U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

MARVIN B. HOBBY,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

ARB CASE NOS. 98-166
98-169

ALJ CASE NO. 90-ERA-30

DATE: February 9, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
Michael D. Kohn, Esq., Stephen M. Kohn, Esq., *Kohn, Kohn & Colapinto, P.C., Washington, D.C.*

For the Respondent:
John Lamberski, Esq., James Joiner, Esq., *Troutman Sanders LLP, Atlanta, Georgia*

FINAL DECISION AND ORDER ON DAMAGES

Complainant Marvin B. Hobby filed a complaint with the Department of Labor in 1990 alleging that Respondent Georgia Power Company (Georgia Power) violated the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (1988),[2/] when it terminated his employment as General Manager of Georgia Power's Nuclear Operations Contract Administration. In 1995, the Secretary of Labor found in Hobby's favor,

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[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2/] The employee protection provisions of the ERA were amended as part of the Comprehensive National Energy Policy Act of 1992 §2902, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992). However, the amendments applied only prospectively, and therefore do not apply to this case which was filed in 1990. *See Yule v. Burns Int'l Security Serv.*, No. 93-ERA-12 (Sec'y May 24, 1995).

and ordered Georgia Power to reinstate him.[3/] In addition, the Secretary remanded the case to an Administrative Law Judge (ALJ) for a calculation of damages. *Hobby v. Georgia Power Co.*, No. 90-ERA-30 (Sec'y Aug. 4, 1995).[4/]

The ALJ issued a Recommended Decision and Order on Remand (RD&O) in 1998 reiterating the reinstatement order and awarding Hobby back pay, perquisites, costs, and compensatory damages. *Hobby v. Georgia Power Co.*, No. 90-ERA-30 (ALJ Sept. 17, 1998). Both parties have appealed the RD&O to this Board. We have jurisdiction over this matter pursuant to 42 U.S.C. §5851 and 29 C.F.R. §24.8 (2000).

After a careful review of the record we reaffirm the Secretary's earlier reinstatement order and adopt generally the ALJ's damage awards, with some modifications.

I. BACKGROUND

A. Hobby's employment in the electric power industry and Georgia Power's decision to eliminate his position.

The facts underlying this dispute are described in detail in the Secretary's 1995 Decision and Remand Order and the ALJ's 1998 Recommended Decision and Order on Remand. We provide a brief summary as general background.

Before being terminated by Georgia Power in 1989, Marvin Hobby had a lengthy career in the electric power industry, with extensive experience in the nuclear power field. He received a Bachelor of Science degree from Mercer University in 1968, and received further training in nuclear physics, radiobiology, and radiochemistry while working for Oak Ridge Associated Universities. He first worked for Georgia Power in 1971, starting as the director of the Edwin I. Hatch Nuclear Information Center in Baxley, Georgia. He was subsequently transferred to Atlanta as a staff member to the company's Ad Hoc Executive Committee, a group established to focus on some of Georgia Power's financial matters. This group included several senior Georgia Power executives.

Hobby left Georgia Power briefly in 1979 to assist with the operation of an alternative energy company. With Georgia Power's encouragement, in 1980 Hobby was hired by the Institute of Nuclear Power Operations (INPO), an organization established to assist the nuclear utility industry in the operation of nuclear power plants. Hobby first worked as INPO's

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[3/] The Secretary of Labor issued final agency decisions in ERA whistleblower cases prior to 1996. In April 1996 the Secretary delegated this authority to the newly-created Administrative Review Board. Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996).

[4/] Decisions and orders of the ARB, Secretary and DOL Administrative Law Judges opinions are published on the Department of Labor's World Wide Web site at *www.oalj.dol.gov*.

Communications Manager, and later as the assistant to INPO's president, Admiral Eugene Wilkinson.

In 1984 Hobby was recruited to work for the newly-formed Nuclear Utilities Management and Resources Council (NUMARC), an industry group established to offer solutions to the Nuclear Regulatory Commission as alternatives to additional regulations. Hobby retained his position at INPO, working for NUMARC as an "on-loan" employee.

Hobby returned to Georgia Power in 1985 as Assistant to the President. In this position, he was involved in monitoring both coal and nuclear power plants, and interacted regularly with Georgia Power's senior executives.

In 1987, Georgia Power proposed to its parent company, Southern Company, that a central entity be created to operate its nuclear power plants, the Southern Nuclear Operating Company (SONOPCO); Hobby participated in making this recommendation. This consolidation occurred late in 1988, with the SONOPCO main office being located in Birmingham, Alabama.

Hobby was offered a position at SONOPCO, but chose to stay at Georgia Power. In 1988 Georgia Power created a new entity within the company, the Nuclear Operations Contract Administration (NOCA), to serve as an interface between Georgia Power and SONOPCO. Hobby was appointed as NOCA's General Manager, a new position. This involved a 2-step promotion within Georgia Power, with Hobby moving from a "Level 18" to a "Level 20" pay scale at an annual salary of $103,104. RD&O at 4. During this period Hobby also participated in contract negotiations between Georgia Power and Oglethorpe Power, another utility company operating in the region.

Beginning in 1989, Hobby engaged in two activities which he later alleged were protected under the ERA's whistleblower protections. First, in January 1989 Hobby was called upon by Georgia Power to participate as a company witness in an ERA whistleblower case that had been brought against the company by John Fuchko, another Georgia Power employee (the *Fuchko* case). Hobby later alleged that at a pre-hearing meeting with Georgia Power's attorneys he raised strong objections to an outline of his proposed testimony in *Fuchko*, asserting that it was false.

Second, several months later in an April 1989 memorandum Hobby raised concerns within Georgia Power whether the organizational structure of SONOPCO complied with the NRC's legal requirements for nuclear plant operators. Hobby's concerns about the reporting structure of the SONOPCO operation were prompted in part by questions that had been raised by Oglethorpe Power's project director, Dan Smith, who had been involved in the contract negotiations with Georgia Power; Oglethorpe held a partial ownership interest in some of the nuclear plants.[5/]

[5/] Questions about the lawfulness of Georgia Power's and Southern Company's decision to consolidate various nuclear plant operations, and Georgia Power's reaction to these questions, were implicated in another ERA whistleblower case brought by Allen Mosbaugh, a Georgia Power manager at the company's Alvin (continued...)

In late November 1989, Hobby heard rumors that he was going to be removed from his job as NOCA General Manager. Hobby's immediate supervisor recommended to Georgia Power's senior management in January 1990 that Hobby's position be eliminated; this action was implemented on February 2, 1990.[6/] Hobby filed his whistleblower complaint with the Labor Department on February 6, 1990, alleging that Georgia Power eliminated his job (1) in retaliation for his January 1989 confrontation with Georgia Power's attorneys and management in connection the proposed testimony in the *Fuchko* case, and (2) because he questioned whether it was legal under NRC licensure requirements for Southern Company's SONOPCO entity to give directions to operate nuclear plants that were under Georgia Power's control.

B. Adjudication of Hobby's whistleblower complaint - liability phase.

Hobby's whistleblower complaint was referred to ALJ Joel Williams for hearing. In November 1991 ALJ Williams issued a decision finding in Georgia Power's favor, and recommended that the complaint be dismissed. In reaching this result, ALJ Williams considered each of the two protected activities claimed by Hobby. The ALJ concluded that Hobby did not engage in protected activity at the January 2 meeting with Georgia Power's attorneys in preparation for the *Fuchko* trial. With regard to the concerns raised by Hobby in the April 1989 memo about SONOPCO and whether SONOPCO's direction of Georgia Power's nuclear plants complied with NRC requirements, the ALJ found that Hobby's actions were protected activity. Ultimately, however, the ALJ found that Georgia Power's decision to eliminate Hobby's position as General Manager of NOCA was motivated by legitimate business concerns, and was not retaliatory. *Hobby v. Georgia Power Co.*, No. 90-ERA-30, slip op. at 51, 53-54 (ALJ Nov. 8 1991).

Hobby appealed to the Secretary of Labor, who reversed. Like the ALJ, the Secretary concluded that Hobby's April memorandum about SONOPCO raised protected concerns; however, the Secretary disagreed with the ALJ and concluded that Hobby was fired for this activity.[7/] As a result the Secretary remanded the case to the ALJ, ordering Georgia Power "to offer Complainant reinstatement to the same or a comparable position to which he is entitled, with comparable pay and benefits, to pay Complainant the back pay to which he is entitled, and to pay Complainant's costs and expenses in bringing this complaint, including a reasonable

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[5/](...continued)
Vogtle nuclear plant. *Mosbaugh v. Georgia Power Co.*, Nos. 91-ERA-1, 11 (Sec'y Nov. 20, 1995). The *Mosbaugh* case subsequently was settled. *Mosbaugh v. Georgia Power Co.*, Nos. 91-ERA-1, 11 (ARB Aug. 23, 1996).

[6/] Hobby remained on the payroll at Georgia Power until February 23, 1990.

[7/] Contrary to the ALJ, the Secretary also concluded that Hobby *did* engage in protected activity at the January 1990 pre-hearing meeting on *Fuchko*; however, the Secretary held that this protected activity did not motivate Georgia Power to terminate Hobby. *Id.* at 10.

attorney's fee." *Hobby v. Georgia Power Co.*, No. 90-ERA-30, slip op. at 28 (Sec'y Aug. 4, 1995).

C. Adjudication of Hobby's whistleblower complaint - damages phase.

On remand the case was reassigned to ALJ Edith Barnett, who conducted extensive evidentiary hearings, supplemented with additional video-taped testimony. ALJ Barnett died before issuing a recommended decision on damages, and the case was reassigned to ALJ Daniel A. Sarno, Jr. In his September 1998 decision, ALJ Sarno recommended that Hobby be awarded:

- reinstatement to a Level 20 (10) position[8/] at Georgia Power (with restoration of all Level 20 (10) perquisites and benefits);
- back pay equal to the mid-point of a Level 20 (10) position from the date of Hobby's termination to the date of reinstatement;
- reimbursement for all lost benefits at the mid-point of a Level 20 (10) employee, plus interest;
- training necessary to the completion of his duties in his reinstated position;
- $250,000 in compensatory damages;
- $23,721.27 as compensation for loss of use of automobile benefits as provided by the company, plus interest;
- $20,384.21 for health and life insurance expenses, plus interest;
- $6,3345.12 for repayment for tax penalties incurred by Hobby when he withdrew retirement account funds prematurely, plus interest;
- $3,605.31 for reimbursement of job search expenses, plus interest;
- the cash value of 19 weeks of vacation time, plus interest;
- expungement of any negative references or commentaries in his employment record; and
- issuance of a "welcome back" memorandum.

RD&O at 69-70.

II. ISSUES PRESENTED

A. Whether Hobby should be reinstated to a position at Georgia Power, or awarded front pay in lieu of reinstatement.

B. The pay level at which Hobby should be reinstated and back pay calculated.

[8/] In 1995 Georgia Power adopted a new pay grade structure, and position levels was revised such that a position at the old Level 18 became Level 9, Level 20 became Level 10, and so on. T. 1728, RD&O at 4 n.2.

C. Whether Hobby should be awarded full back pay, or whether the amount of back pay should be reduced because he failed to mitigate damages.

D. Whether Hobby should be awarded $250,000 in compensatory damages.

E. Whether Hobby should be awarded compensation for vacation time.

F. Whether the ordered remedies should be assessed only against Georgia Power, or against both Georgia Power and its parent, the Southern Company.

III. STANDARD OF REVIEW

Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C. §557(b)(1994). As a result, the Board is not bound by the conclusions of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000) (under analogous employee protection provisions of several environmental acts); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997). *See generally Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (*relying, inter alia, on Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision).

IV. DISCUSSION

A. Whether Hobby should be reinstated to a position at Georgia Power, or awarded front pay in lieu of reinstatement.

1. Reinstatement *vs.* front pay – general background.

In his 1995 decision on liability, the Secretary ordered Georgia Power to "offer Complainant reinstatement to the same or a comparable position to which he is entitled, with comparable pay and benefits." *Hobby v. Georgia Power Co.*, No. 90-ERA-30, slip op. at 15 (Sec'y Aug. 4, 1995). Consistent with the Secretary's decision, the ALJ similarly recommended that Hobby should be reinstated to a Level 10 position, which would be today's equivalent to the Level 20 position that he occupied in 1990 under the payroll classification system then in effect. Before this Board, Georgia Power argues that the reinstatement order should be revisited and reversed, and the case instead should be remanded to the ALJ to determine whether front pay should be awarded.

The employee protection provision of the ERA provides that a wrongfully terminated individual shall be reinstated "to his former position." 42 U.S.C. §5851(b)(2)(B). This is based upon the principle that a complainant should be restored to a position equivalent to that which he or she would have occupied but for the illegal action of the employer. Reinstatement is

viewed as the default or presumptive remedy in wrongful termination cases under the ERA. *See, e.g., Creekmore v. ABB Power Sys. Energy Servs., Inc*., No. 93-ERA-24 (Dep. Sec'y Feb. 14, 1996); *Smith v. Littenberg*, 92-ERA-52 (Sec'y Sept. 6, 1995).

Although reinstatement is primarily a "make-whole" remedy for a prevailing complainant in a discrimination case, intended to return the complainant to the position that he or she would have occupied but for the unlawful discrimination, reinstatement also serves as an important deterrent to other discriminatory acts that might be committed by the offending respondent. As the Supreme Court observed in a leading Title VII case, courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975) (emphasis added). We find this prophylactic objective (*i.e.*, preventing "like discrimination in the future") to be particularly compelling in connection with whistleblower statutes like the employee protection provision of the ERA. The whistleblower protection laws are not intended merely to protect the private rights of individual employees, but are part of a broader enforcement scheme that promotes critical public interests. "Congress recognized that employees in the . . . industry are often best able to detect . . . violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) (explaining rationale for comparable whistleblower provision of the Surface Transportation Assistance Act). Thus "[t]he Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms but health and safety hazards to the public." *Beliveau v. United States Dep't of Labor*, 170 F.3d 83, 88 (1st Cir. 1999). Similarly, referring to the analogous employee protection provision of the Clean Water Act, the Third Circuit explained that:

> Such "whistle-blower" provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Water Act and nuclear safety statutes. They are intended to encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels. * * * The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. If the regulatory scheme is to effectuate its substantial goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute.

Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor, 992 F.2d 474, 478 (1993), *cert. denied*, 510 U.S. 964 (1993). Quite simply, reinstatement is important not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective. *See Allen v. Autauga County Bd. of Educ*., 685 F.2d 1302, 1306 (11th Cir. 1982) (in a case under Age Discrimination in Employment Act, observing that "reinstatement is an effective deterrent to preventing employer retaliation against employees").

Although reinstatement is the presumptive remedy in wrongful discharge cases under the whistleblower statutes, there are circumstances in which alternative remedies are preferred. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship," *Creekmore, supra*, slip op. at 9, or where reinstatement otherwise is not possible. *See, e.g., Doyle v. Hydro Nuclear Servs., Inc.*, No. 89-ERA-22 (ARB Sept. 6, 1996) (reinstatement impractical because company no longer engaged workers in the job classification occupied by complainant, and had no positions for which complainant qualified); *Blackburn v. Metric Constructors, Inc.*, No. 86-ERA-4 (Sec'y Oct. 30, 1991) (Secretary reverses earlier reinstatement orders based on evidence developed on remand that company's electricians were terminated at conclusion of project with no expectation of continued employment). *Cf. Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1449 (11th Cir. 1985), *cert. denied*, 474 U.S. 1005 (in ADEA case, reinstatement, not front pay, was appropriate remedy where there was no evidence that "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy"). Georgia Power argues against Hobby's reinstatement under these front pay theories, asserting (1) that Hobby should not be reinstated to a senior management position because he lacks the skills needed to perform such work, and other corporate executives therefore would not have confidence in his abilities; (2) that other Georgia Power managers would not view Hobby as trustworthy after having litigated a whistleblower case against the company; and (3) that Hobby's position as General Manager of NOCA was abolished, and there is no longer any comparable position within the company to which Hobby can be reinstated. We consider the company's arguments.

2. Whether reinstatement should be denied because Georgia Power management would lack confidence in Hobby's ability to perform in a senior management position.

Georgia Power offers several related arguments challenging Hobby's ability to function at a high level within the company. For example, Georgia Power asserts that Hobby has not functioned as a senior corporate manager in "the rapidly transforming electric utility industry" since his discharge in 1990, and therefore lacks the skills needed to perform in a senior position. The company claims that it improperly is being forced to reinstate Hobby to "a position for which he is unqualified," and that Hobby therefore would not have credibility among his peers in the industry. *See* Respondent Georgia Power Company's Initial Brief in Support of Petition for Review (GP Initial Brief) at 17-18, citing *Coston v. Plitt Theaters, Inc.*, 831 F.2d 1321, 1331 (7th Cir. 1987); *vac'd on other grounds*, 486 U.S. 1020 (1988) (ability to perform a high-level

function is a recognized factor in assessing a request for reinstatement). Georgia Power asserts that a lack of trust and confidence in Hobby's ability to perform his tasks would "unduly hinder" its operations and "create [a] substantial likelihood of future litigation," thus making reinstatement inappropriate. GP Initial Brief at 18, citing and quoting *Francoeur v. Corroon & Black Co.*, 552 F.Supp. 403, 413 (S.D.N.Y. 1982).

We recognize that Hobby's relatively senior position within Georgia Power makes these concerns plausible when considering whether Hobby should be returned to the corporate offices. As noted, when deciding whether to reinstate we must consider such factors as the source of the alleged hostility or friction, its severity, and whether it would be impossible for the parties to reestablish a viable working relationship. In addition, the reinstatement question must be considered against the backdrop of the public policies underlying the ERA and the other environmental whistleblower laws.

The question of Hobby's basic competence and trustworthiness as a manager – and Georgia Power's shifting views on this score – was considered at length in the Secretary's 1995 decision on liability. *Hobby v. Georgia Power Co.*, No. 90-ERA-30, slip op. at 17, 19-21 (Sec'y Aug. 4, 1995). In that decision, the Secretary noted that the company's senior staff generally held Hobby in high regard until his termination in 1990, rating his performance as "excellent" and "commendable." Hobby was said to have an "unsurpassed" knowledge of the industry, and Dwight Evans, Georgia Power's Executive Vice President, testified that Hobby's performance was not a factor in the decision to eliminate his position at NOCA. *Id.*[9/] The record plainly shows that Hobby demonstrated a high level of competence and trustworthiness over a period of years with Georgia Power, being assigned to important responsibilities both within and without the company until his career was abruptly curtailed.

We share the ALJ's view that Hobby's long absence from the corporate suites primarily was the result of Georgia Power's unlawful discrimination, which prevented Hobby from continuing his growth as an industry manager. It would be manifestly unjust to penalize Hobby for Georgia Power's wrongdoing by denying him reinstatement. *See* RD&O at 56. We similarly reject the notion that Hobby's alleged loss of reputation in the industry should act as a barrier to his reinstatement, when the record plainly shows that Hobby enjoyed a good reputation in the industry prior to Georgia Power's unlawful acts. As the ALJ aptly observed, "Respondent [Georgia Power] terminated Complainant because of protected activity, and now seeks to benefit from the fruits of its act of wrong doing." *Id.*

We recognize that in most cases a company will experience some measure of inconvenience when it reinstates an employee who previously was terminated. And we do not doubt that the level of inconvenience may be far greater when the reinstated employee is a senior corporate manager, compared (for example) with a production worker or clerical employee. But

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[9/] To the extent that other Georgia Power executives testified during the liability phase of this proceeding that they had formed a low opinion of Hobby toward the end of his tenure with the company, the Secretary found this changed view to be further evidence of discriminatory bias by the company. *Id.* at 20.

there is no reason why senior managers should receive less protection under the environmental statutes than workers who occupy a lower rung on the corporate ladder. In view of Hobby's very successful career in the power industry, and lacking evidence that his basic capabilities have been diminished materially by some intervening act, we find that his relatively long absence from Georgia Power does not compel an award of front pay in lieu of the normal remedy of reinstatement.

3. Whether reinstatement should be denied because Georgia Power management would not trust Hobby.

While nominally denying that the company has ever claimed that Hobby is personally untrustworthy, Georgia Power quotes the testimony of Senior VP Fred Williams (Hobby's supervisor at the time he was terminated), who stated at trial that "I don't think you or I either one could sit there after something like this [whistleblower trial] and work on a day-to-day basis and have trust in them." GP Initial Brief at 17; T. 2778. The company points to this testimony apparently in support of the proposition that effective reinstatement is impossible because Hobby would be viewed with suspicion or hostility by other corporate managers.

The ALJ acknowledged that the level of a complainant's position and its sensitivity are important considerations in determining whether reinstatement should be ordered. RD&O at 55, citing *Coston*, *supra*, and *Dickerson v. Deluxe Check*, 703 F.2d 276 (8th Cir. 1983). Other courts have acknowledged the difficulty in ordering reinstatement at the managerial level. *See, e.g.*, *Francoeur v. Coroon & Black Co.*, *supra*, at 413, citing *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977) ("Plaintiff's former position as personnel manager is indeed a sensitive one that can be effectively performed only by somebody who enjoys a close, confidential working relationship with management and is able to and trusted to act as management's representative and spokesperson.")

The ALJ found that "none of the executives who testified before ALJ Barnett expressed concerns about Complainant's trustworthiness in an executive position." RD&O at 55-56. We think this may underestimate the level of contention that may now exist between Hobby and the managers who testified, particularly in light of the Williams statement quoted above. But there is no evidence in the record that Hobby himself in an untrustworthy individual. Instead, it appears that Georgia Power is arguing Hobby should be denied reinstatement merely because there are senior officials within Georgia Power who no longer trust Hobby as a result of this litigation.

The normal friction that predictably arises when an employee brings a claim against an employer has been noted frequently by the courts. In the typical case, such friction is an insufficient basis for denying reinstatement, both because it denies the complainant the preferred make-whole remedy and because it would lessen the deterrent value of reinstatement. This issue was aptly characterized by the Eleventh Circuit in a case arising under the ADEA:

> [T]he presence of some hostility between parties, which is attendant to many lawsuits, should not normally preclude a plaintiff from receiving reinstatement. Defendants found liable of intentional discrimination may not profit from their conduct by preventing former employees unlawfully terminated from returning to work on the grounds that there is hostility between the parties. *See Allen* [*v. Autauga County Bd. of Ed.*], 685 F.2d at 1306 (observing that "[u]nless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement"); *see also EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1462 (7th Cir.1992) (noting that "if 'hostility common to litigation' would justify a denial of reinstatement, reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff") . . . To deny reinstatement on these grounds is to assist a defendant in obtaining his discriminatory goals. *See Jackson v. City of Albuquerque,* 890 F.2d 225, 235 (10th Cir.1989) (overruling denial of reinstatement based on the discriminating employer's hostility for the prevailing plaintiff).

Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1339-40 (1999).

We believe this proposition applies fully in this case. The record before us shows that Hobby enjoyed good relationships with his colleagues until he engaged in protected activity and was terminated. It appears that any alleged feelings of hostility that may now exist among Georgia Power executives simply have been the result of Hobby's filing and litigating various complaints. We find this to be an insufficient basis for denying reinstatement. As the ALJ aptly observed,

> . . . Respondent miss[es] the point of this proceeding. This matter was not remanded to find the path of least resistance for Respondent in compensating Complainant, but to make Complainant whole. The Secretary of Labor found that Respondent discriminated against Complainant and Respondent can expect to make some sacrifices to correct its wrongdoing.

RD&O at 56. We concur, and find that the frictions and inconveniences cited by Georgia Power are insufficient reason to deny reinstatement to Hobby.

4. Whether reinstatement should be denied because Hobby's former position, or a comparable position, is unavailable.

In addition to asserting that Hobby is not capable of returning to a management position at Georgia Power, the company argues that reinstatement is inappropriate because Hobby's position no longer exists. Although reinstatement is the presumed remedy in an ERA discharge case, the employer is only obligated to rehire a prevailing employee into the employee's former position, or a comparable position. *Diaz-Robainas v. Florida Power & Light Co.*, No. 92-ERA-10 (Sec'y Jan. 19, 1996); *Sprague v. American Nuclear Resources, Inc.*, No. 92-ERA-37 (Sec'y Dec. 1, 1994). *Cf. Doyle, supra* (reinstatement not appropriate where it is impossible or impractical); *Blackburn, supra* (same).

At the time he was terminated, Hobby had become the General Manager of Georgia Power's Nuclear Operations Contract Administration, a unit created to interface with Southern Company's centralized nuclear power plant operations unit, SONOPCO. During the liability phase of this case, Georgia Power argued before the Secretary that the NOCA General Manager position was not needed, and therefore was eliminated; however, the Secretary concluded that this argument was pretextual, and that Hobby was discharged as the result of unlawful retaliation for his protected activity. *Hobby v. Georgia Power Co.*, No. 90-ERA-30, slip op. at 18-20 (Sec'y Aug. 4, 1995).

On remand, the ALJ acknowledged that Hobby's nuclear liaison duties at NOCA had been transferred out of Georgia Power to SONOPCO. But in ordering reinstatement, the ALJ concluded that "[t]here is no reason to believe such liaison between these two [Southern Company] subsidiaries would no longer be useful." RD&O at 55.

Georgia Power strongly disputes the ALJ's conclusion, explaining in considerable detail that the NOCA General Manager position was never filled after Hobby was discharged and that the entire NOCA operation eventually was disbanded, with its functions absorbed into other parts of the company. GP Initial Brief at 13-15.[10/] Georgia Power asserts that the NOCA position would serve no business purpose within the company today; further, the company claims that it has no other appropriate positions available for Hobby, and that reinstating him would require the creation of a new and unnecessary Level 10 position.

On the other side, Hobby argues that the Board has the power to order Georgia Power to reestablish NOCA, and that he should be returned to his former position as its General Manager.

We decline to order Georgia Power to reinstitute NOCA or an equivalent entity, and appoint Hobby as its General Manager. This type of intervention in the company's internal business operations is unwarranted in this case. But both Georgia Power and Hobby are entirely

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[10/] The ALJ opined that the elimination of the NOCA operation and Hobby's General Manager position was "inextricably entwined with the discriminatory act." RD&O at 55.

too limited in their approach when arguing the range of positions to which Hobby might be reinstated. While the remedies section of the ERA whistleblower provision states that the Secretary "shall . . . reinstate the [prevailing] complainant to his former position[,]" (42 U.S.C. §5851(b)(2)(B)), this text has been construed to mean reinstatement to the same or a *similar* position to the job that was formerly held. *See, e.g., Agbe v. Texas Southern Univ.*, ALJ No. 97-ERA-13 (ALJ Jan. 23, 1998), *adopted*, ARB No. 98-072 (ARB July 27, 1999) ("If Complainant's former position no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions, and benefits."); *DeFord v. TVA*, No. 81-ERA-1 (Sec'y Mar. 4, 1981), *aff'd, DeFord v. Sec'y of Labor*, 700 F.2d 281 (6th Cir. 1983) (ordering reinstatement to same or similar position acceptable to complainant). Stated simply, the reinstatement language of the ERA whistleblower protection section does not require that a prevailing complainant be reinstated to the precise position formerly occupied, only to a comparable position; to view the statutory text otherwise would allow an employer to evade reinstatement merely by abolishing or reconfiguring the particular position that a discharged complainant had occupied.

Although much of Hobby's career in the electric power industry was focused on nuclear operations, it also is clear from the record that he performed a variety of different functions at the senior management level within the company. While it would be desirable under the statutory scheme for Georgia Power to reinstate Hobby to the particular position that he occupied prior to being terminated, in the absence of such a position the company shall reinstate Hobby to a position substantially equivalent. In this instance, that means reinstatement to a senior management position at a level comparable to the NOCA General Manager within the Georgia Power organization, with equivalent duties, functions, responsibilities, working conditions, and benefits.

B. The pay level at which Hobby should be reinstated and back pay calculated.

At the time he was terminated, Hobby was employed as a Level 20 manager at Georgia Power, a position that would now be classified as a Level 10 position under the restructured compensation scheme implemented sometime after Hobby left the company. Even though Hobby rose rapidly in his pay grade during his tenure at Georgia Power, the ALJ recommended that Hobby be reinstated to a position at this same Level 20 (10) grade that he occupied in 1990 when he was terminated, without being promoted to a higher level.

In reaching this result, the ALJ rejected Hobby's arguments that he would have continued his rise within the company at the same pace that he experienced during the years prior to his termination (an approach that the ALJ and the parties describe as the "historical method"). The ALJ also rejected Hobby's claim that if had continued to work for Georgia Power, his career path within the company would have tracked the promotion experience of another Georgia Power manager, Paul Bowers, who became the Senior Vice President of Marketing (the "tracking method"). The ALJ offered this analysis of the reinstatement level issue:

> Complainant seeks reinstatement in a level 26 (13) position. He recognizes that it will not be an easy transition into any reinstated position with Respondent. However, he indicated that a clear message of support from his superiors would go a long way to re-establishing his credibility in the industry. He further recognized that extensive training would be necessary upon his return to Respondent, because of changes in the industry.
>
> I do not find either of Complainant's methods of calculated back pay and reinstatement level reasonable. The tracking method attempts to track Bowers, an employee who [Georgia Power President] Franklin and [Mississippi Power President Dwight] Evans[11/] testified advanced at an unusual rate. The historical method also seems unreasonable. In the five years prior to his termination Complainant advanced two (one) levels. Under the historical model, Complainant argues in the eight years since his termination he would have advanced six (three) levels. This does not seem reasonable, especially in light of corporate down-sizing and reductions in middle management positions in all industries during this period.
>
> GPC has experienced down-sizing and Complainant held an executive level position. [Steve] Wilkinson [Southern Company's compensation manager] testified that most employees who reach a level 20 (10) position do not advance as there are very few positions in levels above 20 (10). It is impossible to determine with absolute certainty what would have happened in the last eight and a half years had Complainant not been unlawfully terminated. It is possible Complainant could have received a promotion in that time. It is equally possible that, even absent discrimination, he would have accepted a position at a lower level of compensation. I find it reasonable to assume, in fashioning a complete remedy for Complainant, that he would have remained at the same level for the entire period.

RD&O at 56-57.

11/ At the time of the hearing on damages, Evans was the President and CEO of Mississippi Power Company. Prior to holding this position, he served as a Vice President at Southern Company Services and at Georgia Power. Tr. 827-8. Evans was Hobby's supervisor at Georgia Power in January 1990. RD&O at 28.

On appeal, Hobby again urges the Board to reinstate him at a higher level based on his historical progression within the company prior to his termination.[12/] Hobby also urges the Board to view Bowers and two Southern Company managers as management-level employees comparable to himself under the "tracking method" analysis, but for a limited purpose: merely that the steady rise of these other executives within the company corroborates the reasonableness of the result that is predicted using the historical method, *i.e.*, that Hobby would have achieved a position approaching a pay Level 26 (13). Complainant's Opening Brief as Cross-Petitioner (Hobby Initial Brief) at 25-27. In addition, Hobby vigorously disputes the proposition that there was downsizing within the ranks of Georgia Power's managers, one of the factors considered by the ALJ when he found that Hobby was entitled only to reinstatement at the level that he occupied in 1990. *See* RD& O at 56.

Based on the record before us, we reach the same conclusion as the ALJ, *i.e.*, that Hobby shall be reinstated to a position at the same Level 20 (10) he occupied when he was unlawfully terminated by Georgia Power. However, we reach this result using a slightly different analysis.

As discussed *supra*, the ERA employee protection provision states that:

> If, in response to a complaint filed under . . . [the ERA whistle-blower provision], the Secretary determines that a violation . . . has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant.

42 U.S.C. §5851(b)(2)(B). The Secretary and this Board have viewed this language broadly as authorizing a "make whole" remedy; with regard to an employee who has been terminated, this begins with an initial presumption that an aggrieved complainant is entitled to reinstatement to the position that was occupied prior to the unlawful discrimination.

In considering complaints under the environmental whistleblower statutes, the Secretary and this Board often have been guided by law developed under other federal employment discrimination statutes, while giving due regard to differences in statutory texts and histories. We particularly have been guided by cases decided under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C.A. §2000e (West 1994), and the National Labor Relations Act, 29 U.S.C.A. §151 *et seq.* (West 1998), recognizing the large body of case law that has been developed under these statutes. *See, e.g.*, *McCafferty v. Centerior Energy*, ARB No. 96-144, ALJ No. 96-ERA-6 (Sept. 24, 1997); *Lederhaus v. Paschen*, No. 98-ERA-13 (Sec'y Oct. 26, 1992); *Dartey v. Zack Co.*, No. 82-ERA-2 (Sec'y Apr. 25, 1983).

[12/] Hobby also disagrees with the ALJ's analysis of his progression rate, asserting that he ascended the pay grades at an even faster rate than the ALJ acknowledged.

In cases involving individual charges of discrimination (as distinguished from class actions), claims for reinstatement and back pay typically are analyzed using an individualized method in which a court "determines a discriminatee's loss by comparing his actual employment history with his hypothetical or reconstructed employment history, that is, what his employment history would have been in the absence of discrimination." II CHARLES A. SULLIVAN ET AL, EMPLOYMENT DISCRIMINATION §14.4 (1988) (discussing claims under Title VII); *accord, Cram v. Pullman-Higgins Co.*, No. 84-ERA-17 (Undersec'y Jan. 14, 1985) citing *UTU v. Norfolk & Western Ry.*, 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). Such an inquiry

> requires the court to determine the positions the employee would have held, the period she would have occupied each position, and the remuneration she would have received in the absence of discrimination. To do this, the court must take account of a multitude of factors, including the qualifications and seniority of the claimant and other employees, and the layoffs, transfers, resignations, and promotions that would have impacted on the claimant's employment.

SULLIVAN, §14.4.2 (footnote omitted).

In analyzing the level of Hobby's reinstatement, we begin with the general proposition that the plaintiff or complainant in an employee discrimination case bears the burden of proving damages. *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1158 (9th Cir. 1999), citing *Horn v. Duke Homes*, 755 F.2d 599, 606 (7th Cir. 1985). This is consistent with the "broadest and most accepted idea . . . that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims." 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §63 (2d ed. 1994).[13/] What evidence did Hobby need to produce to show that a "make whole" remedy in this case must include reinstatement at a higher level than the position he occupied when he was terminated?

Most discrimination cases in which a court orders retroactive promotion involve straightforward "failure to promote" claims, *i.e.*, the underlying basis for the discrimination claim is the complainant's belief that he or she was denied a promotion because of some protected status. This case is different, because the underlying charge of discrimination is Hobby's unlawful termination; the question of reinstatement level arises only with regard to fashioning an appropriate remedy. Several courts have addressed this latter situation, albeit the number of reported cases is comparatively small. The burden on the plaintiff is fairly high. For example, in a 1994 case under the Rehabilitation Act, *Jewell v. Bentsen*, 1994 WL 89014 (D.D.C.), the court observed that:

[13/] There are, of course, countervailing legal and evidentiary concerns that may shift the burden of proof to other parties on specific issues. *Id*. A good example of this burden shifting is the question whether a complainant has appropriately mitigated damages (discussed *infra*), where the burden of proving a "failure to mitigate" falls on the defendant.

> Defendant distinguishes between cases in which discrimination caused a claimant's termination and those in which it caused a denial of promotion. Even in the latter context, the law of this Circuit has been to deny claimants retroactive promotion benefits when they are undeserved. *See Dougherty v. Barry*, 869 F.2d 605, 615 (D.C. Cir. 1989) ("If the district court had been able to determine with certainty which two of the appellees would have received promotions, the proper course would have been to award those two appellees full relief and the others none."). Surely, then, the law requires that discrimination plaintiffs seeking retroactive promotion in *termination cases* demonstrate some *likelihood of promotion* absent discrimination.

Id. at *1 (footnote omitted, emphasis added). In other words, a "likelihood of promotion" is the primary test that the plaintiff must meet. In most cases, this "likelihood of promotion" standard involves demonstrating a predictable career path or career ladder. Thus in *Jewell*, the court found that there was no career ladder promotion potential associated with the job that the plaintiff had been denied, and therefore concluded the plaintiff's claim to reinstatement at a higher grade was speculative. *Id.* at *2, 3. On the other hand, in a case in which an employer unlawfully denied the plaintiff a permanent entry-level position with the company, the Eighth Circuit concluded that a trial court could award instatement at a job classification above the entry-level if (1) the plaintiff had the particular skills or other job-related qualifications required for the higher position, (2) the higher level position was in a line of progression upward from the position that was initially denied, *i.e.*, that the entry-level position normally would be promoted to the higher classification after some interval of acceptable performance, and (3) that the service in the lower level position was not a prerequisite justified by business necessity (aside from the skills and qualifications to perform the higher job). The court characterized this approach as a "job skipping" remedy. *Locke v. Kansas City Power and Light Co.*, 660 F.2d 359, 368-69 (8th Cir. 1981); *accord Pathway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978). *See also Pecker v. Heckler*, 801 F.2d 709, 712-13 (4th Cir. 1986) (ordering reinstatement of employee to a higher-grade position where job had been reclassified and upgraded) and cases cited therein.

In short, the judicial precedent on retroactive promotion in a termination case is relatively narrow, requiring the plaintiff to show that there was a reasonable probability that he would have been promoted to a particular position or class of positions "but for" the unlawful act of discrimination. This Board has taken the same approach in other whistleblower cases under the ERA. *See Doyle v. Hydro Nuclear Servs.*, *supra*, slip op. at 6 (in a refusal to hire case, denying the complainant back pay at a pay rate higher than the position that had been sought because complainant did not show that he would have been entitled to a promotion to the higher-pay job). In the instant case, we deny Hobby's proposed retroactive promotion remedy precisely because the evidence cannot support an affirmative finding that he was likely to be promoted.

Although there is material in the record supporting Hobby's claim that he rose at a rapid pace within the company during the years before he was terminated, finally achieving a Level

20 under the old classification system, Hobby does not identify with any particularity the job or jobs into which he allegedly would have been promoted. Instead, Hobby's "historical method" argues that he would have continued to receive 4% merit pay increases each year (similar to the rate of increases in the years before he was terminated), and that he repeatedly would have been promoted to the next higher pay grade whenever he reached the maximum in-grade pay level.[14/] But Hobby cites no precedent for this approach, and we conclude that this "historical method" is not a legally sufficient substitute for the more-particularized proof that has been required by the courts and this Board, *i.e.*, that a promotion was likely.

Stripped to its essentials, the "historical method" argues that "because I advanced in the past, it can be assumed that I would advance at the same pace in the future." This is pure speculation, and ultimately leads to illogical conclusions because it assumes that all "rising stars" within the executive suites would continue to ascend the corporate ladder until they became the CEO. As a practical matter, in the real world this simply does not happen; at some point the vast majority of senior managers reach a career peak. For some this comes early, for others late, and a very rare few actually reach the top – but without specific evidence demonstrating that Marvin Hobby would have been likely to achieve particular higher-level positions, there is no evidentiary basis for this Board to order that he be reinstated above the Level 20 (10) position that he occupied when he was terminated. We therefore reject the "historical method."

The job tracking approach that Hobby offers is more sound methodologically than the historical method. For example, in *Robinson v. City of Fairfield*, 750 F.2d 1507 (11th Cir. 1985), the Court of Appeals approved a decision by a trial court to award a discharged black male plaintiff reinstatement *and* a retroactive promotion by tracking the career progression of a comparable white employee, observing that "promotions, even if not sought and denied, are a legitimate consideration in Title VII cases for structuring remedies designed to make persons whole for injuries suffered through past discrimination." *Id.* at 1512. The two employees (the black plaintiff, and the second employee who was white) had been hired on the same day. The plaintiff (who subsequently was discharged unlawfully) was hired as a refuse collector, while the white employee was hired as a truck driver. At the time they were hired, the black employee had more education than the white employee, and also had experience driving trucks while in the Army. *Id.* at 1509. The Court of Appeals affirmed the district court's holding that the black employee would have been trained and promoted to the white employee's position or an equivalent position "but for" the discriminatory action, and that it therefore was appropriate to reinstate the plaintiff at the higher position that was achieved by the white worker. *See also Taylor v. Cent. Pennsylvania Drug and Alcohol Servs. Corp.*, 890 F. Supp. 360, 370 (M.D. Pa. 1995) (in calculating back wages, "the courts have typically projected the plaintiff's lost earnings by tracking the career of a similarly situated co-worker who was not subjected to discrimination

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[14/] The ALJ rejected the premise that employees automatically are elevated to the next grade level when they reach the maximum pay, crediting Steve Wilkinson's testimony that most employees at Georgia Power who reach Level 10 remain at that level because there are few positions available above that level. RD&O at 57. In testimony that addressed this issue squarely, Wilkinson stated that employees do not automatically receive level increases upon reaching the maximum salary level for their current level, but that such a promotion would require the opening of a position at the higher level. T. 2137-8, 2144.

and adjusting for distinctions between the situation of the co-worker and that of plaintiff[,]" citing *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108 (3d Cir. 1988), *cert. denied* 492 U.S. 904 (1989)).

But while there is solid precedent for the job tracking methodology, Hobby's case for a retroactive promotion under this theory also fails for want of persuasive evidence, because even under the job tracking approach a court must be able to conclude that the plaintiff would have achieved the positions of the employees chosen as comparators, or closely similar positions. In this case, Hobby argues that he would have been promoted at the same rate as either Paul Bowers, Georgia Power's Senior VP of Marketing, or two other Southern Company-system employees.[15/] Maybe so, or maybe not. But what is significant is that Hobby's background was in nuclear operations, a field quite different from the work performed by these other employees, and Hobby has made no showing that he likely would been promoted into *any* of the positions that these individuals held. Thus the comparison is inappropriate, and Hobby's "tracking method" claim that he would have reached the same pay grade as these other workers also is purely speculative.

Against this backdrop – *i.e.*, Hobby's failure to mount an affirmative case that he is entitled to a promotion – the hotly-contested question whether there has been a reduction in the number of senior management positions at Georgia Power is of no decisional significance, and it is unnecessary for us to reach a finding on whether downsizing occurred.[16/] Accordingly, we concur with the ALJ's finding that Hobby should be reinstated to a position at the same pay grade he occupied when he was terminated, Level 20 (10).

C. Whether Hobby should be awarded full back pay, or whether the amount of back pay should be reduced because he failed to mitigate damages.

Although the ERA's employee protection provision does not explicitly require victims of employment discrimination to attempt to mitigate damages, the Secretary and this Board consistently have 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. The respondent bears the burden of proving that the complainant did not properly mitigate. *See, e.g., Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No.

[15/] Because of the result that we reach on this issue, we do not need to address a second problem in Hobby's argument, *i.e.*, that neither of the Southern Company comparators were employed by the respondent in this case, Georgia Power.

[16/] Georgia Power expended significant energy developing and presenting evidence concerning downsizing at the company, advancing the theory that Hobby's entitlement to back pay would have ended relatively early because he would have been separated from the company as part of a general reduction in the management ranks. *See* RD&O at 63-64. However, the analyses compiled by the company "were seriously flawed." *Id.* Perhaps for this reason, the company does not raise this downsizing argument as part of this appeal.

1995-CAA-3 (ARB Sept. 29, 1998); *Doyle, supra* (ARB Sept. 6, 1996). *See also* II DAN B. DOBBS, LAW OF REMEDIES §6.10(4) at 221-22 (2d ed. 1993); II BARBARA LINDEMAN AND PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1792 (3d ed. 1996) ("Although the burden of proving damages generally falls upon the plaintiff, the defendant carries the burden of pleading and establishing, as an affirmative defense, the plaintiff's failure reasonably to mitigate."). To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 15 (ARB Mar. 29, 2000); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983). *See also*, II CHARLES A. SULLIVAN ET AL, EMPLOYMENT DISCRIMINATION §14.4.5 (1988). "Substantially equivalent employment" would be a position providing the same promotional opportunities, compensation, job responsibilities, working conditions, and status. *See, e.g., Ford Motor Co. v. EEOC,* 458 U.S. 219, 102 S. Ct. 3057, 3065 (1982).

In reviewing mitigation efforts, it should be remembered that the discharged complainant's unemployed status is the result of the respondent's wrongdoing. Even if the evidence shows that substantially equivalent positions were available, a complainant still may be found to have mitigated although he or she was unsuccessful in the search for alternate employment, so long as the complainant was reasonably diligent in pursuing alternate work. Both logically and practically, a court cannot demand that a complainant conduct the "perfect" job search, finding every suitable job. Inevitably, there will be cases where a complainant simply does not find the comparable jobs that may, in fact, exist. Just as the burden of proving a failure to mitigate falls on the respondent, so the "benefit of the doubt" ordinarily goes to the complainant. As the Sixth Circuit has observed,

> A claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The claimant's burden is not onerous, and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market.

Rasimas at 624. This proposition was stated with even greater vigor in a more recent Title VII case:

> The burden is upon the defendant to prove that the discriminatee failed to mitigate damages. *Clarke v. Frank*, 960 F.2d 1146, 1152 (2d Cir. 1992); *Bonura v. Chase Manhattan Bank, N.A.*, 629 F.Supp. 353, 356 (S.D.N.Y. 1986). A defendant "'must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment'" in order to meet its "extremely high" burden of proving failure to mitigate. *Bonura*, 629 F.Supp. at 356 (quoting *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 925 (S.D.N.Y. 1976), *aff'd*,

559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977)).

Kahmann v. Reno, 928 F.Supp. 1209, 1221 (N.D.N.Y. 1996).

Before the ALJ, both Georgia Power and Hobby presented extensive evidence on the issue of mitigation. The ALJ ultimately was not persuaded by Georgia Power's evidence, and concluded the company "failed to carry its burden of showing that Complainant failed to mitigate his damages." RD&O at 62. In addition, the ALJ found that Hobby "carried out a diligent search for employment." *Id.*

On appeal to this Board, Georgia Power challenges the ALJ's recommended finding, arguing that it is erroneous in several respects. However, based on our review of the record and the applicable law, we concur with the ALJ's finding that Georgia Power has failed to carry its burden of proof on the mitigation question. We first review the evidence and legal arguments concerning the availability of substantially equivalent employment, which under ARB case law is a threshold element that must be proved by Georgia Power. We then consider Hobby's efforts to find employment after he was terminated by Georgia Power, recognizing that the lack of a diligent search also has been viewed as dispositive by the Eleventh Circuit in Title VII cases. *See Weaver v. Casa Gallardo, Inc*., 922 F.2d 1515 (11th Cir. 1991), *superseded by statute on other grounds.*

1. Whether Georgia Power proved that substantially equivalent positions were available.

Georgia Power's claim that Hobby failed to mitigate damages rests primarily on the research and testimony of James J. Cimino, Vice President of Executive Search Limited, whose presentation is summarized by the ALJ at pages 35-38 of the RD&O. In addition to offering general testimony about employment prospects and the job search process, Cimino performed two studies for Georgia Power: (1) a "Study of Employment Opportunities, March, 1990 Through December of 1993" in the Southeast United States and (2) a "strawman" study in which Cimino contacted various companies seeking work for a person with Hobby's qualifications to determine the likelihood that Hobby could have found a suitable position.

Cimino's "Study of Employment Opportunities" focused on job listings in THE WALL STREET JOURNAL, THE ATLANTA JOURNAL-CONSTITUTION, NUCLEAR NEWS and CHEMICAL ENGINEERING over a 3-3/4 year period following Hobby's departure from Georgia Power. Cimino and his staff assembled a list of advertised positions or recruiting services in the Southeast region which they felt were consistent with Hobby's qualifications. For the advertisements that listed pay levels, the mean compensation level was $65,000/yr.[17/] Out of

[17/] As an aside, we note that a position paying $65,000/yr. (or less) obviously is not "substantially equivalent" in compensation to Hobby's former position as NOCA General Manager, where he was paid over $100,000/yr. with significant benefits.

1095 advertisements identified, Cimino concluded that Hobby was qualified for 231; moreover, Cimino felt that the balance of the advertisements were at "companies which would have a need for someone with Complainant's qualifications" (RD&O at 36 n.66), and that it would have been useful for Hobby to send them a resume. Cimino acknowledged that only 10% of job openings in the power industry are advertised publicly. In Cimino's opinion, Hobby could have obtained new employment within 12 months of being terminated by Georgia Power. Cimino also expressed the view that an employee's filing of a lawsuit against a former employer would not affect his ability to find new work, and that prospective employers would actually view environmental whistleblowing activity as a plus when considering job applicants. RD&O at 36-37.

In conducting his "strawman" study, Cimino contacted 114 companies to determine whether they would be interested in interviewing an anonymous (and non-existent) candidate with Hobby's credentials, or at least reviewing his resume. Seven of the 114 companies expressed an interest, and seventeen suggested that they either had filled an appropriate position recently, or expected an appropriate position to open soon. Cimino testified that, based on this evidence, Hobby could have found a position in the nuclear industry if he had been diligent. As with the initial "Employment Opportunities" study described above, it was Cimino's view that Hobby's status as a whistleblower would not adversely affect his employability. RD&O at 37-38.

Hobby presented several witnesses to rebut Cimino's studies and testimony, including:

- Dr. Steven I. Jackson, an adjunct professor of public policy at Cornell University and a fellow with the Center for the Study of American Government at Johns Hopkins University. *See* RD&O at 45-47.

- Dr. Penina Glazer, professor of history at Hampshire College, researcher and author (with Myron Glazer) of WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY, published in 1989. *See* RD&O at 47-49.

- Dr. Donald R. Soeken, a retired Public Health Service officer who operates a retreat center for whistleblowers and their families and the author (with Dr. Karen L. Soeken) of a 1987 report entitled *A Survey of Whistleblowers: Their Stressors and Coping Strategies*. *See* RD&O at 49-51.

- David H.W. Griswold, the general manager of the Atlanta office of R.L. Stevens, a firm specializing in job placement for senior executives. *See* RD&O at 38-43. (Hobby had retained the R.L. Stevens firm during 1992 to assist in his job search.)

These witnesses testified to Hobby's job search, the practical difficulty of finding a senior management position (particularly in the power industry), and the special difficulties that a whistleblower probably would encounter after filing a complaint or lawsuit against his former employer. In addition, each pointed specifically to what they viewed as significant defects in the Cimino studies. *See generally* RD&O at 58-63. In essence, these witnesses testified that Cimino

had not demonstrated that there were a significant number of substantially equivalent jobs available to Hobby or that Hobby lacked diligence in his job search approach. Moreover, these witnesses suggested that Hobby's limited success in finding work, particularly in the power industry, was explained in part by his whistleblower status.

The ALJ found the testimony of Griswold, Dr. Jackson and Dr. Glazer to be credible, and specifically concluded that Cimino's testimony was not credible.[18/] *Id.* While the value of the respective testimony of Hobby's witnesses on the mitigation issue varies, we agree overall with the ALJ's credibility assessments, and particularly his summary conclusion that Cimino "was merely creating research to reach a foregone conclusion." *Id.* at 59. While Cimino identified some positions that might have been appropriate for Hobby, it is also clear (as described in the next section of this Discussion) that Hobby engaged in an active job search and applied for many senior management positions.

Nothing in the Cimino studies demonstrates to us that there were a significant number of substantially equivalent positions in the Southeast region for which Hobby would have qualified, and for which he would likely have been hired if he engaged in a more vigorous job search. As the ALJ aptly noted:

> Cimino's report includes some advertisements for which Complainant could have applied, but Respondent's burden is not met by merely pointing out that Complainant did not apply to every available employer. Complainant did reply to at least forty employers and almost certainly more than that. Only after several years of disappointment and rejection did he settle for a position paying substantially less than the one from which he was terminated . . . Complainant was not in search of an entry-level position, which would have been easy to come by. He sought comparable executive employment, with his status as a whistleblower, lack of references from his previous employer, and lack of networking contacts in tow.

RD&O at 62-63.

With the ALJ, we find that the Cimino studies do not demonstrate the existence of a significant number of substantially equivalent jobs that Hobby was likely to win if he had engaged in a more diligent job search. Perhaps Hobby could have conducted a better job search, but "[t]he claimant's burden is not onerous, and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market." *Rasimas, supra.* Under ARB precedent establishing the standard for proving a failure to mitigate

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[18/] In addition, the ALJ concluded that one of Hobby's witnesses, Dr. Soeken, lacked credibility because his opinion was "so fraught with bias that it was implausible." *Id.* at 62 n.107.

damages in whistleblower cases, Georgia Power's failure to prove that suitable equivalent employment existed is sufficient for us to conclude that Hobby prevails on this issue. *See Johnson v. Roadway Express, Inc.*, *supra*; *Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 97-SWD-2 (ARB Dec. 1, 1998).

Viewing the situation confronting Hobby after he was terminated by Georgia Power, we also conclude that Hobby's former status as a highly-compensated power industry manager almost certainly complicated his job search when compared with workers who may have left lower-level jobs. Virtually all of Hobby's career had been spent in a single highly-concentrated industry where relatively few equivalent jobs would be available at any particular moment, and where personal contacts and recommendations would play a major role in finding a suitable position. Hobby had to search for a new position without a favorable job reference from his former employer, Georgia Power; moreover, Georgia Power had issued a press release after the first ALJ decision in this case in 1991, thereby publicizing Hobby's status as a whistleblower. To make matters even more difficult for Hobby, many of the major power industry employers in the Southeast region are Southern Company subsidiaries, *i.e.*, affiliates of the same company that had unlawfully terminated Hobby's employment.

Finally, with regard to the credibility of Georgia Power's primary witness on mitigation, we note particularly that we share the ALJ's disbelief in Cimino's claim that prospective employers would consider a history of whistleblowing to be a positive trait in a job applicant. The testimony of Hobby's witnesses, particularly the work of Dr. Glazer, plainly suggests otherwise. Indeed, Hobby's experience at Georgia Power – where his promising career came to an abrupt halt when he merely alerted his superiors to an organizational structure that he believed was a violation of Georgia Power's operating license with the NRC – is compelling testimony to the hostility that whistleblowers may experience. Cimino's position is simply incredible, and casts doubt generally on his credibility and the value of his research and testimony.

2. Whether Hobby engaged in a reasonably diligent job search.

In addition to challenging the ALJ's fact findings on mitigation, Georgia Power argues that the ALJ applied the wrong legal standard, citing the Eleventh Circuit's decision in *Weaver*, *supra*, and the Fifth Circuit's decision in *Sellers v. Delgado Community College*, 902 F.2d 1189, 1193 (1990). In *Weaver*, the Eleventh Circuit provided this standard for analyzing mitigation of damages questions:

> Casa Gallardo [the defendant] has the burden of showing that Weaver did not make reasonable efforts to obtain work. Specifically, the employer must show that "comparable work was available and the claimant did not seek it out." *If, however, "an employer proves that the employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially comparable employment*."

922 F.2d 1515, 1527, quoting *Sellers, supra*, at 1139 (emphasis added, footnotes omitted). Georgia Power alleges that Hobby did not make reasonable efforts to obtain work, and that under a *Weaver* analysis Hobby's alleged failure to seek work *independently* would compel a finding in Georgia Power's favor on the mitigation question.

Both *Weaver* and *Sellers* were cases under Title VII of the Civil Rights Act of 1964, and not under the Energy Reorganization Act. Although the Secretary and this Board frequently look to case law under Title VII for its persuasive authority (see discussion at 16, *supra*), the anti-discrimination language of Title VII is different from the ERA's employee protection text. In addition, Title VII is designed primarily to vindicate private rights rather than promote the public health and safety enforcement goal of the ERA whistleblower provisions. As such, we do not find the standard articulated in *Weaver* to be controlling in this case; however, we conclude that even under the 2-pronged standard adopted by the Eleventh Circuit in *Weaver*, Georgia Power's argument fails because Hobby actively searched for alternative employment, albeit with limited success.[19/]

At the time he was terminated from Georgia Power in 1990, Hobby had been a manager in the electric power industry almost continuously for nearly 20 years, and was earning

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[19/] One legal scholar has questioned the *Weaver*-type alternative approach for proving a failure to mitigate damages:

> In line with the common law avoidable consequences rule, the defendant's liability for backpay is reduced by sums the plaintiff earned or could have earned in other employment. The reduction is to be made in the sum of any actual earnings received by the plaintiff in other employment. The reduction is also to be made for any income the plaintiff could reasonably have earned in substitute employment, if the plaintiff in fact earned nothing. The rule requiring a reduction for income the plaintiff could reasonably have earned but did not, is often expressed in terms of the usual evidence given on the point by saying that the plaintiff cannot recover for any period of time in which she was not using reasonable diligence to find substitute employment. *But the plaintiff's lack of diligence, though perhaps sufficient to put the burden on the plaintiff to show that no substitute jobs existed, is not itself the critical issue. The critical point is whether the plaintiff actually earned money or could reasonably have done so in a comparable job. If no such job existed, the plaintiff's post-discharge behavior is of no consequence*.
>
> Reduction in the recovery by the amount the plaintiff *could* have earned is required only if the plaintiff had an opportunity to earn income in a job that counts as a substitute for the job in which the plaintiff was wronged; it must be a job that is a "substantial equivalent" of the job from which the plaintiff was wrongfully discharged or one that becomes acceptable as an equivalent when time has demonstrated that the plaintiff must lower her sights.

II DAN B. DOBBS, LAW OF REMEDIES §6.10(4) at 221-22 (2d ed. 1993) (emphasis added).

$103,104. Hobby felt that he would have no difficulty finding employment. Georgia Power offered outplacement services, but Hobby did not accept this assistance because he felt that the services were contingent upon his abandoning his right to take legal action against the company. T. 148-50.

Hobby's initial hopes for executive-level employment in the utility industry focused on obtaining a job with Oglethorpe Power Company. In December 1989 (*i.e.*, just before Hobby was terminated), Oglethorpe Power had offered Hobby the position of Vice President of Power Generation. RD&O at 13. Hobby did not accept the offer at that time, but contacted Oglethorpe Power in February 1990 (the month that he left Georgia Power) to see if the position was still available. T. 158. Although the position had been filled, Hobby testified that several individuals indicated there were other positions besides Vice-President that would suit him, and Hobby expressed his interest to those individuals. T. 161, 215-18, 220.

For the next two years, Hobby regularly pursued his personal contacts with various senior managers at Oglethorpe Power in the hope of obtaining a job, and apparently received encouragement from these company officials. Hobby testified that he focused on obtaining a position at Oglethorpe because management at Oglethorpe knew him personally and were already familiar with the particulars of his lawsuit. Additionally, Oglethorpe's Dan Smith (Director of Power Generation) had expressed concerns about the legality of Georgia Power's relationship with SONOPCO similar to the concerns that prompted Georgia Power to terminate Hobby. T. 235. It is clear that Oglethorpe Power represented to Hobby one of his best opportunities in the Southeast region to obtain a position truly comparable to the job that he had left at Georgia Power, *i.e.*, a senior management slot at an electric utility company. However, the contacts and encouragements from Oglethorpe Power never resulted in a firm job offer.[20/]

[20/] Soon after Hobby was terminated by Georgia Power in 1990, Smith told Hobby that Oglethorpe would be interested in having him as an employee. T. 161. Hobby also spoke with Frank Wreath at Oglethorpe Power, who informed him that the company would be "very, very interested" in hiring him after the hearing phase of his legal claim against Georgia Power. T. 159-60, 163.

In January 1991, Hobby again contacted Oglethorpe and was informed that they were still interested in him. T. 166. In mid-1991, Tom Kilgore, an acquaintance of Hobby's, became Oglethorpe's new president. Wreath told Hobby that Kilgore had been informed of his interest in a position at Oglethorpe. T. 167. Additionally, one of Oglethorpe's board members privately informed Hobby that there was no reason why Oglethorpe's board would oppose his hiring. T. 167-9.

Hobby met with Kilgore soon after Kilgore began serving as Oglethorpe's president. Kilgore was re-assessing Oglethorpe's organizational structure, but told Hobby that he would contact him in a few weeks. T. 169-70. Separate from these discussions, in August 1991, Hobby responded to an advertisement placed by Oglethorpe seeking a Program Director of Power Production. T. 172-73, RD&O at 14. The position was ultimately offered to one of Oglethorpe's then-current employees. T. 174.

By this time, Kilgore, Smith, Wreath, and Dave Self (Oglethorpe's Vice President of Power Production) all had told Hobby that he might be needed in a number of departments at the company. T. (continued...)

While Hobby was pursuing employment with Oglethorpe, he was also assisting in the preparation of his ERA complaint. T. 158. He assisted his counsel in preparing depositions, writing briefs, and reviewing testimony. T. 164-65, 682-83. In addition to his ERA complaint, Hobby was pursuing a Section 2.206 action against Georgia Power before the Nuclear Regulatory Commission. T. 686; 10 C.F.R. §2.206 (2000).

Over time, Hobby expanded his employment search beyond the contacts with Oglethorpe Power. In January 1991 he contacted Eugene McGrath, who had been his supervisor in a previous position and with whom he had worked at INPO. McGrath was then employed by Consolidated Edison of New York, and he told Hobby that he needed someone with experience in performance standards and monitoring. Hobby expressed his interest in such a position, but McGrath subsequently avoided Hobby. Hobby ultimately asked his mentor, Adm. Eugene Wilkinson to intercede on his behalf. McGrath never spoke again to Hobby, but he intimated to Adm. Wilkinson that Hobby would not be hired by Consolidated Edison, commenting obliquely that "there are differences between New York and Atlanta." T. 244-60.

Hobby also looked for employment outside the power industry, while still continuing to seek employment at Oglethorpe. In May 1991, he applied for a position as Administrator of the law firm of Paul, Hastings, Janofsky & Walker, which ultimately hired someone with more relevant experience. T. 264-6. In October 1991 he applied for the position of Senior Contracts Specialist with the Resolution Trust Corporation. T. 267-68, CX-72 at 164. In March 1992 he landed an interview with the Carter Center in Atlanta, but was unable to secure a position. T. 271-73.

In early 1992 Hobby contacted Stuart Thompson, a recruiter who represented companies seeking employees. Thompson advised Hobby that because of his age and experience, he would find it difficult to obtain employment outside of the utility industry. T. 240-41. Hobby then contacted the R. L. Stevens employment firm. He told the firm that he had been terminated from his position at Georgia Power and was having difficulty finding employment. T. 1083-84. In May 1992 Hobby, at the direction of R. L. Stevens, attended a job search seminar and developed a marketing plan for his employment search. T. 288-89, RD&O at 16. Hobby also invested time

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[20/](...continued)
215-16. In September 1991 Hobby again met with Wreath, who informed him that Kilgore believed that Hobby's ERA case needed to be resolved before he could be hired, but that this was the only impediment. T. 225-26.

In November 1991, Smith contacted Hobby for a job interview for a position at Oglethorpe. Hobby expected to meet with Kilgore as part of the interview, but was unable to do so. In December 1991 he contacted Smith about the interview and was told that a hiring decision would not be made until after the holidays. T. 236-38.

Hobby contacted Oglethorpe in January and February 1992 and was told that no action had yet been taken on his hiring. T. 238. Soon after receiving this news, Hobby contacted an employment recruiter and engaged a firm to assist in job placement elsewhere.

in keeping abreast of developments in the nuclear industry through news articles and his industry contacts. T. 1005.[21/]

In June 1992 Hobby applied for positions as Executive Administrative Assistant, Office of the President, Hayes Microcomputer Products; Director of Operations, John Sutton Associates Consultants, Inc.; CEO, Montgomery Ventures; vice-president and general manager for a medical device group; general manager for a manufacturer of technical products; and administrator for an international law firm in central Europe. T. 303, 333; CX-72 at 175,176,178,182-4,187, 192. He forwarded his resume to a number of placement firms. CX-72 at 189-191. He also sent letters seeking an executive assistant position to American Group Practice, Inc.; Chanko-Ward, Ltd.; Hyman, Mackenzie & Partners, Inc.; Richard Kove Associates, Inc.; The Mercer Group; PROSource, Inc.; Shaffer Consulting Group; Kimball Shaw Associates; Egon Zehnder International; Spencer Stuart & Associates; and Russell Reynolds Associates. CX-72 at 180-1.

Hobby continued to work on his contacts within the power industry. James O'Conner, the Chief Executive Officer of Commonwealth Edison in Chicago, informed Hobby that there were no positions available at his company, but that Hobby could rely upon him as a reference. T. 273-4. Hobby also contacted Lee Sillin, the former Chief Executive Officer of Northeast Utilities, who had worked with Hobby at INPO and was then chairman of a utility coordinating committee. Although Sillin had previously offered Hobby a position working for the committee, he expressed reluctance in allowing Hobby to use him as a reference. T. 275-279.

In July 1992 Hobby applied for positions at Alpha Enterprises, the USO, and the Tennessee Valley Authority's Edison Project. T. 308-9, 334, 340; CX-72 at 194, 198, 276. In September 1992 he sought positions as General Manager, Active Parenting Publishers; General Manager, CI Music; and Director of National Field Service and Operations, Ionpure Technologies. CX-72 at 201-2, 205, 207. He also forwarded his resume to Fox-Morris Executive Search and responded to an aviation executive advertisement in The Wall Street Journal. CX-72 at 203, 211. In September or October of 1992, Hobby went to work for a temporary agency, which placed him in a position at Monumental Insurance Company. T. 318. He requested a permanent position but was told he was over-qualified. T. 321-22.

In October and November 1992 Hobby applied for positions as Contracts Administrator and Manager of Purchasing for Fannie Mae; Vice-President, Division Director of Administrative Services, Oak Ridge Associated Universities; Regional Director, Dyncorp; and Project Manager for CEXEC, Inc. T. 336-337; CX-72, 215, 219, 222, 226, 228. In January 1993, Hobby was contacted by a management recruiter who told him that a small utility in Michigan was looking for a new general manager. Hobby expressed interest in the position and supplied the recruiter with additional information. T. 301-302.

[21/] Although Hobby entered into a long-term contract with the R.L. Stevens employment firm to assist in his job search, this relationship ended in September 1992 when Hobby was unable to pay the company's fees. RD&O at 38.

Between January and March of 1993, Hobby applied for positions as Manager of Contracts, MARTA Recruiting; President and CEO, Combined Health Appeal of America; Director of Communications, CARE; and a position at Compuware. (T. 337-38; CX-72 at 233, 236, 241. It was around this time that he was informed that he was not selected for the position at the utility in Michigan. T. 303.

Hobby moved to a different temporary agency which placed him in a temporary position at United Parcel Service (UPS) in March 1993. This was followed by a temporary position at MCI Corp. T. 323-4. At both companies Hobby sought a permanent position; MCI informed him that he was over-qualified for their available openings. T. 325. Hobby was ultimately reassigned back to a temporary position at UPS. T. 327. While working in these temporary positions Hobby applied for positions as Vice-President of Human Resources, Lowerman-Haney, Inc; Human Resources Director, Boreham International; Vice-President of Operations, Checkmate Electronics, Inc; and Executive Director, Plastics Pipe Institute. T. 339, CX-72, 244, 246, 248, 249. He also responded to an advertisement in the Atlanta Journal/Constitution for a position as director of investor relations and corporate communications. CX-72, 252.

In September 1993 Hobby secured a permanent position at UPS. T. 330, 332. Although Hobby had found full-time employment, he continued to search for a position more comparable to the one he held at Georgia Power. He also applied for positions as a regulatory assurance and policy director; Executive Vice-President, American Institute of Architects; Manager, Lawrence Livermore National Laboratory; and Manager of Customer Service and Contract Administration, Siemens Power Corp. T. 306-7, 311, 314; CX-72 at 255-61, 263, 272-4.

We note also that Hobby sought to return to his former position at Georgia Power. After the Secretary issued his initial decision on the merits of this case in August 1995 (finding that Georgia Power had discriminated against Hobby and ordering Hobby's reinstatement), Hobby sought enforcement of the Secretary's reinstatement order in federal court. The U.S. District Court for the Northern District of Georgia ruled that the Secretary's order did not constitute a final order and was therefore unenforceable. This decision was affirmed by the U.S. Court of Appeals for the Eleventh Circuit. *Hobby v. Georgia Power Co.*, No. 1:96-cv-0180-ODE (N.D. Ga. Apr. 18, 1996), *aff'd*, No. 96-8549 (11th Cir. May 6, 1997).

In sum, this is not a case where the complainant abandoned his connection to the job market. Hobby engaged in a meaningful job search, which no doubt was complicated by his abrupt termination from a senior position at Georgia Power. This view was shared by Griswold of the R.L. Stevens agency, whose testimony specifically was credited by the ALJ. *See* RD&O at 60-61. Therefore, even if we were to conclude that the *Weaver* standard applied under the ERA, we would conclude that Georgia Power failed to demonstrate that Hobby did not make "reasonable efforts to obtain work."

3. Whether Hobby otherwise engaged in behaviors that amount to a failure to mitigate.

Georgia Power raises several other arguments in connection with mitigation, criticizing Hobby for: (1) devoting significant time to litigating various claims against the company; (2) declining to use the services of an executive placement firm that were offered by Georgia Power; and (3) not "lowering his sights" and seeking positions outside the nuclear power industry when it became clear that he was unlikely to land a job similar to his former position at Georgia Power. We do not find these arguments persuasive, noting again that the key question when considering the mitigation issue is not whether Hobby conducted the ideal job search, but whether Georgia Power proved that there were substantially equivalent jobs available that Hobby would have discovered if he engaged in a diligent job search.

Hobby acknowledges that he devoted considerable time pursuing his ERA complaint and other complaints against Georgia Power during the period immediately following his termination. However, soon after he left Georgia Power, Hobby also reached out to Oglethorpe Power seeking a new job, a nearby electric utility where his talents already were known and where he had recently been offered the position of Vice President of Power Generation. RD&O at 61. Given the limited number of truly equivalent positions that might have been available to Hobby in the Southeast region, Hobby's contacts with Oglethorpe Power plainly represented one of his best opportunities to find equivalent work. We share the ALJ's view that "[i]t was reasonable for Complainant to cultivate his contacts with Oglethorpe Power for some time because a position with that organization would have provided him with similar compensation and status." *Id.* at 63. We reject Georgia Power's implicit argument that Hobby made himself unavailable for work during the period immediately following his unlawful termination, and therefore should be denied back pay.

We also are not persuaded that Hobby's decision not to use the outplacement services offered by Georgia Power reflects a failure to mitigate, as the company alleges. GP Initial Brief at 28. Viewing the totality of the events surrounding Georgia Power's decision to end Hobby's employment, it is not surprising that Hobby might have viewed the company's offer of assistance with suspicion. Hobby believed that the outplacement services were contingent upon waiving his right to sue the company, although Georgia Power witnesses denied that such a restriction existed. RD&O at 12 n.11. Moreover, Hobby apparently believed that he would have little trouble finding new employment, *id.*, an expectation that we find reasonable in light of the prior job offer from Oglethorpe Power and Hobby's long track record of success at Georgia Power and other power industry organizations. With the benefit of hindsight, perhaps it would have been wise for Hobby to take advantage of the outplacement services, but we find that Hobby's decision to pursue a different job strategy does not mean *per se* that he did not conduct a reasonable job search.

Finally, we are perplexed by Georgia Power's claim that the back pay award should be reduced because Hobby waited too long to "lower his sights" and seek positions outside the nuclear power industry. GP Initial Brief at 35. While it is true that a complainant who is

unsuccessful in his search for an equivalent job must eventually seek employment in another field, *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir. 1986), it was perfectly reasonable for Hobby to keep searching for an equivalent for quite a while. He had spent many years working his way "up the ladder" into senior corporate management positions, and could not have been expected precipitously to "go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co., supra*, 102 S. Ct. at 3065. And when Hobby *did* lower his sights, he repeatedly was rejected by prospective employers as being was over-qualified for available positions. RD&O at 20, 62.

In our view, Georgia Power attempts to place Hobby in a "lose-lose" situation regarding his efforts to find new work, arguing on the one hand that Hobby waited too long to lower his sights, while simultaneously claiming that his back pay award should be reduced because he failed to find equivalent employment. GP Initial Brief at 35, 47. Based on the record in this case, we conclude that Hobby's job search decisions were not manifestly unreasonable, and therefore do not reflect a failure to mitigate damages.

D. Whether Hobby should be awarded $250,000 in compensatory damages.

The ALJ awarded $250,000 for emotional distress, humiliation, and loss of reputation:

> In light of Complainant's high level position, his unemployment and underemployment for over eight years, his inability to find any work within the nuclear community, and the detrimental effect his protected activity has had on any chances of future promotion and future salary increases, and in light of the emotional stress Complainant endured due to his termination and inability to find comparable employment, I find that an order of compensatory damages in the amount of $250,00.00 is reasonable. I recognize that this amount is higher than those awarded in other cases, but I find that the situation here merits such a high award.

RD&O at 67. Georgia Power argues that the ALJ's award of compensatory damages is excessive in light of the fact that Hobby presented no expert medical or psychiatric testimony. We disagree. Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), citing *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-307 (1986); *Creekmore, supra*, slip op. at 24-25 (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); *Crow v. Noble Roman's, Inc.*, No. 95-CAA-08, slip op. at 4 (Sec'y Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment

of having his car and truck repossessed deemed sufficient bases for awarding the compensatory damages).

Georgia Power argues that the ALJ's $250,000 recommended compensatory damages award exceeds amounts awarded by the Secretary and ARB in previous whistleblower cases and should therefore be denied. Although the award is relatively high when compared with other environmental whistleblower cases, there is no arbitrary upper limit on the amount of compensatory damages that may be awarded under these employee protections, as we observed in *Leveille v. New York Air Nat'l Guard,* ARB No. 98-079, ALJ Nos. 94-TSC-3, 4 (ARB Oct. 25, 1999):

> . . . [A] key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Smith v. Esicorp* [ARB No. 97-065, ALJ No. 93-ERA-16 (ARB Aug. 27, 1998)]. However . . . damage awards under other discrimination or discrimination-related statutes can be instructive in setting damage awards in environmental whistleblower statutes before the Department of Labor, even though the levels of compensatory damages awarded under these other statutes are not controlling . . . . [T]here is no arbitrary upper limit on the amount of compensatory damages that may be awarded under the whistleblower protection provisions enforced by the Department; indeed, as a practical matter, exclusive reliance on damage awards in prior whistleblower cases easily could result in the level of compensatory damages becoming frozen in time, ignoring even such basic factors as inflation – a result that would be inconsistent with the statutory mandate that the victims of unlawful discrimination be compensated for the fair value of their loss.

Leveille at 6. We also noted in *Leveille* that damage awards under other discrimination or discrimination-related statutes can be instructive in setting damage awards in environmental whistleblower statutes. For example, compensatory damage awards up to $300,000 for non-pecuniary losses are allowed for certain Title VII actions. 42 U.S.C.A. §1981a(b)(3)(D) (West 1994).

During his final days at Georgia Power, Hobby was subjected to a series of slights by the company – being moved to a much smaller office, having his building access restricted, and being ordered to turn in his employee badge and his gate opener to the executive parking garage. By themselves, these incidents probably would merit only a small award of compensatory damages. But these small events were the precursor of more serious problems to come as Hobby experienced continuing difficulty finding work in his chosen profession, and experienced emotional distress tied to his depleted finances, repeated requests of friends and family for money, and the obligation to inform those responsible for his professional development that he

had been fired from his job with Georgia Power.[22/] In terminating Hobby's employment because of his internal complaints, Georgia Power severely damaged Hobby's reputation. It is clear from the record that Hobby's career had been very promising up until his termination; afterward, that career was largely gone. In this context, we find the ALJ's recommended award of $250,000 compensatory damages to be reasonable, and therefore adopt it.

E. Whether Hobby should be awarded compensation for vacation time.

Hobby requested restoration of lost vacation time instead of the cash value of such time. T. 360, RD&O at 64. The ALJ, noting that "such action is not compatible with Complainant's goals of reintegrating into Respondent's organization," awarded Hobby the cash value of 19 weeks of vacation time, plus interest.

Hobby raised the vacation issue in his pre-trial brief, at the hearing and in his post-hearing brief, and Georgia Power did not contest the issue until the ARB appeal. In its Petition for Review to the ARB, Georgia Power argues that Hobby should not be awarded any damages for lost vacation time "because the back pay award already includes compensation for vacation time that would have been accrued and taken." The company does not provide any citations or support for this contention.

The ERA employee protection provision states that when a violation has occurred, the employer shall "reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant." 42 U.S.C. §5851(b)(2)(B). Does this language require the Board to include payment for lost vacation time in Hobby's damage award?

The Secretary provided guidance for deciding when a complainant is entitled to reimbursement for lost vacation time in *Palmer v. Western Truck Manpower, Inc.*, No. 85-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) (table), available at 1991 U.S. App. LEXIS 21675:

> [F]ringe benefits such as vacation . . . pay are among the items which should be included in back pay." Pathway, 494 F.2d at 263 [Fifth Circuit case]. Thus, in order to be made "whole", a complainant is entitled to be paid for accrued vacation time he has lost as a result of the employer's discrimination. That does not mean, however, that a complainant is automatically entitled to receive both straight wages and vacation time for the same period.

[22/] We note favorably the ALJ's discussion of Hobby's difficulties after he was terminated by Georgia Power. *See* RD&O at 65-68.

> Where it is the practice of the employer to pay an employee for vacation time not taken, it is equitable that a complainant receive both straight wages and vacation pay for the same period. Where, however, an employee must take his vacation or lose it, the addition of vacation pay to a back pay award of straight salary for the same period would compensate the complainant for more than he lost as a result of the employer's illegal discrimination.

Id., slip op at 4-5.

The rationale in *Palmer* is consistent with the case precedent under Title VII. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1562 (11th Cir. 1986), *cert. denied* 479 U.S. 883 (Under Title VII, back pay should include not only "straight salary" but also "interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay"). *See also Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988) (in case under §1983 and Title VII, "The back pay award . . . should include the salary, including any raises, which plaintiff would have received but for the discrimination, as well as sick leave, vacation pay, pension benefits and other fringe benefits she would have received but for discrimination."); *Ross v. Buckeye Cellulose Corp.*, 764 F. Supp. 1543 (M.D. Ga. 1991), *judgment rev'd as time barred*, 980 F.2d 648 (11th Cir. 1993); *Pathway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

In the Joint Stipulations of Respondent Georgia Power Company and Complainant Marvin Hobby, the parties state that "Had Mr. Hobby remained with GPC beyond April 2, 1990, Mr. Hobby would have accrued vacation time at the rate of three weeks per year until October 25, 1993, and after that time he would have accrued vacation time at the rate of four weeks per year." Although the record does not inform us explicitly whether Georgia Power had a policy of allowing employees to "carry-over" unused leave from year to year, we infer that this was the company's practice because it appears that Georgia Power paid its departing employees the cash value of unused vacation time. *See* T. 359 (Hobby stating that "when I was terminated from Georgia Power in 1990, they paid me for all of my unused vacation"). We therefore agree with the ALJ's ruling that Georgia Power shall pay Hobby the cash value of lost vacation until the time he is reinstated, plus interest (described *infra*).

F. Whether the ordered remedies should be assessed only against Georgia Power, or against both Georgia Power and its parent, the Southern Company.

Georgia Power is a wholly owned subsidiary of Southern Company, a utility holding company which is also the parent company of Alabama Power Company; Mississippi Power Company; Gulf Power Company; Energia De Nuevo Leon, S.A. de C.V.; Savanah Electric & Power Company; Southern Company Services, Inc.; Mobile Energy Services Holdings, Inc.; Southern Communications Services, Inc.; Southern Energy, Inc.; Southern Electric Railroad Company; Southern Nuclear Operating Company; and The Southern Development and Investment Group, Inc. RD&O at 10 n.7; Georgia Power's Proposed Findings of Fact at 11. In

his Cross-Petition to the Board, Hobby argues that the ALJ erred by not holding Southern Company liable for his reinstatement and monetary relief.

The ALJ held that the evidence did not support a finding of joint or single employer status. RD&O at 51-54. Before the Board, Hobby does not to address the ALJ's specific holding but instead asks the Board to review more generally the "interrelated operations and management" argument raised in his Post-Hearing Brief. Hobby asserts that "the Southern System constitutes a single employer or joint employer with respect to damages," and that:

> In order for complainant to achieve a 'complete remedy' as ordered by the Secretary of Labor, he is entitled to relief against both the Georgia Power Company and the Southern Company, which controls virtually every aspect of GPC's operations and management, and , which acts as a joint or single employer with GPC . . . If complainant is to obtain a complete remedy affirmative relief must be implemented and apply throughout the Southern Company system.

Hobby's Initial Brief at 32.

The regulations implementing relief pursuant to the ERA require the "party charged" to offer reinstatement. 29 C.F.R. §24.6(a)(2). Georgia Power is the party that was charged by Hobby, and found by the Secretary to have violated the ERA. Neither the parent company nor its other subsidiaries have been joined as parties in this action. *See* RD&O at 54 ("The Secretary's order does not grant jurisdiction over parties who were not joined in the lawsuit"). We decline to expand the scope of this proceeding at this late date. As the named respondent, Georgia Power has the obligation to offer reinstatement to Hobby and to provide the other remedies ordered in this decision.

Although we do not include Southern Company as a party responsible for implementing this decision, it bears noting that the record amply indicates that various management employees moved frequently between and among Southern Company and its subsidiaries as they advanced through the ranks. We specifically note our approval of the ALJ's observation that Hobby is entitled to the same favorable consideration:

> I do caution Southern Company and its subsidiaries against any future discrimination against Complainant based on his protected activity. Much testimony was offered indicating that individuals in one subsidiary may move to another subsidiary to achieve a promotion. Complainant should be offered these opportunities equivalent to others at his level of reinstatement. My ruling here does not provide the other Southern System companies with a loophole through which to discriminate against Complainant in the future.

RD&O at 54 n.103.

V. REMEDY AND DAMAGES[23/]

A. The ALJ's recommended damage awards that were not challenged before the ARB.

Several elements of the ALJ's recommended damage award were not challenged by either party in their appeals to the ARB, and we adopt them with slight modifications. The parties have entered into stipulations that address the manner of calculating some of these awards. *See* RD&O at 4-6 and attachments.

1. Productivity Improvement Plan (PIP) and Performance Pay Plan (PPP).

Georgia Power's Productivity Improvement Plan (PIP) is an incentive plan for Georgia Power executives. The plan pays out bonuses annually and the amount received depends upon not only the executive's grade level but also the overall financial performance of the company. T. 2126; RD&O at 5, 65. The Pay Performance Plan (PPP) provides a bonus to employees based on a standard PPP Funding Percentage Value, and is calculated using either the salary range mid-points of each of Georgia Power's organizations' employees (for the years 1989 to 1996) or the employee's actual salary (from 1996 to the present). RD&O at 65 and Appendix E.

We adopt the ALJ's ruling that Hobby shall receive PIP and PPP bonuses equal to the awards made to an employee at the Level 20 (10) mid-point for the period beginning with his termination until he is reinstated. RD&O at 70.[24/] Because the retroactive award of these bonuses is comparable to back pay, Georgia Power also shall pay interest on the bonuses according to the formula described below at Section E.

2. Medical and Life Insurance Benefits.

The Board adopts the ALJ's recommendation that Hobby shall be compensated for the actual cost of health insurance since his unlawful termination. RD&O at 64-65, 70, citing *Creekmore, supra*, slip op. at 12. We also adopt the ALJ's recommendation that Hobby be

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[23/] We note that the parties agreed during the hearing that compensation manager Steve Wilkinson could be used to calculate compensation and employee benefit figures pursuant to this Order. T. 2175, RD&O at 33 n.58.

[24/] Earlier in the Recommended Decision, the ALJ states that George Power should pay Hobby PPP and PIP benefits at the "average award provided to level 20 (10) employees." RD&O at 65. The "average award" is not necessarily the same as the award made to an employee at the mid-point. Because we order Georgia Power to pay back pay at the mid-point level, *infra*, we similarly adopt the mid-point formulation for the bonus payments.

compensated for the actual cost of life insurance premiums since he was terminated. *Id.*[25/] Because Hobby would have enjoyed the use of these monies if had not been terminated by Georgia Power, the company also shall pay interest on these medical and life insurance costs.

3. Retirement Programs, ESP, ESOP and Stock Options.

We adopt the ALJ's recommendation that Hobby shall be restored fully to all retirement, pension and stock option benefits that were adversely affected by Georgia Power's discriminatory conduct.[26/] Hobby will pay any employee contributions to these plans within ten days after receiving his back pay award. RD&O at 65, 70.

4. Tax Penalty for Early Retirement Fund Liquidation.

After being terminated by Georgia Power, Hobby liquidated 3,278 shares of Southern Company stock held in his ESP and ESOP (retirement) accounts:

TYPE	DATE	NO. OF SHARES	AMOUNT RECEIVED
Non-retirement	5/22/91	730	$20,019.57
ESOP	5/31/90	66	$1,650.00
ESOP	7/31/90	40	$1,025.00
ESP	5/31/90	2399	$59,975.00
ESP	7/31/90	43	$1,101.88
TOTAL		3278	$83,771.45

[25/] The ALJ determined Hobby's medical and life insurance costs to be $20,384.21, increasing by $120/mo. after April 15, 1998.

[26/] Hobby received retirement and pension benefits through Georgia Power's Employee Stock Ownership Plan (ESOP) and Employee Savings Plan (ESP) T. 576-80, 608-9; CX-132-K; CX- 132-P. If Hobby had worked for Georgia Power beyond April 20, 1990, he would have received an amount equal to 5.3 % of his annual salary on March 15th of each year from 1990. RD&O at 5. Georgia Power's Stock Option Plan allows employees to purchase stock at a fixed price; the longer employees stay with the company, the more shares of stock they are allowed to purchase. T. 573-76, 608, 2139-40; CX-132-J; CX-132-O.

T. 494-512; CX-132-D. Hobby incurred tax penalties for early distribution of his IRA account. We adopt the ALJ's determination Georgia Power shall reimburse Hobby for tax penalties resulting from early distribution of the stock and IRA account, plus interest.[27/]

5. Job Search Expenses.

With the ALJ, the Board finds that Georgia Power shall reimburse Hobby $3,605.31 in employment search expenditures. RD&O at 70. *See also* RD&O at 22, referencing T. 538-542, CX-132-B, CX-133, and CX-84. Georgia Power shall pay interest on these expenses.

6. Automobile Benefits.

Georgia Power shall reimbursement Hobby $23,721.27 as compensation for the loss of his car allowance. RD&O at 70; *see also* RD&O at 22, referencing T. 513-519 and CX-132-E. Georgia Power shall pay interest on this lost benefit.

B. Reinstatement and Back Wages

For the reasons discussed above at 6-20, Hobby shall be reinstated by Georgia Power to a Level 10 management position. In addition, Georgia Power shall provide any training needed to re-assimilate Hobby into the company. *See* RD&O at 69.

At the time he was terminated in 1990, Hobby's salary as a Level 20 employee was $103,104. The Level 20 salary mid-point was $102,408. In other words, Hobby's salary in 1990 was higher than the mid-point level, but only slightly – to be precise, .68% above the mid-point. We do not find this slight variance from the mid-point to be material, and therefore order Georgia Power to pay Hobby back wages at the mid-point for Level 20 (10) from the time he was terminated until he is reinstated – ***except for the period in 1990-91 when the Level 20 mid-point was lower than Hobby's actual salary at the time he left the company, i.e., below $103,104***. For this initial period, it is our view that it would be manifestly unjust for Hobby to be paid back wages at any salary level less than the level he actually was paid when he worked for the company; thus, back pay during the 1990-91 period shall be paid at Hobby's actual salary level ($103,104) until the time when the Level 20 (10) mid-point exceeded $103,104, at which

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[27/] Hobby represents that he incurred $6,345.12 in tax penalties in connection with the stock sales, and $314.11 in penalties in connection with the IRA distribution. RD&O at 22 nn.29, 30. Combined, these penalties total penalty $6,659.23, a figure that is at variance with the ALJ's calculation *See* RD&O at 70 item 13. We assume that the ALJ's summary figure is the inadvertent result of a computation error.

The ALJ noted that Hobby's proposed interest calculation regarding the tax penalty was incorrect, and resulted in a doubling of interest. RD&O at 68. Hobby does not challenge this ALJ finding on appeal.

the Level 20 (10) mid-point shall govern.[28/] In addition, Georgia Power shall pay interest on the back pay until the time of Hobby's reinstatement (*see* next section).

Back wages shall be reduced by the amount of Hobby's interim earnings, which were $210,372.86 through 1999:

YEAR	Creditor Resources	Talent Force	Norrell	Ronstad	United Parcel Service	TOTAL
1990	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
1991	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
1992	$717.14	$3,160.50	$0.00	$ 0.00	$0.00	$3,877.64
1993	$0.00	$2,359.00	$10,311.58	$280.00	$6,010.56	$18,961.14
1994	$0.00	$0.00	$0.00	$0.00	$25,339.02	$25,339.02
1995	$0.00	$0.00	$0.00	$0.00	$25,225.00	$25,225.00
1996	$0.00	$0.00	$0.00	$0.00	$30,397.64	$30,397.64
1997	$0.00	$0.00	$0.00	$0.00	$32,525.47	$32,525.47
1998	$0.00	$0.00	$0.00	$0.00	$35,437.25	$35,437.25
1999	$0.00	$0.00	$0.00	$0.00	$38,609.70	$38,609.70
TOTAL	$717.14	$5,519.50	$10,311.58	$280.00	$193,544.64	$210,372.86

RD&O at 5, CX 132 G, p.2. Hobby argues that the work he completed for Creditor Resources in 1992 was performed while he was working full time for Talent Force, after regular working hours and over weekends, and that this amount should be excluded from the back pay calculation. We reject this argument. Because these monies were nevertheless "interim earnings," we include this amount in the interim earnings calculation.

For purposes of computing and compounding interest, all interim earnings shall be credited against Georgia Power's gross back pay obligation during the quarter in which the interim earnings were earned.[29/]

[28/] In his cross-petition, Hobby notes that the ALJ's RD&O contains an ambiguity with regard to the back pay calculation. On the one hand, the ALJ states that back pay should be tied simply to the mid-point of the Level 20 (10) pay scale (RD&O at 70), while elsewhere the ALJ states that the mid-point salary range should increase by 4% each year. RD&O at 58 n.104. In this Final Decision, we direct that the back pay calculation be geared solely to the pay grade mid-point.

[29/] For example, assume that Hobby was entitled to $30,000 in gross back wages from Georgia Power (continued...)

C. Vacation pay

As described above, Georgia Power shall reimburse Hobby for the cash value of vacation benefits from the date he was terminated until he is reinstated, plus interest.

D. Compensatory damages

Georgia Power shall pay Hobby $250,000 in compensatory damages for emotional distress, humiliation, and loss of reputation.

E. Interest

With respect to back wages and other monetary damages listed above in which we have specified an interest award, Georgia Power also shall pay interest, compounded quarterly, in accordance with the following methodology articulated by this Board in the *Doyle* case:

> [T]he interest rate is that charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. *See* 26 U.S.C. §6621(a)(2)[.]
>
> The Federal short-term interest rate to be used is the so-called "applicable federal rate" (AFR) for a quarterly period of compounding. *See, e.g.*, Rev. Rul. 2000-23, Table 1.
>
> To determine the interest for the first quarter of back pay owed, the parties shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points. To determine the quarterly average interest rate, the parties shall calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage point. We round to the whole number because the parties did so in their evidentiary submissions to the ALJ.[30/]

29/(...continued)
during a particular calendar quarter, but received $10,000 in interim earnings during that quarter from a different employer. The net back wages owed by Georgia Power for the calendar quarter would be $20,000. This $20,000 net back wage is the amount that would be added to the back pay total on which interest would be paid and compounded.

30/ As in *Doyle*, the parties in this case have agreed to round the AFR to whole percentage points. *See* RD&O at 5. We therefore order rounding of the AFR under the same methodology used in *Doyle*.

> To determine the interest for the second quarter of back pay owed, the parties shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter's interest rate as calculated according to the preceding paragraph. This multiplication yields the second quarter interest.

Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 042 & 00-012, ALJ No. 89-ERA-22, slip op. at 19-20 (ARB May 17, 2000) (citations and footnotes omitted).

D. Other affirmative relief

Hobby's employment record with Georgia Power shall be expunged of any negative references or commentaries or other materials regarding Hobby's work performance in connection with his discharge. In addition, the company shall issue a "welcome back" memo, consistent with standard company practice. *See* RD&O at 68.

E. Attorney fees and costs

Georgia Power shall pay Hobby attorney fees and costs associated with this litigation, including Hobby's costs in attending the hearing (*e.g.*, transportation, lodging, meals). Hobby may present a fee petition to the ALJ no later than 30 days following the date of this Order.

SO ORDERED.[31/] [32/]

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

[31/] Board Member E. Cooper Brown did not participate in the consideration of this case.

[32/] Because this decision resolves all issues with the exception of the collateral issue of attorney fees and costs, it is final and appealable. *See Fluor Constructors, Inc. v. Reich*, 111 F.3d 979 (11th Cir. 1997) (under the Energy Reorganization Act, a decision that resolves all issues except attorney fees is final.)