In the Matter of:

KENNETH TIPTON,	**ARB CASE NO. 04-147**
COMPLAINANT,	**ALJ CASE NO. 02-ERA-30**
v.	**DATE: June 27, 2007**
INDIANA MICHIGAN POWER COMPANY,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
John T. Burhans, *Burhans Law Offices*, St. Joseph, Michigan

***For the Respondent*:**
J. Patrick Hickey, *Shaw Pittman LLP*, Washington, D.C.

ORDER GRANTING RECONSIDERATION AND DENYING MOTION FOR STAY

This case was originally before us based on a whistleblower complaint Kenneth J. Tipton filed, alleging that his employer, Indiana Michigan Power Company (I&M), terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), and its implementing regulations at 29 C.F.R. Part 24 (2006). A United States Department of Labor Administrative Law Judge (ALJ) concluded in a Recommended Decision and Order (R. D. & O.) that I&M violated the ERA when it fired Tipton in retaliation for his whistleblower activities. The ALJ also awarded Tipton back pay, front pay, and compensatory damages. On I&M's appeal, we concurred with the ALJ's recommended decision, but reversed the ALJ's award of $10,744 to cover Tipton's replacement health insurance expenses on the ground that it constituted a double recovery for Tipton.

On October 10, 2006, I&M filed a Motion for Reconsideration and Modification of Damages Ruling on Front Pay Award Based on Record Error, arguing that the Board should have discounted the ALJ's front pay award to present value. Since there was no evidence in the record that I&M had paid the front pay award to Tipton, the Board had ruled in its Final Decision and Order that discounting was unnecessary. I&M asks that the Board "issue an Amended Final Decision that requires that the front pay award be reduced to its present value as of July 20, 2004."

I. Reconsideration of Front Pay Award

The ARB is authorized to reconsider earlier decisions. *See Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown and Root, Inc.*, ARB Nos. 98-112, 98-112A; ALJ No. 86-ERA-23 (ARB Nov. 20, 1998); *Knox v. United States Dep't of the Interio*r, ARB No. 03-040, ALJ No. 2001-CAA-3, slip op. at 3 (ARB Oct. 24, 2005). *Accord, Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51 (ARB May 30, 2007). Following the principles that federal courts employ in deciding requests for reconsideration, we will reconsider our decisions under the following circumstances: (1) material differences in fact or law from that presented to a court which the moving party could not have discovered through reasonable diligence, (2) new material facts that occurred after the court's decision, (3) a change in the law after the court's decision, and (4) failure to consider material facts presented to the court before its decision. *Knox, supra.*

In support of its motion, I&M points out that the ALJ's preliminary order awarding damages was "effective immediately," and alleges that I&M paid Tipton front pay of $91,038 pursuant to that order on July 20, 2006. There is, however, no evidence of this payment in the record; nor did I&M argue in its brief before the Board that it had paid the award. In his response to I&M's motion for reconsideration, however, Tipton has submitted a copy of a check for $275,141, dated July 21, 2002, and made out to Kenneth J. Tipton. The check carries the notation "BILLINGKTIPTON071504 07/15/2004 Special Handling – Docket No. 2002 ERA 00030," but there is no indication on the check as to what damage amounts the check covers. I&M contends that the check covers all damages except the ALJ's compensatory damage award. Respondent's Motion for Reconsideration at 2. Therefore, since Tipton does not contest I&M's contention that it paid Tipton the front pay awarded by the ALJ, without discounting to present value, and since Tipton has provided a copy of the check as evidence of payment, we conclude that Tipton received his front pay on July 21, 2004. We will therefore reconsider our decision in this case because it gives the Board the opportunity to correct an error, and because reconsideration has been requested within a reasonable time.

Neither party offered any evidence or testimony before the ALJ in support of an appropriate discount rate to be applied in this case. I&M never raised the issue of discounting the front pay award before the ALJ, and Tipton only alluded to it in his post-hearing brief. Complainant's Post-hearing Brief at 150. With little discussion, I&M

contended in its brief before the Board that the discount rate should be five percent because "a prejudgment interest rate of five percent was applied to most of the back pay award." Respondent's Brief at 49. Tipton in his responsive brief before the Board contended that a five percent rate is too high and that the case must be remanded for the ALJ to determine an appropriate discount rate. Complainant's Brief at 50. Thus, the parties have offered the Board very little guidance for calculating an appropriate front pay award.

Courts have taken a variety of approaches in calculating front pay awards, including the use of tables to discount awards to present value, *see, e.g. Suggs v. ServiceMaster Educ. Food Mgmt.*, 72 F.3d 1228, 1234-35 (6th Cir. 1996*)*; and the use of a "total offset" approach to obviate the need for discounting, *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 558 (6th Cir. 2006) (district court's error in failing to apply appropriate discount rate offset by failure to calculate interest on the award and failure to account for raises). In *Jackson v. City of Cookeville*, 31 F.3d 1354, 1361 (6th Cir. 1994), the Sixth Circuit affirmed a district court's use of a variation of the "total offset" approach (also known as the "Alaska rule"), which is to refrain from calculating future salary increases into the front pay award, thereby obviating the need to discount the award to present value. *See also Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 547 (1983) (discussing the Alaska rule); *Stratton v. Dep't for the Aging for the City of New York*, 132 F.3d 869, 882 (2d Cir. 1997) (district court not required to discount front pay to present value where future salary increases not included in award). In *Jackson*, the Sixth Circuit emphasized that it was not adopting the Alaska rule as the one to be uniformly applied in the circuit, but that on the facts of the case before the court, the rule resulted in a "reasonable approximation" of front pay. 31 F.3d at 1361; *see also Pfeifer, supra*, (refusing to adopt a uniform method of calculating lost future earnings).

Here, we adopt the approach taken by the court in *Jackson* and calculate the front pay award without including pay raises or applying a discount rate. We believe this method will result in a reasonable damage calculation. The ALJ's Erratum and Recommended Order, issued July 2, 2004, awarded Tipton front pay of $91,038. The Recommended Order was based on financial data offered in Complainant's Exhibit 15. R. D. & O. at 119. Exhibit 15 lists Tipton's salary at I&M as $95,000 before the addition of annual increases and bonuses. Excluding all annual increases and multiplying Tipton's projected salary by three yields a three-year projected salary of $285,000, the estimated amount Tipton would have earned if he had remained employed at I&M. Since the ALJ also awarded fringe benefits at the rate of 33% of salary and bonus pay at 10% of Tipton's base pay, we estimate that Tipton's total earnings at I&M would have been $407,550, including $94,050 in fringe benefits and $28,500 bonus pay. We estimate Tipton's earnings at NMC to have been $343,200, including salary of $240,000 (without annual increases), fringe benefits of $79,200 (projected three-year earnings at NMC), and bonuses of $24,000. When Tipton's total earnings at NMC for three years are subtracted from his projected earnings at I&M, the resulting total front pay award is $64,350.

Therefore, we order that Tipton's front pay award be reduced to $64,350 and deny I&M's request to discount the award to present value. *See Jackson, supra.*[1]

II. Motion for Administrative Stay

I&M has moved for an administrative stay pending review by the United States Court of Appeals for the Sixth Circuit of the Board's Final Decision and Order in this case. The Board uses a four-part test to determine whether to stay its own actions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants a stay; and (4) the public interest in granting a stay. *See Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161; ALJ No. 2003-STA-55, slip op. at 2 (ARB May 12, 2006); *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 90-ERA-30 (ARB Apr. 20, 2001); *McCafferty v. Centerior Energy*, No. 96-ERA-6, slip op. at 2 (ARB Oct. 16, 1996), applying the criteria set forth in *State of Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987). Evaluation of I&M's motion based on these four factors leads to the conclusion that we should deny a stay in this case.

1. I&M is not likely to prevail on the merits.

The Board, affirming the ALJ's decision in this case, concluded that Tipton engaged in protected activity when he repeatedly requested a signed work hour deviation form from I&M management. In its motion for stay, I&M contends that the Board failed to apply the correct legal standard for protected activity. We disagree. In concluding that Tipton engaged in protected activity, both the Board and the ALJ applied the standard in *Am. Nuclear Res., Inc., v. U.S. Dep't of Labor*, 134 F.3d 1292 (6th Cir. 1998), holding that "To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically." *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 02-ERA-30, slip op. at 5 (ARB Sept. 29, 2006), *citing Am. Nuclear Res.*, 134 F.3d at 1295. As we stated in our decision, Tipton's requests for a signed work hour deviation form clearly met this standard. Furthermore, the "clearly stated objective" of the NRC's Generic Letter 82-12 and I&M's technical specifications implementing the generic letter is insuring nuclear reactor safety by prohibiting employees from working excessive hours. Tipton's requests for a form authorizing a deviation from the NRC's guidelines thus "definitively and specifically" implicated nuclear safety.

I&M further argues in its motion that substantial evidence does not support the Board's decision that I&M terminated Tipton's employment because of his protected activity. The ALJ acknowledged that I&M's firing of Tipton within days after Tipton's protected activity leads to an inference of discriminatory intent. Furthermore, the ALJ

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[1] Upon reconsideration, to correct a typographical error, we amend our Final Decision and Order in this case to omit the final sentence on the last page. *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 02-ERA-30, slip op. at 11 (ARB Sept. 29, 2006).

found ample evidence establishing the requisite causal relationship between Tipton's protected activity and his termination. Not only did he find that none of I&M's proffered reasons for firing Tipton was legitimate; he also found that I&M management had orchestrated a fact-finding investigation to justify its termination of Tipton. The ALJ's decision is fully supported by a thorough, well-reasoned discussion of all the facts presented before him. R. D. & O. at 39-113.

In conclusion, I&M is not likely to prevail in its attempt to overturn the Board's decision on the merits.

2. I&M is not likely to be irreparably harmed absent a stay.

I&M asserts on behalf of its motion for stay that it will suffer irreparable harm from "potentially" unnecessary and unrecoverable expenses of litigating the remaining issues to be resolved in these proceedings, i.e., the attorney's fee issues before the ALJ and the Board. Courts have recognized that the possibility of economic loss does not constitute irreparable harm. *See, e.g., Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002); *Wis. Gas Co. v. Fed. Energy Regul. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). "The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Thus, I&M has failed to show that it would suffer irreparable harm if we deny a stay.

3. Tipton will be further harmed if a stay is granted.

I&M contends that Tipton will not be harmed by a stay that would impact only the timing of Tipton's compensatory damages payment. I&M further contends that there is no evidence that a stay of pending attorney's fee applications would harm Tipton's counsel. Neither of these contentions is persuasive. The purpose of a back pay award is to make the injured employee whole. *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 90-ERA-30, slip op. at 12 (ARB Feb. 9, 2001) *aff'd sub nom. Ga. Power Co. v. U.S. Dep't of Labor*, 52 Fed. Appx. 490 (table) (11th Cir. 2002); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The ERA provides, in pertinent part, that "the Secretary, at the request of the complainant shall assess against the [violator] a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred . . . by the complainant for, or in connection with, the bringing of the complaint. . . ." 42 U.S.C.A. § 5851(b)(2)(B). Clearly, fees and costs experienced by Tipton in resisting I&M's appeal of the ALJ's decision are part of the damages resulting directly from I&M's violation of the ERA's whistleblower protection provision. It has been more than five years since I&M discharged Tipton. Tipton will be further harmed by the continuing delay if we grant a stay.

4. A stay is contrary to the public interest.

The public interest weighs against the granting of a stay. The courts recognize that because employees often are in the best position to ensure nuclear safety, the protection of their rights under the ERA's whistleblower provision is paramount. *Am. Nuclear Res., supra*, 134 F.3d at 1295; *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995), *citing Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) and *Kan. Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). It has been more than four years since Tipton filed this complaint. It is time that Tipton be "made whole" for I&M's violation of the ERA.

In light of I&M's failure to make the required showing for issuing a stay pending judicial review, we deny the motion for stay.

CONCLUSION AND ORDER

We **GRANT** I&M's motion for reconsideration and modify our Final Decision and Order in this case to order a front pay award of $64,350 to Tipton. We **DENY** I&M's motion to stay further proceedings in this case.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge