U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 13 July 2004

In the Matter of

Stacy M. Platone,
Complainant,

v.

Atlantic Coast Airlines
Holdings, Inc.,
Respondent.

Case No.: 2003-SOX-00027

SUPPLEMENTAL RECOMMENDED DECISION AND ORDER AWARDING DAMAGES, COSTS, AND ATTORNEY FEES

On April 30, 2004, I issued my Recommended Decision and Order in this matter, in which I found that the Complainant had demonstrated by a preponderance of the evidence that she was suspended and fired by the Respondent because she had uncovered and reported what she reasonably believed to be a pattern of improper flight loss payments to employees, in violation of the Sarbanes Oxley Act. The Respondent relied on the Complainant's failure to disclose her relationship with a fellow employee and past union representative to justify its dismissal of the Complainant, but I found that the Respondent was also motivated by the Complainant's discovery of possible financial improprieties, and that the Respondent failed to produce sufficient evidence to clearly and convincingly establish that its motive for firing the Complainant was unrelated to her protected activity.

I directed that the record would be held open for thirty days, to allow the Complainant to produce evidence upon which an award of back pay, as well as litigation costs and expenses, including witness fees and reasonable attorney's fees, could be calculated. I provided the Respondent with fifteen days to respond to any evidentiary submission made by the Complainant. I also directed the parties to inform me if they felt that an evidentiary hearing was necessary.

On May 28, 2004, the Complainant filed her "Complainant's Submission of Lost Earnings, Expenses and Attorneys Fees. On June 14, 2004, the Respondent submitted its "Respondent's Opposition to Complainant's Earnings and Fee Submission." On June 18, 2004, Complainant submitted her "Complainant's Motion For Leave to File Reply to Respondent's Opposition to Submission of Lost Earnings, Expenses and Attorney's Fees," as well as her underlying Motion. I have considered all of these pleadings, as well as the attached exhibits, in making my determinations herein.

DISCUSSION

As I noted in my April 30, 2004 Recommended Decision and Order, because of its recent enactment, the Sarbanes Oxley Act lacks a developed body of case law. As the whistleblower provisions of Sarbanes-Oxley are similar to whistleblower provisions found in many federal statutes, it is appropriate to refer to case authority interpreting these whistleblower statutes, in determining appropriate damages as well as liability.

The Sarbanes Oxley Act provides the following remedies for a successful complainant:

> (c) REMEDIES-
>
> > (1) IN GENERAL- An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
> >
> > (2) COMPENSATORY DAMAGES- Relief for any action under paragraph (1) shall include--
> >
> > (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
> >
> > (B) the amount of back pay, with interest; and
> >
> > (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

By its terms, the purpose of the relief provided by the Sarbanes Oxley Act is to make the employee whole, that is, to restore the employee to the same position she would have been in if not discriminated against. As with other whistleblower statutes, the back pay award should therefore be based on the earnings the employee would have received but for the discrimination. *Blackburn v. Metric Constructors, Inc.,* 1986-ERA-4 (Sec'y Oct. 30, 1991).

A complainant has the burden of establishing the amount of back pay that a respondent owes. *Pillow v. Bechtel Construction, Inc.,* 87-ERA-35 (Sec'y July 19, 1993). However, because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, unrealistic exactitude is not required in calculating back pay, and uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating party. *EEOC v. Enterprise Ass'n Steamfitters Local No. 638,* 542 F.2d 579, 587 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977), quoting *Hairston v. McLean Trucking Co.,* 520 F.2d 226, 233 (4th Cir. 1975). *See also, McCafferty v. Centerior Energy,* 1996-ERA-6 (ARB Sept. 24, 1997). *See also, Nichols v. Bechtel Construction Inc.,* 1987-ERA-44, slip op. at 10 (Sec'y Nov. 18, 1993), *aff'd sub nom. Bechtel Construction Co. v. Sec'y of Labor,* 50 F.3d 926 (11th Cir. 1995).

As an initial matter, the Respondent argues that the Complainant is not entitled to damages at all, relying on the decision of the Supreme Court in *McKennon v. Nashville Banner*

Publishing Co., 513 U.S. 352 (1995). I find, however, that the Respondent's reliance on this decision is entirely misplaced.

In that case, the Complainant filed suit under the Age Discrimination in Employment Act of 1967 (ADEA), alleging that she was fired because of her age. Her employer claimed that she was discharged as part of a work force reduction plan necessitated by cost considerations. During preparation for trial, the employer took the complainant's deposition, and discovered that she had removed copies of the company's confidential financial documents, as "insurance." The employer sent the complainant a letter firing her, and stating that had it known of her misconduct, it would have discharged her at once for that reason. The District Court and the Court of Appeals held that the complainant was not entitled to backpay or any other remedy under the ADEA, because her later-discovered misconduct was sufficient grounds for her termination.

Thus, the issue before the Supreme Court was whether all relief should be denied when an employee was discharged in violation of the ADEA, and the employer **later** discovered wrongful conduct that would have led to discharge if it had been discovered earlier. The Supreme Court specifically noted that it was not addressing a "mixed motives" case, but that the case came before them on the express assumption that an unlawful motive was the *sole* basis for the firing. The Supreme Court concluded that an absolute rule barring any recovery of backpay "would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination." *Id.* at 362. The Court held that "where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *Id.* at 362-363.

That is not the factual situation presented here, where I found that the Respondent had mixed motives for dismissing the Complainant. The Respondent has cited to my Decision and Order out of context. Thus, although I found that the Respondent had a legitimate, non-pretextual reason to dismiss the Complainant, that is, her failure to disclose her relationship with Captain Swigart, I also found that the Respondent failed to meet its burden to show by clear and convincing evidence that it *would have* suspended and terminated Ms. Platone on the basis of her relationship with Captain Swigart alone.
As the Court noted in *McKennon, supra,* proving that the same decision would have been justified, in a mixed motive case, is not the same as proving that the same decision would have been made. *Id.* at 360.

As the Complainant correctly pointed out, the Respondent seeks to relitigate issues on which I have already made a ruling. I have determined that the Complainant is entitled to relief under the Sarbanes Oxley Act, including back pay, and I find that the Respondent's arguments to the contrary are inappropriate at this stage, and in any event, misplaced.

Back Pay

The Complainant has requested an award of back pay based on her base salary at the time of her termination, $61,214, plus benefits and other compensation including health and dental insurance, flight benefits, vacation, bonuses, and a 401(k) plan. The record includes the employment offer letter that the Complainant received, setting her salary at $61,214.00 a year (CX 2), as substantiated by her 2002 W-2, and her pay stub for the period of February 24 to March 18, 2003 (Complainant's Exhibit 3, attached to Complainant's Reply to Respondent's Opposition to Submission of Lost Earnings, Expenses and Attorney's Fees).

The Respondent argues that as of March 2, 2003, the Complainant's salary, along with that of other executives, was cut by five percent, to $58,153.30. However, as the Complainant points out, there is no evidence that she was notified of any such reduction, and her pay stub, dated March 18, 2003, indicates that her salary was unchanged. I have reviewed the transcript of the hearing, and I can find no testimony from the Complainant, or from any other executives employed by the Respondent, to substantiate the Respondent's claim of an across the board reduction in executive salaries.[1]

The Respondent has provided an undated computer printout, purporting to show that the Complainant's salary was reduced by five percent, to $58,158.30, effective March 2, 2003 (Respondent's Exhibit 2, attached to Respondent's Opposition to Complainant's Earnings and Fee Submission). The printout does not indicate why the salary was allegedly reduced, or whether the alleged reduction applied across the board, to other employees of the Respondent in executive positions. It is also directly contradicted by the Complainant's pay stub for the period of February 24, to March 18, 2003, which reflects that Respondent in fact paid her at the same rate as before. I find the exhibit proffered by the Respondent to be unreliable and unpersuasive. Thus, I find that for purposes of calculating the Complainant's back pay, the appropriate figure is $61,214 annually.

Mitigation of Damages

The Respondent argues that any back pay awarded to the Complainant should be offset by "interim pay" that the Complainant did or should have earned. The Respondent argues further that there is no evidence that the Complainant made any reasonable effort to secure employment in mitigation of her back pay damages.

The Sarbanes Oxley Act, similar to other whistleblower statutes, does not explicitly require victims of employment discrimination to attempt to mitigate damages. The Secretary and the ARB have consistently imposed such a requirement, in keeping with the general common law "avoidable consequences" rule and the parallel body of damages law developed under other anti discrimination statutes.

However, the employer bears the burden of proving that the complainant did not properly mitigate her damages, and to meet this burden, it must show that (1) there were substantially equivalent positions available; and (2) the Complainant failed to use reasonable diligence in seeking these positions. Ordinarily, the benefit of any doubt goes to the Complainant. *Hobby v.*

[1] Nor is there any documentary evidence to support a deduction for the workers' compensation benefits the Respondent claims the Complainant received.

Georgia Power Co., ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001). *See also, West v. Systems Applications International,* 1994-CAA-15 (Sec'y Apr. 19, 1995)(evidence that the complainant failed to mitigate damages will reduce the amount of the back pay owed; the respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment); *NLRB v. Browne,* 890 F.2d 605, 608 (2d Cir. 1989) (once the plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate that liability); *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.,* 1991-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 9-10.

Here, the Respondent did not even attempt to establish that there were substantially equivalent positions available to the Complainant, but that she did not exercise reasonable diligence in attempting to obtain such positions. As the Complainant pointed out, the Respondent had ample opportunity to explore this issue, both at the hearing and at the Complainant's deposition, but did not choose to do so. Having made a tactical decision not to present evidence that the Complainant failed to explore opportunities that were open to her, the Respondent cannot now argue that she failed to mitigate damages.

I find that the Respondent has not met its burden to present evidence to mitigate its liability to pay the Complainant her back wages.

Vacation Days/Personal Holidays

The Complainant has requested compensation for lost vacation pay and personal holidays. The Respondent's Company Policy Manual provides that, after six months of employment, employees are eligible to take one paid personal holiday each calendar year. This personal holiday may not be accrued or carried over for use in the next calendar year, and there is no pay in lieu of an unused personal holiday. (CX 40 at Section 11.02).

The Respondent's Manual also provides vacation time for regular full time employees, accrued according to length of employment. An employee who worked for the Respondent for less than three years would be entitled to 6.67 hours a month, or 3.07 hours a pay period, equal to ten days a year. The Manual provides that unused vacation time may be accrued up to the amount of the annual accrual plus 40 hours, and that unused vacation time in excess of this maximum accrual amount will be forfeited, and will not be paid out. The Manual provides that on termination, the maximum amount of vacation time that will be paid out is the accrued total as of the last day worked. (CX 40 at Section 11.09).

As noted above, the purpose of the Act is to make the Complainant whole. In determining whether a complainant is entitled to be paid for accrued vacation that she lost as a result of her employer's discrimination, the Administrative Review Board (ARB) has found that, where it is the practice of the employer to pay an employee for vacation time not taken, it is equitable for the complainant to receive both wages and vacation pay for the same period. *See, Hobby v. Georgia Power Co.,* 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), where the ARB adopted the standard in *Palmer v. Western Truck Manpower, Inc*., 1985-STA-16 (Sec'y June 26, 1990), *vac'd on other* grounds*, Western Truck Manpower, Inc. v. United States Dep't of*

Labor, 943 F.2d 56 (9th Cir. 1991), for determining when a complainant is entitled to reimbursement for lost vacation time. In that case, the complainant's former employer permitted carryover of unused leave. The ARB found that the complainant was entitled to the cash value of lost vacation time until he was reinstated, plus interest.

I find that, in addition to her salary, the Complainant is entitled to the cash value of her lost vacation time, as allowed by the Respondent's Manual, to the date of reinstatement or payment. The Respondent's Manual provides that an employee may only carry over an amount of vacation time equal to the amount of the annual accrual, plus forty hours; any additional leave time is forfeited. Thus, I find that the Complainant is entitled to the amount of her annual accrual, ten days, plus forty hours, or in other words, a maximum of three additional weeks of pay.

However, I find that, as the Respondent does not pay its employees for unused personal holidays, the Complainant is not entitled to any additional amount for her unused personal holidays.

Health, Dental, and 401k Benefits

The Complainant requests an amount representing 35% of her salary for Health, Dental, and 401K benefits, as advertised by the Respondent in its benefits manual. This statement is made in the introduction to the ACA/ACAI Employee Benefits booklet, which states that most people never give their benefits coverage a second thought, but "your benefits package may comprise more than 35% of your overall compensation." (CX 6).

In cases arising under other whistleblower statutes, complainants who have successfully established a violation have been found to be entitled to payment of reasonable medical costs that would have been covered under the employer's health insurance coverage. *See, Crow v. Noble Roman's Inc.,* 1995-CAA-8 (Sec'y Feb. 26, 1996). Thus, although the Respondent may advertise the value of its benefits as 35% of an employee's salary, in order to make the Complainant whole, the Respondent is obligated only to reimburse the Complainant for medical expenses she incurred that would have been covered under the company plan.

Here, the Complainant has submitted no evidence of any medical or dental expenses that she has incurred since her termination, and thus she is not entitled to reimbursement for medical or dental expenses. Any such expenses that are incurred by the Complainant from this point until payment of her back pay award by the Respondent, which would have been covered by the company plan, however, must be reimbursed to the Complainant.

The Respondent argued that the Complainant did not participate in its 401k plan, and thus she is not entitled to reimbursement for this benefit as part of her back pay award. The Summary Plan Description for the Respondent's 401k plan states that all employees hired after January 1, 1998 are automatically participants in the Plan on the January 1 and July 1 immediately following the completion of six months of employment (CX 3).

The Complainant began her employment in August 2002, and thus would have become a participant in the Respondent's 401k plan as of July 1, 2003. The plan provides for Employer contributions to the plan under a "401k arrangement," under which the employee can elect to have the Respondent contribute a portion of her compensation to the plan. Because she was not with the Respondent long enough to be eligible to participate in the plan, the Complainant did not enter into a salary reduction agreement with the Respondent, which would have allowed the Respondent to allocate "elective deferrals" to a separate account for the Complainant. The Manual also provides for matching contributions by the Respondent.

Although the Complainant clearly would have been eligible to participate in the Respondent's 401k plan had she remained employed by the Respondent, and would have been eligible to receive matching contributions based on the amount of her "elective deferral," there is no way to predict whether the Complainant would have participated in the plan, and if so, how much she would have elected to have placed in her plan from her salary. Under these circumstances, I find that any calculation of a matching contribution by the Respondent would be purely speculative, and thus I find that the Complainant is not entitled to an amount representing lost 401k benefits.

Flight Benefits

The Complainant has calculated, as part of her back pay, an amount representing the value of free and discounted airline travel provided to Respondent's employees. In its Company Policy Manual, the Respondent sets out the details of its "Travel Privilege Program," which provides for unlimited space-available travel on ACA by employees, eligible family members, and dependents, as well as significant discounts for travel on other airlines.

The availability of these travel benefits was represented to the Complainant as a part of her basic compensation package. The fact that it may not represent a cost to the Respondent does not mean that it does not have value for its employees. However, it is difficult to assign a value to this benefit, as there is no basis on which to predict how often any particular employee would take advantage of it. The Complainant has used the figure of $600 for a round trip ticket, and has requested the equivalent of four round trip tickets through May 30, 2004, but she has provided no explanation of the basis for her calculation.

Moreover, these are not benefits that are accrued, and paid by the Respondent on termination of employment. Under these circumstances, I view these benefits as similar to the personal holiday leave, and I find that the Claimant is not entitled to an additional amount for these benefits.

Time Period for Computation of Back Pay

The Complainant has specifically stated that she does not wish to be reinstated with the Respondent; conversely, the Respondent has not made a bona fide offer of reinstatement to the Complainant. Under these circumstances, back pay, including vacation, continues to accrue,

with interest, until it is paid. *See, Chapman v. T.O. Haas Tire Co.,* 94-STA-2 (Sec'y Aug. 3, 1994). [2] *See also, Dutile v. Tighe Trucking, Inc.,* 1993-STA-31 (Sec'y Oct. 31, 1994).

Costs and Expenses

The Complainant requests costs in the amount of $6,291.76. The Respondent objects to several of these expenses, including costs for meals, photocopying, projector rentals, and overhead postage. There are several entries in the Complainant's summary of expenses for "photocopies," which do not contain any description of what was copied, or by whom. Expenses for photocopying are customarily considered as part of overhead, which in turn is taken into account in setting the attorney's hourly rate. Such expenses cannot be charged separately, unless they are over and above what would customarily be considered to be overhead expenses. The Complainant has provided no information to suggest that these photocopying expenses should not be considered as part of her attorney's overhead, and thus I will disallow them.

There are several entries for the cost of meals, which apparently took place during preparation for the trial. These entries are very modest. I find that it is reasonable to expect the Complainant to meet with her attorneys and discuss the case progress and strategy at meal times, and thus I will allow these costs.

At the hearing, the Complainant made extensive use of overhead projection equipment, and there are several entries in her summary of costs for the rental of this equipment. The use of this projection equipment was helpful at the hearing, and I find that this cost is over and above what would ordinarily be considered to be "overhead." Thus, I will allow these entries.

It is not clear exactly what the Respondent means by "overhead postage," although the Complainant's cost summary includes an entry for "fifty three letters" on November 25, 2003. There is a corresponding entry in the fee petition, indicating that Ms. Bergantino prepared correspondence on that date. Although there is no indication in the cost summary as to what the $19.61 represents, it turns out that the cost of first class postage for 53 letters comes to $19.61. Again, absent any indication that this was an extraordinary cost, over and above what would customarily be considered overhead, I will disallow this entry.

Otherwise, I find that the charges detailed in the Complainant's cost summary are reasonable, and directly related to the successful prosecution of the Complainant's claim, and I approve them.

Attorney Fees

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[2] *See, Ass't Sec'y & Burke v. C.A. Express, Inc.,* 1996-STA-5 (ARB Sept. 17, 1997), where the ARB found that a waiver of reinstatement is valid only when an employer has made an unconditional offer of reinstatement, and since there was no evidence of such an offer in the instant case, held that the appropriate cut-off date for back pay is the date of hire at a commensurate rate of pay.

By far the largest portion of the damages sought by the Complainant is for her attorney fees incurred in bringing this action. Thus, she has requested attorney fees in the amount of $203,650. The Respondent has objected vociferously and on numerous grounds, and has requested that any such award be denied entirely, or at least reduced drastically.

At the outset, I note that many of the arguments by both sides have merit, and I have addressed the Respondent's objections in detail below. This was a hard-fought case, and the Respondent contested virtually every conceivable issue, from coverage and jurisdiction to the merits of the claim. The factual issues presented in this case were complex, with allegations that involved an intricate accounting process. While there is a body of law developed in cases under other whistleblower statutes that was applicable to many of the issues presented here, some of the issues presented, such as the extent of coverage under the Sarbanes Oxley Act, were new and untested.

On balance, I find that this was not a routine, garden variety case; from start to finish, it involved complex and sometimes novel issues of fact and law. The trial of this claim took four full days, and an additional portion of a day for a motions hearing. Given the complexity of the factual and legal issues, of necessity it required a substantial expenditure of time by the attorneys for both sides.

The Supreme Court, in *Hensley v. Eckerhart, supra,* considered the award of attorney's fees in a federal civil rights action, pursuant to Title 42 U.S.C. 1988, and provided an analysis designed to apply to all federal statutes that allow fee awards to prevailing parties. The Court stated that as a threshold determination, the party requesting attorney's fees must be a "prevailing party." Noting that the standard for making this threshold determination has been framed in various ways by different circuits, the Court indicated that

> A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."

Hensley, supra, at 1939, citing *Nadeau v. Helgemoe,* 581 F.2d 275, 278-279 (lst Cir. 1978). As the Court indicated, this is a generous formulation that only brings the plaintiff across the statutory threshold, and it remains for the court to determine what fee is "reasonable."

As a starting point, the Court suggested that the most useful guide was a determination of the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate, or what has been termed the determination of a "lodestar" figure. The Court noted that the party seeking an award of fees has the burden of submitting evidence to support the number of hours worked and the rates claimed; if that documentation is inadequate, the award may be reduced accordingly. Additionally, hours that were not "reasonably expended" should be excluded from the calculation of the initial fee. In making this determination, "billing judgment" is important, and hours that would not properly be billed to a client should not be included in the computation.

Subsequently, in *Farrar v. Hobby,* 113 S.Ct. 566 (1992), the Supreme Court stated that to qualify as a "prevailing party" for purposes of a fee award, a plaintiff must obtain at least some relief on the merits of his claim, noting that statutory fee awards were never intended to produce windfalls to attorneys.

Clearly, in this case the Complainant was a "prevailing party" for purposes of the attorney fee analysis required by *Hensley*. The Complainant prevailed on every contested issue, from jurisdiction and coverage to liability, and has been awarded the bulk of the damages she sought. Thus, she is a "prevailing party" for purposes of the award of attorneys fees.

The next step in determining an appropriate fee is a calculation of a lodestar figure. Turning first to the question of the appropriate hourly rate, I note that the Complainant's attorney has stated that the market rates for attorneys of his experience level handling similar complex litigation in the Washington, D.C. area are substantially higher than the rates that were charged to the Complainant, and that counsel's firm agreed to accept the Complainant's case at a reduced hourly rate to enable her to have access to the administrative process and the judicial system.

The documentation submitted by Complainant's counsel consists of an affidavit by Mr. York, setting out his status as a graduate of the University of North Carolina School of Law, and his partnership at Wehner & York, where he specializes in litigation, defending and advising major corporations, institutions, and individuals in high-profile cases. Mr. York also stated that the hourly rates that were actually charged to the Complainant for his services, as well as those of his associate, Mr. Hildebrandt, and his legal assistant, Ms. Bergantino (as opposed to the rates customarily charged), were significantly below the market rate for this type of complex litigation.

The Respondent's attorney claims that this reduced rate is too high, but does not provide any information on the prevailing rate for similar legal work, and speculates that "most of the work could have been performed at a lower hourly rate."[3]

As the Supreme Court noted, it is the burden of the Complainant's attorney to submit evidence to support his hourly rate, and inadequate documentation may justify a reduction in that rate. *Hensley, supra,* 103 S.Ct. at 1939. Here, the Complainant's counsel has offered no evidence as to what the prevailing market rates actually are for this type of complex litigation, other than to state what counsel's own fees are for such work.

In determining the "market rate," that is, the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation, I have looked to the 2004 Altman Weil Survey of Law Firm Economics for guidance. This survey reflects that the average hourly rate for an equity partner in the Washington D.C. area is $485; for an attorney with twenty one or more years of experience, $497; and for an associate, $302. In the South Atlantic region, of which Washington, D.C. is a part, the average hourly rate for a partner is

[3] The "community standard" that applies is not suburban Reston, as suggested by the Respondent, but the Washington, D.C. metropolitan area, which is where this case was tried.

$318; for an attorney with twenty one or more years of experience $322; and for an associate $213.[4]

Taking into account the information provided in the Altman Weil Survey, as well as Mr. York's experience, the complexity of the issues presented, and the excellent presentation at trial, I find that the hourly rates agreed to by the Complainant are well within the "market rate" range, and eminently reasonable. I also note that, generally, the rates agreed to by a complainant are a good indication of the "market rate."

I have taken into account the fact that Complainant's counsel agreed to represent the Complainant at reduced rates, and thus to some extent *pro* bono, to provide the Complainant with access to the legal system. In turn, assisting the Complainant in gaining access to the legal system, in addition to providing individual redress for discrimination, promotes the broader purposes of the Sarbanes Oxley Act, that is, financial integrity in public companies.

However, other factors lead me to the conclusion that the rates customarily charged by counsel, as opposed to the reduced rates to which the Complainant agreed, are not reasonable in this particular case. Such fees indicate that the attorneys who charge them are experts in this particular area of the law, who require little time to recognize the issues and research the law, and thus could be expected to charge less billable hours than an attorney who is not an "expert" in the particular practice area.

A review of the fee petition reflects that a substantial amount of time was spent on research, as well as preparation for depositions and trial. The bulk of this time was billed by Mr. Hildebrandt, a decision that reflects reasonable billing judgment, as Mr. Hildebrandt bills at a lower rate. Nevertheless, the amount of time spent on these tasks belies the use of hourly rates that reflect "expert" status in this particular practice area. As Complainant's counsel concedes, this is a new area of the law in many respects, and I find that, with the exceptions noted below, the time spent on such tasks was reasonable. But counsel cannot expect to recover fees based on an hourly rate that indicates that they have expertise in this particular, limited practice area.

Under these circumstances, I find that it is reasonable and appropriate to calculate the fee award using the following hourly rates: $275 for Mr. York, and $150 for Mr. Hildebrandt.

I have some difficulty with the hourly rates charged for Ms. Bergantino. It is not at all clear to me whether she is a "summer associate," or a "legal assistant," or why her hourly rate is $150, as opposed to the $100 hourly rate for Ms. Olson, a legal assistant. In any event, it does not appear that she is an attorney with the firm. Thus, I will reduce Ms. Bergantino's hourly rate to $100, in line with that of Ms. Olson.

Hours Reasonably Expended

In determining the lodestar figure, which is the next step in calculating the appropriate attorney fees, the hourly rate must be multiplied by the number of hours reasonably expended.

[4] The Survey provides a breakdown for specific practice areas, none of which are directly applicable here, but they are all national averages.

The Respondent has made a number of specific objections to the entries on the attorney's fee petition. As Complainant's counsel has provided the Complainant with a valuable service by bringing this claim to a successful conclusion, I will award fees for a reasonable amount of time that Complainant's counsel should have expended to reach a positive result, taking into account the objections by the Respondent.

In addressing the specific objections raised by the Respondent, I note that in the absence of any appearance of abuse, incompetence, obvious error, or lack of good faith, I will not attempt to parse the billing entries and second guess the choices made by the Complainant's counsel in rendering these professional services. Thus, I will not isolate and analyze every entry for each task performed, and state which are allowed and which denied. Rather, I have reviewed the entire course of the case, and I find that, given the nature and circumstances of this case, with the specific exceptions noted, the hours expended to reach the result obtained were reasonable.

In making this determination, I acknowledge the special and particularized nature of a whistleblower case. A complainant's counsel takes on unique risks in representing a client in such a case. Thus, the complexity and difficulty of the case is coupled with the risk that, absent recovery for the client, there may be no payment of attorney fees. I find that when a case is well litigated, as this case was by all parties, it is proper to acknowledge the Complainant's attorney's performance. I also note that in awarding attorney fees, judges must be aware that if fees were too tightly restrained, and kept below or outside the norm for the parties involved, the plaintiff's bar may become reluctant to represent potential whistleblowers.

Excessive Block Billing

Respondent objects to "large block entries with vague descriptions," often by multiple attorneys, which give no indication of what actual work was performed. The examples cited by the Respondent are entries for "Trial prep" or "Review discovery," without further details about the work performed. The Respondent also notes that on at least thirty five occasions, the time entry includes the "ubiquitous" time entry of "Review 18 USC § 1514A; 49 USC § 42121." Many of these entries are combined with meetings with the Complainant, without any breakdown of the time spent on each task.

My review of the fee petition shows that while the level of detail in the descriptions of many of the services provided is adequate, the fee petition has numerous time entries that do not allow a meaningful opportunity for reviewing the reasonableness or necessity of the fees charged. These include research and review of whistleblower and other federal statutes and rules; review of discovery; deposition preparation; review of files and exhibits; and trial preparation. Where the billing descriptions do not afford a meaningful opportunity to determine the reasonableness of the time expenditures, an Administrative Law Judge need not engage in an item by item reduction of the hours, which would be an impossible burden. It is permissible to make reductions based upon a percentage basis. Thus, as the block billing method used by Complainant's counsel does not provide an adequate basis upon which to judge the reasonableness of all of the time expended, I find it appropriate to reduce the total hours billed by 15% across the board.

Billing for Multiple Counsel

The Respondent argues that the fee petition does not indicate the distinct contribution of each of the two attorneys, and that the entries are duplicative and redundant, and should be disallowed. As Complainant's counsel pointed out, two attorneys represented the Complainant in these proceedings, assisted by a legal assistant and a summer associate. As I observed at the hearing, and as Complainant's counsel argues, the Complainant's two attorneys performed complementary roles, with Mr. York taking the lead, and Mr. Hildebrandt providing support and assistance. This is also supported by the fee petition, which reflects that on repeated occasions, Mr. Hildebrandt performed much of the research and preparation work, which he then reviewed with Mr. York.

I find that the decision to use Mr. Hildebrandt, who bills at a lower rate than Mr. York, for a large part of the tasks, including research and trial preparation, was efficient and cost effective. The Complainant's counsel also elected to use legal assistants for much of the tasks involved. The Supreme Court has observed that "encouraging the use of lower-cost paralegals rather than attorneys wherever possible . . . 'encourages cost-effective delivery of legal services . . . .'" *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989).

I find that, given the factual and legal complexity of the issues in this case, it was reasonable and prudent to use two attorneys at the hearing and at depositions, as well as support staff, to prepare for and prosecute this case. Nor has it escaped my attention that Respondent also found it prudent to use the services of at least two attorneys, during the trial and deposition phases. Thus, with the exception of the specific instances noted herein, I will not disallow any time on the grounds that the Complainant unnecessarily used the services of more than one attorney.

Respondent's Summary of Objections to Fee Claims

In addition to the objections noted above, the Respondent has submitted a detailed, eight page, entry by entry list of objections to Complainant's counsel's fee petition. As discussed above, I find that it is not necessary or even appropriate to go through these objections line by line, as to do so would turn this proceeding into a second litigation. Rather, I will address these objections by broad categories.

Deposition Preparation

The Respondent objects to the 50.2 hours allegedly billed by Complainant's counsel for deposition preparation on September 4, 8, 9, 12, and 14, 2003. However, I find that this number is misleading. The fee petition reflects that on September 4, Ms. Olson spent 7 hours on a variety of tasks, including preparation for depositions. Given that this entry includes several tasks, only one of which was preparation for depositions, I see no reason to reduce this entry.

Similarly, on September 8, Ms. Olson spent a total of 8.5 hours on a variety of tasks, one of which was the preparation of cross-examination of the Respondent's witnesses. I see no reason to reduce this entry. There are no entries on September 9 for deposition preparation.

Again, the fee petition reflects that on September 12, Mr. Hildebrandt spent a total of 8 hours on a variety of tasks, including deposition preparation. I find this entry to be reasonable.

On September 14, Mr. Hildebrandt, Ms. Olson, and Mr. York spent a total of 26.7 hours preparing for depositions, which took place the following day. I find that, while any one of these entries, standing alone, would be eminently reasonable, and that it is also reasonable to allow two attorneys to prepare for depositions, it is unjustifiably duplicative to bill for a third person to work on this task. I will thus disallow the entry for Ms. Olson's time, 9 hours at $100 an hour.

Response to Discovery Requests

The Respondent objects to the entries for preparing a response to the Respondent's discovery requests on October 28, 29, and 31. Complainant's counsel's fee petition reflects that Mr. Hildebrandt spent 8 hours on each of these days performing research, drafting responses to discovery, and performing work on a letter to Mr. Petesch. Mr. York also has an entry for October 31, 2003, for a variety of tasks, including drafting a letter to Mr. Petesch.

Again, given the complexity of this case, I find that these entries are reasonable, and sufficiently detailed, and I will allow them.

Trial Preparation

The Respondent objects to the 206.5 hours it claims was billed by Complainant's counsel for trial preparation. It is difficult to determine the precise entries to which the Respondent objects. Complainant's counsel's fee petition contains numerous entries for "trial preparation," as well as more specific tasks in preparation for trial, such as preparing witnesses, reviewing exhibits, and conducting research. Many of these entries also include the performance of other tasks, not necessarily related to trial preparation.

Given the factors I have discussed above, *i.e.*, the complex and novel factual and legal issues raised by this claim, as well as the risks inherent in taking on a case such as this one, I find that the number of hours entered for tasks involved in preparing this claim for trial are reasonable. To the extent that some of the entries are vague, I have already reduced the total billed by Mr. York and Mr. Hildebrandt by 15%, to account for vague block billing. Thus, I reject the Respondent's challenge to these entries.

Fees Sought for Unsuccessful Motions

The Respondent objects to the time billed by Mr. York and Mr. Hildebrandt for the preparation of a summary judgment motion, which I denied, as "duplicative," as it re-capped arguments already made in opposition to the Respondent's motion to dismiss. The fact that the Complainant did not prevail in her summary judgment motion does not mean that her attorneys should not be compensated for preparing it. This is especially so in light of the fact that the Complainant ultimately prevailed on all of the legal issues raised by her claim. Thus, I will not disallow any of the time to which the Respondent objects on this ground.

Review of Discovery Documents

The Respondent objects to the entries for 80 hours it claims was spent on reviewing discovery documents on specific dates. Again, this number is misleading. The fee petition reflects that on the dates listed by the Respondent, Mr. York and Mr. Hildebrandt spent a total of 63.5 hours performing a variety of tasks, only one of which was reviewing discovery documents. There is no entry for review of discovery documents on October 20, 2003.

Again, given the complex nature of this case, I find that the entries objected to are reasonable, and I will allow them

September 29, 2003 Hearing

The Respondent objects to the entry for a total of 12.8 hours of attorney time for the hearing on September 29, 2003, claiming that Respondent's counsel recorded a total of 3.5 hours for preparation and actual hearing time. I note that Mr. Hildebrandt and Ms. Olson both recorded 4 hours for attendance at the hearing, while Mr. York recorded 4.8 hours for attendance at the hearing as well as a conference with the Complainant.

I do not find it particularly relevant that counsel for the Respondent, Mr. Petesch, "recorded" a total of 3.5 hours for preparation and actual hearing time. Not mentioned by Mr. Petesch is that he was accompanied by Ms. Belcher, in-house counsel for the Respondent, whose services were presumably compensated by the Respondent.

I find that four hours for attendance at the hearing, including travel time, is not unreasonable, and I will allow the entries for Mr. York and Mr. Hildebrandt. However, I do not find any justification for the presence of a third person at the hearing, and thus I will disallow the 4 hours entered for Ms. Olson.

Drafting of Complaint and Objections to Secretary's Findings

The Respondent has objected to entries for the drafting of the complaint, and objections to the Secretary's Findings. The fee petition includes an entry of 7 hours for Mr. Hildebrandt on March 25, 2003 for research and drafting the complaint, and 1 hour on April 2, 2003 for finalizing and filing the complaint. Given the complex factual pattern of this case, combined with the fact that the governing statute was new and untested, I find that 8 hours is not an unreasonable amount of time to spend on drafting a complaint. Thus, I will allow these entries.

Similarly, the fee petition contains an entry of 9 hours on August 14, 2003 by Mr. Hildebrandt, for drafting objections to the Secretary's letter, and 2.2 hours by Mr. York for review of these objections. Again, given the complex and novel factual and legal issues presented by this case, I do not find these hours to be unreasonable, and I will allow these entries.

Calls to the Complainant

The Respondent states that "numerous other time entries indicate telephone calls to the client and others which likely took only a fraction of the time indicated to complete." As Respondent's counsel did not participate in these telephone calls, it is not possible for him to know how long these telephone calls actually took, and his veiled and unsupported allegation of fraudulent billing is not well taken. I have reviewed the fee petition, and find that the telephone calls reflected in the billing entries were to the Complainant, potential witnesses, and persons who could be expected to have information relevant to the Complainant's case. Counsel for the Complainant has represented that his firm did not, in fact, bill for the majority of the telephone conferences with the Complainant. Under these circumstances, I will not disallow any of these entries.

Preparation for and Attendance at Trial

The Respondent objects to the 206.5 hours listed by Complainant's counsel from November 1 through November 13, 2003, for trial preparation, exhibit preparation, and review of statutes, as excessive. The Respondent points out that its "sole" attorney spent 61.9 hours in trial preparation and production of additional documents for the Complainant.

Similarly, the Respondent objects to the time recorded by Complainant's counsel for appearing at the trial on November 14, 17, and 20, 2003, arguing that three attorneys were not necessary, and that "sole counsel" for the Respondent recorded 26.6 hours for the first three days of trial.

The Respondent objects to the entries for trial preparation on November 16, 18, and 19, 2003; the review of the file, discovery, and statutes on November 21, 2003; the entries for file review, preparation for final day of trial, and review of statutes from November 22 to December 15, 2003; and the entries for the final day of trial on December 16, 2003, on the grounds that two attorneys were not needed at trial; and the claim that the file and statute review, and preparation times were "excessive."

Again, Mr. Petesch, the "sole" attorney for the Respondent, neglected to point out that Respondent also had in-house counsel working on this matter, namely Ms. Belcher. Nor has Mr. Petesch denied the use of legal assistants by his firm or by the Respondent to assist in preparation for the trial. I find Respondent's attempts to "compare and contrast" to be misleading and not particularly helpful in addressing the issue of appropriate attorney fees.

I find that the entries for trial preparation and attendance at trial are reasonable, and I will allow them.

Miscellaneous Entries

I have reviewed the remainder of the objections by the Respondent, and, with the few exceptions noted below, reject them for the reasons discussed above, and keeping in mind that I have already reduced the time claimed by 15%. There are two entries, however, that I will disallow.

The first is an entry on November 14, 2003, for 3 hours for Ms. Olson, for driving documents to Washington, D.C. for trial. This is strictly a clerical task, and the Complainant has offered no reason why these documents could not have been brought by her two attorneys. I will disallow this entry.

The Respondent has objected to entries allegedly totaling 10.6 hours on November 21, 24, and 25, 2003 for "research on airport associations and boards; letters to airline boards and other third parties," claiming that there is no rational connection to this case or to preparation for the final day of trial. I agree with this contention, although I note that on November 21, 2003, Ms. Bergantino recorded 1 hour for online research regarding airport associations and airport boards, and 5.5 hours on November 24, 2003 for online research regarding airport boards for open records inquiry. No hours were recorded for similar tasks on November 25, 2003. The information provided in these entries is not sufficient for me to determine their relationship to this case, and I will disallow these 6.5 hours, at $150 an hour.

Conclusion

Based on the foregoing, I approve hourly rates of $275 for Mr. York, $150 for Mr. Hildebrandt, and $100 for Ms. Olson and Ms. Bergantino. Reducing the number of hours billed by 15%, as well as accounting for the specific entries disallowed above, results in a total number of hours of 346.12 for Mr. York, 415.35 for Mr. Hildebrandt, 87.55 for Ms. Olson, and 31.41 for Ms. Bergantino. Multiplying the hourly rates by the number of hours results in a total fee of $169,381.50. The total allowable costs, taking into account the entries disallowed, come to $5,378.38.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the Respondent shall:

A. Pay to the Complainant back wages, on the basis of an annual salary of $62, 213.88.

B. Pay to the Complainant vacation pay, calculated at the rate of 3.07 hours every two weeks, not to exceed the equivalent of three weeks of pay.

C. Pay to the Complainant any expenses that she incurs from this date forward for medical treatment that would have been covered under her medical insurance.

D. Pay to the Complainant interest at the rate of 3%, compounded quarterly.

E. Pay to the Complainant her costs in prosecuting this claim, in the amount of $5,378.38.

F. Pay to the Complainant's attorneys fees in the amount of $169,381.50.

G. The amounts due for back pay, vacation pay, and medical expenses, together with interest, shall continue to accrue until paid by the Respondent.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE: Pursuant to ¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002), authority and assigned responsibility to act for the Secretary of Labor has been delegated to the Administrative Review Board ("ARB") in review or on appeal of cases arising under the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. The Sarbanes-Oxley Act employee protection provision provides that complaints filed with the Secretary of Labor shall be governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b). Regulations directly governing Sarbanes-Oxley Act whistleblower complaints, however, have not yet been promulgated by the Department of Labor. In light of the absence of clearly governing regulations, the parties are advised that they should preserve their rights of appeal by filing in writing with the ARB, within ten business day of the date of this Decision and Order, any petition for review by the ARB. The ARB's address is Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave, Washington DC 20210. The petition should be served on all parties and on the Chief Administrative Law Judge.