



In the Matter of:

TIMOTHY C. DIETZ,

ARB CASE NO. 15-047

COMPLAINANT,

ALJ CASE NO. 2014-SOX-002

v.

DATE: May 12, 2016

CYPRESS SEMICONDUCTOR CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

Paul F. Lewis, Esq.; and Andrew E. Swan, Esq.; *Lewis Kuhn Swan PC*, Colorado Springs, Colorado

*For the Respondent:*

Raymond M. Deeny, Esq.; *Sherman & Howard L.L.C.*, Colorado Springs, Colorado; William A. Wright, Esq.; *Sherman & Howard L.L.C.*, Denver, Colorado; and Lori Phillips, Esq.; *Sherman & Howard L.L.C.*, Atlanta, Georgia

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*. Judge Corchado, concurring.

**ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL  
DECISION AND ORDER AWARDING ATTORNEYS' FEES**

Cypress Semiconductor Corporation (Cypress) appeals the decision of an Administrative Law Judge (ALJ) to award attorneys' fees and litigation costs to Timothy C. Dietz (Dietz) in a

case brought under the whistleblower provision of the Sarbanes-Oxley Act (SOX).<sup>1</sup> We deferred deciding this appeal until after we resolved the appeal of the ALJ's decision on the merits of Dietz's whistleblower claim. We have now affirmed the ALJ's decision on the merits.<sup>2</sup> Dietz is thus an "employee prevailing" within the meaning of the SOX whistleblower provision and is entitled to his "litigation costs" and "reasonable attorney fees."<sup>3</sup> Because Cypress does not contest the award of attorneys' fees and costs on appeal except to say that Dietz should not be awarded any fees or costs if he does not prevail, we affirm the ALJ's award of attorneys' fees and costs.

## DISCUSSION

Dietz filed a complaint against Cypress under the whistleblower provision of the SOX.<sup>4</sup> On December 1, 2014, after extensive discovery, a four-day hearing, the submission of more than a hundred exhibits, and post-hearing briefing, an ALJ concluded that Cypress had retaliated against Dietz in violation of the SOX whistleblower provision.<sup>5</sup> On December 31, 2014, Dietz then filed with the ALJ a Bill of Costs and Attorneys' Fees, to which Cypress responded on January 7, 2015. In the meantime, Cypress had appealed the ALJ's decision on the merits to this Board. That appeal was docketed as ARB Case No. 15-017. Then, on April 20, 2015, the ALJ issued an order awarding Dietz \$241,923.50 in fees and \$10,492.87 in costs, for a total of \$252,416.37.<sup>6</sup> Cypress timely appealed the ALJ's attorneys' fees order. That appeal was docketed as ARB Case No. 15-047, and that is the appeal before us now.

On March 30, 2016, this Board affirmed the ALJ's decision on the merits. We concluded that substantial evidence supported a finding that (i) Dietz made complaints that included allegations of violations of the federal mail or wire fraud statutes, thereby triggering the protection of SOX's whistleblower provision; (ii) Cypress both placed an undeserved disciplinary memorandum in Dietz's personnel file and constructively discharged him; (iii) his protected activity was a contributing factor in both the disciplinary memo and his constructive

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<sup>1</sup> 18 U.S.C. § 1514A (2012).

<sup>2</sup> *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (Mar. 30, 2016).

<sup>3</sup> 18 U.S.C. § 1514A(c)(1), (c)(2)(C).

<sup>4</sup> 18 U.S.C. § 1514A.

<sup>5</sup> ALJ's Recommended Decision and Order (R. D. & O.) at 82.

<sup>6</sup> ALJ's Supplemental Decision and Order Awarding Attorneys' Fees (Supplemental D. & O.) at 12.

discharge; and (iv) Cypress would not have disciplined him or constructively discharged him if he had not made his complaints.<sup>7</sup> Accordingly, we must now address Cypress’s appeal of the ALJ’s award of attorneys’ fees and costs.

Prevailing complainants in SOX whistleblower cases are entitled to “litigation costs . . . and reasonable attorney fees.”<sup>8</sup> Dietz prevailed on the merits. He is thus entitled to costs and reasonable attorneys’ fees.

An award of attorneys’ fees must be reasonable. We review the reasonableness of an ALJ’s attorneys’ fees award under an abuse of discretion standard<sup>9</sup> and set aside an award only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>10</sup>

Under this standard, we affirm the amount the ALJ awarded in attorneys’ fees. Cypress does not contest the amount of the ALJ’s award on appeal. Its only argument is that we should reverse the award of attorneys’ fees and costs if we reverse the ALJ’s decision on the merits, because then, Dietz would not be a “prevailing” complainant. We did not reverse the ALJ’s decision on the merits, and so that argument is moot.

Moreover, the amount the ALJ awarded was reasonable. She used the lodestar method and provided sufficient reasons for the hourly rates she applied and the number of hours she approved. She also reasonably explained the amount she awarded for costs. Consequently, we affirm the ALJ’s award of attorneys’ fees and costs.

Finally, we note that, in ARB Case No. 15-017 (the appeal on the merits), Dietz filed a “Request for Costs and Expenses before the Administrative Review Board” on April 18, 2016. If Cypress wishes to contest any aspect of this request, it may do so by filing a response with this Board on or before **May 18, 2016**.

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<sup>7</sup> *Dietz*, ARB No. 15-017, slip op. at 21-22.

<sup>8</sup> 18 U.S.C. § 1514A(c)(2)(C); *see also* 29 C.F.R. § 1980.109(d)(1) (prevailing complainant entitled to “litigation costs, expert witness fees, and reasonable attorney fees.”).

<sup>9</sup> *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-067, ALJ No. 2013-FRS-003, slip op. at 2 (ARB Aug. 12, 2015).

<sup>10</sup> *Petersen v. Union Pacific R.R. Co.*, ARB Nos. 13-090, 14-025; ALJ No. 2011-FRS-017, slip op. at 3 (ARB Feb. 20, 2015).

## CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Supplemental Decision and Order Awarding Attorneys' Fees.

**SO ORDERED.**

**ANUJ C. DESAI**  
**Administrative Appeals Judge**

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

**Judge Corchado, concurring:**

I understand Cypress's only argument in its attorneys' fees appeal to be that we should reverse the ALJ's Order on attorneys' fees and costs if we reverse the ALJ's decision on the merits. The Board affirmed the ALJ's decision on the merits, which disposes of Cypress's appeal. That is sufficient for me to concur and go no further in analyzing the attorneys' fees awarded.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**