U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

KARLENE PETITT,

COMPLAINANT,

v.

DELTA AIRLINES, INC.,

RESPONDENT.

ARB CASE NO. 2021-0014

ALJ CASE NO. 2018-AIR-00041

DATE: September 26, 2022

Appearances:

For the Complainant:
Lee Seham, Esq. and Nicholas Granath, Esq.; *Seham, Seham, Meltz & Petersen, LLP*; White Plains, New York

For the Respondent:
Ira G. Rosenstein, Esq. and Lincoln O. Bisbee, Esq.; *Morgan, Lewis & Bockius LLP*; New York, New York

Before BURRELL, GODEK, and PUST, Administrative Appeal Judges; BURRELL, Administrative Appeals Judge, concurring

ORDER DENYING MOTION FOR CLARIFICATION, OR IN THE ALTERNATIVE, PETITION FOR APPEAL

GODEK, Administrative Appeals Judge:

This matter arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] (AIR 21), and its

[1] 49 U.S.C. § 42121.

implementing regulations.[2] In a complaint filed with the Department of Labor's Occupational Safety and Health Administration (OSHA), Karlene Petitt (Complainant) alleged that Delta Airlines, Inc. (Respondent) unlawfully discriminated against her in violation of AIR 21's whistleblower protection provisions. On December 20, 2020, an Administrative Law Judge (ALJ) issued a Decision and Order Granting Relief, and awarded front pay damages, back pay damages, compensatory damages, and ordered Respondent to publish the decision. Respondent timely appealed the ALJ's decision to the Administrative Review Board (ARB or Board).

On March 29, 2022, the Board affirmed the ALJ's decision on the merits and the award of back pay damages. The Board remanded the case for further proceedings after vacating the award of front pay damages as legal error and vacating the award of compensatory damages for lack of evidentiary support.[3] The Board held that the ALJ's front pay award was equivalent to an award of future lost earnings and based on mere speculation as to Complainant's damage to her reputation which was insufficient to support an award of future lost earnings.[4] The Board noted that "[o]n remand, the ALJ may reopen the record to determine whether Complainant can prove that Respondent's violation of AIR 21 caused lost future earnings."[5] As for the award of compensatory damages, the Board found that the ALJ's award of $500,000 was unsupported by the evidence in the record.[6] The Board "instruct[ed] the ALJ on remand to reconsider this award in light of other cases with similar characteristics as Complainant's. . . ." [7] In reconsidering the amount of the compensatory damages on remand, the Board provided that "the ALJ may reopen the record to take additional evidence on Complainant's emotional distress, humiliation, and loss of reputation as a result of Respondent's adverse action taken against her after engaging in protected activity."[8]

On July 18, 2022, Respondent submitted to the Board a Motion for Clarification of the Board's Remand Order, or in the Alternative, Petition for Appeal Pursuant to the Collateral Issue Doctrine, and Motion to Stay Post-Remand Proceedings Before the Tribunal. Respondent contends that clarification is necessary because the ALJ on remand has interpreted the Board's Order of Remand

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2 29 C.F.R. Part 1979 (2021).

3 *Petitt v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041 (ARB Mar. 29, 2022) (Order of Remand).

4 *Id.* at 23.

5 *Id.*

6 *Id.* at 26-27.

7 *Id.* at 27.

8 *Id.*

as permitting Complainant to potentially recover damages for completely new claims of retaliation. In her response opposing Respondent's motion, Complainant argues that clarification is unnecessary because her discovery requests have been within the scope of the Board's Order of Remand, and neither she nor the ALJ are confused about the Board's directives on remand.

The Secretary of Labor has delegated authority to the ARB to review appeals of ALJ decisions under AIR 21.[9] This includes the discretion to consider interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."[10] Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.[11]

Upon consideration of Respondent's motion, Complainant's discovery requests, and the ALJ's subsequent orders regarding discovery, the Board concludes that Respondent's motion requesting clarification or a review of the ALJ's discovery orders does not warrant the Board's review. The Board's Order of Remand is not vague or ambiguous, and the ALJ's orders appear to be in accordance with the Board's directives on remand. Because the ALJ has not expressed any confusion over the Board's directives on remand, the Board concludes a clarification of the Board's Order is unnecessary. We also consider Respondent's concerns to be speculative, and, therefore, we conclude they do not present the type of exceptional circumstance that justify the Board's discretionary interlocutory review or intervention.

Accordingly, Respondent's Motion for Clarification of the Board's Remand Order, or in the Alternative, Petition for Appeal Pursuant to the Collateral Issue Doctrine, and Motion to Stay Post-Remand Proceedings Before the Tribunal is **DENIED**.

SO ORDERED.

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[9] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[10] *Id.*

[11] *See Turin v. AmTrust Fin. Servs., Inc.*, ARB No. 2017-0004, ALJ No. 2010-SOX-00018, slip op. at 4 (ARB Apr. 20, 2017) (Decision and Order Dismissing Interlocutory Appeal).

[redacted]

STEPHEN M. GODEK
Administrative Appeals Judge

[redacted]

TAMMY L. PUST
Administrative Appeals Judge

BURRELL, Administrative Appeals Judge, concurring:

I concur in the majority's order denying clarification. We grant clarifications in limited circumstances.[12]

In our prior order, we affirmed the ALJ's findings and conclusions on liability. Because Complainant was never discharged but had been restored to her job sometime in or around September 2017, we reversed the ALJ's order of front pay. We vacated the order of compensatory damages for lack of evidentiary support.[13] Nonetheless, we recognized Complainant's request for remedies due to severe damage to her reputation may fit under loss of future earnings capacity.

In proceedings before the ALJ on remand, Complainant sought discovery in at least the following areas: "(1) "green slip" payments for similarly situated first officers; (2) scheduling practices for Complainant as contrasted with similarly situated pilots; (3) depositions of individuals responsible for ongoing discriminatory treatment; (4) depositions of third parties with knowledge of reputational damage inflicted by Respondent; and (4) depositions of third parties with knowledge of Complainant's lost economic opportunities."[14]

Respondent counters that it would be an abuse of discretion to reopen the record to permit Complainant to introduce new evidence. Further, Respondent contends that Complainant seeks to reopen the record concerning allegations that are far broader than those authorized by the ARB. Finally, it argues that the ALJ

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12 *See Dilley v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980).

13 *Petitt*, ARB No. 2021-0014, slip op. at 22-23 (ARB Mar. 29, 2022).

14 *Petitt v. Delta Airlines*, ALJ No. 2018-AIR-00041, slip op. at 2 (ALJ June 3, 2022) (ALJ Order Granting Limited Additional Discovery and Directing the Parties to Confer about Additional Hearing Dates).

should not reopen the record to conduct any additional discovery.[15] Respondent asked the ALJ for a protective order on matters regarding discovery and depositions, which was denied for the most part.

DISCUSSION

As we noted in our prior order of remand, front pay and loss of future earning capacity are separate remedies.[16] As a form of make-whole relief, employment law, including AIR 21, prefers reinstatement of the employee.[17] In cases where reinstatement is not feasible, courts may award forward-looking pay in the form of front pay.[18] Reinstatement and front pay are alternates.[19] Generally, a court's order of reinstatement and front pay together would constitute a double recovery.[20] Accordingly, the ARB vacated the ALJ's award of front pay because Complainant was restored to the job with the same pay and terms of employment.[21]

The ARB noted Complainant's theory appeared to be an attempt to argue loss of future earning capacity.[22] Damages for impaired future earning capacity are generally awarded in tort suits when a plaintiff's physical injuries diminish his earning power.[23] Courts have also awarded loss of future earning capacity in employment cases.[24] The tort of loss of future earning capacity is based on the diminished capacity to earn, not on individual instances of lost earnings in the

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15 *Id.*

16 *Petitt*, ARB No. 2021-0014, slip op. at 21 (ARB Mar. 29, 2022).

17 49 U.S.C. § 42121(b)(3)(B)(ii).

18 *Ass't Sec'y of Lab. for Occupational Safety and Health & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-0014, ALJ No. 2003-STA-00036, slip op. at 8 (ARB June 30, 2005).

19 *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 1998-0056, ALJ Nos. 1997-CAA-00002, -00009, slip op. at 27 (ARB Feb. 29, 2000).

20 *Teutscher v. Woodson*, 835 F.3d 936, 954 (9th Cir. 2016); *Selgas v. Am. Airlines, Inc.*, 104 F.3d 9, 13 (1st Cir. 1997) (explaining that a district court's discretion to craft an equitable remedy is limited by the need "to avoid duplication").

21 *Petitt*, ARB No. 2021-0014, slip op. at 22 (ARB Mar. 29, 2022).

22 *Id.* at 22-23.

23 *Gorniak v. Nat'l R.R. Passenger Corp*., 889 F.2d 481, 484 (3d Cir.1989) (FELA suit by railroad employee).

24 *Teutscher*, 835 F.3d at 957; *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953-54 (7th Cir. 1998).

future.[25] The scope of the remedy is evaluated from the perspective of the time of the injury.[26] The RESTATEMENTS (SECOND) OF TORTS provides as follows:

> The extent of future harm to the earning capacity of the injured person is measured by the difference, viewed as of the time of trial, between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm.[27]

An employer's full reinstatement of an employee to prior pay, terms, and conditions of employment might constitute prima facie evidence of comparable earning capacity.[28] Though, this is not necessarily the case, especially if the injury took place early in a career. An employee reinstated to the same job with the same pay can still prove loss of future earning capacity when evidence shows the employee is locked in or cannot obtain future advances reasonably probable.[29]

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[25] JACOB A. STEIN, 2 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 6.3 (3d ed. 2022 update); *Monias v. Endal*, 330 Md. 274, 623 A.2d 656 n.4 (1993) ("We should note that we are dealing with future loss-of-earnings damages, rather than future loss-of earning-capacity damages. There is a distinction between loss of earnings and loss of earning capacity").

[26] The Supreme Court in *Sea-Land Servs. v. Gaudet* stated that:

> Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury.

414 U.S. 573, 594 (1974) (internal quotation omitted). "[I]t is necessary, in order to ascertain [lost earning capacity] damages, to determine the plaintiff's pre-tort life expectancy and pre-tort work-life expectancy because it is pre-tort expectancies, not post-tort, that are relevant to the computation of lost earning capacity." 2 STEIN ON PERSONAL INJURY DAMAGES, *supra* note 25, at § 6.3 n.14 and accompanying text.

[27] RESTATEMENT TORTS (2d) § 924, comment (d) (1979) (May 2022 update).

[28] *Reed v. Union Pac. R.R. Co.*, 185 F.3d 712, 718 (7th Cir. 1999) (Illinois law); *Rasinski v. McCoy*, 227 So. 3d 201, 204 (Fla. 5th Dist. Ct. App. 2017) (Florida law) (finding insufficient evidence to compensate motorist for loss of future earning capacity where motorist continued to work in industry after the accident at the same hourly pay and any testimony as to loss of future earnings or job security was pure speculation).

[29] *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 362 (3d Cir. 1998) (plaintiff need not show loss of earnings to show loss of earning capacity; plaintiff can recover if plaintiff proves severe diminution in ability to earn in the future, to change jobs, or to advance along expected career path).

As with other forms of forward pay, there is some speculation in an award of loss of future earning capacity. The more objective the evidence, the less speculative the remedy.[30] To recover for lost earning capacity, a plaintiff must produce "competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him . . .. [A] plaintiff must show that his injury has caused a diminution in his ability to earn a living."[31] Plaintiff may testify as to aspects of job, work-life expectancy, and reasonable prospects for promotion or future increases if such prospects are likely or probable.[32] A plaintiff's proof of loss of future earning capacity may involve some uncertainty but must refrain from crediting purely speculative conjecture.[33] Expert testimony will be helpful.[34]

Respondent also disputes the ALJ's characterization of the ARB's order to reopen the record. The ARB's Order of Remand did not order the ALJ to reopen the record but left the decision with the ALJ's discretion. The ARB wrote:

> On remand, the ALJ may reopen the record to take additional evidence of the Complainant's emotional distress, humiliation and loss of

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[30] 2 STEIN ON PERSONAL INJURY DAMAGES, *supra* note 25, § 6.6 ("The admission of evidence to prove the plaintiff's future earning capacity may include evidence that would fairly indicate present earning capacity and the probability of its increase or decrease in the future, including evidence of age, intelligence, habits, health, occupation, life expectancy, ability, probable increase in skill, and rates of wages paid generally to those following the same vocation, particularly where the injured person has fitted himself or herself for, but has not yet entered, the work of his or her choice.").

[31] *McKnight v. Gen. Motors Corp.*, 973 F.2d 1366, 1370 (7th Cir. 1992) (*quoting Gorniak*, 889 F.2d at 484).

[32] *Andler v. Clear Channel Broad., Inc.*, 670 F.3d 717, 727 (6th Cir. 2012) ("Testimony regarding what an injured plaintiff could have earned should take into account factors such as the plaintiff's age, employment record, training, education, ability to work, and opportunities for advancement.").

[33] Loss of future earnings capacity is subject to mathematical calculation. *See, e.g.*, *Williams v. Rene*, 72 F.3d 1096, 1102 (3d Cir.1995); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 143 (3d Cir.1973) ("Although the determination of such damages often involves a host of uncertain contingencies, the verdict must still have its basis in evidence, not conjecture.").

[34] RESTATEMENT TORTS (2d) § 924, comment (e) ("If the person harmed is alive at the time of trial, ordinarily the opinion of experts on the probable diminution of the plaintiff's life expectancy as a result of the tort is admissible as bearing upon the impairment of future earning capacity."); *see also Rutherford v. Palo Verde Health Care Dist.*, 2015 WL 12864245 (C.D. Cal. 2015) (citing Federal Rules of Evidence on expert witness in lost earning capacity case); *Andler*, 670 F.3d at 728 ("When calculating earning-capacity factors such as projected salary and years in the workforce, experts often consult actuarial tables, Bureau of Labor Statistics figures, or other averages along with the plaintiff's historical earnings.").

reputation as a result of Respondent's adverse action taken against her after engaging in protected activity.[35]

Reopening the evidentiary record on remand is in the sound discretion of the trial court and can only be reviewed for abuse of that discretion.[36]

[redacted]

THOMAS H. BURRELL
Administrative Appeals Judge

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[35] *Petitt*, ARB No. 2021-0014, slip op. at 27 (ARB Mar. 29, 2022); *see also id.* at 23.

[36] *Dalton v. Copart, Inc.*, ARB Nos. 2004-0027, -0138, ALJ No. 1999-STA-00046, slip op. at 6 (ARB June 30, 2005) (ARB affirming ALJ's discretion on remand not to reopen the record "because he had given Dalton ample opportunity at hearing to present evidence pertaining to any and all damages which he had suffered, and Dalton simply had failed to do so."); *Zenith Radio Corp. v. Hazeltine Rsch. Inc.*, 401 U.S. 321, 331 (1971). In deciding whether or not to reopen the record, a trial court considers the probative value of the evidence proffered, the proponent's explanation for failing to offer such evidence earlier, and the likelihood of undue prejudice to the proponent's adversary. *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1160 (1st Cir.1996).