U.S. Department of Labor

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

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

Issue Date: 15 February 2005

CASE NO.: 2003-SOX-15

In the Matter of:

DAVID E. WELCH,
Complainant,

v.

CARDINAL BANKSHARES CORPORATION,
Respondent.

APPEARANCES:

D. Bruce Shine, Attorney
For Complainant

Laura Effel, Attorney
Douglas W. Densmore, Attorney
Joseph M. Rainsbury, Attorney
For Respondent

BEFORE: Stephen L. Purcell
Administrative Law Judge

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

On January 28, 2004, I issued a recommended decision and order in this case finding that Respondent, Cardinal Bankshares Corporation, had retaliated against Complainant, David Welch, for engaging in protected activities and thereby violated the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. On February 27, 2004, Welch filed a motion and supporting documentation seeking recovery of attorney's fees, lost wages, and other costs and expenses. Because of delays in resolving the damages issues occasioned by Respondent's premature appeal of my recommended decision and order, Complainant filed a subsequent motion for damages with supporting documentation on December 17, 2004. Cardinal filed its *Objections to Damages and Memorandum in Opposition to Complainant's Motion for Damages* [hereinafter *Objections to Damages*] on January 12, 2005.

The Sarbanes-Oxley Act provides that any employee who prevails in an action under the whistleblower provision of the statute "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). Relief under the Act expressly includes reinstatement, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees, and reasonable attorney fees. 18 U.S.C. § 1514(c)(2)(A)-(C). Similarly, the applicable regulation provides:

> If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

29 C.F.R. § 1989.109(b).

I. Reinstatement

Reinstatement is a drastic remedy and will frequently pose difficulties, but reinstatement as a remedy is generally appropriate to further the stated remedial goal of Sarbanes-Oxley, *i.e.* to make complainants whole. *Id.* Indeed, despite the inherent problems posed by reinstatement, it is the default or presumptive remedy in wrongful termination cases. *See, e.g.*, *Creekmore v. ABB Power Sys. Energy Servs., Inc*., No. 93-ERA-24 (Feb. 14, 1996); *Smith v. Littenberg*, 92-ERA-52 (Sept. 6, 1995).

Cardinal argues that reinstatement is inappropriate in this case because: (1) subsequent to Welch's discharge, Cardinal learned of facts that made Welch unfit for his position; (2) Cardinal's shareholders have supported Respondent's termination of Welch's employment; (3) Welch and Cardinal's relationship has devolved into one of enmity and distrust; and (4) Welch's reinstatement would require the displacement of a subsequently hired employee. Each of these arguments is discussed and rejected below.

A. After-Acquired Evidence of Welch's Unfitness for his Position

In support of its contention that Welch is unfit for reinstatement to his position as Chief Financial Officer (CFO), Cardinal relies on the after-acquired evidence rule enunciated by the U.S. Supreme Court in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). In that case, the Court wrote:

> It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event upon lawful grounds.

McKennon, 513 U.S. at 362.

McKennon involved a 62 year old employee of thirty years who was purportedly discharged by her employer as part of a workforce reduction plan. *McKennon*, 513 U.S. at 354. She alleged that her discharge was impermissibly based on age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq*., and sought a variety of legal and equitable remedies in a civil suit filed against her former employer. *Id*. During discovery, McKennon acknowledged at her deposition that, during her final year of employment, she had copied confidential documents bearing on the company's financial condition, removed them from the office, and showed them to her husband. *Id.* at 355. A few days after the deposition, her employer wrote a letter informing McKennon that the removal of confidential documents from the office was an express violation of her employment agreement and, if it had known about the removal earlier, it would have terminated her instantly. *Id.* Under the circumstances presented in that case, the Court found that neither reinstatement nor front pay was an appropriate remedy, despite the fact that age discrimination had been shown. *Id*. at 361-62. The facts of *McKinnon*, however, are substantially different from those presented here.

Justice Kennedy described the issue presented in the *McKinnon* case as

> whether an employee discharged in violation of the [ADEA] is barred from all relief when, *after her discharge*, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds.

Id. at 354 (italics added). He went on to make clear that this was not a "mixed-motives case" where the employer discharged the worker for two reasons, one discriminatory and one lawful. *Id*. at 359. Justice Kennedy wrote:

> As we have said, the case comes to us on the express assumption that an unlawful motive was the sole basis for the firing. McKennon's misconduct was not discovered until after she had been fired. The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason. Mixed motive cases are inapposite here, except to the important extent they underscore the necessity of determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law.

Id. at 359-60.[1]

[1] *See also*, *Russell v. Microdyne Corp*., 65 F.3d 1229 (4th Cir. 1995), stating that the rule set forth in *McKennon* is more appropriately described as an "after-acquired motive" case in which "the employer does not assert that it had in its mind [at the time of the discriminatory action] a legitimate non-discriminatory reason that explains its challenged action and that would insulate it, to whatever extent, as in the mixed-motive case; instead, the employer argues that it has acquired evidence since the time of that action that, had it known it at the time, would have led it to do exactly what it did, except for a legitimate reason rather than an illegal one." *Id*. at 1237.

In a *Joint Declaration of Members of the Board of Directors and Audit Committee of Cardinal Bankshares Corporation* [hereinafter, *Board Declaration*], Respondent's board collectively wrote:

> [H]ad Welch not been discharged on October 1, 2002, he most certainly would have been fired by us later in October after the examination report of the Bureau of Financial Institutions was received by Cardinal and reviewed by us. . . . The entire Board reviewed that report at its meeting on October 9, 2002, after Welch had been fired. The examination report reflects numerous errors in call reports for December 31, 2001, March 31, 2002, and June 30, 2002. We review the preparation of accurate call reports as one of the most important responsibilities of a chief financial officer of a financial institution like Cardinal.
>
> Had Welch still been employed by Cardinal as chief financial officer when we reviewed the examination report, we would have discharged him on the grounds of inability to manage the functions for which he, as Chief Financial Officer, had responsibility. Indeed, we believe that the fiduciary duty we owe to the company's shareholders would have prevented us from continuing to employ Welch after receiving that report.

Id. at ¶ 3. Similarly, in a *Declaration of R. Leon Moore* [hereinafter *Moore Declaration*], Respondent's CEO wrote:

> Cardinal did not have the cover letter [from John M. Crockett, Deputy Commissioner, Virginia State Corporation Commission, Bureau of Financial Institutions] and examination report [dated July 22, 2002 and prepared by Examiner Robert P. Bishop] at the time when the Audit Committee recommended Welch's dismissal and the Board of Director's discharged Welch on October 1, 2002. The letter, which is dated September 30, 2002, arrived with the report on October 4, 2002, and was reviewed by the Board of Directors on October 9, 2002.

Id. at 2.

Respondent thus clearly implies, through its CEO and board, that: (1) various errors contained in call reports dated December 31, 2001, March 31, 2002, and June 30, 2002 came to its attention after Welch was terminated on October 1, 2002; (2) it was unaware of these numerous errors when Welch's dismissal was recommended and approved on October 1, 2002; and (3) these errors are attributable to Welch and so egregious that, had he not been fired on October 1, 2002, he would have been fired by the board on October 9, 2002 when the board first reviewed and considered the report of examination. I find Respondent's assertions are, at best, inaccurate.

Based on the record before me, it is quire clear that Respondent knew of the alleged call report errors prior to Welch's termination on October 1, 2002. As the cover letter from Deputy Commissioner Crockett makes clear, the examination conducted by Examiner Robert P. Bishop began on or around July 22, 2002, more than two months before Welch was fired. *Letter from*

Virginia's State Corporation Commission Bureau of Financial Institutions, attachment to *Moore Declaration* (Sept. 30, 2002). As the transcript of the formal hearing in this case also makes clear, Moore, the bank's CEO, was well aware of the call report errors around the time the examination was concluded in August of that year.

Moore testified at the formal hearing that he had spoken with Robert Bishop after August 2, 2002 about issues raised by Welch with Bishop during the bank examination regarding the financial accounting practices of Cardinal, *i.e*., the call reports. Tr. 275-76. Moore testified:

> The information that Mr. Bishop and I discussed was information that they had uncovered in their examination, which related to the preparation of the call report and the fact that Mr. Welch had told them that the inaccuracies was [sic] because of him being out on sick leave.

Tr. 277. Moore expressly testified that "the errors on the call report[s] was [sic] discussed with me" at the time the bank examiners conducted their "exit interview" sometime around August 15, 2002. Tr. 278, 279. Indeed, the examiner's report confirms that "[a] detailed list of the[] call report errors [in the June 30, 2002, March 31, 2002, and December 31, 2001 call reports] was left with Bank management." Corporate Family Report of Examination of Cardinal Bankshares Corporation at 28, attachment to *Declaration of R. Leon Moore* (July 22, 2002).

The record also establishes that the board was aware of the content of the examiner's report prior to Welch's termination but did not take any adverse action against him. As noted above, the board identified October 9, 2002, two weeks after Welch was terminated, as the date upon which it learned of the call report errors. *Board Declaration* at ¶ 3. However, on September 17, 2002, prior to Welch's termination, Cardinal's board of directors held a meeting to address Welch's allegations of wrongdoing within Cardinal. The minutes of the meeting reflect that the meeting was attended by Leon Moore, Mike Larrowe, William Gardner, K. Venson Bolt, and Douglas W. Densmore, Cardinal's attorney. *Welch v. Cardinal Bankshares*, 2003-SOX-15, *slip. op*. at 12 (Jan. 28, 2004); (CX-33). At the meeting, Moore recited several problems regarding Welch's performance. *Id*. He specifically noted that, in August 2002, state bank examiners had cited fifteen errors in the second quarter call report, which Welch blamed on Larrowe & Co. and on the fact that he was out on sick leave when the report was filed.

Based on the foregoing, I find that Respondent clearly knew about the call report errors before Welch was fired on October 1, 2002. It thus cannot rely on the "after acquired evidence" rule enunciated in *McKennon* to support a claim that it would have fired Welch after that date.

B. Shareholder Support

Respondent also argues that Welch should not be reinstated in light of the support expressed by its shareholders for Cardinal's handling of this case as evidenced by the reelection of the board members who were responsible for discharging Welch. It asserts that, because Sarbanes-Oxley is intended to benefit shareholders, it would be inappropriate to reinstate Welch after the shareholders supported the board of directors. According to Cardinal's counsel:

> A tribunal's reinstatement of a chief financial officer in the teeth of shareholder support for the board's actions discharging him would reflect a particularly egregious substitution of the tribunal's judgment for the judgment not only of the company's independent directors but of its shareholders, who in the final analysis, are the intended beneficiaries of Sarbanes-Oxley.

Cardinal's Objections to Damages at 20-21.

Among the items submitted by Respondent in conjunction with its opposition to Complainant's request for damages was a copy of the board's "open letter" to its depositors, customers, and members of the Floyd, Virginia community, which was published in the *Floyd Press* on March 4, 2004. *Board Declaration* at ¶ 2 and attachment. The letter states, in relevant part:

> The Board firmly believes that the process it followed in reaching its decision to terminate Mr. Welch was precisely in keeping with the process mandated by Sarbanes Oxley. The decision to terminate Mr. Welch was made entirely by us, the independent outside directors. We exercised our judgment in Cardinal's best interest. We reviewed the facts, listened to the advice of our expert counsel and CPA, and we were satisfied that we understood the issues before us and made our own decision.
>
> . . . . .
>
> We determined through a thorough investigation that there was no merit to Mr. Welch's complaints. Mr. Welch was terminated solely because he failed to comply with directives we, the independent directors, endorsed in connection with the investigation of his complaints. We believe our decision was right then and we believe even more firmly now that our decision was correct.
>
> . . . . .
>
> If the government wants independent directors to actively manage, control and be responsible for corporate affairs, as Sarbanes Oxley emphasizes, then it should not punish companies, like Cardinal, where the independent directors do precisely that. We expect to be fully vindicated on appeal.

Ibid. (underlining in original). [2]

Clearly, the board has persisted in its view that Cardinal was right in firing Welch on October 1, 2002. For all the reasons set forth in my January 28, 2004 recommended decision and order, I disagree. I believed then, as I do now, that Welch engaged in protected activity when he raised various concerns about Cardinal's accounting practices which he reasonably believed at the time were inconsistent with federal statutes or regulations relating to fraud against

[2] Respondent also submitted with its objections to Complainant's request for damages two newspaper articles which were exhibits from Welch's deposition taken by Cardinal's counsel on October 13, 2004 : a January 31, 2004 article from the Roanoke Times entitled "Judge rules act protects whistle-blower," and a February 12, 2004 Associated Press article entitled "Worker is first to blow whistle under new law, but case is a word away from WorldCom, Enron." *See Respondent's Counter Designations from the Deposition of David Welch*, Ex. 2, Ex. 4.

shareholders of publicly held corporations.[3] *See, e.g., Welch v. Cardinal*, *supra*. at 53-61. Over the course of several weeks, these concerns were communicated to, among others, Cardinal's CEO and directors, and Welch's employment by Respondent was then terminated following his decision not to attend a meeting with Douglas Densmore, Cardinal's outside counsel and Michael Larrowe, a member of its outside accounting firm, after he was told he could not have his personal attorney with him at that meeting.[4] As I explained in my prior decision:

> [T]he purpose of the meeting arranged by Moore and Densmore was not to conduct a legitimate inquiry into the various concerns raised by Welch regarding Respondent's accounting deficiencies and improprieties. Rather, it was their intent to create a situation whereby Welch would *not* attend the meeting so they could use that act as a justification for terminating his employment.

Welch v. Cardinal, *supra*. at 66 (italics in original). I further determined that Welch's protected activity was a contributing factor in the decision to terminate him stating, in relevant part:

> Respondent argues that Welch was suspended and later discharged *solely* because he refused to meet with Larrowe [and] Densmore without a personal attorney (Resp. Br. at 1-19). Respondent repeatedly states that any adverse employment action was taken against Welch "[f]or this reason - and this reason alone" (Resp. Br. at 2). However, the evidence adduced in this case shows that Complainant came under attack by Moore, Larrowe, and Densmore immediately after he refused to sign Cardinal's third-quarter certification and before he ever refused to meet with Larrowe and Densmore. First, Moore, Larrowe, and Densmore disparaged Complainant's performance before the Audit Committee to create a formal record of criticism directed at Complainant. Next, Moore, through Larrowe and Densmore, imposed an arbitrary requirement that Welch could not have his personal attorney present while being questioned about the various concerns he had raised about Cardinal's financial accounting practices. This requirement . . . was clearly imposed for the purpose of using Welch's anticipated refusal to comply as a pretext for firing him.

Id. at 62 (italics in original).

---

[3] Implicit in Cardinal's "I'm right and you're wrong" response to my determination regarding its liability is an apparent belief that the absence of any finding, by either the Securities and Exchange Commission or state banking authorities, of a violation stemming from the matters reported by Welch means that his reports concerning those matters cannot form the basis for a violation of Sarbanes-Oxley. However, the fact that a subsequent investigation into alleged improprieties does not reveal any unlawful conduct does not mean that reporting the alleged wrongdoing is not a "protected activity." A complainant in a Sarbanes-Oxley case is not required to show that there was *actual* misconduct, only that he *reasonably believed* that one or more instances of such conduct had occurred. *See, e.g.*, 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1).

[4] The statement in the board's open letter that "Welch was terminated solely because he failed to comply with directives we, the independent directors, endorsed in connection with the investigation of his complaints," is accurate insofar as it refers to Welch's refusal to meet with Densmore and Larrowe. As noted in my prior decision, Respondent has repeatedly identified Welch's refusal to attend this meeting as the one and only reason for his discharge. *See, e.g.*, *Welch v. Cardinal*, *supra*. at 62.

What, if any, part the decision to fire Welch played in the shareholders' reelection of the board's members is, based on the facts before me, unknown. It would be pure speculation on my part if I were to assume, as Respondent would have me do, that the decision to reelect individuals who were on the board when Welch was fired is evidence that some, any, or all of the shareholders based their decision in whole or in part on that action. The board of directors has presumably dealt with many matters other than Welch's firing, and the shareholders' reelection of the board after that event reflects nothing more than a general approval of the board's actions, not specific approval of the board's dismissal of Welch.

Respondent has cited no legal authority supporting its argument that this matter is a factor relevant to Welch's reinstatement, and I have found none which suggests that it is. The shareholders' reelection of Cardinal's board of directors simply does not weigh against Welch's right to reinstatement.

C. Enmity and Distrust

Cardinal asserts, as its third reason for opposing Welch's reinstatement, that:

> Reinstatement in the present case would be impractical. Cardinal is a small operation with only 65 employees and only one central office. As Chief Financial Officer, Welch would be required to work in close proximity with persons who have developed a distrust and dislike of him. This goes far beyond the friction that inevitably accompanies a lawsuit. Indeed, the evidence in this case shows that Welch was disliked by other Bank of Floyd employees even prior to his allegations of misconduct. Thus, for example, in an August 15, 2002, memorandum in Welch's personnel file, three of Welch's subordinates at the bank complained about his conduct as their supervisor, noting [several] problems . . . . Indeed, each of the employees reported that their unhappiness with Welch as their supervisor had caused them to be physically ill. All three of the employees signed the memorandum. Patricia Spangler remains employed in the Finance Department and has insisted she will resign if Welch is reinstated . . . . Welch also had a reputation for having a short temper. . . . Even Welch has admitted that returning to Cardinal would be uncomfortable due to the animosity. . . . Because of the enmity between the parties and the "friction and controversy" which inevitably would result from Welch's return to Cardinal, reinstatement is not an appropriate remedy.

Cardinal's Objections to Damages at 23-24 (bolding omitted).

Numerous courts have confronted the inevitable friction that develops in employment discrimination actions. In the typical case, such friction is not a sufficient basis for denying reinstatement. *See, e.g.*, *Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322, 1339-40 (11th Cir. 1999) ("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."); *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1462 (7th Cir. 1992) ("[I]f '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."); *Jackson v. City of Albuquerque*, 890 F.2d 225, 235 (10th Cir.

1989) (overruling the denial of reinstatement based on the discriminating employer's hostility for the prevailing plaintiff); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 602 (11th Cir. 1986) ("[P]revailing Title VII claimants are [presumptively] entitled to reinstatement in the absence of unusual circumstances."); *Allen v. Autauga County Bd. of Ed.*, 685 F.2d 1302**,** 1306 (11th Cir. 1982) ("Unless 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."); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir. 1981) ("Antagonism between parties occurs as the natural bi-product of any litigation. Thus, a court might deny reinstatement in virtually every case if it considered the hostility engendered from litigation as a bar to relief."); *McCuistion v. Tennessee Valley Auth.*, 89-ERA-6 (Sec'y Nov. 13, 1991) (reinstatement is a usual component of the remedy in discrimination cases).

While reinstatement is the preferred remedy, it is not always required. *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037 (7th Cir. 1994); *McKnight v. General Motors Corp.*, 973 F.2d 1366 (7th Cir. 1992); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1066 (8th Cir. 1988); *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). For example, in *McKnight*, a case brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e, *et seq*., the court wrote:

> Courts of equity traditionally have refused to order specific performance of employment contracts, because it is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment. *Lumley v. Wagner*, 1 DeG. M. & C. 604, 42 Eng. Rep. 687 (Ch. 1852); Farnsworth, Contracts 822, 824 (1982). By hypothesis in such a case, the employer does not want the employee back; and probably the employee does not want to be working for this employer, and hopes to be bought out. Each party will want to make life as miserable as possible for the other party while also wanting to invoke the court's aid to prevent the other party from doing the same thing to him. Courts do not want to involve themselves in the industrial equivalent of matrimonial squabbling. They do not want to be involved in the continuous supervision of a personal relationship that may last for many years. Therefore, although Title VII empowers the court to order reinstatement of an employee who succeeds in proving racial discrimination, the power is discretionary and should not be used where the result would be undue friction and controversy.

Id. at 115. Similarly, in *McNeil*, a case brought under the ADEA, the court noted that, although reinstatement is usually the preferred remedy, reinstatement is not always appropriate if, for example, there are no positions available with the former employer or the employer-employee relationship is "pervaded by hostility." *McNeil v. Economics Laboratory, Inc.*, *supra*., 800 F.2d at 118. In *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d. Cir. 1984), another ADEA case, the court noted that reinstatement may be denied where "the employer-employee relationship [has] been irreparably damaged by animosity associated with the litigation." *Id*. at 728-29. *See also*, *Chancellor v. Federated Dept. Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982) (reinstatement may be refused "where discord and antagonism between the parties [make] it

preferable to fashion relief from other available remedies."). Likewise, in *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Oct. 31, 1994), the Secretary wrote:

> If there is such hostility between the parties that reinstatement would not be wise because of irreparable damage to the employment relationship, the ALJ may decide not to order it.

Id., slip op. at 4-5. In *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995), the Secretary also recognized that "manifest hostility between a complainant and company managers could cause a "dysfunctional work environment" which might render reinstatement infeasible. *Id*., slip op. at 9.

Despite clear evidence of the manifest hostility exhibited against him by certain individuals at Cardinal, Welch has persisted in his desire to be reinstated as Cardinal's CFO since this matter first came before the Office of Administrative Law Judges on April 29, 2003. In contrast to the reaction of those individuals, Welch has expressed no animosity towards Respondent's officers, directors, and employees, and he has repeatedly expressed a strong desire to be reinstated. As noted by his counsel:

> If enmity and distrust exist between Welch and Cardinal, it does not exist on the part of Welch as evidenced by his comments contained within the newspaper articles introduced by Cardinal [during his deposition]. A neutral reading supports the proposition that Welch is prepared to work toward making his return to Cardinal productive for all concerned.

Complainant's Reply Memorandum to Respondent's Opposition to Complainant's Motion for Damages at 10.

Cardinal is, as Respondent's counsel notes, a small employer, and upon reinstatement Welch will be required to work closely with other employees, officers, and directors who have criticized him since this litigation commenced. Indeed, there is little doubt that hostility continues to exist at Cardinal which will make reinstatement difficult. One of the clearest examples of this hostility may be garnered from a review of the declarations of the board and CEO, and the pleadings filed by Respondent's counsel, parts of which I find are patently inconsistent with other record evidence.

As noted above, the board asserted that Welch would have been fired after October 1, 2002 based on evidence relating to inaccuracies in Cardinal's previously filed call reports. *See Board Declaration* at ¶ 3. Similarly, Moore stated that Welch would not have received a raise in compensation at the end of 2002 based on Cardinal's receipt of the examination report prepared by state bank examiners and forwarded under cover letter dated September 30, 2002. *See Moore Declaration* at 2 ("Cardinal did not have the cover letter and examination report at the time when the Audit Committee recommended Welch's dismissal and the Board of Directors discharged Welch on October 1, 2002). Neither the board, nor Moore, expressly alleged in their respective declarations that the information contained in the examiner's report was unknown to them prior to Welch's firing, although that fact is clearly implied. However, Respondent's counsel

specifically argued, presumably with the knowledge and consent of their client, that this information was unknown to Cardinal until after Welch was fired. Counsel asserted:

> The Joint Declaration clearly shows that Cardinal's Board of Directors and Audit Committee - the very authorities to whom he would be required to report if he were reinstated - strongly distrust Welch and lack confidence in his abilities. This distrust arises not only because of the insubordination which led to his dismissal, but also *because of actions preceding his dismissal which were only discovered by the Board and Audit Committee after his dismissal*. These after acquired facts alone would have caused the Board to terminate Welch as Cardinal's chief financial officer.

Objections to Damages at 17 (italics added). For all the reasons previously stated, I find that Respondent knew of the inaccuracies contained in the previously-filed call reports before October 1, 2002, and that any assertion by it to the contrary is simply not true.

Despite the hostility which is evidenced by this and other record evidence, I find that reinstatement, while it will be difficult, is appropriate. Welch clearly seeks reinstatement, and he has professed a willingness to work with Respondent's employees, officers, and directors if his request is granted. As a prevailing complainant in this matter, Welch is presumptively entitled to reinstatement absent unusual circumstances, s*ee Donnellon v. Fruehauf Corp.*, *supra.*, 794 F.2d at 602, and Cardinal should not be allowed to profit from its unlawful conduct by preventing Welch from returning to his former position as CFO. *See, e,g,, Farley v. Nationwide Mutual Ins. Co.*, *supra*. 197 F.3d at 1339-40. Welch was clearly not fired on October 1, 2002 because of any enmity which previously existed between him and Cardinal's other employees, as Respondent now implies, but *solely* because he refused to meet with Densmore and Larrowe under the circumstances described above. Any hostility which has developed since his discharge is no different in kind or degree from that which, regrettably, occurs all too frequently following litigation of this sort. Furthermore, although Welch will be required to report to a CEO and board of directors who have been openly critical of Welch since this litigation was initiated, that circumstance is not sufficiently "unusual" in the context of a Sarbanes-Oxley whistleblower case to warrant denying him reinstatement. Indeed, doing so would send a clear message to other corporate officers that the Act, which was passed by Congress for the express purpose of encouraging employees to disclose conduct which they reasonably believe to be unlawful, does not apply to them.

Under the Act and its implementing regulations, Welch is entitled to be "made whole," and the only reasonable alternative to reinstatement would be "front pay," a remedy which the parties have neither sought nor addressed in their post-hearing briefs. I find that ordering Welch's reinstatement as CFO under the facts of this case is both reasonable and necessary to make Welch whole and to further the ends of Sarbanes-Oxley.

D. Displacing Another Employee

The final argument raised by Cardinal against reinstatement is that reinstatement is inappropriate where the position previously held by the complainant is no longer available

because it has been filled by an innocent incumbent. *Objections to Damages* at 24, *citing, inter alia*, *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 120-21 (4th Cir. 1983). *See, also, Patterson v. American Tobacco Co.*, 535 F.2d 257, 267-68 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976). According to Respondent's CEO:

> Cardinal now has a new CFO, who would lose her job if Welch were reinstated. Although Welch's first replacement, Ray Fleming, resigned to take another position, Cardinal hired a subsequent replacement for Fleming. The new CFO has had experience as a bank financial officer. Since there is no need for more than one chief financial officer in an organization the size of Cardinal and its operating subsidiaries, reinstating Welch would displace a qualified employee whom Cardinal needs and who played no part in the events that led to Welch's discharge.

Moore Declaration at 3.

Respondent has provided no information with respect to, *inter alia*: when Fleming or his replacement was hired by Cardinal; whether these individuals incurred moving or other expenses in accepting the CFO position; whether they left other employment to become Respondent's CFO; whether they were aware of this litigation and Welch's claim of entitlement to reinstatement as Respondent's CFO when they were hired; and what hardships, financial or otherwise, would be suffered by the incumbent CFO if her employment with Cardinal were now terminated. Under the circumstances presented by this case, I am not persuaded that reinstatement should be thwarted simply because Respondent has now hired someone to fill the position which Welch held until his unlawful discharge.

In refusing to order reinstatement in *Spagnuolo*, the Fourth Circuit relied on the "rightful place" theory. *Spagnuolo*, 717 F.2d at 120. Under the "rightful place" theory, aggrieved employees cannot "bump" incumbent employees from their current positions. *Id.* Instead, the aggrieved employees are given full seniority rights and are permitted to obtain the next available vacancy by means of that seniority. *Id.* at 121. In the interim period, the employees are awarded back pay to compensate for lost earnings. *Id.* The "rightful place" theory is intended to balance the rights of an aggrieved employee against "innocent" incumbents who did not participate in the discrimination that lead to the aggrieved employee's cause of action. *Id.* at 120-21.

Spagnuolo, and Fourth Circuit case law relying on it, do not involve whistleblower statutes. Instead, *Spagnuolo* and its progeny were decided under the ADEA and Title VII. Based on the reasons set forth below, I find that the facts, circumstances, and considerations presented in *Spagnuolo* are sufficiently distinguishable from those presented here that reinstatement should not be denied simply because the position previously held by Welch has now been filled by another individual.

First, as noted above, *Spagnuolo* made clear that the "rightful place" theory was intended to balance the rights of an aggrieved employee against "innocent" incumbents who did not participate in the discrimination that lead to the employee's cause of action. *Id.* at 120-21. I find that the "innocence" of the incumbent employee in this case is questionable in light of the

fact that she was clearly hired by Respondent when it knew full well that the position for which she was hired was subject to a legal claim by Welch. As Respondent has made abundantly clear, this case received extensive local and national press coverage following my earlier recommended decision on liability.[5] Given this fact, I find it highly unlikely that the incumbent CFO did not know of, or that Respondent did not disclose to her, the likelihood that Welch could be reinstated to his former position as Cardinal's CFO when the issue of damages was finally decided. Indeed, in my prior recommended decision and order, Cardinal was expressly told:

> In his complaint in this matter, Welch seeks, *inter alia*, reinstatement with Cardinal without loss of seniority and benefits. Inasmuch as Complainant has established he was discriminated against by Cardinal because of his having engaged in protected activities, he is entitled to be reinstated to his former position as Cardinal's CFO without loss of seniority and without loss of any benefits to which he was entitled prior to his discharge.

Welch v. Cardinal, supra., slip op. at 71.

Respondent was thus clearly aware that reinstatement would be ordered in any subsequent decision on damages. It cannot now feign ignorance of that fact, or claim that it did not anticipate such an order. If the present CFO was unaware of the likelihood of Welch's reinstatement, responsibility for that ignorance rests squarely with Cardinal, and it should not be permitted to profit from its actions by blocking Welch's reinstatement to the position from which he was unlawfully removed.

Furthermore, dicta in *Spagnuolo* actually supports reinstatement under the circumstances presented here. In that case, the Fourth Circuit recognized an exception to the "rightful place" theory, noting that an incumbent employee *could* be "bumped" if the employer hired that employee in violation of an order requiring reinstatement of the complainant to a comparable position. *Spagnuolo*, *supra.*, 717 F.2d at 122. The court explained that, if the facts show the employer has filled a vacancy in a job that the trial court concluded was comparable to the original position from which the complainant was removed, "the district court is empowered to bump the 'new' incumbent from *that* position and order that [he] be employed in that job." *Ibid*. (italics in original). The court went on to state:

> It is important to note that this is not bumping the original employee who was the *unknowing* beneficiary of discrimination, as that bumping is prohibited by Title VII. Rather, this is bumping an employee whose promotion or hiring was in violation of the court's rightful place order. This "authorized" bumping presumes that the employee who is promoted or hired after the judicial pronouncement of discrimination is no longer an innocent beneficiary.

[5] *See, e.g.*, Duncan Adams, *Judge Rules Act Protects Whistle-Blower*, Roanoke.com, January 31, 2004; Adam Geller, *Worker is First to Blow the Whistle under New Law, but Case is a World away from Worldcom, Enron*, Daily Press, February 12, 2004; Adam Geller, *Faint Echoes of Enron*, Richmond Times Dispatch, February 13, 2004.

Ibid. (italics added). Other circuits have similarly concluded that bumping is the appropriate remedy when the employer has knowledge of an aggrieved employee's rights. *See, e.g.*, *Walters v. City of Atlanta*, 803 F.2d 1135, 1149 (11th Cir. 1986) ("A defendant's recalcitrance, as evidenced by repeated discriminatory actions *after it is on notice* of past illegal discrimination against a plaintiff, militates in favor of granting this extraordinary relief.") (emphasis added); *Brewer v. Muscle Shoals Bd. of Educ.*, 790 F.2d 1515 (11th Cir. 1986) (approving of bumping after school board violated a settlement agreement); *Lee v. Macon County Bd. of Educ.*, 453 F.2d 1104 (5th Cir. 1971) (authorizing bumping because school board hired incumbent after it had knowledge of the victim's claims). *See also, Lander v. Lujan*, 888 F.2d 153, 159 (D.C. Cir. 1989) (Ginsburg, R.B., Concurring)("bumping" appropriate for high-level employee because comparable position unlikely to become available and "rightful place" theory unlikely to make complainant whole).[6]

Finally, it bears noting that, to the extent Cardinal's incumbent CFO may suffer some hardship at this point because there has been a substantial delay in reinstating Welch before now, that harm is directly attributable to the litigation strategy employed by Respondent's counsel since my initial recommended decision was issued on January 28, 2003. Despite having been expressly informed that the recommended decision was interlocutory,[7] counsel appealed that decision to the Administrative Review Board on February 5, 2004. In dismissing Respondent's appeal, the ARB noted, *inter alia*:

> The ALJ in this case bifurcated his consideration of the entitlement and damages issues presented by Welch's complaint. Accordingly, the ALJ's initial [Recommended Decision and Order] finding that Cardinal had retaliated against Welch in violation of the SOX did not fully dispose of the complaint before him as it reserved the damages claim for further adjudication. The proceedings before the ALJ are not yet concluded and the ten-day period for filing a timely appeal from the ALJ's decision has not yet commenced. Thus, by definition, the appeal of the ALJ's R. D. & O. is an interlocutory appeal.
>
> Nevertheless, Cardinal argues that the Board should accept its appeal because it is "not interlocutory." Respondent's Memorandum in Response to Order to Show Cause (Resp. Mem.) at 1. Cardinal states that because the R. D. & O. is a "decision of the administrative law judge" it is subject to immediate

[6] Indeed, despite its general acceptance of the "rightful place" doctrine, the Fourth Circuit itself has ordered reinstatement of a complainant although an "innocent" employee was thus "bumped." *See Chester v. Wise County Electoral Board*, 117 F.3d 1413 (Table) (unpublished) (affirming reinstatement of complainant in civil rights action brought under 42 U.S.C. § 1983 based on jury's determination that he was deprived of First Amendment right to freedom of association when unlawfully discharged due to political affiliation; court further affirmed trial court's determination that "rightful place" doctrine was inappropriate because appellants offered no comparable employment and there was no prospect of vacancy in the position at issue).

[7] I previously issued an erratum in this case with respect to my January 28, 2003 recommended decision in which I deleted the "Notice of Appeal Rights" which had been inadvertently attached to the decision. I noted that it had come to my attention that one of the parties (Cardinal) believed that any appeal in the case had to be filed within 10 days from January 28, 2003. I therefore expressly informed the parties that "[t]hat decision and order is not, nor was it intended to be, a 'final' order from which an appeal to the Administrative Review Board may be taken" and ordered that the "Notice of Appeal Rights" be deleted from the recommended decision. *Welch v. Cardinal Bankshares, Corp.*, 2003-SOX-15 (Feb. 3, 2003) (Erratum).

> review pursuant to 29 C.F.R. § 1980.110(a). However, this argument that all ALJ decisions are subject to section 1980.110(a)'s immediate review procedures ignores not only 29 C.F.R. 1980.110(c) and the ALJ's Erratum stating that his R. D. & O. was not subject to such review, but also a substantial body of ARB precedent, which Cardinal did not discuss, much less attempt to distinguish. . . .

Welch v. Cardinal Bankshares Corp., ARB Case No. 04-054, *slip op.* at 3 (May 13, 2004) (Order). Other arguments raised by Respondent's counsel that Cardinal's appeal was not premature were similarly rejected by the ARB. *Id*. at 3-6.

Not satisfied with this clear statement regarding the non-finality of the recommended decision, Respondent's counsel thereafter sought review in the Fourth Circuit. Only after that court reached the same conclusion[8] was the case then returned to me for consideration of the issues which are the subject of this supplemental recommended decision and order. Had Respondent not pursued these appeals, the parties' submissions on damages would have been filed on or before March 14, 2003.[9] A supplemental recommended decision and order could then have been issued within a reasonable period of time thereafter, and the several month delay in getting a final decision on damages could have been avoided. Such was not the case, however, and, consequently, Welch's reinstatement has been delayed until now. In balancing the relative hardships that may be suffered by the incumbent CFO and Welch, I find that the facts of this case tip the scale in Welch's favor.

For all the foregoing reasons, I find that reinstatement offers Welch the best opportunity to be made "whole." Reinstatement is the "presumptive" remedy, and other remedies, such as front pay, would not adequately redress Welch's injury. While Welch's reinstatement will pose certain difficulties, those difficulties are not insurmountable and cannot defeat reinstatement.

II. Back Pay

Cardinal terminated Welch on October 1, 2002. From March 31, 2003 through May 6, 2004, Welch was employed by Buchanan Health Care. In May 2004, Buchanan abolished Welch's position. Welch has been unemployed since that time. *Id.* At the time of his discharge, Welch's annual salary at Cardinal was $57,834.14. *Affidavit of David Welch*, Schedule B. Welch's salary at Buchanan was approximately $70,000 per year. *Id.*

The complainant in a whistleblower claim has the burden of establishing the amount of back pay that his former employer owes. *Pillow v. Bechtel Constr. Inc.*, 87-ERA-35 at 13 (Sec'y July 19, 1993). However, "unrealistic exactitude is not required" in calculating back pay and "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating [party]." *Johnson v. Bechtel Constr. Co.*, 95-ERA-11 at 2 (Sec'y Sept. 11, 1995); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976). The purpose of a back pay award is to make the complainant whole.

[8] In an order dated September 3, 2004, the court determined that "there is no final order over which the court has jurisdiction." *Cardinal Bankshares Corp. v. U.S. Dept. of Labor*, No. 04-1791, *slip. op*. at 1 (Sept. 3, 2004) (Order).
[9] Complainant was given 30 days from the date of the order within which to file supplemental information regarding damages, and Respondent was given fifteen days thereafter to respond. *Welch v. Cardinal*, *supra*., slip op. at 72.

Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y Oct. 20, 1991). "An employee is generally entitled to back pay from the date of his wrongful termination to the date the discrimination is rectified." *Clarke v. Frank*, 960 F.2d 1146, 1151 (2d Cir. 1992). Back pay may, however, be cut off at the point a complainant obtains other work at a higher level of compensation than he received from his previous employment. *See, e.g.*, *Taddeo v. Farenga*, 102 F. Supp. 2d 197, 198 (S.D.N.Y. 2000).

While I recognize that Welch's gross income from Buchanan was greater than it had been at Cardinal, and that this fact might arguably justify cutting off an award of back pay on the date he obtained that employment, I find that doing so would be inappropriate in this case since Welch's net compensation from Buchanan was actually less than it had been at Cardinal. Welch incurred substantial expenses when he accepted employment with Buchanan which, had he not been fired by Respondent, he would not have otherwise incurred. Furthermore, the benefits he received from Buchanan were inferior to those to which he was entitled at Cardinal. Under the circumstances presented here, reducing Welch's back pay award rather than terminating it on the date he began working for Buchanan is reasonable and appropriate.

Cardinal offered a litany of arguments as to why Welch should not be entitled to back pay. First, Cardinal argues that the admission of Welch's evidence on damages was barred by 29 C.F.R. §§ 18.54 and 18.55. I previously considered and rejected these arguments and here reaffirm that ruling. Cardinal also claims that Welch's back pay should be severely limited by after-acquired evidence. Cardinal claims that had it not unlawfully fired Welch in retaliation for his protected activity on October 1, 2002, it would have fired him shortly thereafter because of call report errors or lying about those call reports which Respondent first learned about on October 9, 2002. Cardinal's "after-acquired evidence" argument was discussed above in connection with Welch's reinstatement. This evidence is insufficient to limit Welch's back pay for the same reasons that it was insufficient to defeat reinstatement. *See supra* I.A. (discussing Cardinal's "after-acquired evidence").

Cardinal also argued that Welch should not be entitled to back pay because he failed to mitigate his damages. A discharged employee is required to exercise "reasonable diligence" in seeking and maintaining alternate employment. *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-114, 7 (Aug. 31, 2004). The employer has the burden of establishing the availability of suitable alternate employment and the employee's failure to take reasonable efforts to seek such employment. *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, 15 (Aug. 6, 2004). Cardinal's principal objection is that Welch sought permanent employment but hamstrung his own employment efforts by informing potential employers that he would return to Cardinal if given the opportunity. *Objections to Damages* at 8.

Welch has documented an adequate search for interim employment. He searched local newspapers and other publications, spoke with friends, family members, and others concerning prospective employment, and maintained a log of his employment efforts. *Complainant's Supplemental Memorandum of Law in Support of Motion for Damages* at 3 (Dec. 17, 2004) (hereinafter *Complainant's Motion for Damages*) at 4. He also consulted with two "headhunters." *Id.* These efforts did in fact lead to Welch's employment with Buchanan, five months after he was discharged by Cardinal. Whether an approach that specifically targeted

temporary employment would have been more successful is purely speculative. Furthermore, it would have been irresponsible of Welch not to disclose to prospective employers that he was involved in litigation which might result in reinstatement as Cardinal's CFO. Based on the record evidence, I find that Welch has demonstrated he exercised reasonable diligence in seeking and maintaining alternate employment.

Calculation of Welch's back pay begins with the wages he lost from Cardinal because of his wrongful termination, including the value of Welch's lost benefits and bonuses. *See Hobby v. Georgia Power Co.*, 90-ERA-30, at 66 (ALJ Sept. 17, 1998). The award must then be offset by Welch's income from Buchanan Health Care. This approach (reducing Welch's total lost compensation by his net earnings from Buchanan) is the most appropriate method of calculating Welch's back pay given the facts in this case.

A. Lost Compensation

Welch's annual salary for 2002 was $57,834.00, while he actually received $49,342.41 for the year according to his W-2 Wage and Tax Statement. *Affidavit of David Welch*, Schedule B. Because of his termination on October 1, 2002, Welch lost pay for six pay periods that year for a total loss of wages of $13,346.34. Furthermore, because of his termination, Welch lost a 3% year-end bonus and a 3% year-end 401K match. *Id.* These payments, each equal to $1,735.02, were automatic, and they thus should be considered as part of Welch's lost compensation. Welch's lost wages in 2002 therefore total $16,816.38.

Welch, as a prevailing complainant, is entitled to all promotions and salary increases that he would have obtained but for the illegal discharge. *Robinson v. City of Fairfield*, 750 F.2d 1507, 1512 (11th Cir. 1985). His 2003 salary is thus greater than it was in 2002. Based on the parties' submissions, the average raise for employees at Cardinal for 2003 is shown to be 2.25%, although the awards varied based on individual performance. Cardinal argues that Welch's pre-termination performance was unsatisfactory, and therefore asserts he would not have been entitled to a raise. *Objections to Damages* at 12. However, as noted both in this decision and the original recommended decision and order, Welch was terminated not because of any performance deficiency, but solely because of his alleged insubordination when he refused to meet with Densmore and Larrowe. In light of the facts presented in this case, Respondent's contentions now regarding Welch's substandard performance are highly suspect, and any uncertainties with respect to whether he would be entitled to a salary increase must be weighed against Cardinal. *Johnson v. Bechtel Constr. Co.*, *supra*. at 2; *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, *supra*, 542 F.2d at 587. Thus, Welch should be credited with the 2.25% average raise received by Respondent's employees. While Welch could have, in fact, received a greater or lesser raise, it is reasonable to conclude that the average raise awarded to other employees is the best approximation of what Welch would have received. I thus find that his annual pay-rate for 2003 is $59,135.27 ($57,834.00 X 1.0225). Welch is also entitled to a 2% 401K match, worth $1,182.71, that Cardinal automatically gave its employees in 2003.[10] Thus, Welch's total lost income for 2003 was $60,317.98 ($59,135.27 + $1,182.71).

[10] According to the Declaration of Shelby Rutherford, Respondent's Assistant Cashier and Human Resources Manager, the 401(k) match for Cardinal's employees at the end of 2003 was 2%, versus the 3% match paid in 2002, but it again rose to 3% at the end of 2004. *Declaration in Opposition to Complainant's Motion for Damages* at 2.

Welch's salary in 2004 should also reflect Cardinal's average raise of 2.25% paid to employees. Welch's salary in 2004 would thus have equaled $60,465.81 ($59,135.27 (2003 salary) X 1.0225). The 3% 401K match would have equaled an additional $1,813.97. Thus, Welch's total lost salary from Cardinal in 2004 would have equaled $62,279.78 ($60,465.81 + $1,813.97).[11]

When he was fired, Welch also lost his life and health insurance benefits. During the period he was employed by Buchanan, Welch was not entitled to either life or health insurance coverage, and he therefore purchased health insurance through his wife's employer at a cost of $123.50 per month from October 2002 until at least December 2004, a total of 27 months. Despite Respondent's contentions to the contrary, this expense of $3,334.50 (27 X $123.50) is recoverable since Welch would not have had to purchase health insurance benefits if he had not been unlawfully discharged.

Welch, however, argues that he is entitled reimbursement for the substantially higher cost of his health insurance from Cardinal. He contends that this is necessary because the health insurance he purchased through his wife's employer was inferior to the insurance Cardinal provided, and resulted in his incurring additional health care costs. Welch did not submit any evidence of these expenses, and they are therefore not reimbursable. Similarly, Welch is not entitled to compensation for lost life insurance benefits. Clearly, Welch would not have benefited from any policy obtained through Cardinal since he is still living, and there is no evidence that he purchased replacement coverage. Compensation for lost life insurance benefits would thus constitute a windfall for Welch. *Cf. Chesser v. State of Illinois*, 895 F.2d 330, 338 (7th Cir. 1990) ("[T]he goal of back pay is to compensate the employee, not punish the employer."). Furthermore, although he argues that the costs of obtaining life insurance have now increased because he is older than when he was fired by Cardinal in 2002, any increase in premium costs now will be borne by Respondent, not Welch, upon his reinstatement.

Thus, Welch's total lost compensation from Cardinal through the end of 2004 equals $142,748.64.

Summary of Lost Compensation from Cardinal

Lost Compensation in 2002:	$ 16,816.38
Lost Compensation in 2003:	60,317.98

[11] Neither Complainant nor Respondent mentioned year-end bonuses for the years 2003 or 2004 in their submissions on damages. However, among the items noted in an attachment to Welch's Affidavit, he lists, for the years 2003 and 2004, "Defined Benefit contribution[s]" of $3,159.00 and references "Compensation and Other Matters" on page 10 of Respondent's 2003 proxy booklet. *Welch Affidavit, Schedule B* at 2. No such document is attached to Complainant's request for damages. Although it may be that the "defined benefit contributions" to which Complainant refers replaced the year-end bonuses that had been paid to Cardinal's employees in earlier years, the information provided by Welch is insufficient for me to make that determination. My wage computations for the years 2003 and 2004 therefore do not include increases due either to year-end bonuses or defined benefit contributions.

Lost Compensation in 2004:	62,279.78
Replacement Health Insurance:	3,334.50
Total:	**$142,748.64**

B. Earnings from Buchanan

As discussed above, Welch's lost earnings must be offset by his earnings from Buchanan. Welch worked for Buchanan from March 31, 2003 through May 6, 2004. Welch's compensation from Buchanan totaled $54,812.20 in 2003 and $36,715.16 in 2004. Welch also received a $20,000 performance bonus from Buchanan. *Affidavit of David Welch*, Schedule D. Thus, Welch's total compensation from Buchanan equaled $111,527.36. These earnings, however, must be reduced by the expenses Welch incurred when he worked for Buchanan in Grundy, Virginia.

1. *Unreimbursed Living Expenses*

In Exhibit A.2, Welch seeks $5,192.35 in "Unreimbursed Living Expenses." *Affidavit of David Welch* (Dec. 17, 2004). Welch was unable to find a job between October 1, 2002 and March 31, 2003. On March 31, 2003, Welch began working at Buchanan Health Care in Grundy, Virginia. Grundy is approximately three hours from Welch's home in Meadows of Dan, Virginia. Because of the distance, Welch rented a second apartment in Grundy during the work week and drove home to be with his wife on weekends. This living arrangement resulted in significant living and travel expenses.

The expenses listed in Exhibit A.2, with certain exceptions, represent Welch's rent, water bill, electric bill, and long distance charges, while he lived in Grundy. These expenses are recoverable to the extent Welch has shown they were actually incurred since Welch would not have incurred them had it not been for his unlawful termination by Cardinal. Furthermore, Welch's duty to mitigate his damages did not require that he ask his wife to quit her job and move himself and his wife to another location. *Florence Printing Co. v. NLRB*, 376 F.2d 216, 221 (4th Cir. 1967). Reimbursement of these expenses is therefore necessary in order to make Welch "whole."

Welch's rent in Grundy and his electric and water bills, collectively totaling $3,331.58, are valid offsets to his income from Buchanan. Welch also lists as "unreimbursed living expenses" various long distance and other telephone charges totaling $1,860.77. However, the dates listed in Exhibit A.2 relating to telephone charges both precede and post-date the period of time when he was working at Buchanan between March 31, 2003 and May 6, 2004. For example, he lists long distance charges paid to "FBC" for the period October 18, 2002 to August 6, 2004. Similarly, he notes long distance charges paid to "USC" from October 26, 2002 to June 6, 2004. Finally, he notes telephone service provided by Verizon for the period May 12, 2003 to July 12, 2004. Since Welch provided no explanation for charges incurred outside the dates he was employed with Buchanan in Grundy, he has not met his burden of showing that such expenses were reasonably incurred. However, but for Welch's unlawful termination by Cardinal

in October 2002, the remainder of the listed expenses would not have been incurred. Welch is thus entitled to recover $5,042.04[12] for his "Unreimbursed Living Expenses."

2. *Expenses Related to Welch's Relocation to Grundy, Virginia*

Welch's move to Grundy also resulted in significant traveling expenses. Welch lived and worked in Grundy during the week and his wife remained in Meadows of Dan. Each weekend while he lived in Grundy, Welch traveled back to Meadows of Dan to be with his wife. Undeniably, this travel would not have been necessary if Welch had not been terminated by Cardinal. Furthermore, Welch did not accept the job in Grundy as a matter of personal preference for that location. Welch was unemployed for five months prior to working for Buchanan and accepted the position in Grundy only because he needed the income. As such, the cost of the travel is recoverable.

Cardinal argues that these travel expenses are non-reimbursable commuting expenses. For support, Cardinal relies on *Sullivan v. Commissioner*, 368 F.2d 1007 (2d Cir. 1966). *Sullivan*, however, dealt with mileage deductions for tax purposes. In *Sullivan*, the Second Circuit relied on the general rule in tax law that expenses of commuting from home to work and back are not deductible as business expenses. *Sullivan*, 368 F.2d at 1008. This general rule, however, is inapplicable to the remedial goal of Sarbanes-Oxley, which seeks to make the complainant whole. 18 U.S.C. § 1514A(c)(1). Furthermore, Welch's travel expenses were not the expense of driving to and from work at Buchanan. Instead, the expense was the cost of Welch's trip from his apartment in Grundy to his home in Meadows of Dan which would not have been necessary had he not been unlawfully discharged by Cardinal.

However, I find that Welch is not entitled to reimbursement for all of the mileage listed in Schedule A.4. The entries in schedule A.4 purportedly represent the mileage from Meadows of Dan to Grundy less the mileage from Meadows of Dan to Floyd (the drive Welch would have made if he had continued to work for Cardinal). Each listing is described as "Mileage - MOD/Grundy less MOD/Floyd." Despite the identical descriptions, the actual mileage inexplicably varies from entry to entry with a high of 321.6 miles and a low of 171.6 miles. Clearly, these entries do not all represent the same trip from Meadows of Dan to Grundy. Exactly what they do represent is not explained. While it is certainly possible that there were times when Welch traveled to and from Grundy more often than once a week during his tenure with Buchanan, he has not said so in his pleadings, and I will not speculate with respect to these discrepancies. Thus, Welch's travel expenses are not recoverable as they are currently stated.

Nonetheless, Welch has established that he lived in Grundy for thirteen months and that he traveled from Grundy to Meadows of Dan and back each weekend. *See Complainant's Motion for Damages*, 12; *Affidavit of David Welch*, Schedule A.4. Welch is thus entitled to recover the cost of a weekly roundtrip between Meadows of Dan to Grundy for thirteen months (*i.e.*, 56 weekly trips) less the mileage he would have driven to Floyd if he had continued to work

[12] Deducted from Welch's listed expenses were the following charges: Long distance (FBC) charges totaling $68.23 for the periods 10/18/02 through 3/18/03 and 6/6/04 through 8/6/04; long distance (USC) charges totaling $47.15 for the periods 10/26/02 through 3/26/03 and 6/6/04; Verizon – Grundy charges totaling $34.93 for the period 6/21/04 through 7/12/04.

at Cardinal. The mileage from Meadows of Dan to Grundy is 148 miles. *Affidavit of David Welch*, Schedule A.4. The roundtrip distance is thus 296 miles. Welch did not submit evidence of the distance from his home in Meadows of Dan to Floyd in either his affidavit or his motion for damages. An Internet search listed the distance as 19.5 miles.[13] During his tenure with Cardinal, Welch commuted between Meadows of Dan and Floyd, so he would have traveled this distance twice a day, five times per week. Welch thus traveled 19.5 miles ten times per week for a total of 195 miles (10 X 19.5). The difference in the weekly mileage traveled by Welch would thus be 101 miles (296 - 195). Welch drove this distance for a total of 56 weeks. At the IRS approved rate of thirty-six and one half cents per mile, Welch's total expense was $2,064.44 (101 X .365 X 56).

3. *Total Buchanan Compensation*

Welch's total compensation during the 13-month period he worked for Buchanan is thus equal to $104,420.88 ($111,527.36 in compensation - $7,106.48 in expenses).

Based on the foregoing, Welch's total back pay award (his lost compensation less his earnings from Buchanan) is thus equal to $38,327.76 ($142,748.64 - $104,420.88).

Summary of Back Pay Award Through 2004

Lost Compensation from Cardinal:	$142,748.64
Less Total Compensation from Buchanan:	104,420.88
Total Back Pay Award:	**$ 38,327.76**

Back Pay Award in 2005

Since Welch is "entitled to back pay from the date of his wrongful termination to the date the discrimination is rectified," *Clarke v. Frank*, *supra*., 960 F.2d at 1151, Respondent's obligation to reimburse Complainant for lost wages has continued since the end of 2004 and will continue to do so up to the date he is reinstated. The rate of Welch's compensation for the year 2005 shall be computed by the parties in the same manner as described above, *i.e*., annual salary for the preceding year + 3% 401(k) match + average salary increase for Cardinal employees + $123.50 per month for life insurance benefits.

D. Prejudgment Interest

Given the remedial nature of the employee protection provisions of Sarbanes-Oxley, and the "make whole" goal of back pay, prejudgment interest on Complainant's back pay award is appropriate.[14] *See, e.g.*, *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042 (ARB May 17, 2000), slip op. at 18, n.18. Such interest should be compounded quarterly. *Ibid*. With respect to computing such interest, the ARB, in *Doyle*, wrote that

[13] *See* www.mapquest.com (last visited Jan. 28, 2005).
[14] Indeed, applicable regulations expressly provide for back pay with interest. 29 C.F.R. § 1989.109(b).

> the 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.
>
> 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.

Id. at 18-19 (citations omitted). Since the total amount of the back pay award will depend on the date upon which Welch is reinstated, the parties will be required to follow the procedures outlined by the ARB in *Doyle* for computing prejudgment interest owed on Complainant's back wages owed in this case.

III. Special Damages

A. Depositions, Attorney's Fees, and Expert Witness Fees

In Exhibit A.1, Welch claims special damages totaling $21,488.71 for "Depositions, Attorney's Fees and Expert Witness Fees." *Affidavit of David Welch*, Exhibit A.1. Sarbanes-Oxley expressly allows recovery of expert witness fees and litigation costs. 18 U.S.C. § 1514(c)(2)(A)-(C). The majority of Welch's expert witness fees were paid to Timothy Chinaris, J.D. at a rate of $250 per hour for 10.3 hours (total of $2,575.00) and to Wynne Baker, CPA at a rate of $250 per hour for 40 hours (total of $9,875.00).[15] Recovery of these fees, totaling $12,450.00, is proper. However, recovery of an additional expert witness fee of $314.97 to Dent K. Burk Associates, CPA, must be denied. Dent K. Burk never testified in this case, and Welch has not provided any evidence indicating what services Dent K. Burk provided. Furthermore, in *Complainant's Motion for Damages*, Complainant noted that he "utilized two (2) expert witnesses . . . ." *Complainant's Motion for Damages*, 14. Welch listed those two witnesses as Professor Timothy Chinaris and Wynne Baker, CPA. *Id.* Complainant does not mention Dent K. Burk and does not indicate what services Dent K. Burk may have provided. The inclusion of this fee is therefore improper.

Welch also paid the costs associated with various depositions, totaling $1,698.55, costs associated with the transcript of the formal hearing, totaling $1,301.45, and an out-of-pocket attorney retainer totaling $4,850.00. *See Complainant's Supplemental Memorandum of Law in Support of Motion for Damages* at 14. These amounts are expenses incurred by Welch and are therefore recoverable.[16] *See* 18 U.S.C. § 1514(c)(2)(A)-(C).

[15] In both his Supplemental Memorandum in support of damages, and Exhibit A.1 attached to Welch's affidavit, he notes that Baker's expert witness fee was $9,875.00, despite the fact that 40 hours at $250 per hour would result in a total fee of $10,000. No explanation was given for the lower number but, since that is what Welch alleges was owed to Baker, reimbursement will be in that amount.

[16] Welch's entitlement to reimbursement for attorney fees is addressed below, and the out-of-pocket expenses related to the retainer paid to Mr. Shine is listed here simply for administrative convenience. This amount is *not* included in the fee award set forth below, and there is thus no "double recovery" with respect to these fees.

Welch is thus entitled to reimbursement for expert witness fees totaling $12,450.00, the retainer paid to his attorney totaling $4,850.00, and deposition and court reporting fees of $3,000.00. The total reimbursement from Schedule A.1 is thus $20,300.00.

Summary of Exhibit A.1 Recovery

Attorney retainer:	$ 4,850.00
Expert Witness Fees:	12,450.00
Litigation Costs and Deposition Fees:	3,000.00
Total:	**$20,300.00**

B. Travel Expenses

In Exhibit A.3, Welch seeks compensation for travel expenses totaling $3,536.17. The majority of these expenses relate to travel for the hearing, meetings with his attorney, and travel for depositions. *Affidavit of David Welch* (Feb. 27, 2004). These expenses, with one minor exception, would not have been incurred but for Welch's wrongful termination, and they are therefore compensable under Sarbanes Oxley in order to make Welch whole. 18 U.S.C. § 1514A(c)(1). Cardinal argues that travel to a meeting with the FBI, the SEC, and USAG is not reimbursable. As this expense appears to be related to a separate enforcement action and was not necessary in the prosecution of the present case, this expense of $80.67 on October 7, 2002 should not be reimbursed. Welch is therefore entitled to recover $3,455.50 with respect to the listed travel expenses.

C. Job Search Expenses

Welch's job search expenses are likewise reimbursable. Complainant requests $1,681.91 in job search expenses. These expenses were made necessary because of Welch's unlawful termination and were required as part of his duty to mitigate damages. These expenses are therefore reimbursable.

D. Other Expenses

In Exhibit A.6, Welch claims $1,068.17 in "Other Expenses." He notes, with one exception, that the listed expenses were incurred to reproduce, bind and mail exhibits and documents to counsel and expert witnesses in this case. The exception is a $102.41 charge related to an air conditioning unit purchased for his apartment in Grundy during the period he worked for Buchanan. I find that all of these expenses flow from Welch's prosecution of this case, that they were reasonably incurred, and that they are therefore reimbursable by Cardinal.

Summary of Complainant's Special Damages

Depositions and Hearing, Attorney Retainer, Expert Witness Fees:	$20,300.00
Travel Expenses:	3,455.50

Job Search Expenses:	1,681.91
Other Expenses:	1,068.17
Total:	**$26,505.58**

Summary of Complainant's Damages

Back Pay:	$38,327.76
Special Damages:	26,505.58
Total:	**$64,833.34**

IV. Attorney's Fees

Welch's counsel, Bruce Shine, has requested an award of attorney's fees and expenses in the amount of $108,006.37. *Complainant's Petition for Attorney's Fees* (Dec. 17, 2004). An award of attorney's fees is based on the lodestar method in which the first step is to ascertain the reasonable compensable hours and the second step is to multiply the number of hours by an appropriate hourly rate. *Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air*, 478 U.S. 546, 565 (1986); *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639, 652 (4th Cir. 2002). In the present case, Shine claimed 447.25 hours at an hourly rate of $250 per hour. The total thus equaled $111,812.50. Shine then deducted the retainer of $4,750.00, which was included in Schedule A, and added $943.87 in legal expenses to reach his total request of $108,006.37.

I find both the number of hours claimed and the hourly rate charged by Bruce Shine to be reasonable for this litigation. This determination is based on a comparison to the rates charged by other attorneys in the same locality, Mr. Shine's 37 years as an attorney, and on the recognition that the present case was complex and presented several questions of first impression.

Other than questioning Shine's hourly rate and the award of attorney's fees in general, Cardinal's only argument against Shine's fee petition is that Shine lumped several tasks together under a single entry. Fee claimants must submit documentation that reflects "reliable contemporaneous recordation of time spent on legal tasks that are described with reasonable particularity." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). I find that the fee petition was sufficiently documented. The petition clearly identified the amount of time spent, what tasks were performed, and the date on which they were performed. As written, the petition is 19 pages long. If Shine were forced to segregate every task, the documentation would become unmanageable. *Hensley* requires that fee petitioners document fees with "reasonable particularity." Shine's petition meets this burden. Shine is thus awarded $108,006.37 in attorney's fees.

Summary of Award Through 2004

Damages:	$ 64,833.34
Attorneys Fees and Expenses:	108,006.37
Total:	**$172,839.71**

RECOMMENDED ORDER

Based on the foregoing findings of fact and conclusions of law, it is HEREBY RECOMMENDED that Respondent, Cardinal Bankshares Corporation, be ORDERED to:

Reinstate Complainant David Welch as the Chief Financial Officer of Cardinal Bankshares Corporation with the same seniority, status, and benefits he would have had but for Respondent's unlawful discrimination.

Pay Complainant $38,327.76 in back wages for the period October 1, 2002 through December 31, 2004.

Pay Complainant $26,505.58 in special damages, exclusive of attorney's fees.

Pay Complainant's counsel, D. Bruce Shine, $108,006.37 in attorney's fees and expenses.

Pay Complainant back wages for the period January 1, 2005 to the date of his reinstatement calculated in the manner set forth above.

Pay Complainant prejudgment interest on all back wages owed for the period October 1, 2002 to the date of his reinstatement calculated in the manner set forth above.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).