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Issue Date: 11 February 2009

CASE NO.: 2004-STA-26

In the Matter of:

JAMES M. MINNE and
ROBERT W. PRIVOTT
Complainants

v.

STAR AIR, INC.
Respondent

RECOMMENDED DECISION AND ORDER ON DAMAGES

This case arises under Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. § 31105, and its implementing regulations, 29 CFR Part 1978. James Minne (Minne) and Robert Privott (Privott) (collectively Complainants) alleged that Star Air, Inc. (Respondent) retaliated against them in violation of the STAA's whistleblower protection provisions. I issued a Recommended Decision and Order on October 14, 2004, finding that Respondent had not violated the Act because Complainants had not suffered any adverse action. Upon review, the Administrative Review Board (ARB) disagreed with my findings, and remanded the case for further consideration of each element of Complainants' prima facie case. On August 27, 2008, I issued a Recommended Decision and Order on Remand, finding a violation of the Act.¹ While finding a violation of the Act, the damages portion of the claim was reserved for further adjudication. The parties were granted a period of thirty (30) days to settle the amount of the back pay award. No settlement was reached, and the record was re-opened for a period of sixty (60) days for the submission of additional evidence and briefs regarding the calculation of the back-pay award.

Complainants submitted their brief on November 28, 2008. Respondent did not submit any evidence to the court. Respondent was granted an additional (30) days to submit evidence. No response was received.

1. The ARB docketed the case for appeal on September 8, 2008. I issued an Erratum on December 5, 2008 noting that a Notice of Review was mistakenly attached to the Recommended Decision and Order on Remand. The Decision was not intended to be an appealable order as it did not dispose of the entire complaint. On December 31, 2008, the ARB issued an Order Dismissing Appeal, indicating that it will review the case in its entirety after the damages portion of the claim has been decided.

Reinstatement

In the August 27, 2008 Recommended Decision and Order, Complainants were ordered to be reinstated to their former positions with Respondent, effective immediately.² In their Brief, however, Complainants indicate that they are, at present, unable to obtain reinstatement.

According to Complainants, they presented at Respondent's last known place of business on September 18, 2008, where they observed that Respondent no longer occupied the building. Exhibit 1, ¶¶ 3-4, Exhibit 2, ¶¶ 3-4. Complainants then proceeded to an alternative location that Respondent used in connection with his business. Exhibit 1, ¶ 5, Exhibit 2, ¶ 5. At said location, Complainants were greeted by a receptionist who informed them that Respondent was no longer in business. *Id.* They were given a business card indicating that a company known as Custer Products occupies the location. *Id.* In an affidavit submitted with their Brief, Complainant Privott indicated that he believes Respondent continues to operate a business selling ammunition. Privott, who started his own business selling ammunition at gun shows, stated that he has worked several shows where Respondent had a representative present. Exhibit 1, ¶ 7. At the most recent show, which occurred in March of 2008, Privott was informed by Respondent's representative that Robert Custer still owned Star Air. *Id.* As a result of their inability to be reinstated, Complainants have requested that they be awarded front pay in lieu of reinstatement "pending the determination on Robert Custer's operations as Star Air." See Complainants' Brief at 3.

Reinstatement is the presumptive remedy under the STAA; front pay is used as a substitute only when reinstatement is impossible or impractical. *Berkman v. United States Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2, 9, slip op. at 27 (ARB Feb. 29, 2000) (under the Clean Air Act, 42 U.S.C.A. § 7622). Furthermore, an employer's liability for back pay continues to accrue until such time as the employer reinstates the complainant, makes him a bona fide offer of reinstatement, or, in very limited circumstances, where the employee rejects a bona fide offer of reinstatement. See, *Polewsky v. B & L Lines Inc.*, 90-STA-21 (Sec'y May 29, 1991); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008).

At present, Complainants have not demonstrated that their reinstatement is impossible or impractical. Rather, Complainants have requested front pay in lieu of reinstatement only while they attempt to identify whether Respondent is still operating. Complainants will be compensated, however, for any further delays in their reinstatement as the amount of the back pay award will continue to accrue until Respondent has made a bone fide offer of reinstatement or the Complainants are actually reinstated.³ Thus, I find that the present circumstances do not warrant an award of front pay.

2. The record did not contain any evidence of hostility between the parties which would prevent them from resuming a working relationship.

3. Complainants must continue to make good faith efforts to be reinstated; they are not permitted to allow Respondent's liability to accrue unnecessarily.

Back Pay

A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). “An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA.” *Assistant Sec’y & Moravec v. HC & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Sec’y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002), citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975). Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. *Polewsky v. B&L Lines, Inc.*, 90-STA-21, slip op. at 5 (Sec’y May 29, 1991). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by the evidence; the award need not be rendered with “unrealistic exactitude. *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12 (ARB May 30, 1997), citing *Pettway v. Am. Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-61 (5th Cir. 1974).

Once entitlement to back pay is found, interest should be added to compensate the employee for losses suffered because his employer unlawfully deprived him of the use of his money. *Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec’y Aug. 21, 1986), *overruled on other grounds, Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Prejudgment interest is to be paid for the period following a complainant’s termination until the ALJ’s order of reinstatement whereas post-judgment interest is to accrue until the payment of the back pay award. *Johnson, supra*. In calculating the interest on back pay awards under the STAA, the rate used is that charged for underpayment of federal taxes. *See* 26 U.S.C.A. § 6621(a)(2) (West 2002); *Drew v. Alpine, Inc.*, ARB Nos. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Interest accrues, compounded quarterly, until respondent pays the damages award. *Assistant Sec’y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 3 (ARB Jan. 12, 2000); *see Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 18-21 (ARB May 17, 2000).

I. Complainant Minne

Minne was employed with Respondent during the weekends as a commissioned sales representative. Exhibit 3, ¶ 3. During the week, he worked as an independent contractor for a company called Nexagen. *Id.* Minne earned \$28,400.00 working for Respondent in 2002, and approximately \$400.00 in 2003 before he was terminated on or about January 10, 2003. (TR p. 61-62). Minne continued to work for Nexagen after his termination, and he also became the primary caretaker of his elderly grandmother. Exhibit 3, ¶¶ 3-4. Minne indicated that his obligations as a caretaker would not have interfered with his ability to work for Respondent on the weekends. *Id.* Minne has not received any similar weekend-only work since January 10, 2003 to offset any back pay he is owed.⁴ Exhibit 3.

4. A back pay award is offset by a complainant’s interim earnings in positions he or she could not have held had his or her employment with Respondent continued. *Nolan v. AC Express*, 92-STA-37 (Sec’y Jan. 17, 1995). Minne only worked for Respondent on the weekends. As such, there is no evidence that any position that he

Minne's quarterly back pay is based on his wages from 2002. Minne is owed the following in back pay and interest:

<u>Year/Quarter</u>	<u>Back Pay Owed</u>	<u>Interest Rate</u>	<u>Interest⁵</u>	<u>Total</u>
2003				
Quarter 1	\$6,700.00	4.67%	\$312.89	\$7,012.89
Quarter 2	\$7,100.00	4.48	\$632.26	\$7,732.26
Quarter 3	\$7,100.00	4.32	\$640.75	\$7,740.75
Quarter 4	\$7,100.00	4.61	\$684.16	<u>\$7,784.16</u>
				\$30,270.06
2004				
Quarter 1	\$7,100.00	4.63%	\$689.14	\$7,789.14
Quarter 2	\$7,100.00	4.64	\$690.86	\$7,790.86
Quarter 3	\$7,100.00	5.30	\$789.22	\$7,889.22
Quarter 4	\$7,100.00	5.35	\$801.92	<u>\$7,901.92</u>
				\$31,371.14
2005				
Quarter 1	\$7,100.00	5.90%	\$885.11	\$7,985.11
Quarter 2	\$7,100.00	6.41	\$966.96	\$8,066.96
Quarter 3	\$7,100.00	6.59	\$999.50	\$8,099.50
Quarter 4	\$7,100.00	7.03	\$1,068.52	<u>\$8,168.52</u>
				\$32,320.09
2006				
Quarter 1	\$7,100.00	7.38%	\$1,126.82	\$8,226.82
Quarter 2	\$7,100.00	7.78	\$1,192.43	\$8,292.43
Quarter 3	\$7,100.00	8.05	\$1,239.09	\$8,339.09
Quarter 4	\$7,100.00	7.86	\$1,213.51	<u>\$8,313.51</u>
				\$33,171.85
2007				
Quarter 1	\$7,100.00	7.87%	\$1,213.04	\$8,313.04
Quarter 2	\$7,100.00	7.77	\$1,197.59	\$8,297.59
Quarter 3	\$7,100.00	7.84	\$1,207.17	\$8,307.17

would have held during the week would have prevented him from working for Respondent during the weekend. While a complainant has a duty to exercise reasonable diligence to mitigate damages, it is the employer's burden to prove a failure to mitigate. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005). It is acknowledged that Minne has made no apparent attempt to mitigate his damages, however, Respondent, whose burden it is to prove a failure to mitigate, has not provided any evidence on the issue to the court.

5. All interest awarded herein has been calculated according to the formula announced by the ARB in *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 18-21 (ARB May 17, 2000).

Quarter 4	\$7,100.00	7.00	\$1,078.50	<u>\$8,178.50</u>
				\$33,096.30
2008				
Quarter 1	\$7,100.00	5.82%	\$889.21	\$7,989.21
Quarter 2	\$7,100.00	4.84	\$730.32	\$7,830.32
Quarter 3	\$4,733.33	5.46	\$685.98	<u>\$5,419.31</u>
				\$21,238.84
			TOTAL:	\$181,468.28

On the back pay award, Minne is also entitled to post-judgment interest (calculated in the same manner as pre-judgment interest) until the payment of the award. *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 199-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18.

II. Complainant Privott

Privott worked for Respondent from 2000 until January 10, 2003 as a commissioned sales representative. Exhibit 4, ¶ 2, TR pp. 109-110. In 2000, Privott earned \$18,966.00, in 2001 he earned \$38,024.00, and in 2002 he earned \$53,378.00 working for Respondent. Exhibit 4, ¶ 3, TR pp. 109-110. Privott worked one show for Respondent in 2003, but he asserts that he did not receive payment, despite the fact that his social security records indicate that he earned \$735.00. Exhibit 4, ¶ 4. Privott stated that he attempted to find alternative work selling ammunition, but he believed that the nature of his separation from Respondent “blacklisted” him. Exhibit 4, ¶ 5. In 2004, Privott began working as a part-time waiter at Chilli Peppers restaurant. Exhibit 4, ¶ 7. He continues to work at the restaurant part-time and has earned a total of \$21,740.74. *Id.* In the spring of 2007, Privott began his own business traveling to gun shows and selling ammunition; he has not received any income from his business. Exhibit 4, ¶ 8.

I do not find that Privott’s wages from his work as a part-time waiter are to be deducted from his back wage award. As noted, a back pay award is offset by a complainant's interim earnings in positions he or she could not have held had his or her employment with Respondent continued. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995). Additionally, when it cannot be determined which job a complainant would have held absent the discrimination, the law does not require “unrealistic exactitude” in calculating the back pay award. *Pettway*, 494 F.2d at 260-261. Any uncertainties in determining what a complainant would have earned are to be resolved against the discriminating employer. *Id.* While it is unlikely that Privott worked as a waiter only during the week, there is no way to ascertain what portion of his wages he would have been precluded from earning had he continued to work for Respondent. As a result, and consistent with the rule that uncertainties are to be resolved against the employer, I find that Privott’s back wage award is not offset by his wages as a server.

Privott’s quarterly back pay is based on his wages from 2002. Privott is owed the following in back pay and interest:

<u>Year/Quarter</u>	<u>Back Pay Owed</u>	<u>Interest Rate</u>	<u>Interest</u>	<u>Total</u>
2003				
Quarter 1	\$13,344.50	4.67%	\$623.19	\$13,967.69
Quarter 2	\$13,344.50	4.48	\$1,223.59	\$14,568.09
Quarter 3	\$13,344.50	4.32	\$1,205.82	\$14,550.32
Quarter 4	\$13,344.50	4.61	\$1,285.95	<u>\$14,630.45</u>
				\$57,716.55
2004				
Quarter 1	\$13,344.50	4.63%	\$1,295.24	\$14,639.74
Quarter 2	\$13,344.50	4.64	\$1,298.47	\$14,642.97
Quarter 3	\$13,344.50	5.30	\$1,483.34	\$14,827.84
Quarter 4	\$13,344.50	5.35	\$1,507.22	<u>\$14,851.72</u>
				\$58,962.27
2005				
Quarter 1	\$13,344.50	5.90%	\$1,663.58	\$15,008.08
Quarter 2	\$13,344.50	6.41	\$1,817.40	\$15,161.90
Quarter 3	\$13,344.50	6.59	\$1,878.57	\$15,223.07
Quarter 4	\$13,344.50	7.03	\$2,008.30	<u>\$15,352.80</u>
				\$60,745.85
2006				
Quarter 1	\$13,344.50	7.38%	\$2,117.86	\$15,462.36
Quarter 2	\$13,344.50	7.78	\$2,241.17	\$15,585.67
Quarter 3	\$13,344.50	8.05	\$2,328.88	\$15,673.38
Quarter 4	\$13,344.50	7.86	\$2,280.81	<u>\$15,625.31</u>
				\$62,346.72
2007				
Quarter 1	\$13,344.50	7.87%	\$2,279.92	\$15,624.42
Quarter 2	\$13,344.50	7.77	\$2,250.89	\$15,595.39
Quarter 3	\$13,344.50	7.84	\$2,268.89	\$15,613.39
Quarter 4	\$13,344.50	7.00	\$2,027.05	<u>\$15,371.55</u>
				\$62,204.75
2008				
Quarter 1	\$13,344.50	5.82%	\$1,671.27	\$15,015.77
Quarter 2	\$13,344.50	4.84	\$1,372.64	\$14,717.14
Quarter 3	\$8,896.33	5.46	\$1,289.29	<u>\$10,185.59</u>
				\$39,918.50
			TOTAL:	\$341,894.64

On the back pay award, Privott is also entitled to post-judgment interest (calculated in the same manner as pre-judgment interest) until the payment of the award. *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 199-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18.

Attorney's Fees

Under the STAA, a prevailing complainant is entitled to litigation expenses, including attorney fees and costs. *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004); *Eash v. Roadway Express, Inc.*, ARB Nos. 02 008, 02 064, ALJ No. 2000-STA-47 (ARB Mar. 9, 2004). Complainant's counsel is granted a period of thirty (30) days for the submission of a fully supported petition for attorney fees and costs. Respondent will be allowed fifteen (15) days thereafter to file any objections.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent reinstate Complainants to their former positions, and take what affirmative action is necessary to abate all violations of the Department of Transportation regulations; and
2. Respondent shall remit to Complainant James Minne:
 - a. The amount of \$181,468.28 representing back pay and interest in addition to post-judgment interest calculated in accordance with 26 U.S.C. §6621; and
3. Respondent shall remit to Complainant Robert Privott:
 - a. The amount of \$341,894.64 representing back pay and interest in addition to post-judgment interest calculated in accordance with 26 U.S.C. §6621; and
4. Complainants' counsel has a period of thirty (30) days to file a fully supported fee petition, and Respondent shall have fifteen (15) days thereafter to file a response.

A

DANIEL L. LELAND
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.