



In the Matter of:

**BARRY D. MODER,**

**ARB CASE NO. 01-095  
02-039**

**COMPLAINANT,**

**ALJ CASE NO. 2000-WPC-5**

**v.**

**DATE: June 30, 2003**

**VILLAGE OF JACKSON, WISCONSIN,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Jeffrey P. Sweetland, Esq., *Shneidman Myers, Milwaukee, Wisconsin***

*For the Respondent:*

**James R. Scott, Esq., *Lindner & Marsack, S.C., Milwaukee, Wisconsin*  
Delmore Beaver, *Village of Jackson, Wisconsin, Jackson, Wisconsin***

### **FINAL DECISION AND ORDER**

This case arises under the whistleblower protection provision of the Federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367 (West 2001) (the Clean Water Act), and implementing regulations at 29 C.F.R. Parts 18 and 24 (2002). The Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he concluded that the Village of Jackson, Wisconsin violated § 1367 when it failed to promote the complainant, Barry Moder, to supervisor of the Village wastewater treatment plant in May 2000. *Moder v. Village of Jackson, Wisconsin*, ALJ No. 2000-WPC-0005 (ALJ Aug. 10, 2001) (liability and relief). *Id.* (ALJ Oct. 15, 2001) (attorney fees and costs). For the reasons below, we affirm the ALJ's determination that the Village violated § 1367(a) by failing to promote Moder in May 2000. We recalculate the backpay award amount. And we vacate the R. D. & O. with respect to its findings and conclusions concerning post-hearing events and recommendation to award compensatory damages and front pay.

## BACKGROUND

### 1. Statement of facts

Moder began working as an operator in the Village wastewater treatment plant in early 1986. *R. D. & O.* at 2. In 1988, Moder began to suspect that the plant superintendent, Brian Schultz, was falsifying wastewater contamination reports required by the Wisconsin Department of Natural Resources (DNR). *Id.* In 1989, the Village hired another operator, Jeff Deitsch. *Id.* at 4. Deitsch, Moder, and a third operator determined that the superintendent was in fact falsifying reports. Moder and Deitsch each contacted DNR. *Id.* All three operators helped DNR in its investigation, but Moder was the most senior operator and helped DNR most. *Id.* at 6.

DNR notified the Village of its investigation and conclusions in late 1989, after completing its investigation. *Id.* at 6. At that time, DNR advised Village Administrator/Clerk, Delmore Beaver, that Schultz had been falsifying data and that DNR was suspending Schultz's wastewater treatment license. *Id.* at 6, 7.

When Beaver relayed this information to the Village Board, some Board members were upset that Moder did not come to the Board first with his suspicions but instead went directly to DNR. *Id.* At least one Board member and some Villagers believed that Moder reported Schultz's falsifications to DNR in hopes of getting the superintendent position himself. *Id.* at 7-8.

After the Village fired Schultz, Moder was the only operator at the plant with credentials required by law for operation of a wastewater treatment plant. *Id.* The Village did not fill the vacated superintendent post but later gave Moder the title "lead operator." *Id.* at 8. As lead operator, Moder was responsible for the day-to-day operation of the plant but had no authority over the other operators. *Id.* All operators reported to the Village Director of Public Works, David Murphy. *Id.*

In 2000, Murphy decided the wastewater plant needed an on-site supervisor, so the Village established a new position – supervisor/foreman (hereafter, "supervisor"). *Id.* The person in this position would supervise the operators and other employees in the plant and report to Murphy. *Id.* Moder and Deitsch each had sufficient experience and licensure to meet basic qualification requirements, and both applied. *Id.*

Beaver and Murphy regarded the two men as equally qualified and administered tests to help in the selection process. *Id.* at 8, 13. Murphy thought Deitsch performed slightly better than Moder on one of the tests. *Id.* at 10. Beaver and Murphy both thought Moder performed significantly better than Deitsch on another test. *Id.* at 9.

In a pre-selection interview, Beaver told Moder that Moder's participation in the 1989 DNR investigation might count against Moder in the eyes of some Board members who would be participating in the supervisor selection. *Id.* at 10. An architect, Daniel Goetsch, whose firm

had a contract to upgrade the wastewater treatment facility, told Moder that Murphy also had concerns about Moder because of Moder's involvement in the 1989 investigation. *Id.* at 11.

Hoping to open a dialogue with Murphy on this issue, Moder went to Murphy's office on Monday, May 8, 2000, the day before the Board was to choose the new supervisor. *Id.* Moder gave Murphy a copy of DNR's record of the first call DNR received from an unidentified plant operator about Schultz's falsifications. *Id.* at 11-12. Moder told Murphy he did not make this call. *Id.* at 12. Moder got the impression Murphy did not want to discuss the matter and left. *Id.* at 12. Immediately after Moder's departure, Murphy took the report to Beaver. *Id.* Beaver instructed Murphy to make copies for the Board members. *Id.*

The Board that would approve the selection of supervisor included two people who had been on the Board in 1989 and 1990 – Phil Laubenheimer and John Kruepke. *Id.* at 11-13. Beaver testified that Laubenheimer was the Board member who was still “concerned” about Moder's whistleblowing in 1989. *Id.* at 10.

At the beginning of the May 9, 2000 Board meeting, Kruepke announced his retirement from the Board. *Id.* at 12. After conclusion of routine business, the Board went into closed session to select the new wastewater plant supervisor. *Id.* at 13. Beaver asked Kruepke to stay for the closed session in case anyone had questions about what happened in 1989-1990. *Id.* Beaver gave each Board member a copy of the DNR report and as he put it, gave the Board “a history lesson” about the DNR investigation. *Id.*

The Board asked Murphy to recommend Deitsch or Moder. *Id.* at 13. Murphy insisted the two were equally qualified and the Board should choose. *Id.* Eventually, however, Murphy recommended Deitsch because he was more comfortable with Deitsch and felt that Deitsch was more of a team player than Moder. The Board accepted Murphy's recommendation. *Id.*; Hearing Transcript (Tr.) 433-435.

Beaver testified that he considered Moder's involvement in the DNR investigation irrelevant to the promotion decision in 2000. R. D. & O. at 13. Beaver testified that he provided the Board with the DNR complaint, gave the “history lesson,” and kept Kruepke for the closed session because he was sure the DNR report would raise questions in the Board members' minds and Kruepke could help answer them. *Id.* at 12-13. Beaver gave the DNR report to the Board even though Beaver considered it irrelevant because “if the memo is important to Barry, it should go to the Board.” Tr. 357.

Murphy testified that when he told the Board Deitsch was a better “team player” than Moder, he meant, among other things, that when Deitsch or other operators had asked Moder over the years for direction in performing their jobs, Moder always told them to ask their supervisor, Murphy, instead of answering the questions himself. *Id.* at 28.

## **2. Procedural history**

On June 8, 2000, Moder filed a complaint with the Occupational Safety and Health

Administration (OSHA) alleging that the Village passed him over for promotion in violation of the whistleblower protection provision at § 1367 of the Clean Water Act. R. D. & O. at 1. OSHA investigated Moder's allegations and on July 12, 2000, issued a determination that Moder's actions in helping DNR investigate Schultz in 1989, "were a factor in [Moder's] non-selection to the Treatment Plant Supervisor/Foreman position in the Sewer Utility." Administrative Law Judge's Exhibit (ALJ Ex.) 2. The Village requested that the Office of Administrative Law Judges adjudicate the matter. *Id.*

The hearing in this case concluded on December 13, 2000. The parties filed post-hearing briefs on March 30, 2001.

On May 7, 2001, the ALJ was prepared to issue a Recommended Decision and Order. R. D. & O. at 36. However, on that day he received two letters, one from the Village and one from Moder's counsel.

Moder's counsel advised the ALJ that "[t]here have been some recent developments that bear on the remedies available to Mr. Moder in the event that you find the Village liable for discrimination in violation of Section [1367]. . . ." Complainant's Exhibit (CX) 71. Moder's counsel stated that the Village reorganized its Department of Public Works in April and asserted the reorganization created new injury to Moder. *Id.*

The reorganization involved creation of a new position, Utility Superintendent, who would have overall charge of the Village's wastewater and municipal water operations. *Id.* The Utility Superintendent would report to Murphy, the Director of Public Works. *Id.*

The Village promoted Deitsch to Utility Superintendent. *Id.* The Village promoted Moder to the position he was seeking in the litigation of this case – wastewater plant supervisor. *Id.* As wastewater supervisor, Moder would report to Deitsch. *Id.*

Although promotion to wastewater supervisor and backpay were the only remedies Moder had requested in his complaint or argued for in his post-hearing brief, Moder's counsel now asserted that "Mr. Moder can only be 'made whole' by an order instating him, not in the Supervisor/Lead Operator position, but in the Utility Superintendent position, which has been awarded to Mr. Deitsch." *Id.* As Moder's counsel saw it, if the Village had not discriminated against Moder by making Deitsch plant supervisor, it would have been Moder, not Deitsch, who would have become Utility Superintendent. *Id.* Moder's counsel considered the reorganization an attempt to assure that no matter what, Deitsch would continue to be Moder's supervisor. *Id.* "For these reasons, Mr. Moder requests further hearing on remedies if liability is found." *Id.*

In its letter, the Village objected to Moder's "attempt at providing evidentiary information concerning events which have occurred post-hearing in this matter." Respondent's Exhibit (RX) 105. In any event, the Village argued, "Mr. Moder has now obtained the position which he testified was his 'dream job.' There certainly is no legal support for the notion that he is entitled to every position that Mr. Deitsch obtains with the Village for the rest of his (or Deitsch's) life." *Id.* The Village contended that "[t]here is no need for any additional hearing in

this matter.” *Id.*

By Order dated the same day, May 7, 2001, the ALJ directed the parties to submit job descriptions for Moder and Deitsch’s new posts, salary levels, and similar information. ALJ Ex 23.

**a. Village’s supplemental brief**

In its supplemental brief, the Village asserted that it reorganized its Department of Public Works because the supervisor of the Village Water Utilities Division, Gordon Bell, retired after the hearing in the instant case. RX 106A at 1-2. The person the Village selected to replace Bell was not as experienced as Bell, so the Village created the Wastewater/Water Utility Superintendent position to oversee both the wastewater treatment plant and the Water Utility Division. “This would serve as a ‘crutch’” for Bell’s replacement while he learned the position. *Id.* at 2. “Creation of the Superintendent position would also alleviate the need to have two individuals directly reporting to Mr. Murphy regarding wastewater and water operations.” *Id.*

The Village also asserted that it selected Deitsch for the Utility Superintendent position because of his experience as wastewater plant supervisor and his experience in municipal water systems. *Id.* at 2; RX 3. The Village contended that Moder lacked necessary experience with municipal water systems. *Id.* Thus, even if Moder had been promoted to wastewater supervisor in 2000, he still would not qualify for the Utility Superintendent post. *Id.* at 5.

**b. Moder’s supplemental brief**

In his supplemental brief, Moder raised a new claim. Moder contended that the reorganization injured him even though it gained him the wastewater supervisor job, because he would continue to be subordinate to Deitsch and earn less than Deitsch. CX 72 at 2. “Since this [the reorganization] would perpetuate the rankings created by the Village’s discriminatory conduct a year ago, Moder has requested further hearing on the remedy question and instatement as Utility Superintendent.” *Id.* “A promotion remedy is not limited to the position or pay grade that was unlawfully denied to the employee. If, but for the initial discrimination, the employee would have advanced even further in the organizational hierarchy, the make-whole remedy may include promotion to the level which he or she would currently occupy.” *Id.* at 4. Alternatively, Moder suggested, the Village could keep Moder and Deitsch in their respective positions but pay Moder the same salary as Deitsch or make Moder co-Utility Superintendent. *Id.* at 10.

**c. Subsequent correspondence with ALJ**

On May 7, 2001, the ALJ issued an Order in which, among other things, he denied Moder’s request for a reconvened hearing as “unnecessary” and causing undue delay in final resolution of this matter. ALJ Ex. 23; R. D. & O. at 32.

By letter dated May 22, Moder disputed the factual basis for the Village’s argument that Deitsch but not Moder had necessary municipal water system expertise. CX 81. In this letter Moder’s counsel compared Moder and Deitsch’s experience and expertise with the Utility

Superintendent job description and asserted that in point of fact, Moder was the more qualified individual. “[I]f there is an issue as to the relative qualifications of Mr. Deitsch and Mr. Moder for the Utility Superintendent position, them [sic] Mr. Moder renews his request for further hearing on this issue. Without waiving his request for a hearing, Mr. Moder makes the following observations on the state of the record . . . .” *Id.*

By letter dated June 21, the Village advised the ALJ that “Mr. Barry Moder voluntarily resigned his employment with the Village of Jackson effective June 18, 2001.” RX 8.

#### **d. Recommended decision and order**

On August 10, 2001, the ALJ issued the Recommended Decision & Order in this case. The ALJ concluded that Moder proved by a preponderance of the evidence that unlawful discrimination that violated the whistleblower protection provision of the Clean Water Act “was a substantial motivating factor in the decision not to promote him to supervisor/foreman [in May 2000], and I so find and conclude.” R. D. & O. at 26.<sup>1</sup> The ALJ rejected the Village’s evidence of non-discriminatory intent because he found this evidence not credible. *Id.* at 28-30. The ALJ ruled that Moder was entitled to the wastewater plant supervisor position and awarded Moder backpay. *Id.* at 37.

In that part of his decision directed to the post-hearing reorganization, the ALJ declared himself “very surprised” that the Village would alter the status quo while the case was not yet decided. R. D. & O. at 31. He concluded that to award Moder the wastewater supervisor position – a position Moder now held anyway – would perpetuate the unfair ranking created by the Village’s original decision to promote Deitsch rather than Moder in May 2000. In light of the Village’s post hearing reorganization, the ALJ characterized Moder’s injury not as loss of a promotion, but as “the elevation of Deitsch over him in the organizational hierarchy.” R. D. & O. at 34-35. Relying on the parties’ assertions in their post-reorganization letters and briefs,<sup>2</sup> R. D. & O. at 31, the ALJ concluded that, “even if the Village [were] ordered to award the WWTP supervisor position as a remedy for discrimination, Moder [would] still be in exactly the same position vis-à-vis Murphy and Deitsch that he has occupied for the last year as a result of the unlawful discrimination.” *Id.* Moder “[would] never obtain his rightful place in the hierarchy . . . . He [would] perpetually remain subordinate to [Deitsch] who, but for the illegal discrimination, would be [sic] . . . his inferior[.]” *See Franks [v. Bowman Transp. Co., 424 U.S. 747,] 767-768 [(1976)].* *Id.* at 35.

Specifically in response to the post-hearing reorganization, the ALJ ordered the Village

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<sup>1</sup> The ALJ meant that Moder has proven that his protected activity in 1989 motivated the Village not to promote him.

<sup>2</sup> The ALJ is free to admit additional evidence after the close of the hearing. Rule 29 C.F.R. § 18.54(a) of the Rules of Procedure for Administrative proceedings provides: “When there is a hearing, the record shall be closed at the conclusion of the hearing unless the administrative law judge directs otherwise.”

to pay Moder two years' front pay based upon the difference between Moder's "current salary" and Deitsch's Utility Superintendent salary. *Id.* at 37. "Complainant shall submit that amount to the ARB for consideration as part of the Board's final decision herein." *Id.* The ALJ also ordered the Village to pay Moder \$25,000 for emotional suffering and distress. *Id.*

## **JURISDICTION AND STANDARD OF REVIEW**

The ARB has jurisdiction to review the ALJ's recommended decision under 29 C.F.R. § 24.8. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)). Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the recommended decision of the ALJ. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

## **ISSUES**

- (1) Whether the ALJ correctly held that Moder was not promoted because he engaged in protected activity.
- (2) Whether the ALJ erred in awarding backpay, damages for emotional distress and front pay.
- (3) Whether the ALJ's award of attorney's fees and costs should be affirmed.

## **DISCUSSION**

### **1. Merits of Moder's whistleblower complaint based on May 2000 events**

Section 1367(a) of the Clean Water Act prohibits employer discrimination against whistleblower employees:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C.A. § 1367(a).

To show discrimination under the environmental whistleblower statutes, a complainant initially must show that the employer is subject to the statutes, that the complainant engaged in protected activity of which the employer was aware, that he suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 18 (ARB Feb. 28, 2003); *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995). The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Jenkins*, slip op at 18. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Where a complainant establishes that an unlawful reason was a motivating factor in the employment decision (“mixed motive”), the employer must prove by a preponderance of the evidence that it would have made the same decision absent the unlawful reason. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion). See *Desert Palace, Inc., dba Caesars Palace Hotel & Casino v. Costa*, \_\_\_ U.S. \_\_\_, No. 02-679, slip. op at 8 (June 9, 2003), *aff’g sub nom. Costa v. Desert Palace, Inc.*, 299 F.3d 838 (2000) (direct evidence of discrimination is not required in mixed-motive cases under Title VII of the Civil Rights Act). See also *Combs v. Lambda Link*, ARB No. 96-066, ALJ No. 95-CAA-18 (ARB Oct. 17, 1997).

In this case, the dispute centers on the motives of key Village personnel, especially Beaver and Murphy. Beaver, for example, testified that he took the actions he did in an effort to protect Moder from retaliation and that he, Beaver, considered Moder’s involvement in the 1989 DNR investigation irrelevant to Moder’s qualifications in 2000 for plant supervisor. He testified that he gave the Board copies of the DNR report of the 1989 whistleblower call, kept Kruepke at the closed session to answer questions about the DNR investigation, and gave the Board a “history lesson” about the DNR investigation not because he considered that information relevant to the choice between Moder and Deitsch but to make sure the Board did not pay too much attention to the 1989 events. Tr. 346. Murphy testified that he too considered the 1989 investigation irrelevant to selection of the new plant supervisor and that all he meant by saying Moder was not a team player was that Moder was running the plant himself without sharing information with the other operators. Tr. 434-435.

The ALJ, who was present to observe the demeanor of the witnesses and who lived with the case from its inception, did not believe this testimony. R. D. & O. at 15, 16, 24. Absent some flaw or significant omission in the ALJ’s explanation for not believing this testimony, we have no reason to disturb the ALJ’s conclusions. The ALJ explains in careful detail the extent to which he rejected this testimony based on the demeanor of the witnesses. *Id.* With equal care and detail, the ALJ notes inconsistencies between this evidence and other, more plausible evidence and explains why and how he analyzed conflicting evidence to reach the conclusions he did. *Id.* at 23-30.

The Village’s objections to the ALJ’s findings of fact do not identify flaws in his logic or failure to consider all the evidence. The Village’s basic position is that the ALJ should have



found Village witnesses more credible than he did and Moder's testimony less credible than he did. On this record, that is no basis for reversal. See *Universal Camera*, 340 U.S. at 496, 71 S.Ct. at 468 ("the Senate Committee responsible for the Administrative Procedure Act explained in its report that examiners' decisions 'would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing'"); *Kopack v. NLRB*, 668 F.2d 946, 953 (7th Cir. 1982) ("Demeanor is often a major factor in an ALJ's decision to credit the testimony of one witness over that of another when the two present conflicting views of the same event. One must attribute significant weight to an ALJ's findings based on demeanor because neither the Board [NLRB] nor the reviewing court has the opportunity similarly to observe the testifying witnesses").

We have carefully studied the entire record, the ALJ's findings and conclusions and the arguments of the parties concerning Village liability for its failure to promote Moder in May 2000. We find the ALJ's analysis of the record to be meticulous and complete and his legal conclusions without error. Because of its exceptional comprehensiveness and clarity, we adopt the ALJ's R. D. & O. on the question whether the Village violated § 1367, R. D. & O. at 1 – 30, as our own and for that reason attach the R. D. & O. hereto.

## **2. Relief awarded by the ALJ**

### **a. Backpay**

The Clean Water Act provides in relevant part:

If he [the Secretary] finds that such violation [of § 1367] did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation . . . .

33 U.S.C.A. § 1367(b).

The purpose of a backpay award is to make the injured employee whole. *Hobby v. Georgia Power Co.*, ALJ No. 90-ERA-30, ARB Nos. 98-166, 98-169, slip op. at 12 (ARB Feb. 9, 2001), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor*, 52 Fed. Appx. 490 (table) (11th Cir. 2002). The backpay award should reflect not just lost base earnings; it should reflect attendant losses such as "interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay." *Hobby*, slip op. at 12 (internal citations omitted). Correspondingly, the backpay amount should not be reduced for an employee who is paid by the hour and works overtime. Otherwise, the employer would benefit from and the innocent employee be penalized for the employee's additional hours of work.

The ALJ applied these principles correctly by ordering that Moder receive the difference between the \$43,480 salary for the supervisor position and Moder's annual earnings of \$38,833 based on an hourly rate of \$18.67 at 2080 hours per year. R. D. & O. at 31. However, the ALJ erred in the actual amount he awarded for the period during which Deitsch received the \$43,480 supervisor salary and Moder worked at \$18.67 per hour. Relying on Exhibit 7, a memorandum prepared by the Village listing Deitsch and Moder's actual earnings per month from May 22, 2000 through May 7, 2001, the ALJ awarded Moder \$1,459.44 – the difference between the two totals. R. D. & O. at 37.

However, the Exhibit 7 earnings attributed to Moder included overtime. *See, e.g.*, Tr. 248-249; CX 54 (June 2000 pay stub showing Moder worked 2 hours overtime). The correct backpay calculation should subtract Moder's base pay (\$38,388) from Deitsch's base pay (\$43,380) for the eleven months during which Deitsch served as wastewater supervisor and Moder continued as lead operator. The difference between \$43,380 and \$38,388 is \$4,992.00; less one twelfth is \$4,576.00. This amount, plus prejudgment interest,<sup>3</sup> is the correct backpay award for the period May 22, 2000, through April 22, 2001.<sup>4</sup>

#### **b. Compensatory damages for emotional distress**

Compensatory damages authorized by the Clean Water Act may include damages for emotional distress. *Cf. Martin v. Dep't of the Army*, ALJ No. 1993-SWD-1, ARB No. 96-131, slip op. at 17 (ARB July 30, 1999) (compensatory damages under the environmental whistleblower protection provisions creates a "species of tort liability," which "may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . personal humiliation, and mental anguish and suffering'").

However, emotional distress is not presumed; it must be proven. "Awards generally require that a plaintiff demonstrate both (1) objective manifestations of distress, *e.g.*,

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<sup>3</sup> Prejudgment interest is the rate that is charged on the underpayment of Federal income taxes, *i.e.*, the Federal short-term rate under 26 U.S.C.A. § 6621(b) (West 2002), plus three percentage points. *Overall v. TVA*, ALJ No. 97-ERA-53, ARB Nos. 98-111, 98-128, slip op. at 50 n.23 and authorities cited therein (ARB Apr. 30, 2001).

<sup>4</sup> There were questions below about cost of living increases and bonuses that might affect the amount of backpay to which Moder is entitled. As far as we have been able to determine Deitsch never received a bonus, though he did receive a 3% cost of living increase, but the record does not show whether the COLA went into effect at the beginning or at the end of Deitsch's 11-month term as wastewater supervisor. Therefore, our computations make no provision for COLAs or bonuses, as the record is insufficient on these items.

The record also fails to establish when Moder and Deitsch's promotions in April 2001 took effect. The record shows the two men accepted their promotions on April 18. For simplicity's sake, we assume their new salaries became effective April 22, 2001.

sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress.” *Id.* “To recover for emotional distress . . . the complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm.” *Gutierrez v. Univ. of California*, ALJ No. 98-ERA-19, ARB No. 99-116, slip op. at 9 (ARB Nov. 13, 2002).

The ALJ awarded Moder \$25,000 for emotional distress because of “the suffering caused him by the egregious, disparate, discriminatory and hostile treatment by the Respondent.” R. D. & O. at 37. In point of fact, however, Moder did not claim compensation for emotional distress in his original complaint, nor did he request compensation for emotional distress for the time period after the reorganization and Moder’s promotion to plant supervisor.

The ALJ states, “[c]omplainant testified credibly as to the effects of Respondent’s actions upon him and the situation was so unbearable that Complainant suddenly was forced to resign his employment.” R. D. & O. at 37. But in point of fact, Moder did not proffer testimony at the hearing to support an award for emotional distress, he did not mention emotional distress in his post-hearing brief, and he adduced no evidence in support of such relief in his post-reorganization filings. Indeed, as we noted above, Moder provided the ALJ with absolutely no information about his reasons for resigning as plant supervisor in April 2001 or the effects, if any, the reorganization had on his state of mind. Inasmuch as emotional distress cannot be assumed but must be proved, this record does not support such an award.

### **c. Front Pay**

The primary remedial purpose of the environmental whistleblower protection provisions is to make the individual victim of discrimination whole. *See, e.g., Hobby*, slip op. at 7; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975); *Davoli v. Webb*, 194 F.3d 1116, 1143-1144 (10th Cir. 1999). To effectuate this purpose, Congress gave the Secretary of Labor broad authority to “take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation.” 33 U.S.C.A. § 1367(b).

However, front pay – money for future lost compensation as a result of discrimination – may be an appropriate substitute for promotion or reinstatement in certain circumstances. *Hobby*, slip op. at 7-8; *Doyle v. Hydro Nuclear Servs., Inc.*, 89-ERA-22, slip op. at 2-3 (ARB Nov. 26, 1997). For example, front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified. *Id.*

In the instant case, the Village offered and Moder accepted the position of plant supervisor before the ALJ issued a decision. Two months later, still before the ALJ issued a decision, Moder resigned. Although afforded an opportunity to explain the circumstances to the ALJ before the ALJ issued a decision, Moder chose not to do so. Indeed, the record before us is

devoid of any evidence concerning Moder's circumstances while employed in the job he had been seeking by means of this litigation, his reasons for quitting, or his present employment status.

Although the ALJ did not grant Moder's motion for a supplemental hearing concerning the reorganization's effects on Moder, the ALJ did ask for information about Moder's new position and pay status from which front pay could be calculated if appropriate and granted both sides considerable latitude in discussing factual matters in their supplemental briefs. Moder did not take advantage of the ALJ's invitation to explain his circumstances before issuance of the R. D. & O. Moder also did not petition for review of the ALJ's denial of a supplemental hearing, seek to amend his complaint or file a new complaint alleging new claims. Thus, by his own actions, Moder has assured that the record contains no evidence that could support a finding that the promotion the Village voluntarily gave Moder and which the ALJ ultimately awarded to him, was insufficient, together with back pay, to make Moder whole.

The ALJ's reasons for awarding Moder front pay are purely speculative: "I understand why [Moder quit in June 2001], i.e., a continued hostile environment . . . ." R. D. & O. at 37. "I can readily sympathize with the Complainant and understand the reasons for his actions. He has been told over and over that the Respondent no longer wishes to have his services." *Id.* We therefore reverse the front pay award.

### **3. Attorney fees and costs**

Section 1367(c) provides that whenever an order to abate a violation of § 1367(a) is issued, attorney fees and costs reasonably incurred by the complainant shall be assessed:

at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

33 U.S.C.A. § 1367(c).

The ALJ recommended attorney fees and costs for the proceedings below in the amount requested in Moder's counsel's petition for fees – \$59,126.26. This amount is based on 271.90 hours of attorney time at \$200.00 per hour and 18.25 hours of paralegal time at \$75.00 per hour through September 5, 2001. The fee petition identifies each charge with the name of the attorney or paralegal who performed the task, the nature of the task, and the time involved. The ALJ concluded that tasks were identified with sufficient detail to permit him to conclude that each was a reasonable expenditure of time. Fee R. D. & O. at 2.

The Village objects to the award on two grounds. First, it asserts that attorney fees may

be awarded only at the time the final decision and order in the case is issued. The ALJ's order was only a Recommended Decision and Order. Therefore, the Village urges, the ALJ's fee award was premature.<sup>5</sup>

The Village's argument is misplaced. The Clean Water Act whistleblower provision expressly authorizes the Secretary to award attorney fees and costs against the person found to have committed a violation of § 1367(a). 33 U.S.C.A. § 1367(c). As previously noted, the Secretary has delegated her adjudicatory authority under § 1367 to this Board. Secretary Order 1-2002, *supra*. The ALJs charged with responsibility for conducting the hearings in § 1367 cases are responsible for issuing recommended decisions and orders on matters requiring agency adjudication under § 1367. 5 U.S.C.A. §556; 29 C.F.R. § 18.27. Inasmuch as § 1367(c) authorizes attorney fees and costs against the person found to have violated the § 1367(a) prescription against whistleblower discrimination, the ALJ's recommendation of fees and costs for the proceedings below was entirely within the scope of the ALJ's hearing responsibilities.<sup>6</sup>

The Village also objects to the attorney fee and costs award on the ground that counsel's petition lacks sufficient specificity to support a finding that each charge was reasonably incurred. Inasmuch as the Village identifies not even one item that it deems inadequate, and the entries are fully consistent with petitions routinely granted, we reject this argument.

## CONCLUSION

Accordingly, we **AFFIRM** the Recommended Decision and Order with respect to its findings and conclusions that the Village of Jackson denied Moder a promotion to the wastewater treatment plant supervisor in May 2000 in retaliation for Moder's whistleblowing activity in 1989. We **AWARD BACK PAY** in the amount of \$4,576.00 plus **PREJUDGMENT INTEREST, AND ATTORNEY FEES AND COSTS** for the proceedings below in the amount of \$59,126.26.

We **VACATE** that part of the R. D. & O. containing findings of fact and conclusions of law concerning reorganization of the Village's Department of Public Works in April 2001 and **VACATE** the R. D. & O. to the extent it awards compensatory damages for emotional distress and awards front pay.

It is further **ORDERED** that the Complainant shall have 20 days from the date of this Decision and Order to submit to this Board an itemized petition for additional attorney fees and other litigation expenses incurred in this case on or after September 5, 2001. The Complainant shall serve the petition for fees and expenses on the Respondent, who shall have 30 days from

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<sup>5</sup> The Village appears to miscite to 29 C.F.R. § 24.6(b)(3) (1994). The current counterpart appears at 29 C.F.R. § 24.8(d)(2) (2002).

<sup>6</sup> We also note that the claim that ALJs lack authority to recommend attorney fees and awards based on the proceedings before them is now moot, inasmuch as this is the final decision and order in this case and we adopt the recommended award in the amount of \$59,126.26.

issuance of this Decision and Order to file objections to the petition with this Board.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**