunte not to worry because DVI would need its in-house lawyers more than ever.⁴³ But Miller was part of the management group that engaged in financial records manipulation and was gone by mid-October. Though Miller had been asked to, and did, recommend to Toney who should be riffed, the ALJ’s citing Miller’s opinion that in-house lawyers would not be riffed is not particularly relevant because, as Kalkunte had to have known, Miller did not have authority to determine who would be riffed. Toney did.

Finally, the record is somewhat confusing as to what Cascioli was referring to when she testified that she did not give Kalkunte the “normal letter” that notified employees they were being riffed.⁴⁴ Cascioli did in fact prepare and sign, and Kalkunte did receive, a “Personnel Action Notice” informing her that she had been riffed.⁴⁵ If Cascioli (and the ALJ) are referring to some other “normal letter” informing employees they had been riffed, such a letter is not in the record. More important still is the fact that Cascioli testified that not only did she not prepare this “normal letter” for Kalkunte, but she did not do so for Kolbe either, thus refuting a finding that DVI treated Kalkunte differently.⁴⁶

2. ALJ: Though Kalkunte’s role had become redundant, the fact that DVI later transferred another attorney into Kalkunte’s position indicates pretext.

The ALJ noted that DVI’s “alleged legitimate, non-discriminatory reason for terminating Ms. Kalkunte was that her role had become largely redundant, and there was no longer any work for her to do at DVI post-bankruptcy.” According to the ALJ, this

⁴⁰ Kolbe Deposition at 25.

⁴¹ RX 62.

⁴² R. D. & O. at 48-49.

⁴³ T. at 294.

⁴⁴ Cascioli Deposition at 142.

⁴⁵ RX 30.

⁴⁶ Cascioli Deposition at 142.

reason is a pretext because in January 2004, Toney “replaced” Kalkunte with in-house attorney Robert DeCandia and told DeCandia to handle any items that might “fall through the cracks” as a result of Ms. Kalkunte’s termination.”⁴⁷

The problem with this finding is that DVI did not allege or argue that it terminated Kalkunte because her role had become redundant and that there was no longer work for her to do. Rather, DVI presented evidence and argued that it discharged Kalkunte as part of a necessary, significant RIF.⁴⁸ Furthermore, the record does not support a finding that Kalkunte did not have work to do. Neither Toney nor Clay testified that Kalkunte had no work to do. In fact, Toney instructed Clay to ask Kalkunte for a list of her work responsibilities. According to Clay, she asked for such a list but never received it. Even so, Clay herself conducted a review of Kalkunte’s duties and reported what she found to Toney.⁴⁹

Therefore, the record is clear that Kalkunte had work to do. But, as Toney testified, the “value that we were receiving was not significant enough to the estate to keep Ms. Kalkunte on.” Toney made this decision after consulting with Latham & Watkins attorneys Athanas, Meller, and Heller.⁵⁰ Athanas told Toney that his opinion of Kalkunte was “not particularly high” because, in her role in assisting the bankruptcy attorneys during a very important potential financing transaction, she had told him that a certain asset was unencumbered when in fact it was encumbered.⁵¹ Heller told Toney that when his lawyers needed items that internal counsel would normally provide right away to outside counsel, Kalkunte was not providing those items, and, therefore, Latham & Watkins was not relying on her.⁵² Likewise, Meller informed Toney that Kalkunte was not adding value because she “doesn’t seem to have the command of the facts we need . . . so it is easier to go do it ourselves.” He was getting information from Kalkunte that was “just plain wrong and that really scares me because we have such limited data that we know they are wrong, how could she not know they are wrong and she is still sending them to us.” Therefore, he told Toney that Latham & Watkins attorneys would have to do the work he hoped Kalkunte could have done.⁵³ In short, Kalkunte was supposed to

⁴⁷ R. D. & O. at 49-50.

⁴⁸ T. at 527-557; RX 30; DVI Financial Services, Inc.’s Brief in Support of Proposed Findings of Fact and Conclusions of Law at 15-21.

⁴⁹ T. at 252-253, 541, 648-649.

⁵⁰ T. at 552.

⁵¹ Athanas Deposition at 8-11.

⁵² Heller Deposition at 16.

⁵³ Meller Deposition at 11-15.

be assisting the Latham & Watkins bankruptcy lawyers. She was rified not because she had no work to do, but because she was not performing the work she was expected to perform. Thus, since the record does not support a finding that Kalkunte's job had become redundant and that she had no work to do, that finding cannot be the premise for the ALJ's pretext finding.

Moreover, Kalkunte did not prove by a preponderance of the evidence, as she must, that DeCandia "replaced" her and therefore her position was not redundant. The record demonstrates only that DeCandia was officially transferred from one of DVI's business units ("Executive") to the Legal Department, was given the same title Kalkunte had, did post-bankruptcy document retrieval and asset assessments that Kalkunte had not been able to do, and did work that might "fall between the cracks" because of Kalkunte's absence. A fair reading of this evidence can support no more than a finding that DeCandia took on some unknown quantity of work that Kalkunte used to do.

3. ALJ: DVI witnesses testified that "performance" played no role in Toney's decision to RIF Kalkunte, yet DVI presented "a great deal of testimony" about her "performance" problems. This "inconsistent post hoc explanation" for the decision to terminate Kalkunte is evidence of pretext.

The ALJ cites Kalkunte's hearing testimony that on the day she was terminated and met with Clay and Cascioli, Clay told her that her termination "had nothing to do with [her] performance and that it was part of the continuing risk [sic] that had commenced on August 25th."⁵⁴ The ALJ also cites Cascioli's deposition testimony that Kalkunte's "performance played no role" in her termination. But Cascioli's deposition indicates only that Clay told her that she, Clay, would be informing Kalkunte about the termination. Cascioli did not remember what Clay told her was the reason.⁵⁵ In addition, the ALJ cites Clay's OSHA certification as proof that "performance played no role." This document, however, says nothing about "performance," but only that Clay told Kalkunte that she was rified because her position was being eliminated.⁵⁶ Thus, the record reveals only that according to Kalkunte, one DVI witness, Clay, told Kalkunte that "performance" played no role in her termination.

To further support his finding, the ALJ points to Toney's OSHA certification as evidence that Toney claimed that he did not terminate Kalkunte for "performance."⁵⁷ In that document, Toney certified that he met with Kalkunte on Sept. 12 to discuss her repeated inquiries about her bonus, her improperly contacting attorneys on the Unsecured

⁵⁴ R. D. & O. at 50; T. at 304.

⁵⁵ Cascioli Deposition at 144; R. D. & O. at 50.

⁵⁶ CX 48, para 22; R. D. & O. at 50.

⁵⁷ R. D. & O. at 50.

Creditors Committee about the bonus, and her meddling in an issue that did not pertain to her.⁵⁸ Toney certified that he did not later terminate her because of these incidents.⁵⁹

But since the ALJ characterizes those incidents as “*performance* problems and interpersonal issues,” he would have us understand that Toney certified that he did not terminate Kalkunte for “performance.”⁶⁰ The ALJ then goes on to quote part of Toney’s hearing testimony where, after explaining that Athanas and Meller had informed him about Kalkunte’s deficiencies in helping the bankruptcy lawyers, Toney said, “Her performance or lack thereof or [sic] the support of the bankruptcy case obviously comes into the decision making as it does with every employee.”⁶¹ Thus, since Toney here testified that “performance” did play a role in his decision to RIF Kalkunte, the ALJ found that DVI offered inconsistent reasons for terminating her, and that this amounts to pretext.⁶²

Even accepting Kalkunte’s uncorroborated testimony that Clay told her that “performance,” whatever that meant, played no role, the record as a whole does not support the ALJ’s pretext finding because Toney’s testimony about Kalkunte’s “performance” was not about the incidents the ALJ termed “performance problems and interpersonal issues.” Toney testified that he terminated Kalkunte because the Latham & Watkins lawyers had told him about their experiences with her, and he had concluded that she did not “add value” to the estate. Clearly, the “performance” Toney was referring to was Kalkunte’s inability to help the outside bankruptcy lawyers and her serious mistake pertaining to the encumbered asset.⁶³ Therefore, the ALJ’s pretext finding cannot stand because Toney’s certification that he did not terminate Kalkunte because of the three incidents is not inconsistent with his testimony that he decided to terminate her because her performance in carrying out her job duties was not adding value to the estate.

C. Conclusion

The entire record herein conclusively demonstrates that Kalkunte did not prove by a preponderance of the evidence that DVI and APS violated the SOX. Simply put, the

⁵⁸ CX 47, para 20-29; T. at 541-546.

⁵⁹ CX 47, para 35.

⁶⁰ R. D. & O. at 50 (emphasis supplied).

⁶¹ T. at 627.

⁶² R. D. & O. at 51.

⁶³ T. at 552.

evidence that the ALJ and my colleagues rely upon is not substantial. The record contains no direct evidence that Toney retaliated. The record contains overwhelming evidence that contradicts the ALJ's finding that Toney's words, tone, and demeanor at the September 12 meeting demonstrate retaliatory animus. Nor does the record support the ALJ's "impressions" that Heller's September 10 email proves retaliatory intent. The same is true for the ALJ's three pretext findings. Therefore, I would reverse the ALJ's recommended decision and dismiss Kalkunte's complaint since substantial evidence in the whole record does not support that decision.

OLIVER M. TRANSUE
Administrative Appeals Judge