In the Matter of:

RICHARD BARRETT,

COMPLAINANT,

v.

e-SMART, TECHNOLOGIES, INC.,

RESPONDENT.

ARB CASE NOS. 11-088
12-013

ALJ CASE NO. 2010-SOX-031

DATE: April 25, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Patricia Douglass, Esq., Great Falls, Virginia

For the Respondent:
L. Anthony George, Esq., Michael R. MacPhail, Esq.; *Holme Roberts & Owen, LLP*; Denver, Colorado

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson Reuters 2009). Richard Barrett alleges that his former employer, e-Smart Technologies, Inc. (e-Smart), constructively discharged him from employment because he reported his opposition to the dissemination of what he believed was a misleading Form 10-K annual report that was to be filed with the Securities and Exchange Commission (SEC). In a Decision and Order issued September 9, 2011 (D. & O.), the Administrative Law Judge (ALJ)

held that Barrett's internal complaint about the 10-K draft[1] was protected activity and contributed to his constructive discharge. In a separate opinion, the ALJ awarded damages and attorney's fees (D. & O. Fees). e-Smart appealed both the ALJ's decision on the merits (ARB No. 11-088) and the ALJ's award of attorney's fees (ARB No. 12-013). We consolidated the appeals for purposes of Administrative Review Board (ARB or Board) review and decision. We find the ALJ's decisions to be thorough, in accordance with law, and well supported by detailed findings of fact. Having reviewed the evidentiary record as a whole, and upon consideration of the parties' briefs on appeal, we summarily affirm both decisions.

BACKGROUND

e-Smart hired Barrett as a litigation consultant in November 2006. D. & O. at 5-6. Barrett's job was to collect technical evidence to support e-Smart's litigation position against former employees.[2] As part of this review, he interviewed current and former employees of e-Smart and surveyed e-Smart's development of smart card technology. *Id.* at 6. While working as a consultant, Barrett observed the company's financial weakness and inability to pay its employees (including Barrett) in a timely fashion. *Id.* at 6-7; Hearing Transcript (Tr.) at 283-86.

On May 1, 2007, e-Smart Chief Executive Officer (CEO) and Chief Financial Officer (CFO), Mary Grace, hired Barrett as Chief Operating Officer (COO). D. & O. at 7. Under the agreement, Barrett's salary was $377,000 with a performance bonus of up to 150 percent of base pay in stock options and benefits.

While reviewing e-Smart's operations, Barrett implemented a restructuring of the engineers' salaries. He cut base pay and added performance pay. As a symbol of solidarity, he recommended the same system for his own pay. Under the plan, his new base pay was $245,000. *Id.* at 9. If the company met certain performance goals, the employees could earn back the difference. *Id.*

In early July 2007, Grace complimented Barrett on his performance as COO. *Id.* at 10. On July 30, 2007, Grace asked Barrett to rewrite a portion of e-Smart's 2006 annual 10-K filing with the SEC. *Id.* at 11. Barrett found many problems with the draft 10-K. He felt the draft contained significant misrepresentations regarding e-Smart's financial position as well as the status of the firm's technological development. On August 12, 2007, he made a series of edits. He disclosed e-Smart's operating loss accumulated since its founding. Barrett also made many edits to the 10-K draft concerning the status of the smart card technology, noting future development goals and toning down the prototype's capabilities. *Id.* at 12-13.

Because his changes were so significant, e-Smart management hesitated to incorporate them all at once. *Id.* at 14. Maranda Fritz, outside counsel, was worried that including all of this

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[1] Because e-Smart is a small business, the ALJ noted that the form was 10-KSB. As the ALJ referred to the filing as 10-K, and the parties do not object, we too will refer to the filing as the 10-K.

[2] D. & O. at 6. e-Smart was suing its former founders for alleged theft of trade secrets.

information might make investors feel that past 10-Ks were untruthful. Grace was unwilling to incorporate Barrett's changes. *Id.* On August 15, 2007, Fritz recommended against disseminating the draft. Barrett responded that he wanted his name taken off the draft. On August 16, 2007, Fritz circulated another draft of the 10-K without many of Barrett's deletions and edits. *Id.*

Shortly thereafter, "Grace abruptly began a series of actions that led in two months' time to the end of Complainant's employment with e-Smart." *Id.* On August 22, 2007, Grace announced a staffing change in the parent company, IVI Smart, in which the COO of that company assumed all of Barrett's technology duties at e-Smart. *Id.* at 15. Just ten days earlier, Grace had assigned Barrett with the tasks that were now being assigned to another. *Id.* Over the next several weeks, Grace refused many of Barrett's calls and limited their communication to ministerial tasks. *Id.* at 16-19.

Prior to the 10-K revisions, Barrett had paid himself on the 1st and 15th of each month out of the company's operations account to which he had authorized access. *Id.* at 8. On August 22, 2007, Russo, e-Smart's in-house accountant, instructed Barrett to close the e-Smart account Barrett had been using to pay for salaries and expenses. *Id.* at 16. After Barrett closed the account, Grace and e-Smart had to pay Barrett out of another account. Barrett's September 1, 2007 paycheck was a few days late, and his September 15, 2007 check was several days late. Barrett did not receive an October 1 paycheck. Grace claimed this was due to error.

On October 4, 2007, Barrett e-mailed Grace and claimed that he felt he was being forced out of the company and asked for a meeting or further discussion on his separation from the company. *Id.* at 17. Grace responded with assurances of future communication. CX-23. Grace did not return the call as indicated. Barrett continued his reduced tasks. Barrett did not receive a paycheck on October 15, 2007. *Id.* at 19. On October 17, 2007, Barrett sent an e-mail to Grace entitled "Resignation" stating that she had constructively discharged him and identifying the factors establishing such discharge. Fritz responded that they were not accepting his resignation and denied the constructive discharge allegation. Fritz responded on Grace's behalf and informed Barrett that his checks were in the mail. *Id.* e-Smart never sent the checks. *Id.* at 20.

On January 15, 2008, Barrett mailed a complaint to OSHA, which it received on January 17, 2008. *Id.*; CX-33. OSHA investigated Barrett's complaint and concluded on February 26, 2010, that e-Smart violated SOX's whistleblower protection provisions. CX-34. OSHA ordered reinstatement, back wages, and a bonus. e-Smart requested a hearing before the Office of Administrative Law Judges. The ALJ assigned to the case held a four-day hearing and ruled in Barrett's favor. The ALJ found that Barrett engaged in protected activity and that the protected activity contributed to his constructive discharge. The ALJ further held that e-Smart failed to prove that it would have constructively discharged Barrett absent Barrett's protected activity. The ALJ awarded damages and attorney's fees. e-Smart appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012). The Board reviews an ALJ's factual findings to determine whether they are supported by substantial evidence.[3] The ALJ's legal conclusions are reviewed de novo.[4] The Board generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."[5]

DISCUSSION

SOX Section 1514A(a) provides whistleblower protection for employees of publicly traded companies who report certain acts that they reasonably believe to be unlawful. 18 U.S.C.A. § 1514A(a). To prevail in a SOX proceeding, an employee must prove by a preponderance of the evidence that he: "(1) engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against . . . him; and (3) the protected activity was a contributing factor in the adverse personnel action." *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 10 (ARB May 25, 2011). If the employee proves these elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of the [protected] behavior." 29 C.F.R. § 1980.104(c) (2009); *see also Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009).

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[3] 29 C.F.R. § 1979.110(b). Substantial evidence is "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)).

[4] *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (*citing Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)).

[5] *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

1. Timeliness of Barrett's Complaint with OSHA

When this case arose, an employee alleging retaliation under SOX was required to file his or her complaint with OSHA "not later than 90 days after the date on which the violation occurred."[6] The OSHA regulations specified at the time that:

> [w]ithin 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant) an employee who believes that he or she has been discriminated against in violation of the Act may file . . . a complaint alleging discrimination . . . .

29 C.F.R. § 1980.103(d).

The ALJ found that constructive discharge occurred on October 20, 2007, or on October 17, 2007, at the earliest. D. & O. at 22. To determine the timeliness of Barrett's complaint, the ALJ obtained the envelope from OSHA in which Barrett had mailed his complaint, which showed a postmark date of January 15.[7] Based on the January 15th date, the ALJ found that Barrett timely filed his complaint because the regulations implementing SOX designate the postmark date as the filing date with OSHA when the complaint is submitted by mail. *Id.* at 22. *See* 29 C.F.R. § 1980.103(d).

On appeal, e-Smart argues that Barrett's complaint was not timely filed because the substantial evidence of record does not support the ALJ's finding of constructive discharge on October 17 or October 20 and that, to the extent Barrett was constructively discharged (which e-Smart contends is not the case), the "triggering event" that began the running of the 90-day period for the constructive discharge claim occurred on or before October 15. Additionally, e-Smart contends that the appropriate filing date for the OSHA complaint was January 17, 2008, the date OSHA received Barrett's complaint.

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[6] 18 U.S.C.A. § 1514A(b)(2)(D). Sections 922(c) of the Dodd-Frank Act, P.L. 111-203 (July 21, 2010), amended Section 806 of SOX, 18 U.S.C.A. § 1514A, to lengthen the time for filing a complaint to 180 days.

[7] CX-33; CX-144. e-Smart claims that it was error for the ALJ to ask OSHA for the postmarked envelope and that Barrett himself should have entered this into evidence. Pet. for Rev. at 5. The ALJ ruled that there was nothing prejudicial about requesting and admitting the envelope into evidence. D. & O. at 3 n.4. e-Smart claims that the ALJ's advocacy deprived e-Smart of the ability to cross-examine Barrett on the postmarked envelope. Pet. for Rev. at 5. Nothing prevented the Respondent from cross-examining Barrett regarding when he mailed the letter, and we agree with the ALJ that introducing the envelope into evidence did not prejudice the Respondent. Furthermore, the postmarked envelope was a matter of public record of which the ALJ could have taken official notice. 29 C.F.R. § 18.201.

Upon review of the evidentiary record, we conclude that the substantial evidence of record supports the ALJ's finding that Barrett's constructive discharge occurred on October 17, 2007. Furthermore, as a matter of law the ALJ was correct in relying upon the January 15, 2008 mailing postmark date as the date upon which Barrett filed his OSHA complaint. Barrett's complaint was thus filed within the ninety-day period required at the time under SOX for filing a whistleblower complaint. Accordingly, we hold that Barrett's complaint was timely filed with OSHA.

2. Protected Activity

The ALJ held that Barrett engaged in protected activity because he reported misstatements and omissions in the 10-K draft that he reasonably believed would mislead investors by distorting the company's current capabilities. D. & O. at 23-30.

On appeal, e-Smart claims that the ALJ erred in finding that Barrett engaged in protected activity. Pet. for Rev. at 5. According to e-Smart, the ALJ's finding that Barrett had an objectively reasonable belief is not supported by substantial evidence. In support, e-Smart gives several reasons why Barrett's reporting was not reasonable. Pet. for Rev. at 5, 6-8. e-Smart further claims that Mr. Saito was the one with the technical ability to evaluate the smart card technology for purposes of the 10-K. e-Smart claims that Barrett had only been working at e-Smart for ninety days but others such as Saito had much more experience working with the e-Smart technology. e-Smart Br. at 9-10.

e-Smart further claims that Barrett's complaints about the 10-K were not protected because they raised concerns about future SOX violations. According to e-Smart, a SOX complainant's beliefs must involve an actual violation occurring at the time the employee raises the concern. Pet. for Rev. at 6.

As to e-Smart's factual objections, we hold that the ALJ's finding of protected activity is supported by substantial evidence. Furthermore, contrary to e-Smart's position, reporting an actual violation is not required. A complainant can engage in protected activity when he reports a belief of a violation that is about to occur or is in the stages of occurring. *Sylvester*, ARB No. 07-123, slip op. at 16. We find, as did the ALJ, that Barrett engaged in protected activity.[8]

[8] The ALJ harmlessly erred in using the "definitively and specifically" test. D. & O. at 25. An employee only needs to show a reasonable belief of a violation to engage in protected activity. *Sylvester*, ARB No. 07-123, slip op. at 17; *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013) (giving the ARB's adjudication *Chevron* deference, citing *United States v. Mead Corp*. 533 U.S. 218 (2001)). Furthermore, an employee complainant does not need to allege elements of anti-fraud laws such as materiality or scienter. *Sylvester*, ARB No. 07-123, slip op. at 21.

3. Change of Job Duties and Constructive Discharge

Barrett alleged that he suffered several adverse actions including removal of job duties, alienation, and loss of pay. Barrett argued that this amounted to constructive discharge. Barrett also complains of post-discharge retaliation. D. & O. at 20.

The ALJ conducted a thorough analysis of the applicable law and based his finding of constructive discharge on a wide pattern of aggravating events. *Id.* at 30-37. The ALJ held that several incidents including removal of job duties and failure to reinstate salary alone would not be sufficient to create conditions supporting constructive discharge. But taken together with the failure to pay Barrett timely in September and not at all for the month of October, e-Smart's actions demonstrate a "wider pattern of aggravating factors" which satisfy the constructive-discharge standard. *Id.* at 32-37.

e-Smart states that all of the events constituting constructive discharge occurred before October 15 and that his complaint was filed more than ninety days thereafter. e-Smart contends that the ALJ erred because a party alleging constructive discharge cannot rely on events that occurred more than ninety days prior to filing the complaint. Pet. for Rev. at 9. e-Smart claims there are several reasons why Barrett did not receive his pay besides constructive discharge: those relating to e-Smart's lack of money and bad working conditions. Pet. for Rev. at 11-12. Further, e-Smart claims that failure to pay alone does not constitute constructive discharge. Pet. for Rev. at 10; e-Smart Br. at 18.

We conclude that the ALJ correctly held that non-discrete conduct outside the statute of limitations can be relied upon when the earlier conduct only became actionable once other conduct occurring within the limitations period occurred. *Cf. Nat'l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101 (2002).

We affirm the ALJ's finding that e-Smart constructively discharged Barrett. *See Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011); *Wallace v. City of San Diego*, 479 F.3d 616 (9th Cir. 2007).

4. Causation

The ALJ held that e-Smart's adverse actions followed closely on his reporting concerns about the 10-K draft.

On appeal, e-Smart claims that the ALJ applied the wrong causation standard. According to e-Smart, the ALJ applied the prima facie inference rather than a standard of proof. Pet. for Rev. at 13-14. In addition, e-Smart argues that the ALJ erred in finding the failure to pay Barrett a factor in establishing retaliatory constructive discharge because other critical workers also were not getting paid. Pet. for Rev. at 12; e-Smart Br. at 18-19; CX-22.

We find that the ALJ's findings of facts are supported by substantial evidence. Within a week of his protected activity, Grace began removing his duties and alienating him. Within a couple more weeks, e-Smart began delaying and withholding payment of wages.

We also conclude that the ALJ correctly applied SOX's "contributing factor" causation standard. While the ALJ may have been loose with the language by incorporating OSHA's prima-facie-case framework,[9] the standard that the ALJ actually applied satisfied that required to prove causation before an ALJ.[10] It is clear that the ALJ applied a "contributing factor" standard of proof and not merely an inference of causation. The ALJ, for example, did not find that temporal proximity alone satisfied causation. The ALJ held that temporal proximity in conjunction with e-Smart's pretext and behavior with other technology employees shows "that [Barrett's] protected activity was a contributing factor in e-Smart's actions against [him]." D. & O. at 39.

5. Clear and Convincing Affirmative Defense

The ALJ also held that e-Smart failed to show that it would have constructively discharged Barrett in the absence of his protected activity concerning the 10-K filing. The ALJ reasoned that e-Smart put forth weak evidence and failed to call witnesses with first-hand knowledge. e-Smart did not call Grace, Fritz, or Russo – the key e-Smart players with personal knowledge of the relationship between Barrett, e-Smart, and Grace. *Id.*

On appeal, e-Smart argues that the ALJ improperly drew an adverse inference from e-Smart's failure to offer evidence from the persons most knowledgeable about Barrett's circumstances. Pet. for Rev. at 14-15. The ALJ did not err in drawing a negative inference from Respondent's failure to call critical witnesses within its control. *See Underwriters Labs., Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) ("[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.").

In any event, independently of any adverse inferences, the ALJ found that e-Smart's evidence fell short of its burden of proving by clear and convincing evidence that it would have taken the adverse actions against Barrett absent his protected activity. The ALJ explained at length why e-Smart's justifications for its adverse actions were lacking in credibility and otherwise insufficient to sustain its burden of showing that it would have taken adverse action in the absence of Barrett's protected activity. D. & O. at 39-42. We uphold those findings.

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[9] *See* 29 C.F.R. § 1980.104(e).

[10] *See Kester v. Carolina Power & Light Co*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-8 (ARB Sept. 30, 2003) ("[W]e continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried.").

6. Damages

The ALJ awarded back pay and interest in the amount of $1,223,626.15, based on Barrett's entitlement to an annual salary of $377,000. The ALJ also awarded Barrett the option rights to buy 10 million shares of e-Smart common stock with the ability to exercise those options as if his last day of employment were the date of the ALJ's Order, September 9, 2011.[11] *Id.* at 45.

On appeal, e-Smart claims that the ALJ erred in awarding back pay at the higher rate of pay and that Barrett had no contractual or statutory right to the annual rate of $377,000. Pet. for Rev. at 16. e-Smart states that the pay reduction was a discrete discriminatory act that Barrett is barred from challenging because he failed to timely challenge it. Pet. for Rev. at 17. This is a mischaracterization of the issue. The pay reduction was not alleged as a discrete discriminatory act – it was simply a circumstance relevant to determining sufficient damages. The period of ninety days is not relevant for purposes of determining damages for victims of a hostile work environment (or constructive discharge). SOX's make-whole remedy applies to the proven damages for actionable incidents incurred following the protected activity. *See Nat'l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101, 119 (2002) ("timeliness requirement does not dictate the amount of recoverable damages"). The protected activity took place in mid-August. Following this protected activity, a series of escalating non-discrete adverse events occurred, eventually resulting in a cause of action on or around October 17, 2007. When e-Smart took away his duties in retaliation for his internal reports concerning the 10-K draft, it took away Barrett's ability to earn the full salary for which he was initially hired. The ALJ did not err in using Barrett's original salary of $377,000 to effectuate the requisite "make whole" remedy. 18 U.S.C.A. § 1514A(c)(1).

7. Attorney's Fees

The ALJ awarded attorney's fees and costs. e-Smart appeals the ALJ's award of attorney's fees. As noted above, we consolidated the attorney's fees appeal with the merits appeal.

Barrett requested the award of attorney's fees based on an hourly rate of $250.00 per hour. The ALJ applied the Laffey Matrix and awarded Barrett's counsel, Patricia Douglass, Esq., fees and costs in the amount of $94,708.65. Barrett also sought fees in the amount of $32,218.85 for work performed by two other law firms for this case. D. & O. Fees at 1. The ALJ awarded $2,250 in fees to Lisa E. Aguiar, Esq. The ALJ denied fees to the Shartsis Friese law firm. D. & O. Fees at 10.

On appeal, e-Smart claims that Douglass should be denied fees that Barrett has not actually paid. Thus, e-Smart claims that the fees award should be capped at $10,000, which

[11] We deem the Respondent to have waived any objection to the option rights award as it did not challenge this award on appeal. The ALJ's ruling on this matter is final. 29 C.F.R. § 1980.110(a).

corresponds to the amount that Barrett actually paid "out of pocket." e-Smart Fees Br. at 3. e-Smart claims that Douglass failed to present any satisfactory evidence of the prevailing rate in San Francisco for legal services on a SOX whistleblower claim or to show that Douglass had any experience working on SOX whistleblower claims. e-Smart claims that the Ninth Circuit has been critical of using the Laffey Matrix in a market 3,000 miles away from D.C. e-Smart claims that the ALJ erred in awarding the amount of $250 for the entire billing period because Douglass charged only $200 for the first ten months of representation. e-Smart Fees Br. at 4. e-Smart also claims that Douglass's billing invoices are vague and the amount of the award should be reduced to $47,694.50 for the work described with specificity. e-Smart Fees Br. at 5.

Douglass responds that her fee is much less than the rate corresponding to San Francisco. Douglass noted that the San Francisco market has a 35% premium as compared with a 24% premium for the D.C. market (on which the Laffey Matrix is based). Douglass Fee Br. at 2 n.3. Douglass claims that the Supreme Court has not required specific expertise on a particular statute and has considered general expertise on complex litigation sufficient. Douglass Fee Br. at 3. Douglass claimed that the ALJ parsed the fee petition and determined that the claimed work was reasonable and described with reasonable specificity.

We find the ALJ's fee award supported and reasonable. We reject e-Smart's claim that fees should match costs or the rates actually billed to the clients. To the contrary, the hourly rate is determined by reference "to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (rejecting an argument that attorney's fees for nonprofit legal service organizations should be based on cost); *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286 (1989). Here, the ALJ found that the forum community was San Francisco. Further, we do not find any lack of specificity in Douglass's billing that requires reducing the hours billed. In *Pillow v. Bechtel Constr. Inc.*, ARB No. 97-040; ALJ No. 1987-ERA-035 (ARB Sept. 11, 1997), we reduced the total hours for lack of specificity. We do not find the same degree of lack of specificity in this case.

8. The Respondent's additional grounds for appeal

e-Smart claims that it should be granted a new hearing based on trial counsel's incompetence. Pet. for Rev. at 17-18. At the hearing, Barrett entered notations on his copy of exhibits and testified from the exhibits with the notations. e-Smart's former attorney failed to promptly identify this conflict to the judge. e-Smart claims that the ALJ erred in refusing to reopen the record and that it failed to get a full deposition in discovery. We review the ALJ's holdings concerning the depositions and the notations under the abuse-of-discretion standard. We feel that the ALJ adequately handled any prejudice concerning the notations on the exhibits. We also find that the ALJ seemed fair in attempting to facilitate the additional deposition of Saito and the inclusion of the full deposition in the record. The ALJ did not abuse his discretion.

CONCLUSION

The ALJ held that e-Smart violated SOX's employee protection provisions when it retaliated against Barrett for engaging in protected activity, and accordingly awarded damages and attorney's fees. We find that the ALJ's factual findings are supported by substantial evidence and that his legal conclusions, except where otherwise noted, are in accordance with applicable law. We thus affirm the ALJ's Decision and Order issued September 9, 2011, awarding Barrett damages. We also affirm the ALJ's Order of November 3, 2011, awarding attorney's fees.

As the prevailing party, Barrett is also entitled to costs, including reasonable attorney's fees, for legal services performed before the ARB. Barrett'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 with the ARB, with simultaneous service on opposing counsel. Thereafter, e-Smart shall have 30 days from their receipt of the fee petition to file a response.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge