



**In the Matter of:**

**DINAH R. GUNTHER,**  
**COMPLAINANT,**

**v.**

**DELTEK, INCORPORATED,**  
**RESPONDENT.**

**ARB CASE NOS. 13-068,**  
**13-069**

**ALJ CASE NO. 2010-SOX-049**

**DATE: November 26, 2014**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainants:*

**Dinah R. Gunther, *pro se*, Spring Hill, Florida**

*For the Respondent:*

**Charles B. Wayne, Esq; *DLA Piper LLP (US)*, Washington, District of Columbia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge***

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (Thomson/West Supp. 2014), as amended, and implementing regulations, 29 C.F.R. Part 1980 (2013). Dinah R. Gunther filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging retaliation by her employer, Deltek, Incorporated (Deltek or company), in violation of SOX. OSHA dismissed the complaint.

Gunther requested a hearing with the Office of Administrative Law Judges. On July 31, 2012, the Administrative Law Judge (ALJ) issued a Decision and Order Granting Claim in Part and Dismissing Individual Respondents (D. & O.). The ALJ issued a supplemental decision awarding damages on June 5, 2013 (Supplemental D. & O.). Deltek petitioned the Administrative Review Board (ARB) for review of the ALJ's liability order (ARB No. 13-068). Gunther petitioned the ARB for review of the ALJ's liability order and order on damages (ARB No. 13-069). We summarily affirm the ALJ's liability order. We also affirm the relief ordered, with the modifications explained below.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions arising under SOX. See Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. § 1980.110. The ARB reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo. 29 C.F.R. § 1980.110(b). *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

### **DISCUSSION**

#### ***A. ALJ's Decision and Order Granting Claim In Part and Dismissing Individual Respondents (July 31, 2012)***

On July 31, 2012, the ALJ entered a decision and order on the merits of Gunther's SOX complaint. To prevail on that complaint, Gunther must prove by a preponderance of the evidence that she engaged in protected activity that contributed to the adverse action she suffered by her employer. *See* 18 U.S.C.A. § 1514A(b)(2); *Galinsky v. Bank of America*, ARB No. 11-057, ALJ No. 2011-SOX-010, slip op. at 14 (ARB Oct. 31, 2012). The ALJ determined that Gunther satisfied this showing. The ALJ determined that the complaints Gunther filed in April 2009 with Deltek management and the Securities and Exchange Commission (SEC), and in May 2009 with OSHA, constituted protected activity under the Act. D. & O. at 24-26. The ALJ determined that the Company's termination of Gunther's employment on October 27, 2009, was adverse action within the scope of the Act. *Id.* at 27-30. The ALJ determined that Gunther's SOX complaints contributed to her termination. In support of that determination, the ALJ found that Gunther's termination followed her return from a leave of absence that resulted from an investigation into the issues Gunther's SEC complaint raised (*id.* at 30-31), that Deltek terminated Gunther's employment after she and the Company failed to reach a settlement agreement associated with Gunther's OSHA complaint (*id.* at 30), and that the OSHA complaint Gunther filed asserted unlawful retaliation she suffered due to her SEC complaint concerning Deltek's practices (*id.*). Substantial evidence fully supports these findings.

Where, as here, the complainant satisfies her showing, the employer may avoid liability if it proves by clear and convincing evidence that the adverse action would have occurred even absent the protected acts. *Galinsky*, ARB No. 11-057, slip op. at 14. The ALJ determined that Deltek failed to meet this showing. The ALJ found that Deltek manager Holly Kortright terminated Gunther's employment based on events that took place on October 26, when Gunther arrived at the company's offices to return to work after the settlement discussions ended, and when the company did not pay her wages and benefits. D. & O. at 30. The ALJ found that even though Gunther's "timing of her return was ill advised, as she did not give Deltek sufficient advance notice and did not have her counsel contact Deltek's counsel in advance, nor did she obtain permission from any one to return[. . .] that does not mean that Deltek had a basis for terminating her employment due to her premature return alone, nor has it made such argument." *Id.* at 30. Based on the ALJ's findings, the ALJ concluded: "Respondents have not demonstrated by clear and convincing evidence, or even by a preponderance of the evidence, that they would have terminated Complainant in the absence of her protected activity. They have relied exclusively upon an explanation that I have found to be pretextual." *Id.* at 32. These findings are substantially supported by the record and are in accordance with law.<sup>1</sup>

### ***B. ALJ's Supplemental Decision and Order Awarding Damages (June 5, 2013)***

The ALJ's supplemental decision on damages awards Gunther the following relief: back pay in the amount of \$138,692.00; \$10,200.00 for lost quarterly bonuses; \$15,652.00 for the net value of her lost health insurance; \$7,486.00 for accrued paid time off; \$30,000.00 for tuition reimbursement; \$300,352.00 for front pay and fringe benefits from the date of the decision and continuing for four years; \$27,418.00 for attorney's fees and costs; \$15,099.00 for litigation costs; and pre-judgment interest on the backpay award and associated fringe benefits calculated in accordance with 26 U.S.C. § 6621. The ALJ further ordered that Gunther's record be expunged. Supplemental D. & O. at 37-38. Substantial evidence fully supports the relief.

Deltek argues (Br. at 31-37) that the ALJ erred in determining that the company's evidence acquired after the liability proceedings failed to show that Gunther would have been fired on other grounds, and that she is not entitled to relief. The ALJ addressed each contention the company raised, and determined that Deltek failed to show that these actions warrant a denial

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<sup>1</sup> While the ALJ's liability determination is supported by substantial evidence, we do not endorse every collateral legal issue in the ALJ's legal analysis. For example, the ALJ determined that Gunther's earlier reports of her concerns to management could not be protected activity as management was aware of the problems. D. & O. at 24. The Act, however, does not shield an employer from liability when a complainant informs the employer about purported violations that the employer already knows. See *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-047, slip op. at 7 (ARB June 28, 2011). Gunther advances (Br. at 18-22) certain arguments pertaining to alleged adverse actions Deltek took, and dismissal of named individuals that may be affected by this erroneous finding. We need not address these additional arguments Gunther raises since the relief awarded makes her whole. See *infra* at 4-5.

of relief. Supplemental D. & O. at 8-14. Substantial evidence supports the facts found by the ALJ supporting that determination, and the ALJ's legal conclusions are in accordance with law.

Deltek further argues (Br. at 39) that the ALJ erred in awarding tuition reimbursement. However, where the employer is found to have violated the law, "the order will provide all relief necessary to make the employee whole . . . ." 29 C.F.R. § 1980.109(d)(1). The undisputed evidence in the record reflects that Deltek administers a "Tuition Reimbursement Policy," and will "reimburse employees who have been working fulltime for at least 6 months for the cost of courses or programs related to an employee's position." Supplemental D. & O. at 21. The ALJ found that Gunther was enrolled in college classes and "took advantage of this program" while employed with Deltek. *Id.* Substantial evidence thus supports the award of this relief.

On cross-appeal, Gunther argues (Br. at 26) that the ALJ erred in awarding back pay from October 27, 2009, rather than from September 16, 2009, when Deltek stopped paying her salary. We agree. Gunther was on administrative leave during this period pending her discharge after an SEC complaint was filed. She is thus entitled to back pay relief from September 16, 2009, to make her whole.

Gunther argues (Br. at 29) that the ALJ erred in refusing to award attorney's fees for time associated with negotiating an unsuccessful settlement with Deltek. See D. & O. at 32-34. "[S]ettlement discussions are an ordinary part of the litigation process. Thus . . . awarding attorney's fees incurred as a result of reasonable settlement efforts is proper." *Couch v. Continental Cas. Co.*, 2008 WL 131198, at \*5, 2008 U.S. Dist. LEXIS 2327, at \*12 (E.D. Ky. Jan. 11, 2008). "[F]ailed settlement negotiations . . . do not warrant a reduction of hours" awarded in attorney's fees. *Trainer v. HEI Hospitality, LLC*, 2012 WL 119597, \*10 (D. Mass. Jan. 13, 2012). See also *Riverside v. Rivera*, 477 U.S. 561, 569 (1986) ("[W]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."). Gunther is entitled to attorney's fees for work performed in the settlement negotiation; the attorney's fee award is thus modified to reflect an additional \$15,269.50 for fees Gunther paid to the Employment Law Group from September 1, 2009, to November 16, 2009, when she was engaged in settlement negotiations with Deltek. In all other respects, the ALJ's factual findings in support of the relief to Gunther are supported by substantial evidence and fully in accordance with law.<sup>2</sup>

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<sup>2</sup> Finally, since Gunther failed to comply with the ALJ's briefing schedule (see Order (ALJ May 7, 2013)), there was no error in denying her request to supplement a Proof of Damages. In any event, the ALJ did not suspend damages as of November 5, 2012, but awarded front pay for four years from the date of the decision.

## **CONCLUSION**

The ALJ's July 31, 2012 Decision and Order Granting Claim in Part and Dismissing Individual Respondents is **AFFIRMED**. The ALJ's June 5, 2013, Supplemental Decision and Order Awarding Damages is **AFFIRMED**, as modified pursuant to this Order.

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**