

**U.S. Department of Labor**

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**Issue Date: 02 December 2004**

**CASE NO.: 2003-STA-39**

**IN THE MATTER OF**

**GEORGE T. LUCKIE,  
Complainant**

**v.**

**UNITED PARCEL SERVICE,  
Respondent**

**RECOMMENDED DECISION AND ORDER**

**Background**

This claim arises under Section 405 of the Surface Transportation Act (the Act), 49 U.S.C. 31104. The Act protects employees from discharge, discipline or discrimination for filing a complaint about commercial motor vehicle safety and/or for refusing to operate a vehicle when such operation constitutes a violation of Federal motor vehicle safety regulations or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

**Procedural History**

The Complainant filed a complaint with the Secretary of Labor alleging that he was discriminatorily terminated in violation of the Act. Following an investigation of this matter, the Secretary of Labor, acting through her agent, the Regional Administrator, issued findings on May 14, 2003, that the Complainant was not an "employee" under the Act and Respondent was not in violation of the Act. (ALJ 1). The Complainant requested a formal hearing, and on June 8 and 9,

2004<sup>1</sup>, a hearing was held in Birmingham, Alabama, at which time all parties were given an opportunity to present evidence and arguments. The decision is based on the record made at the de novo hearing which included testimony of witnesses, Administrative Law Judge Exhibits 1-5 and “A” and “B”, Complainant’s Exhibits 1-70 (except 9) and Respondent’s Exhibits 1-44. The parties also were granted until October 12, 2004 to file post-trial briefs, which both parties did.

### **Issues**

The Respondent agreed they are subject to the Act and issues for me to determine are:

1. Was Complainant a covered employer under the Act;
2. Did Complainant engage in activity which is protected within the meaning of the Act; and
3. Whether any adverse action taken against Complainant was due to his engaging in protected activity.

### **Findings of Fact**<sup>2</sup>

1. United Parcel Service, Inc. (Respondent) is a company that is engaged in the transporting of packages, both interstate and intrastate, using commercial motor vehicles within the meaning of the Act.

2. To carry out its business, Respondent sets up distribution centers which are known as “hubs” or “package centers.” From these hubs, packages are loaded onto Respondent’s trucks and trailers to be moved through the Respondent’s distribution chain for distribution in interstate commerce.

3. The organizational structure of Respondent is broken down into regions, with each region having a Regional Manager and certain staff positions who report directly to that Regional Manager. Each region is comprised of six to ten districts. These districts are in turn organized with a District Manager at the

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<sup>1</sup> Throughout the parties have waived any time constraints imposed by the Act.

<sup>2</sup> The conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact, for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

top supervising level of Staff Managers. Those District Staff Managers are similar in description to those found at the regional level with both having Staff Managers for Human Resources, Plant Engineering, Industrial Engineering, Accounting, Labor, Business Development and Security. Though the Staff Managers at the District level report directly to the District Manager, they also report to their Regional Manager of the same staff function at the regional level.

4. George T. Luckie (Complainant) was hired by Respondent in 1975 as a part-time package loader/unloader in the Respondent's Alabama District. From 1979 through 1981, Complainant worked as a package car driver. In 1981 Complainant was promoted to a supervisory position.

5. Complainant was promoted to Business Manager at one of Respondent's package center facilities in 1985. As a Business Manager, Complainant supervised a number of package car drivers and was responsible for all package operations at the center.

6. Complainant became the Hub Manager for the Montgomery, Alabama hub operation in 1988, where he was responsible for the night operation at the hub, including package unloading, sorting and reloading.

7. In January 1989, Complainant was reassigned to a Business Manager position, in which he stayed until February 1990 when he was given a special assignment to be an instructor at Respondent's Supervisor Basic Training School in Springfield, Massachusetts. Following the completion of his special assignment, Complainant was reassigned to a Business Manager position in Birmingham, Alabama.

8. Complainant was promoted to the position of Division Operations Manager in the Alabama District in May 1991. As a Division Operations Manager, Complainant reported directly to the Alabama District Manager and was responsible for the district's package operations within a specific geographic area. Between July 1993 and November 1994, Complainant was assigned to work on special projects in Atlanta and Nashville; and in November 1994, Complainant became the District Security Manager for the Alabama District. Complainant's district included Alabama and the Florida panhandle, and at the time of his termination he reported directly to his District Manager, Chris Martin, and to his Regional Security Manager, Steve Hernandez.

9. Complainant remained the District Security Manager for the Alabama District from November 1994 until his employment terminated in November 2001. As a District Security Manager, Complainant was a Pay Grade 18, Division Manager-level employee within Respondent's organizational structure.

10. As Alabama District Security Manager, Complainant's primary job duties related to resolving customer claims for lost, stolen or damaged packages in Respondent's system, conducting investigations into incidents of employee theft and violations of Respondent's sexual harassment, honesty and integrity policies and overseeing certain security measures at the Company's facilities, including alarm systems and guard services. And while none of Complainant's job duties as District Security Manager routinely involved driving a vehicle, working as a mechanic or loading and unloading trucks, Complainant testified without contradiction that since he was responsible for monitoring all damaged packages, he regularly handled packages to investigate damage claims, and in the past had investigated fires.

11. Complainant testified he was responsible for the safety of the Respondent's people and property in Alabama, as well as for all packages throughout the Respondent's system in Alabama; and in doing so he said he felt an obligation to following federal, state and regulatory laws.

12. To assist him in carrying out his job responsibilities, Complainant managed a staff of 20 to 25 employees. Reporting directly to him were a Security Manager, a Supervisor of the department's Damage Reduction Group, which was responsible for inspecting damaged packages, investigating and auditing package claims and making customer visits, and Security Representatives, who were involved in various claims reduction activities in the district's package center operation.

13. After the terrorist attack of September 11, 2001, there was a heightened safety concern regarding the potential of attacks through the use of Respondent's facilities. Memos and directives reflecting these concerns are found at Complainant's Exhibits 16-26, and there was testimony given to Congress in this regard.

14. These bulletins reflect a concern over safety issues, and some directed to Complainant in his position as Security Manager stressed the need to cooperate with law enforcement personnel with respect to any suspected hazardous material. In fact, one of the memos specifically instructed Management to report any

suspicious activity regarding hazardous materials to the National Security Office in accordance with the Federal Motor Carrier Safety Act. (Complainant's Exhibit 16).

15. Respondent, by all accounts, is committed to a policy of promoting qualified individuals from within the Company; and when an employee accepts a management-level position, it is understood that he /she will be expected to accept periodic reassignments, special assignments and promotions anywhere in the country. It is common for Respondent's managers to relocate on numerous occasions to multiple geographic locations throughout their careers. Also, unrefuted was testimony that when a management-level employee receives notification that he/she has been identified for reassignment, he/she is not informed of the specific location of the new position until he accepts the transfer.

16. A key component of the career development process for management employees is the "People's Meeting." At the People's Meetings managers individually and collectively review the job performance of lower-level employees and, based upon that review, determine which employees are candidates for promotion, reassignment or special assignment. For managers such as Complainant who worked in Respondent's Security Department, People's Meetings were held among the Corporate Security Staff and the Regional Security Managers.

17. In the past, Complainant had had several conversations with his Regional Managers about relocation; and in April 2000, Complainant met with Jack Woods, his then Southeast Regional Security Manager, to discuss his career with Respondent.

18. At that meeting, Complainant and Woods discussed the fact that the Alabama District was a small or "starter" district and because Complainant had already held the Security Manager position in the district for a number of years, he needed to relocate to another district in another region of the country in order to assume greater responsibilities and enhance his career, and also to provide an opportunity for another manager to further his or her career in the Alabama District Security Manager position. Complainant acknowledged the need for such a career transfer, but voiced concern about the timing because of his then pending divorce and child custody suit which he suggested might be concluded by the end of the year.

19. Subsequently, on May 2001, Jack Woods met with his successor in the region, Steve Hernandez, to discuss all of the District Security Managers in the Southeast Regional, including Complainant.

20. In September 2001, the Southeast Regional Staff Managers and Region Manager held a People's Meeting at which they reviewed the performance and discussed the career development of all the Division Operations and Staff Managers in the district in the Southeast Region; and based upon Complainant's experience in operations and in the Security Department in the Alabama District, Hernandez recommended at the September 2001 People's Meeting that Complainant, for career enhancement, be reassigned to a larger district with greater responsibilities.

21. On October 19, 2001, following the Southeast Region People's Meeting, Hernandez met with Complainant to discuss his career development. At that October 19, 2001 meeting, Hernandez informed Complainant that, based upon his performance and tenure as the Alabama District Security Manager and the Company's desire to move him to a larger district to enhance his career and open up the Alabama District Security Manager position for another employee, he had recommended at the September 2001 People's Meeting that Complainant be reassigned to another district. Aware of Complainant's custody issues, Hernandez also informed Complainant that if he was unable to accept a reassignment by the end of 2002 he would have to step out of his District Security Manager position and work with the Alabama District Manager to find another job in the district.

22. While at no time during their meeting did Hernandez guarantee Complainant that he would not be asked to relocate before 2003, his intent to abide by such a promise is reflected in a memorandum of that October 19, 2001, meeting written to Complainant's District Manager, Chris Martin, which reads, in part, as follows:

Today, I met with Truitt Luckie to discuss his position as the Alabama District Security Manager. I explained to him that I needed to understand the status of his personal situation. Truitt stated that his divorce has finally been settled and he is responsible for the custody of his children Thursday through Monday.

As a representative of the Region and the Security function, I informed Truitt that in 2003 he would no longer maintain the position of District Safety Manager for the Alabama District. I added that the

region and function had been unable to offer him other districts due to his marital situation. The Alabama District is considered a starter district and he has been in that position for more than seven years. I explained that ideally he should be reassigned to another district in order to enhance his managerial skills and career. Truitt acknowledged he fully understood the circumstances and the purpose of our discussion.

In reviewing his situation I informed Truitt that should he be unable to relocate at the end of next year he must accept a position outside the function. He assured me he would have his personal problems in order by then and felt he was fully capable of managing any operation within the district. (Complainant's Exhibit 27).

23. In the early morning of October 30, 2001, a package on a conveyor belt in Respondent's Montgomery hub caught on fire. The hub was within Complainant's district. Although personnel initially attempted to put out the fire with fire extinguishers, they were unsuccessful and it was necessary to evacuate the building and call in the local fire department. The Montgomery Fire Department extinguished the Montgomery hub fire in 23 minutes. In addition to fire department personnel, members of the Montgomery Hazardous Materials Rescue Company responded to the fire.

24. The fire caused over \$100,000.00 in damage to the building. Approximately 5000 packages were involved in the fire. The building was evacuated and at least one employee was carried to the hospital.

25. Following his notification of the fire, Complainant contacted Ricky Quincey, one of his investigators, and sent him to the scene of the fire. Quincey, acting under Complainant's direction, began an investigation of the fire and reported to Complainant throughout the day of October 30.

26. When the Montgomery Fire Department cleared the Montgomery hub for re-entry, the department did not impose any terms or conditions on Respondent for re-entering the building and resuming operations. In addition, the Montgomery Hazardous Materials Rescue Company did not give any indication that there were any potentially hazardous materials on site. However, when Complainant learned from Quincey that the fire looked suspicious in nature and had started without any apparent reason from a package sitting on the conveyor belt, and employees had used six to eight fire extinguishers but the fire continued to grow hotter, shooting

out fire balls, burning white hot and consuming the conveyor belt in flames, Complainant expressed concern to his supervisors that the origin of the fire looked suspicious.

27. That same day, Complainant learned that employees were removing the fire debris to the dump before the cause of the fire had been determined. He also discovered that Respondent had not isolated the trailer from which the suspicious package had been unloaded, and no efforts had been made to determine if other packages in the same truck might pose a similar danger to the employees and facility.

28. Complainant complained to Vance Allison, the Human Resource and Safety Director, that the truck was still on the loading dock and that he felt the matter was not being handled correctly. Complainant told Allison they needed to isolate the truck on the yard away from people because he was concerned for their safety. He was also concerned that other potentially hazardous items could be shipped across the country through that hub.

29. Complainant believed his job as a District Security Manager, as well as his concern for other employees and the general public, required him to make certain that the investigation was done thoroughly and that any reports were completed accurately and timely in order to protect the safety of others. He also was aware that a potentially hazardous material situation required notification to the Department of Transportation. DOT Form 5800 must be filed if a person is injured, or there is property damage suffered by the carrier which exceeds \$50,000.00; or there is an evacuation which lasts for more than an hour or the facility is shut down for more than an hour. The Montgomery fire met these requirements, and the DOT form was required to be filed.

30. In an effort to comply with his job requirements and safety concerns, Complainant attempted to pursue an investigation of the fire, but he was stopped by his District Manager, Chris Martin. Complainant explained to Martin that he had safety concerns because they did not know what else was on the trailer and did not know what was on the other trailers that had yet to be unloaded that morning. In response to that concern, Martin replied, "so what."

31. Later the same day, Martin reprimanded Complainant for his attempts to continue the investigation. According to Complainant, her words were "what the hell are you and Ricky Quincey trying to do, you are just adding to the anxiety of the situation in Montgomery."



32. Martin, who testified at the hearing, admitted she knew Complainant was investigating damages and losses caused by the fire, and she acknowledged he had safety concerns for the employees and that he wanted to expand the investigation to determine the cause and origin of the fire. She also agreed that she was irritated because Complaint had called the regional safety director about the fire.

33. Complainant was removed from the investigation by Chris Martin, and instructed to report that the fire was caused simply by friction on a conveyor belt.

34. No further investigation was done by Respondent regarding the cause of the fire, and while the DOT Form 5800 was filed, most questions were answered as “unknown.” (Complainant’s Exhibit 36).

35. On November 1, 2001, Hernandez, Martin and Allison met with Complainant and informed him that he had been selected for reassignment; and Martin told Complainant that if he did not agree to relocate he could take a demotion or accept a separation package. Complainant asked for time to consider these options, and the parties met again on November 9, 2001 at which time Complainant was terminated for his refusal to take any of the options offered, and he was escorted from the building.<sup>3</sup>

36. Aside from the separation package (Complainant’s Exhibit 14) or relocation to another District, Complainant was offered an assignment as Business Manager at the Roebuck Package Center in the Birmingham area with the promise he would be considered for future promotions.

37. As a District Security Manager, Complainant was a Grade 18 and would have remained so had he agreed to a transfer to another District. In the Roebuck Business Manager position that Complainant also was offered, he would have been a Grade 16 and incurred a decrease in his salary, but remained in Birmingham. Also, he would no longer have been eligible for stock options if he accepted the Business Manager position, but he would have been eligible for stock bonuses and would have continued to participate in his other employment benefits.

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<sup>3</sup> Prior to that meeting, Complainant’s computer had been seized and the locks to his office changed. At the November 9 meeting, Complainant was searched with a metal detector.

38. Since his departure from Respondent, Complainant has filed no applications for employment, but ultimately constructed and operates a car wash, which in 2004 started yielding an income of \$4,000 per month. Prior to that time, Complainant apparently lived off of the sale of stock.

### **Discussion and Conclusions of Law**

This proceeding is brought under the employee complaint provision of the Act, which states:

A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding

To establish a prima facie case of discriminatory treatment under the Act, Complainant must prove : (1) that he was engaged in an activity protected under the Act; (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 299 (6<sup>th</sup> Cir. 1987). The establishment of the prima facie case creates an inference that protected activity was the likely reason for the adverse action. *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973). At a minimum, Complainant must present evidence sufficient to raise an inference of causation. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992).

### **Status**

In order to assert a claim under the Act, an individual must be a covered "employee" under the Act. More specifically, the Act provides that "[an] 'employee' means a driver of a commercial motor vehicle . . . , a mechanic, a freight handler, or an individual not an employer who . . . directly affects commercial vehicle safety in the course of employment by a commercial motor carrier."

In this instance, it is Respondent's position that Complainant falls within none of the categories that would provide him protection under the Act. I do not agree. Obviously, Complainant was neither a driver of a commercial motor vehicle nor a mechanic, but I find he was either a freight handler or an individual who directly affected commercial vehicle safety in the course of his employment with the Respondent, or both.

As argued by Complainant, while he did not exclusively handle packages the unrefuted testimony is that he handled damaged packages in performing security checks and resolving damage claims. How could this not fall within the Act's purpose of promoting a safe and efficient transportation system?

An individual who directly affects commercial safety is a description which likewise embraced Complainant in his role as District Security Manager, particularly given the heightened alert following "9/11" and the company and government bulletins which followed. In fact, one of the very duties listed for a Manager was "see, hear, and communicate with sufficient capability to perform assigned tasks and maintain proper safety conditions." (Respondent's Exhibit 7).

Respondent is a company engaged in transporting of packages, both interstate and intrastate, while using commercial motor vehicles within the meaning of the Act, and Complainant played a role in accomplishing that mission in a safe and lawful manner in both his position a manager and an employee of that company.

### **Protected Activity**

Having determined Complainant was a covered employee under the Act, the next issue is whether or not Complainant engaged in protected activity under the Act. Here again, Employer urges that Complainant's actions did not amount to protected activity because Complainant failed to file a complaint or a proceeding prior to the termination of his employment on November 9, 2001. Again, I do not agree with Employer.

Safety-related complaints under 49 of the Act include complaints raised to an employer as well as to government authorities. *Clean Harbors*, 146 F.3d at 19-21; *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 9 (ARB Oct. 31, 2003); *Bettner v. Daymark, Inc.*, ARB No. 01-088, ALJ No. 00-STA-041, slip op. at 23 (Oct. 31, 200).

Likewise, to establish protected activity the employee need demonstrate only a reasonably perceived violation of the underlying statute or its violations. This is to say, that although the employee need not prove an actual safety violation, the complaints must be made in good faith. *See Ashcraft v. Univ. of Cincinnati*, NO. 83-ERA-7, slip op. at 9 (July 1, 1983).

In this instance, it is undisputed that Complainant made complaints and expressed his concerns to his supervisor over the origin of the fire and the possibility that the shipping truck still contained other such packages or that other such packages were in transit. Complainant had misgivings about the cause of this event and the manner in which it was not investigated; and I find his concerns, particularly in the wake of “9/11”, to have been in good faith. Even though the fire department was able to extinguish the fire, because of its magnitude and unknown origin, one is left to wonder why the aftermath was thrown in a dumpster and the truck was left dockside to continue being unloaded without further investigation.

### **Adverse Employment Action**

Clearly, Complainant suffered an adverse action regarding the terms of his employment. Some ten or fifteen days before the fire, Complainant had been told, and it was confirmed in a memorandum (Complainant’s Exhibit 27), that because of his domestic situation, his slated transfer would not take place until the year 2003. Consequently, on November 1, 2001, when he was told that he must transfer immediately outside the district or take another position until a later time or separate from the company, an adverse action regarding the terms of his employment obviously befell Complainant in the form of the untimely nature of choices as they related to his personal life when he had previously been given contrary assurances.

### **Cause of the Adverse Action**

Though Employer presented evidence at the trial that both transfers and relocations are mandatory requirements of a manager’s job with the Respondent if he wishes career enhancement, I find that the timing of Complainant’s concerns over the fire and his sudden transfer option was not coincidental.

The proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection. *Wrenn*, 808 F.2d at 501 (citing *Burrus v. United Telephone Co.*, 683 F.2d 339, 342 (10th Cir. 1982), cert. denied, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982); *Miller v.*

*Fairchild Industries, Inc.*, 797 F.2d 727, 731-32 (9<sup>th</sup> Cir. 1986); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 601 (11<sup>th</sup> Cir. .1986); *Mitchell v. Baldrige*, 759 F.2d 80, 86 & n. 6 (D.C. Cir. 1985)(and cases cited therein).

While the Respondent has attempted to put forth legitimate, non-discriminatory reasons for Complainant's abrupt removal as Alabama District Security Manager, I find the same to be pretextual. The evidence presented showed that prior to a transfer, an employee is usually interviewed for the new position and not terminated if he or she refuses the position offered. In this instance, Martin was unhappy about Complainant's concerns over the origin of the fire, and the coincidence of his transfer immediately following the fire defies any explanation other than retaliation.

In sum, I find that as a covered employee, Complainant engaged in protected activity by voicing his safety concerns over the origin of a fire involving packages moved through Respondent's system, and that as a result of Complainant's concerns he suffered an adverse action regarding the terms of his employment.

### **Damages**

Complainant seeks reinstatement, compensatory damages with back pay, attorney's fees and costs.

### **Reinstatement**

Though a favored remedy in cases of this nature, I do not find reinstatement to Complainant's former position to be appropriate in this instance.

First and foremost, Complainant left his employment with Respondent voluntarily. He was given the choice of a transfer to another district or another position if he chose to remain, for family reasons, in the Birmingham area. Complainant, however, was angry over what he perceived to be retaliation for his safety concerns and he accepted neither offer. While Complainant could have remained with Employer, taken advantage of the employee grievance procedures and filed a suit such as this one, he did not. Consequently, since he in essence terminated himself, I find he is not entitled to reinstatement.

Additionally, there is the question of where Complainant would be reinstated if found so entitled? The remedy is to his "former position," but the testimony was without contradiction that employees in staff management positions with

Respondent always and frequently are transferred and relocated throughout the system to enhance their careers. Complainant knew such a transfer was imminent for him, but it simply came sooner than he had been lead to believe. Where, however, Complainant would now be in his career, both physically and positionally, is an unknown. Consequently, aside from the fact that Complainant left his employment voluntarily, for me now to arbitrarily place Complainant in some place or position is not an appropriate remedy. Had Complainant taken the options offered, perhaps he would have the answer, but he did not, and therefore there is no way of ascertaining where Complainant would this day be had he stayed in Respondent's employment. The only certainty is that based on Respondent's transfer policies it would not be in his former position.

### **Back Wages**

An employee against whom adverse action is taken has a duty to diligently seek to mitigate his damages. In this instance, Complainant failed to mitigate his damages.

The reassignment that was offered Complainant from the Alabama District Security Manager position to another District Security Manager position was a lateral transfer opportunity in which Complainant would have received the same if not more in his salary, stock options and retirement benefits. The Roebuck Business Manager position that Complainant also was offered would have resulted in a small decrease in Complainant's salary, and although Complainant would not have been eligible for stock options if he accepted the Business Manager position, he would have been eligible for stock bonuses and would have continued to participate in his other employment benefits. But Complainant did neither, and in fact he testified he filed no subsequent employment applications and lived on stock sales until 2004 when he started receiving income from a car wash he built.

In *Ford Motor Co. v. E.E.O.C.*, 102 S.Ct 3057, 3065 (1982), the Supreme Court wrote concerning a claimant's duty to minimize damages that:

This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.

Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.

Though coming 14 months sooner than expected, the lateral transfer would have caused Complainant to suffer no monetary loss, and the Roebuck job, while at a lesser pay, would have allowed Complainant to remain in Birmingham and in the employment of Respondent. There has been no evidence that either position was demeaning. One was equivalent except for location and the other satisfied Complainant's location concerns.

Consequently, it is my finding that inasmuch as Complainant refused a substantially equivalent position as to the one he had, that Complainant is not entitled to back wages.

### **Compensatory Damages**

Compensatory damages are not exemplary damages, but rather are damages designed to compensate a party for the loss sustained by the wrong. In this instance it appears to me that what Complainant lost was the salary and stock options he would have earned had he remained in Birmingham as the Alabama District Security Manager until the year 2003, less what he would have earned had he mitigated his losses and accepted the Roebuck Business Manager position which would have accomplished the purpose of allowing him to remain in Birmingham for another year.

The adverse action taken against Complainant for his protected activity was to alter the terms of his employment by expediting his transfer from the Alabama District by some 14 months (November 9, 2001 to December 31, 2002). The only way Complainant could have remained in the district for the duration promised was to take the lesser paying position after which he was told he could be reconsidered for future promotions and reassignment to district manager positions in other districts. Had he accepted the alternative, I find the Complainant would have suffered a financial loss, and an approximation of that loss is what I find to be his consequential damages.<sup>4</sup>

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<sup>4</sup> I also find Complainant entitled to recover costs and attorney's fees reasonably incurred in the prosecution of this matter, the exact amount to be subsequently determined following the instructions of the Order.

At the hearing, though some information was provided concerning Complainant's wages (CX 44, 45 and Tr. 637-642), an exact comparison between Complainant's then actual wages and the Roebuck manager's position was not offered in detail. Consequently, post-hearing I sought input from each party as to the difference in income and benefits between the District Security Manager's position in Birmingham and the Roebuck Business Manager's position during the period of November 9, 2001, through the year 2002. Both parties responded to my inquiry, but as might be expected their arguments were not in total agreement.

While each appears to agree that both positions were entitled to annual stock awards and other company benefits, but that stock options were not available to the Roebuck Business Manager's position, they could not agree as to: 1) whether there was a difference in annual salary between the two positions and 2) the value of the stock options Complainant would have lost during that period.

In their letter of November 22, 2004 (ALJ Exhibit A), Complainant's counsel argues that Complainant's base salary at the time he was terminated was \$7,650.00 per month and that the highest base salary for a grade 16 business manager was \$5,950.00 per month, a loss of \$23,800.00 (the \$1,700.00 per month difference multiplied by the 14 months in question). Respondent's counsel, on the other hand, argues in their letter of November 23, 2004 (ALJ Exhibit B), that because of company policy that Complainant's salary would have been "red circled" and remained the same, which they refer to as \$95,625.00 per year. However, while there is no hard evidence to support either party's contentions, Respondent's reply is a bit undermined by Ms. Martin's comment at the conclusion of the hearing that had Complainant taken the Roebuck position he would have suffered a small reduction in salary (Tr. 640).

As to the stock options, which everyone agrees Complainant would have lost had he taken the Roebuck manager's position, an even greater disagreement arises. Complainant's counsel suggests in the year 2000 with stock options Complainant increased his income by approximately \$140,000.00 (CX 44) and would have done so again in the ensuing years as demonstrated by the fact that for only a portion of his stock payments in 2001 Complainant received an additional \$71,031.24 in income (CX 45). It is also argued by Complainant that because stock options could not be exercised for five years that due to his termination he lost those then pending in his account (see pg. 2, CX 45). While not taking exception to the lost of stock options, Respondent's position is simply that it would be "pure speculation" to attempt to place a value on stock options Complainant would have



been entitled to in the District Manager's position because 1) the options were based on the value of the stock five years hence and 2) Complainant might not have chosen to exercise these options once so entitled.

As to loss of unexercised options due to his termination, I find the Complainant could have mitigated the loss of those options listed on page 2 of Complainant's Exhibit 45 had he taken either of the employment positions he was offered by Respondent. Consequently, I do not find this loss to be a part of Complainant's consequential damages. As to his salary and loss of stock options from November 2001 through December 2002, however, I find these to be his consequential damages and place their value at \$123,200.00.

Because Complainant testified and Ms. Martin too acknowledged at the hearing there was a salary reduction with the Roebuck manager's position, I find that had Complainant accepted that position his loss of income would have been \$1,700.00 per month or \$23,800.00 for the 14 month period from November 2001 through December 2002. Concerning the stock options, Complainant would have received and/or exercised during the same period had he remained as a district manager, I find, while only an approximation, the best measure to be the approximately \$71,000.00 he had received in 2001 prior to his termination. Divided by the first 10 months of that year, the result is \$7,100.00 per month in lost stock options. \$7,100.00 multiplied by the 14 month period from November 2001 through December 2002, yields a total loss of stock options of approximately \$99,400.00. Added together, \$23,800.00 and \$99,400.00 equal \$123,200.00, the amount I find to fairly represent Complainant's consequential damages in view of Complainant's own failure to mitigate his other losses.

### **RECOMMENDED ORDER**

It is hereby **ORDERED**:

1. Complainant shall prevail on his complaint;
2. Respondent shall pay to Complainant compensatory damages in the amount of \$123,200.00;
3. Respondent shall pay interest on the above sums as of the date of this ORDER at the rate provided by 28 U.S.C. § 1961; and

4. Complainant's counsel shall have fifteen (15) days from receipt of this ORDER in which to file a fully supported attorney fee petition and simultaneously to serve a copy upon opposing counsel. Thereafter, Respondent shall have ten (10) days from receipt of the fee petition in which to file a response.

**So ORDERED** this 2nd day of December, 2004, at Metairie, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**

**CRA:bbd**

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to the Recommended Decision and Order within thirty days of the issuance of this Recommended Decision and Order unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule.