



Issue Date: 28 March 2005

Case No. 2004-AIR-13

In the Matter of

DAVY MERRITT,
Complainant,

v.

ALLEGHENY AIRLINES, INC.,
Respondent.

AMENDED DECISION AND ORDER

This matter is before me pursuant to section 519 The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“Act”), 49 U.S.C. 42121, and its implementing regulations at 29 C.F.R. Part 1979 (“Regulations”). On February 8, 2005, I issued a Decision and Order Granting Relief upon my finding that Respondent had discriminated against Complainant in violation of the Act. Pursuant to my Order of Clarification issued February 14, 2005, I hereby issue this Amended Decision and Order to include my findings regarding monetary damages.

As a preliminary matter, I incorporate by reference the entirety of the text of my original Decision and Order, with the exception of the Notice of Appeals paragraph that I erroneously appended to it.

Under the Act and Regulations, a successful Complainant is entitled to compensation (back pay) and to recoup the reasonable costs and expenses he incurred during prosecution of his claim. 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.109. The parties have expressed their opinions and arguments regarding the appropriate amount of monetary damages in this case; Complainant’s attorney submitted a letter dated February 28, 2005 and the Respondent submitted a letter dated March 17, 2005.

ATTORNEY FEES AND COSTS

Complainant’s attorney, Matthew J. Fusco, submitted with the February 28, 2005 letter an itemized billing sheet as well as an affidavit in support of his claimed hourly rate. The itemized bill contains sufficient detail for me to evaluate the reasonableness of each entry. Upon review of each entry individually and as part of the entire itemized bill, I find Mr. Fusco’s time spent on preparing and trying this case to be reasonable. Further, Complainant has been billed

for 2.4 hours of time for research by an associate attorney in Mr. Fusco's law firm; that amount of time, too, is reasonable.

The Respondent states only one objection to the itemized bill: that Mr. Fusco bills sixteen hours for the time he spent driving between Rochester, New York and Harrisburg, Pennsylvania for depositions and the hearing. In response, Mr. Fusco points out that the hearing was originally set to take place in Rochester, but was moved to Harrisburg at Respondent's request for the convenience of its witnesses. While I agree that the amount of time Mr. Fusco spent traveling between the cities is reasonable, I disagree with his practice of billing his usual hourly rate for travel. I will therefore not adjust the number of hours billed for this activity, but will set an adjusted hourly rate for "travel time" in my discussion of reasonable hourly rates below.

The next issue for me to decide is appropriate hourly rates for the attorneys representing Complainant. In the February 28, 2005 letter, Mr. Fusco states that he is a partner in the law firm of Chamberlain D'Amanda Oppenheimer & Greenfield, LLP in Rochester, New York. Including the time Mr. Fusco spent in a clerkship for a United States District Court, he apparently has been in practice for approximately eighteen years. His emphasis is in labor and employment law. I note, in addition, that the quality of Mr. Fusco's representation of the Complainant in this case has been very good: he submitted well-written and well-researched materials to this office, was prepared and professional at the hearing, and has conducted himself in a courteous manner during all contact with this office. In addition, Mr. Fusco states that the associate assisting him in this matter, Ms. Michelle Cimino, has been in practice for six years and specializes in employment-discrimination law.

For the attorney time billed to Complainant in this claim, Mr. Fusco requests an hourly rate of \$250 for himself and an hourly rate of \$175 for Ms. Cimino. I take official notice of the *Altman Weil Survey of Law Firm Economics, 2004 Edition*, which reports that the average hourly rate for an attorney (1) practicing in Pennsylvania (where this hearing took place) and (2) having eighteen years' experience in the practice of law to be \$288. Not only is Mr. Fusco's hourly rate reasonably close to this average, but it is actually below it. Additionally, I note that the average hourly rate for an associate attorney in Pennsylvania is \$199, an amount higher than that billed for Ms. Cimino's work.

I further note that Respondent has no objection to the requested hourly rate. Considering Mr. Fusco's and Ms. Cimino's experience, skill, and quality of work performed, I find that the rates of \$250 per hour and \$175 per hour, respectively, are reasonable and are approved. Further, for the time during which Mr. Fusco was traveling between his office in Rochester, New York and the hearing site in Harrisburg, Pennsylvania, he can reasonably charge half his normal hourly rate, equal to \$125 per hour.

The Complainant's fee for attorney time therefore consists of 161.4 hours at an hourly rate of \$250 (lead attorney rate), 2.4 hours at an hourly rate of \$175 (associate rate), and 16 hours at an hourly rate of \$125 (lead attorney travel rate). The total approved attorney fee is therefore \$42,770.

Finally, Mr. Fusco bills a total of \$3,260.50 in costs for litigating this case. Those costs consist of long-distance telephone tolls, copying, shipping, traveling, and computer-researching costs. In addition, Mr. Fusco lists a "Miscellaneous Disbursement" of \$2,087.55. This amount is equal to his itemized costs for several reporting services, and as each listed charge is reasonable, I find that the whole is as well. Further, I note that Respondent states no objection to these costs. I find that the requested costs of \$3,260.50 are reasonable and are approved. The total approved for attorney's fees and costs is therefore \$46,030.50.

DAMAGES

The final matter to be resolved in this claim is the calculation of damages, specifically, the back pay that Respondent owes Captain Merritt. Pursuant to my Order, Respondents reached an agreement of reinstatement with the Complainant at an early stage; therefore, I calculate back pay from the date Captain Merritt was discharged (June 7, 2003) until the date he was "economically reinstated" (January 25, 2004). The parties have agreed to stipulate to the following:

1. That, for the period from June 7, 2003 through January 24, 2004, Complainant's back pay is calculated at the contractual rate of \$55.27 per hour, multiplied by monthly contractual guarantee plus one-year look-back average of hours paid above guarantee. This results in a total back pay amount of \$39,927.51.
2. That, for the third and fourth quarters of 2003, Captain Merritt elected not to continue with Respondent's health insurance through COBRA, but instead made health-insurance-premium payments to the Livingston County Chamber of Commerce, along with membership fees to the Chamber. The total of those payments was \$2,450.99.
3. That Captain Merritt earned a total of \$16,648.06 from Route Relievers, Inc., and that this amount properly offsets back-pay wages.
4. That Captain Merritt received a total of \$7,703 in unemployment compensation benefits, and that this amount properly offsets back-pay wages.

I find that the total remaining damages due to Complainant by Respondent are therefore \$18,027.44.

ORDER

The above considered, I hereby ORDER that Respondent pay to Complainant, Davy Merritt, the sum of \$18,027.44 for damages. I also ORDER that Respondent pay to Complainant's attorney, Matthew J. Fusco, the sum of \$46,030.50 for attorney fees and costs.

A
MICHAEL P. LESNIAK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Amended Decision and Order shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US 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 shall 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. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21,