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**Issue Date: 11 August 2005**

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In the Matter of

STEPHEN W. DALE
Complainant

v.

STEP 1 STAIRWORKS
Respondent
…….

Case No. 2002 STA 00030

Before: Stuart A. Levin
Administrative Law judge

For Complainant:
Diana Brodman Summers, Esq.
Lisle. Illinois

For Respondent:
Gregory H. Andrews, Esq.
Lisle, Illinois

Decision and Order on Remand

On April 4, 2005, the Administrative Review Board remanded this matter for further proceedings consistent with the Final Decision and Order it issued on March 31, 2005. The Board's ruling affirmed, in part, and reversed in part, a decision issued on April 11, 2003, which concluded that Complainant, Stephen Dale, was fired from his job as a truck driver for engaging in activity protected by the whistleblower provisions of the Surface Transportation Assistance Act of 1982. The Board affirmed the finding that Respondent, Step 1 Stairworks, violated the Act, but it remanded with instructions to reinstate Dale to his former position, notwithstanding Dale's waiver of reinstatement at the hearing and to re-open proceedings related to issues involving questions of relief. The Board noted the Employer had proceeded without the assistance of counsel and, as a *pro se* litigant,

had not, at the hearing, been properly advised by the judge about its evidentiary burdens and about damage mitigation.

Following the Board's decision, an Order issued on May 5, 2005, mandating reinstatement and reopening the record to afford the parties an opportunity to address the issues raised by the remand. On June 14, 2005, Complainant filed his comments in accordance with May 5, 2005 Order; however, the Employer did not file a response. Instead, the Employer proffered a check without further comment to Complainant's counsel who placed it in her safe until its purpose could be clarified. Employer did not, however, offer to reinstate Dale. Thus, the Employer's compliance with the Order was not forthcoming, but it was still acting *pro se*; and the trier of fact had not yet had an opportunity to explain to Employer that its failure to offer reinstatement was inconsistent with the Board's ruling in this matter.

Shortly thereafter, however, Employer decided, belatedly but wisely, to retain counsel who entered an appearance on Employer's behalf and requested an extension of time to respond to the May 5, 2005, order. The request was granted, and the Employer has now addressed the issues raised by the Board's remand. Complainant filed a Rebuttal, and Employer, on July 21, 2005, filed a petition asking to further supplement the record with additional evidence relating to Complainant's July 18, 2005, declination of its reinstatement offer and the further argument that Complainant's latest refusal of reinstatement demonstrates that he would not have accepted a reinstatement offer in April of 2003, even if it had been offered to him. While the Board provided no indication that it would entertain such reasoning, *post hoc ergo propter hoc*, when it held, notwithstanding Complainant's express waiver of reinstatement at the hearing, that Employer's liability ended only when it extended a bona fide job reinstatement offer, the Employer previously was granted the time it requested to prepare and respond to the May 5 order and fully participated through counsel in these proceedings. Accordingly, its current request, in effect, to extend proceedings, piecemeal, is denied.

## I.
## Reinstatement

The April 11, 2003, Decision and Order which issued in this matter did not order reinstatement. Although the Board noted that Complainant's attorney at the hearing stated that he was not seeking reinstatement, and although Complainant did not, on appeal, request reinstatement, (*See*, Compl. Br. to the ARB, filed Nov. 13, 2003), the Board, *sua sponte*, concluded that it was error not to disregard

Complainant's waiver of reinstatement and order reinstatement anyway.[1] Accordingly, the May 5, 2005, Order directed Employer "to reinstate Dale unless the parties demonstrate that circumstances exist under which reinstatement would not be appropriate." While the Employer sought to demonstrate why its liability should be tolled, the parties made no attempt to demonstrate why reinstatement would be inappropriate; and, on July 13, 2005, Employer complied with the reinstatement Order issued on May 5, 2005, by submitting to Complainant an offer of reinstatement. On July 18, 2005, Complainant declined the offer of reinstatement.

## II.
## Damages

In the Decision which issued on April 11, 2003, Complainant was awarded $4080.00 representing eight weeks of lost wages. The Board ruled that this amount was arbitrary because the Employer had not, despite Complainant's waiver of reinstatement at the hearing, made him an unconditional offer of reinstatement, and because it was error to suggest that Complainant must show that he attempted to mitigate damages. The Board thus held that the Employer bears the burden of establishing that Dale failed to mitigate his damages by showing that "substantially equivalent positions were available to Complainant and he failed to use reasonable diligence in attempting to secure such positions." [2]

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[1] Appellate precedent is conflicting with respect to whether a trier of fact may rely upon a complainant's representation that reinstatement is not sought. For example, in Dutile v. Tighe Trucking, Inc., 93 STA 31 (Sec'y 1994), cited by the Board in this matter, a ***pro se*** complainant's statement that he did not seek reinstatement was deemed unacceptable. In contrast, Complainant here is not pro se. Moreover, it has been held that while the STA expressly provides that a prevailing complainant is entitled to reinstatement, 49 U.S.C. § 2305(c)(2)(B), the statute does not prohibit voluntary waiver of that right. Thus, the Secretary has held that a complainant's decision not to seek reinstatement must be recognized and respected, *See, e.g.,* Moravec v. HC & M Transportation, Inc., 90-STA-44 (Sec'y Jan. 6, 1992), slip op. at 22 n14, appeal docketed, No. 92-70102 (9th Cir. Feb. 18, 1992); Nidy v. Benton Enterprises, 90-STA-11 (Sec'y Nov. 19, 1991), slip op. at 17 n.15, and while there may be cases in which reinstatement should be ordered despite, for example, a *pro se* complainant's remarks to the contrary, the Secretary has held that a deliberate decision not to seek reinstatement must be respected. Thus, in Nix v. Nehi-RC Bottling Company, Inc., 84-STA-1 (Sec'y July 13, 1984), the Secretary found that respondent had violated the employee protection provision of the STA; however, the complainant was not interested in returning to work for Respondent and reinstatement was not ordered. Nevertheless, the law of the case here is set forth in the Board's March 31, 2005 decision, and a reinstatement order was entered despite Complainant's waiver of reinstatement at the hearing.

[2] Since it appears this matter arises within the jurisdiction of the Seventh Circuit Court of Appeals, a comment about the burden of mitigation does not seem unwarranted in light of Sprogis v. United Air Lines, 517 F.2d 387, 392 (7th Cir. 1975). Although the authorities are mixed, it has been held that mitigation of damages by seeking suitable employment is a duty of victims of employment discrimination. A complainant may be "expected to check want ads, register with employment agencies, and discuss potential opportunities with friends and acquaintances." Doyle v. Hydro Nuclear Services, 89-ERA-22 (ARB Sept. 6, 1996), quoting Helbing v. Unclaimed Salvage and Freight Co., Inc., 489 F.Supp. 956, 963 (E.D. Pa. 1989), *quoting* Sprogis at 392. The general rule in labor cases is that "an

On remand, the Employer was thus invited to document the availability of equivalent positions and to show whether a back pay award should be reduced by any money Dale earned between January 23, 2002, the date of termination, and July 13, 2005, the date the Employer extended a bona fide offer of reinstatement. In addition, Complainant was granted, in accordance with the remand directive, a second chance to show the steps, if any, he took and when he took them to obtain substantially equivalent employment.

## Employer's Response
## I.
## Employer Seeks to Toll Liability

In its response to the May 5, 2005, order which implemented the Board's remand instructions, Employer initially objected to the duration of its back pay liability as defined by the Board. Employer embraced the Board's ruling that the ALJ committed reversible error because the ALJ "had a duty to inform Lambes (Employer's Representative at the hearing) about Mitigation," (ARB D&O at 7), and "…should have advised Lambes, a *pro se* litigant, about this burden." Id.[3] Employer then reasoned, invoking the Board's own rationale, that the Board, too, has a duty similar to the obligation it recognizes and imposes on ALJs to advise *pro se* litigants about mitigation, and, Employer argued, the Board failed to fulfill its duty to inform Mr. Lambes about mitigation during the period this matter was pending appeal and damages were accruing. Specifically, Employer emphasized that during the two-year period this matter was before the ARB on appeal, the Board never advised it, as a *pro se* litigant, that an offer of reinstatement was needed despite Complainant's waiver and would have avoided the accumulation of damages, thus mitigating its liability. Emp. Resp. at 4-9.

Employer asserted, in addition, that it should not now be held accountable for damages during the two-year period this matter was pending appeal, because Board decisions under the STA should, by regulation, issue "within 120 days" of

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employee must at least make reasonable efforts to find new employment which is substantially equivalent to the position [lost] . . . and is suitable to a person of his background and experience…" Intermodal Cartage Co., Ltd. v. Reich, No. 96-3131 (6th Cir. Apr. 24, 1997)(unpublished decision available at 1997 U.S. App. LEXIS 9044)(case below 94-STA-22). NLRB v. Seligman & Assoc., 808 F.2d 1155, 1164-65 (6th Cir. 1986), quoting NLRB v. Westin Hotel, 758 F.2d 1126, 1129-30 (6th Cir. 1985). The April 11, 2003 decision noted that Complainant failed to demonstrate that he made any effort to find employment, and his damages were curtailed accordingly. *See,* Sprogis, *supra*.

[3] Specifically, the Board held that the ALJ's error in failing to inform the *pro se* litigant about mitigation was that: "he did not tell Lambes that, in the event that Step 1 was liable for back wages, Lambes would have the burden of proof to show that Dale had breached his duty to mitigate damages." ARB D&O at 7.

the date of issuance of the ALJ decision, and thus damages were substantially increased because the appellate decision issued several hundred days later. Employer argued that this delay is particularly significant in this instance in view of Complainant's waiver of reinstatement which the ALJ accepted at the hearing, but which the Board, two years later, refused to accept. Emp. Resp. at 5-6. Thus, Employer argued that any back pay award should be tolled between the period April 11, 2003, the date the trier of fact's Decision and Order issued, and May 5, 2005, the date of the Order which required reinstatement.

## II.
## The Board's Remand Directives

While the Employer maintains that the treatment the Board accorded it as a *pro se* litigant did not measure up to the Board's own standards, such contentions are beyond the purview of the adjudicative authority vested in trial judges and clearly exceed the scope of the issues defined by the Board in its order of remand. It must suffice here simply to note that it is not within the province of a trial judge to assess or pontificate upon the procedures or treatment parties may receive before an appellate tribunal. Employer's concerns as articulated in its submission are, however, preserved for appeal and may be addressed to the Board should it again review this case.

Beyond that, the factors the Employer cites as justification for tolling its liability were all before the Board when it held that it would deem the Employer's back pay liability ended at such time as the Employer made a bona fide offer of reinstatement. The Board was aware of the Employer's *pro se* status on appeal; it specifically commented on Complainant's waiver of reinstatement at the hearing, and the ALJ's error in accepting it; and it was cognizant of the amount of time the appeal was pending. Id. at 6, 8. It ruled, nevertheless, that: "Back pay liability begins when the employee is wrongfully discharged…. Back pay liability ends when the employer makes the bona fide unconditional offer of reinstatement…." ARB D&O, (March 31, 2005) at 6. The Board's language, moreover, specifically refutes the notion, advanced by Employer, that Complainant's decision to decline a bona fide reinstatement offer, post appeal, should be construed as relating back to his waiver of reinstatement at the hearing.

Since the circumstances Employer cites as the basis for tolling its liability were before the Board when it rendered its decision, they can not now justify a departure from the Board's specific instructions in this proceeding. Accordingly, in compliance with the Board's mandate, Employer's back pay liability

commences as of January 23, 2002, the date of termination, and ends July 13, 2005, the date the Employer conveyed a bona fide offer of reinstatement to Dale.

Calculating Damages

I.

Employer notes that Complainant adduced no evidence at the hearing that he initiated any job search, but it concedes that Complainant, having been afforded a second chance on remand, has now demonstrated that he took reasonable measures to mitigate his potential damages during the 5 ½ months he was unemployed following his termination. Emp. Resp. at 4.[4] Further, Employer has not documented the availability of substantially equivalent positions during that 5 ½ month period. Accordingly, Complainant will be awarded, consistent with the Board's instruction, full back pay without reduction for that period. After Complainant found work, Employer observes, and Complainant agrees, his back pay award must be reduced by the interim earnings he received. Id., *see also*, Compl. Resp. at 6.

II.

In measuring the damages in this matter, it must be noted that the parties agree that Complainant's base pay per month may be determined by multiplying his base hourly rate times 8 hours per day times the number of workdays each

[4] In the April 11, 2003 decision, it was noted that, although Complainant was out of work for 5 ½ months, his damages were, in effect, tolled at two months, because he introduced no evidence to demonstrate "when he initiated his job search or the leads, if any, he pursued before he landed his present job." D&O at 13-14. Thus, Complainant, at the hearing, failed to meet the minimal showing the courts have suggested a complainant may be expected to satisfy. Sprogis v. United Air Lines, *supra* at 392; Helbing v. Unclaimed Salvage and Freight Co., Inc., 489 F.Supp. 956, 963 (E.D. Pa. 1989); NLRB v. Seligman & Assoc., 808 F.2d 1155, 1164-65 (6th Cir. 1986); NLRB v. Westin Hotel, 758 F.2d 1126, 1129-30 (6th Cir. 1985); *see also*, Doyle v. Hydro Nuclear Services, 89-ERA-22 (ARB Sept. 6, 1996); Intermodal Cartage Co., Ltd. v. Reich, No. 96-3131 (6th Cir. Apr. 24, 1997). (unpublished decision available at 1997 U.S. App. LEXIS 9044)(case below 94-STA-22). Only after remand and reopening of the record did Complainant eventually document his post-termination job search effort during his period of unemployment covering the first 5 1/2 months after his termination.

Thus, considering the record evidence adduced at the hearing, and in view of Complainant's waiver of reinstatement, the April 11, 2003 order awarded him $4080.00 or eight weeks pay, rather than damages either for the full period of 5 ½ months he was out of work or thereafter until reinstatement was offered. As explained in the April 11, 2003 decision at page 14, in the absence of any evidence that he initiated any job search, an eight-week period, under the circumstances, seemed a generous, but in the exercise of discretion, reasonable period before Complainant might be expected, at least, to begin looking for work; and, since he did not seek reinstatement, damages after he found work seemed inappropriate. The Board ruled, however, that this rational was erroneous and arbitrary, and held, instead, that Employer was liable for full back pay unless Employer showed the availability of substantially equivalent work; and after Complainant found work, Employer was liable, as a matter of law, for full back pay less interim earnings until Employer offered reinstatement.

month as shown in Complainant's exhibits. *See*, CX F; Emp. Resp. at 10, Table A. They also agree that Complainant's overtime wage rate was $19.13 per hour, and that an average of 8 hours overtime each month, or $663.00 is reasonable. CX E, F, G, H; *see also*, Emp. Resp. at pg 9-10. Nor is it disputed that Complainant's lost earnings must be reduced by the amount of the earnings he actually received after the termination, again, as shown in Complainant's exhibits. CX J, K, L, I; *see also*, Emp. Resp. at 11, Table B.[5] Finally, the parties agree on the interest rates and calculations set forth in CX M and N. *See*, Emp. Resp. at 11-12.

The Employer's only specific objection to Complainant's evidence and calculations is its assertion that the duration of its liability should run from the date of termination, January 23, 2002, to April 11, 2003, the date the initial order issued in this matter, and thus its liability amounts to $27,577.15, including interest, rather than $57,427.85[6] as Complainant demands for the entire period from January 23, 2002, to July 13, 2005, when the reinstatement offer was extended. Compl. Resp. at 8; CX O.

As discussed above in detail, however, Employer's contentions that damages should be tolled are not consistent with the Board's decision in this matter and must, at this level, be rejected. Accordingly, an award of back pay less actual interim earnings plus interest will, based on the evidence adduced on remand and cited above, be entered in the amount of $57,427.85 through June of 2005 with interest continuing through July 13, 2005. Doyle v. Hydro Nuclear Services, 1989 ERA 22 (ARB May 17, 2000); Cotes v. Double R. Trucking Inc., 1998 STA 34 (January 12, 2000); Drew v. Alpine Inc., 2001 STA 47, (ARB June 30, 2003); Murray v. Air Ride, Inc., 1999 STA 34 (ARB December 29, 2000).

## Attorney's Fees

In previous proceedings, Complainant's attorney was awarded fees in the amount of $3,600.00, and the Board affirmed that award. Because the Employer has failed to satisfy the fee award in compliance with the order, Complainant's Counsel, relying upon Doyle, and based on the CPI, now seeks 5.9% interest or an additional $212.40 on the award. Counsel also seeks supplemental fees totaling $4,200.00 for work performed from October 24, 2003, to June 13, 2005, and billed at an hourly rate of $150.00. Counsel will be awarded interest of $212.40 on the prior award; however, her petition for supplemental fees must be denied, without

[5] Interestingly, although the burden of establishing that Complainant failed to mitigate his damages rests with the Employer, it appears the evidence demonstrating mitigation was mainly in the possession of Complainant.
[6] This amount includes interest calculated through June 30, 2005.

prejudice, at this time. It appears that the supplemental fee petition includes work performed before the ARB and work performed on Complainant's case before me. As such, it is necessary for counsel to file separate, itemized petitions for approval of her supplemental fees with the adjudicative body before which the work was performed. Accordingly, Counsel may file, on or before September 9, 2005, an appropriate fee petition for the supplemental work she performed before OALJ and not covered by her previous petition, and Employer may file on or before September 23, 2005, such objections to the supplemental fee petition as it deems appropriate. Therefore:

ORDER

IT IS ORDERED that Employer, Step 1 Stairworks, pay to Complainant, Stephen Dale, back pay and interest in the amount of $57,427.85 plus additional interest from July 1, 2005 to July 13, 2005, and post-judgment interest compounded quarterly until the award is paid, and;

IT IS FURTHER ORDERED that Employer, Step 1 Stairworks, pay to Diana Brodman Summers, Esq. the sum of $3,600 pursuant to the Order awarding fees and costs issued on June 11, 2003, plus $212.40 in interest accrued on the unpaid fee award, and;

IT IS FURTHER ORDERED that the supplemental fee petition filed by Complainant's Counsel be, and it hereby is, denied without prejudice.

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Stuart A. Levin
Administrative Law Judge