



In the Matter of:

THOMAS H. SMITH,

ARB CASE NO. 97-065

COMPLAINANT,

ALJ CASE NO. 93-ERA-16

v.

DATE: August 27, 1998

**ESICORP, INC. (Formerly known as
EBASCO SERVICES, INC.),**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the whistleblower provision of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (1988).^{1/} In a Decision and Order of Remand on March 13, 1996 (R.O.), the Secretary found in favor of Respondent Esicorp, Inc.^{2/} (Esicorp) on all issues except the existence of a hostile work environment. The Secretary held that the drawing of a series of cartoons on a drawing board in a prominent place at the work site ridiculing Complainant Thomas H. Smith (Smith) for his protected activity constituted intentional, pervasive, and regular harassment.^{3/} The Secretary held that Esicorp's managers and foremen were aware of this harassment and permitted it to continue, in violation of the ERA. R.O., slip op. at 24. The Secretary remanded the case to the Administrative Law Judge (ALJ) for a determination of

^{1/} The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 25, 1992), do not apply to this case in which the complaint was filed prior to the effective date of that Act.

^{2/} Esicorp, Inc., was formerly known as Ebasco Constructors, Inc. For consistency's sake we will refer to Respondent as Esicorp.

^{3/} On remand the ALJ also found that a high ranking Esicorp official wore a hat with Smith's nickname in a circle and a slash across the name. ALJ Order at 3.

Smith's entitlement to compensatory damages, attorney's fees and expenses, and other appropriate relief. *Id.* at 29.

On remand, the ALJ reconvened the hearing and Smith and his wife testified about the impact of the harassment on him, on their relationship, and on Smith's relationship with his son. The ALJ found Smith to be a very credible witness in describing the impact of the harassment. Recommended Decision and Order Awarding Damages (ALJ Order) at 7. He found that Smith "became depressed, began experiencing stomach problems and felt 'worthless' and 'like a nobody.'" *Id.* at 6. He found that the stress of the harassment disrupted Smith's family, caused him to quarrel with his wife and adversely affected his relationship with his son. *Id.* The ALJ recommended an award of \$100,000 in compensatory damages. *Id.* at 12.

Smith submitted a request for attorney's fees in the amount of \$68,667.50, but the ALJ recommended reducing that amount. He reduced the hourly rate claimed from \$250 to \$150, and he reduced the number of hours claimed by 15 percent. ALJ Order at 9-10. The ALJ recommended an attorney's fee award of \$34,570.50 and an award of expenses of \$1,696.19.

DISCUSSION

I. Compensatory Damages

The ALJ did not explain how he arrived at his recommended award of \$100,000 in compensatory damages. Applying considerations relevant to this determination, we conclude that an award of \$20,000 in compensatory damages is appropriate.

The Secretary has held that an important criterion for determining whether an award of compensatory damages is reasonable is "whether the award is roughly comparable to awards made in similar cases." *Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Sec'y Dec., Jan 18, 1996, slip op. at 6, quoting *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1285 (7th Cir. 1995), and citing numerous cases. More recently, we also have found that it is appropriate to consider the range of awards made in similar cases when awarding compensatory damages. *Van der Meer v. Western Kentucky University*, ARB Case No. 97-078, ALJ Case No. 95-ERA-38, ARB Dec. Apr. 20, 1998, slip op. at 9, *appeal docketed*, *Western Kentucky University v. U.S. Dept. of Labor*, No. 98-3698 (6th Cir.). The courts of appeals also have held that awards of compensatory damages should be based, at least in part, on consideration of awards made in other, comparable cases. *See, e.g., Mathie v. Fries*, 121 F.3d 808, 813-14 (2d Cir. 1997).

Several recent Secretary and ARB decisions awarding compensatory damages for emotional distress are instructive:

- o *Van der Meer v. Western Kentucky University*, ARB Case No. 97-078, ALJ Case No. 95-ERA-38, ARB Dec., Apr. 20, 1998. The ARB awarded Van der Meer \$40,000 because he suffered public

humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.

- o *Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Sec'y Dec., Jan 18, 1996, slip op. at 5. Gaballa had been blacklisted, and testified that he felt his career had been destroyed by the respondent's action. The Secretary reviewed the compensatory damages awards for mental and emotional suffering made in a number of cases, which ranged from \$10,000 to \$50,000, and awarded Gaballa \$35,000.
- o *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Dep'y Sec'y Dec., Feb. 14, 1996, slip op. at 25. The Deputy Secretary awarded Creekmore \$40,000 for emotional pain and suffering caused by a discriminatory layoff. Creekmore showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company.
- o *Michaud v. BSP Transport, Inc.*, ARB Case No. 97-113, ALJ Case No. 95-STA-29, ARB Dec. Oct. 9, 1997, slip op. at 9. The ARB awarded \$75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist. Evidence also showed foreclosure on Michaud's home and loss of savings.
- o *Smith v. Littenberg*, Case No. 92-ERA-52, Sec'y Dec., Sept. 6, 1995, slip op. at 7. The Secretary affirmed the ALJ's recommendation of award of \$10,000 for mental and emotional stress caused by discriminatory discharge where Smith supported his claim with evidence from a psychiatrist that he was "depressed, obsessing, ruminating and ha[d] post-traumatic problems."
- o *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Sec'y Dec. after Remand, Aug. 16, 1993, slip op. at 5. The Secretary awarded Blackburn \$5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children.
- o *Bigham v. Guaranteed Overnight Delivery*, Case No. 95-STA-37, ARB Case No. 96-108, ARB Dec., Sept. 5, 1997, slip op. at 3. The

ARB awarded Bigham \$20,000 for mental anguish resulting from discriminatory layoff.

- o *Lederhaus v. Paschen*, Case No. 91-ERA-13, Sec’y Dec., Oct. 26, 1992, slip op. at 10. The Secretary awarded Lederhaus \$10,000 for mental distress caused by discriminatory discharge where Lederhaus showed he was unemployed for five and one half months; foreclosure proceedings were initiated on his house; bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted.

As the Secretary explained in *Lederhaus*, slip op. at 10:

Complainant must prove the existence and magnitude of subjective injuries with “competent evidence.” *Carey v. Piphus*, 435 U.S. [247 (1978)] at 264 n.20. The testimony of medical or psychiatric experts is not necessary, however, although it can strengthen a Complainant's case. *Busche v. Burkee*, 649 F. 2d 509, 519 n.12 (7th Cir. 1981), *cert. denied* *Burkee v. Busche*, 454 U.S. 897 (1981). As the Supreme Court noted in *Carey v. Piphus*, 435 U.S. at 264 n.20, “[a]lthough essentially subjective, genuine injury in this respect [mental suffering or emotional anguish] may be evidenced by one's conduct and observed by others.”

The severity of the retaliation suffered by Smith is also relevant to our determination of appropriate compensatory damages. The courts have held that the more inherently humiliating and degrading the defendant’s action, the more reasonable it is to infer that a person would suffer emotional distress, and the more conclusory the evidence of emotional distress may be. *United States v. Balistrieri*, 981 F.2d 916, 932 (7th Cir. 1993).

With these principles in mind, and comparing the facts in this case to other cases awarding compensatory damages, we find that an award of \$20,000 is appropriate. Here, the employer’s conduct was limited to several cartoons lampooning Smith for his protected activities, which were displayed from October 21 to December 16, 1991. Smith did not suffer loss of a job or blacklisting and did not incur financial losses, such as foreclosure on his home or threatened lawsuits by creditors. *See Lederhaus v. Paschen*, slip op. at 12. Smith’s evidence of mental and emotional injury was limited to his own testimony and that of his wife and was not enhanced by the testimony of psychological experts.

Smith testified that he became moody and uncommunicative toward his wife and son (T. 837, 873, 877-78), that the harassment made him feel worthless and like a “nobody” (T. 864), and that he “went into a shell or a cocoon.” T. 864, 878. Smith did not testify that the cartoons had any other more severe effects on him. Smith’s wife testified that the cartoons affected Smith’s stomach and caused him headaches, and that he sometimes mentioned suicide. T. 754, 742. She also testified that Smith got into arguments with her about household items being out

of place and chores not getting done, and that sometimes Smith would leave the house without telling his wife where he was going. T. 742.

Taking all these factors into consideration and weighing the awards made for emotional distress in other whistleblower cases in which the discriminatory action by the employer was inherently more severe, we find that Smith is entitled to an award of \$20,000 for mental pain and suffering.^{4/} In so ruling, we are not persuaded by Esicorp's argument that Smith's emotional distress was caused by the fact that a back injury was preventing him from working as a carpenter. *See* Respondent's Brief to Administrative Review Board on Remand as to Damages (Respondent's Brief to ARB) at 8-9; R.O. at 6-7.

II. Attorney's fees and costs.

The ALJ properly ruled that the "lodestar" approach (multiplication of the number of hours reasonably expended on the litigation by a reasonable hourly rate) should be applied to the award of attorney's fees. ALJ Order at 8. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) The ALJ reduced the hourly rate requested from \$250 to \$150 based on affidavits submitted by Esicorp from two experienced Houston area attorneys. They attested that the customary hourly rate in that area for an attorney with 25 years' experience is \$185 and stated that a reasonable rate for an attorney with only ten years' experience would range from \$125 to \$150 per hour. *See* Affidavit of Thomas M. Callan, Exhibit A to Respondent's Response to Complainant's Motion for Award of Attorney Fees and Expenses. Smith submitted an affidavit by a local attorney supporting his claim for \$250 an hour, but the ALJ credited Esicorp's affidavit that an attorney with 10 years' experience would be compensated at \$150 an hour. There is nothing in the record that would warrant our disturbing this finding.

^{4/} Smith urges this Board to award \$3,500,000 in "compensatory" damages, arguing that nuclear workers will fear to speak out about pollution problems if Esicorp is ordered to pay only "small damages" and suggesting that employers "unwhipped by justice" may again violate the employee protection provisions of the Energy Reorganization Act. Complainant's Reply Brief as to Damages and Remedy at 5, 7-14. Implicitly, the argument suggests that the Board should make large compensatory damage awards in order to "send a message" to the employer community.

Smith's position confuses compensatory damage awards with exemplary (or punitive) damage awards. The amount of a compensatory damage award is governed by the harm done to the complainant; the purpose of the compensatory damage award is to make the complainant whole for the harm caused by the employer's unlawful act. In contrast, exemplary damages are intended to punish and deter egregious conduct by a respondent. Although the Board is authorized to award compensatory damages under the Energy Reorganization Act, 42 U.S.C. §5851(b)(2)(A), we have no authority to award exemplary damages. *Compare*, 15 U.S.C. §2622(b)(2)(B) (authorizing award of exemplary damages under the Toxic Substance Control Act).

The ALJ also reduced the number of hours claimed because they represented work on “policy arguments and peripheral and irrelevant issues,” such as discussing Smith’s entitlement to back pay after the Secretary found that Smith’s termination was not a violation of the ERA. ALJ Order at 10. The ALJ also found that Smith’s briefs were repetitive. For example, Smith repeated a full statement of background facts in his brief on damages that he had already set forth in his original briefs to the ALJ and the Secretary. ALJ Order at 10. In addition, the ALJ found that Smith spent unnecessary and wasteful time on an attempt to add Raytheon Corporation as a party to this proceeding. *Id.* Taking all these factors into account, the ALJ reduced the total number of hours claimed by 15 percent. *Id.* We find that the ALJ made reasonable adjustments to the elements of the lodestar based on the record before him. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (calculation of fees should exclude “hours that are excessive, redundant, or otherwise unnecessary . . .”).

The ALJ also reduced the amount requested for costs and expenses by \$500 for lack of specificity for one item, and recommended an award of \$1,696.19 for this element of damages. We adopt that recommendation as reasonable based on the record.

III. Injunctive Relief

The ALJ rejected a long litany of requests by Smith for injunctive relief, recommending only an order to post the ALJ’s decision in prominent places at the worksite for 90 days, as provided in the Secretary’s Decision and Order of Remand. We agree with the ALJ that the facts in this case do not justify the imposition of the detailed, extensive injunctive relief sought by Smith. Although the Secretary held that Esicorp created a hostile working environment, there was no evidence that it was widespread or involved all aspects of Esicorp’s operations. Rather, the hostile environment was limited to a series of derogatory cartoons over a two month period (October 21 to December 16, 1991) in one area of the plant. *See* Remand Order at 25-27.

Esicorp represents that it no longer is in business, has no presence at the South Texas nuclear plant and would have no way of assuring that the order for posting the decision can be carried out. Respondent’s Brief to ARB at 14. But Esicorp also represented to the ALJ at the hearing on remand that Esicorp would be responsible for any relief for which Ebasco would have been held liable. T. 727 (May 26, 1996 hearing on remand). Smith has moved to add Raytheon Corporation as a party respondent, asserting that Raytheon succeeded to all of Esicorp’s property and personnel at the South Texas plant. However, Smith only seeks to add Raytheon as a party for purposes of affirmative and injunctive relief. Complainant’s Reply Brief on Damages and Remedies at 15.

We do not think any useful purpose would be served at this stage of this proceeding to reopen the record and take evidence on whether Raytheon meets the tests for successorship liability (*see Rowland v. EasyRest Bedding, Inc.*, Case No. 93-STA-19, Sec’y Dec. and Remand Ord., Nov. 21, 1994, slip op. at 2), only to assure that the posting relief is carried out. The purpose of posting is to provide notice that whistleblowers will be protected if they are discriminated against. If Esicorp is unable to secure posting of the Secretary’s March 13, 1996

decision and this decision at the South Texas nuclear plant, notification may be accomplished by publishing the two documents in a local general circulation newspaper. Such an order brings this longstanding matter to a close and provides Smith more timely relief.

CONCLUSION

Accordingly, it is ordered that:

- 1) Respondent Esicorp shall pay Complainant Thomas H. Smith \$20,000 in compensatory damages;
- 2) Esicorp shall pay Smith \$34,570.50 in attorney's fees and \$1696.19 in expenses;
- 3) Esicorp either shall secure the posting of this decision and of the Secretary's March 13, 1996 decision in a lunchroom and another prominent place, accessible to employees at the South Texas nuclear facility, for a period of ninety days, or shall publish the decisions in a local general circulation newspaper.
- 4) Smith's motion to amend the caption is denied.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member